

# Draft Report

## Discretion of Administrative Bodies and Judicial Control

Edith Zeller  
Roman Kuibida  
Roman Melnyk

September 2020



THIS PROJECT IS FUNDED BY  
THE EUROPEAN UNION



**This publication was produced with the financial support of the European Union. Its contents are the sole responsibility of the EU-funded Project PRAVO-Justice and do not necessarily reflect the views of the European Union.**

**Edith Zeller**, President of the Association of European Administrative Judges, Judge of the Vienna Administrative Court, International Expert on the EU Project Pravo-Justice

**Roman Kuybida**, PhD in Law, Deputy Chairman of the Board of the Center for Political and Legal Reforms. For more than ten years, he was teaching at the Law Department of the Taras Shevchenko National University of Kyiv. He participated in scientific advisory councils of courts and advisory bodies to various state authorities. Member of the Public Integrity Council (2016-2020). Author and co-author of many studies, textbooks, commentaries, and other publications on the judiciary, judicial system, and administrative justice.

**Roman Melnyk**, Professor, Doctor of Law, Member of Board of the NGO 'German-Ukrainian Legal Dialogue', Vice President for Science of the Academy of Administrative and Legal Sciences, participant in numerous German-Ukrainian projects in the field of human rights, administrative law and administrative justice. Author and co-author of many studies, textbooks, commentaries and other publications on administrative law and administrative justice.

Edited by **Kostyntyn Krasovsky** and **Illia Chernohorenko** – national experts of the Pravo-Justice Project

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## Abbreviations:

Grand Chamber	Grand Chamber of the Supreme Court
Venice Commission	European Commission for Democracy through Law
ECHR	European Convention on Human Rights
ECtHR	European Court on Human Rights
EU	European Union
EU MS	EU Member States
HQCJ	High Qualification Commission of Judges of Ukraine
HCJ	High Council of Justice
CAP of Ukraine	Code of Administrative Justice of Ukraine
Convention	Vienna Convention on the Law of Treaties, 1969.
CJEU	Court of Justice of the EU

## INTRODUCTION

Discretionary powers enable a public authority, a local self-governance body, or any other administrative authority (hereinafter – administrative authority) to make the best balanced and fair decisions when applying law.

In 2019, Ukrainian Administrative Procedure Monitoring, which was carried out by the EU Project Pravo-Justice, dealt with discretion of administrative authorities and judicial control over its application. The results of the monitoring showed that the domestic law lacks clear rules on the limits of judicial interference with the discretion of administrative authorities while in the meantime, there is no distinction between the discretion of elected and non-elected authorities and no difference in the scope of judicial review of individual and collective decisions. At the same time, the study found that the concepts of interpretation of laws and discretion are not sufficiently distinguished in all areas of Ukrainian legal doctrine.

Accordingly, within the framework of the EU Pravo-Justice Project, a group of national and international experts examined the discretion of administrative authorities and judicial control over its exercise in terms of legal doctrine, European standards, national legislation, and judicial practice.

Based on the results of the study, the experts developed guidelines (algorithm) for monitoring the discretion application by the administrative authority (see Section VI).

The expert group consisted of two national experts:

- Roman Kuybida, PhD in Law
- Roman Melnyk, Professor, Doctor of Law

and an international expert:

- Edith Zeller, Judge

The analysis consists of six sections:

- I. Executive summary and conclusions (prepared by the group of national and international experts)
- II. Doctrine Review (drafted by Roman Melnik)
- III. Council of Europe Standards and Recommendations (prepared by Roman Kuybida and Edith Zeller)
- IV. Legislation and case law of the EU MS (prepared by Edith Zeller)
- V. National legislation and case law (prepared by Roman Melnyk and Roman Kuybida)
- VI. Guidelines for monitoring the exercise of discretion (prepared by Roman Melnik, Roman Kuybida and Edith Zeller).

## EXECUTIVE SUMMARY

### A. Doctrine Overview

1. Administrative discretion, while being a power of the administrative authority, gives the latter some margin of appreciation, as they can choose among several decisions which are available under law. They may act or refuse acting, and when they do, they choose one or several possible options.
2. Administrative discretion is a legal tool which is necessary and alternative for the managerial activities of public administration and which solves a number of important tasks, the most important being ensuring fair, efficient, and customized law making and law enforcement by the said authorities.
3. There are three main types of administrative discretion:
  - 1) administrative discretion regarding a decision/action. The public authority has the right to decide independently whether or not it will make a decision / act;
  - 2) administrative discretion regarding one of the options of a decision / action. The public authority has the possibility to make one of the legally permissible decisions or to perform one of the legally permissible actions;
  - 3) administrative discretion on the mode of action. The public administration has the possibility to decide independently on how it will act in a particular situation.
4. Administrative discretion is not free; it is always exercised in accordance with legislation (law), because according to Art. 19, Part 2 of the Constitution of Ukraine "*public authorities and local governments, their officials are obliged to act only on the basis, within the powers and in the manner prescribed by the Constitution and laws of Ukraine*".
5. The fact that administrative discretion is bound by legislation (law) makes it possible for administrative courts to review decisions (actions) taken by a public administration entity as a result of exercising discretionary powers.
6. The prevailing view today that administrative courts may review only the legality (lawfulness) of administrative discretion is increasingly becoming subject to reasonable criticism, which leads to a gradual expansion of the control by administrative courts over discretionary powers of public administration.
7. Administrative courts can review both the compliance of administrative discretion with legislation (law) and the consistency of decisions (actions) made on the basis of discretion with fundamental human rights and that of a citizen, general principles of governance, procedural rules, circumstances of the case, available resources, economic feasibility etc.

8. Illegal (erroneous) discretion can manifest in various forms: a) extra vires exercise of discretion; b) non-exercise/insufficient exercise of discretion; c) abuse of discretion.
9. It is necessary to distinguish vague legal concepts from administrative discretion. The difference between them is that if discretion is on the side of legal consequences of the rule ("discretion on legal consequences", "discretion on action", "discretion on the choice of one of the options"), the vague legal concepts are on the side of legal structure which requires the use of appropriate methods of interpretation of law to know the essence (content) of such concepts. Interpretation of vague legal concepts can be done via grammatical, systematic, historical, teleological interpretation.

## **B. Standards and Recommendations of the Council of Europe**

10. Neither the ECHR nor the Recommendations of the Council of Europe (on judicial review of administrative acts or on the exercise of discretionary powers by administrative authorities) specify how judicial review should be organized. However, regardless of how the judicial system is structured, requirements of Article 6(1) ECHR must be fulfilled.
11. The standards and recommendations of the various institutions of the Council of Europe have a coherent effect on national legal systems. With regard to the exercise of discretion by administrative authorities, these standards and recommendations are aimed at preventing arbitrariness on their part and excessive interference with human rights, based on the consideration to prohibit abuse of power.
12. The case law of ECtHR on Art. 6 (1) ECHR (here on questions of the necessary scope of judicial review) lays down the determining frame within which discretionary power can be exercised and particularly legally controlled. Although the recommendations of the Committee of Ministers of the Council of Europe and the Venice Commission are not formally binding, they are very important for national practice, in particular for providing meaningful interpretation and expanding the principles embodied in part 2 of Article 2 of CAP of Ukraine, which set requirements, including for the exercise of discretionary powers.
13. The ECtHR case law demonstrates a number of principles and tests which serve as beacons for courts when reviewing the exercise of discretion by administrative authorities.

## **C. Legislature and Jurisprudence of the EU Member States**

14. Density of judicial control of (individual) acts of the administration allows in every jurisdiction certain margins of appreciation for the administration, although the design differs and the extent of the scope differs as well.
15. Basically there are two main different categories:

The first group of legal systems knows the principle of full judicial control. These are basically German legal tradition countries. Judicial review is also linked to the distinction between discretion and margin of appreciation (*Beurteilungsspielraum*) with respect to unclear legal terms.

A second group of states acknowledges both - on the level of facts and on the level of legal consequences - a rather broad administrative flexibility, following the basic principle that, in principle, the judge does

not/should not replace the administration. This is an approach which was primarily pursues an objective judicial review and thus applies in such systems which focus on an objective legal review (contrary: judicial review based on subjective rights, i.e. German approach).

France would be one of these countries (see *Ultra vires proceedings* and full appeal proceedings, i.e. “*recours pour excès de pouvoir*”, “*recourse n annulation*”) The courts usually check here mainly the compliance of the administrative decision with formal criteria, in particular compliance with the legal requirements. Exceptions exist only in the case of intensive fundamental rights violations and the density of control varies in line with different categories of complaints/pleas. However, development in jurisprudence tends to see the duty and function of administrative judiciary no longer only to guarantee objectively the legality of administrative actions but also to include a legal protection on the individual (subjective) level.

16. Both, Germany and France distinguish between bound administration and discretionary execution of laws.
17. With respect to unclear legal terms (undetermined legal notions): both, German and French system grant a certain margin of appreciation to the administration (*Beurteilungsspielraum/erreurs manifests d’appréciation*). Although it is not “discretion” according to German doctrine, German jurisprudence has nevertheless as well developed certain limits for judicial control in these areas. Limits of judicial control exist as well generally in highly technical areas as well as there is tendency to do so with respect to regulatory decisions of administrative sectorial authorities.
18. Historically spoken, there has been a trend to clarify and by this narrow the formerly freely exercised discretion of administrative authorities (which had often claimed before courts that courts must not review their decisions because of discretion) in order to protect individual rights. It is mainly jurisprudence of supreme courts which have knitted the fine lines and are key players for further adaptations – also seen against the background of economic and other public needs.
19. General parameter of judicial practice to control discretionary decisions:

In any case, procedural justice and the control of procedural fairness preserve its full importance also in cases when discretionary power is exercised by the administrative authority. This should avoid arbitrariness and should fit under the principles of an effective judicial control.

Furthermore generally it is appealable when the discretionary decision was issued *ultra vires* (i.e. the administrative authority went beyond the legal limits of the margin of appreciation) or the administrative authority used other than the legal criteria to exercise the discretion

Also when the use of discretionary power has not been kept to the legal aim or was not used for the legitimate purpose (or other basic principles like proportionality or equality) the administrative act will be quashed.

20. However, in those systems (or categories of legal actions, like in France) where the law entrusts the courts to check even the correctness of the exercised discretion, the courts are empowered as well to settle and close the dispute by deciding in the merits of the case. Traditionally the German tradition courts exercised the more intense scrutiny of administrative discretion
21. In Germany the exercise of discretion is limited to an exercise of discretion with respect to legal consequences.



22. The French doctrine on discretion is not limited to the level of legal consequences (but also includes the level of legal facts) and it has primarily been developed through jurisprudence of Conseil d'Etat.
23. Judicial review is limited in all European countries with respect to exercised discretion (or generally: granted margins of appreciation to the administration). In France and Germany (as well as in other European judicial systems) judicial review of discretion is driven by fundamental rights and principle of proportionality, as these fundamental principles would not interfere with discretion granted by the legislator to the administration.

#### D. National Legislation and Jurisprudence

24. The national legislation enshrines some basic standards (principles) to be observed by administrative authorities when making (taking) discretion-based decisions (actions). Failure to comply (non-compliance) with these standards may give grounds for a decision (committed/not committed action) to be recognized as unlawful by the administrative court, which is in power to oversee compliance.
25. Despite the fact that the law does not contain the term «discretionary powers of an administrative authority», the importance of the concept in the administrative practice is high and keeps increasing.
26. The most difficult issue for judicial practice is the question of the scope (limits) of judicial control over the correct application of discretion by an administrative authority.
27. The practice of the Supreme Court (Grand Chamber) brings us to conclude that in order to verify whether an authority has acted on the basis of and within its scope of powers, it is appropriate to ascertain, in particular:
  - whether these powers are discretionary;
  - if so, whether their exercise (non-exercise) can be subject to judicial control, or the discretion of the administrative authority is exclusive;
  - if the exercise of discretionary powers may be subject to judicial oversight to protect the violated rights of a person, whether the body pursued a legitimate goal or acted transparently and as consistently as possible; whether it complied with the procedural guarantees; whether it duly motivated the decision; whether it is not arbitrary, irrational, groundless or erroneous in relation to legal facts; biased or manifestly unfair.
28. . At the same time, it must be acknowledged that the practice of the Supreme Court needs to be better correlated with the criteria for assessing decisions, actions or omissions of administrative authorities as set out in Article 2 § 2. 2 CAP of Ukraine, ensuring their proper wording in accordance with the relevant recommendations of the Committee of Ministers of the Council of Europe. In the case of a reference to the ECtHR case law, it is appropriate to indicate the relevant judgments of this Court and the paragraphs in order to lift any doubt as to the correctness of such a reference.

## II. DOCTRINE OVERVIEW

1. Administrative discretion as a legal category is quite new for domestic legal doctrine, and especially the practice of law enforcement, and its content is clarified to certain extent only. During the Soviet period, “administrative discretion” was almost never studied in works on administrative law.
2. In view of this, we will analyze the existing (modern) views of administrative discretion which exist in European and modern Ukrainian legal doctrine and will further come up with recommendations to public administration<sup>1</sup> and administrative courts.

### A. Concept of “Administrative Discretion”

3. It comes to administrative discretion is the case when the part of a legal rule that contains legal consequences (in particular, sanctions) provides for several possible (admissible) responses of the administrative authority to the events or actions by subjects of legal relations. In this case, according to both European and Ukrainian authors, such an authority is given some margin of appreciation, as they can choose among several decisions which are available under law. They may act or refuse acting, and when they do, they choose one or several possible options<sup>2</sup>.

#### Attention!

The official (legal) definition of “**discretionary powers**” (or **administrative discretion** which is the same) is enshrined in the Methodology of Anti-corruption Review (hereinafter – the Methodology), approved by the order of the Ministry of Justice of Ukraine of 24.04.2017 No. 1395/5, where the powers mean a set of rights and responsibilities of public authorities and local governments; persons authorized to perform the functions of the State or local governments, which allows determining in full or in part the type and content of a management decision; or the possibility of making an independent choice among several options for management decisions provided in the legal act/regulation or the draft act/regulation normative legal act»<sup>3</sup>.

4. Administrative discretion, as noted in the English scientific literature, is not a duty but a power of the subject of the public administration, as the legal concept of discretion provides a choice between alternative courses of action and/or inaction. If the law provides only for a specific decision, it is not the exercise of discretion (powers), but the fulfillment of a duty<sup>4</sup>.
5. While sharing the idea of qualifying administrative discretion as powers, German scholars, when specifying this point, emphasize that the application of administrative discretion should always be related to a specific case, which, consequently, excludes the use of “general discretion”<sup>5</sup>, i.e. future-oriented prohibitions or restrictions.

#### Example

<sup>1</sup> Public administration agent – the same as administrative authority (body).

<sup>2</sup> Maurer H. Allgemeines Verwaltungsrecht. Verlag C.H. Beck, München, 2011, S. 147; Braibant G. French Administrative Law: Transl. from French / Edited and preceded with the article by S.V. Bobotov. – M.: Progress, 1988. – P. 191-192; Tkach H. Legal Nature of Discretionary Powers of Executive Body // Public administration: Aspects of Administrative Law Theory and Practice / Averianov V. (ed.). - K., 2003. - P. 124.; Fundamentals of Administrative Justice and Administrative Law / Kuybida R., Shishkin V. (ed.). - K., 2006. - P. 166.

<sup>3</sup> On the Approval of the Methodology of Anticorruption Expertise: Order of the Ministry of Justice of Ukraine of 24.04.2017 No. 1395/5 // <https://zakon.rada.gov.ua/laws/show/v1395323-17#n8>

<sup>4</sup> Nedjatigil, Zaim M. Judicial Control of Administrative Discretion: A Comparative Study (Great Britain, France, Germany, Netherlands, Italy). *Anglo-American Law Review* 14.2 (1985), p. 97.

<sup>5</sup> Maurer H. Allgemeines Verwaltungsrecht. Verlag C.H. Beck, München, 2011, S. 148.

The operation of an enterprise cannot be restricted because, in the opinion of a public authority, the former may harm the environment in the future. The decision to prohibit or not prohibit the operation of an enterprise (decision on the basis of administrative discretion) can be made solely based on the review of the existing factual background of a particular case (situation), which is already happening (or has happened) in real life.

6. At the same time, administrative discretion is used by the public administration both when making individual decisions (issuing an administrative act) and when preparing and issuing regulations. In the latter case, it comes to the administrative authority having the possibility (powers) to formulate independently (without violating the framework established by law) the content (provisions) of bylaws.

### **Attention!**

Regarding the latest point (in terms of judicial control over the adoption of regulations), British scholars say that the choice of government should not ... be protected from judicial control just because such a choice takes the form of a rule.<sup>6</sup> It is clear that the revision of administrative acts of general effect as such, rather than the revision of their application under specific circumstances, significantly expands the possibilities for judicial review. In view of this, scholars believe that judges, in such cases, should avoid resolving hypothetical disputes, especially in politically controversial areas<sup>7</sup>, and limit themselves to correcting clearly defined errors in the application of the law (even in acts of general effect)<sup>8</sup>. Thus, when it comes to reviewing a policy [in the sense of a regulatory act] as such (directly) and not in the context of its application in specific circumstances, the only reason for judicial review in the United Kingdom is an error in the application of legislation (illegality).

## **B. Purpose of Administrative Discretion**

7. The purpose of administrative discretion is the following:
- first, discretion ensures individual and fair approach when solving certain cases, because they are reviewed within specific circumstances that may be taken into account by the relevant authority;
  - second, such powers promote administrative flexibility by way allowing public authorities to adapt to changing circumstances and priorities (provided there are restrictions in place to ensure legality and reasonableness)<sup>9</sup> and contribute to greater efficiency (rationality) and effectiveness of management<sup>10</sup>;
  - third, administrative discretion allows taking into account as fully as possible the rights, freedoms, and legitimate interests of an individual and, especially, when weighing them against the public interest.

## **C. Regulatory Forms of Giving the Power of Administrative Discretion**

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<sup>6</sup> Paul Craig, *Administrative Law* (8th edn, Sweet and Maxwell 2016), p. 469.

<sup>7</sup> Bernard Schwartz and William Wade, *Legal Control of Government: Administrative Law in Britain and the United States* (Clarendon Press 1972), p. 283.

<sup>8</sup> [1986] AC 112.

<sup>9</sup> Mcharg, Aileen. "Administrative Discretion, Administrative Rule-Making and Judicial Review." *SSRN Electronic Journal* (2017): *SSRN Electronic Journal*, 2017, p. 270

<sup>10</sup> Friedrich, J. Carl. 1940. *Public Policy and the Nature of Administrative responsibility*. Public Policy. Cambridge: Harvard University Press, p. 3-34.; Kolomojets T.O. *Administrative Law of Ukraine. Academic course: textbook* / T.O. Kolomojets. - K.: Юрінком Інтер, 2011, P. 40.

8. The answer to the question of whether any legal rule gives or not the right of administrative discretion to a public authority or not, should be sought directly in the rule. In the vast majority of cases, the text of the rule would give the necessary answer (for example, it uses such wording as “may”, “has the right” or “should”). Less common are situations where the answer to the question about whether discretion is applicable or not arises from the interpretation of the relevant rule<sup>11</sup>

### Attention!

The Methodology for conducting the anti-corruption review<sup>12</sup> states that discretionary powers may be enshrined in regulations or draft regulations in the following ways:

- 1) through evaluative concepts, for example: “if there are good reasons, the authority has the right to provide ...”, “in some exceptional cases, a person authorized to perform the functions of the State or local self-government may allow ...”, “a decision may be made, unless it is contrary to the public interest...” etc.;
- 2) by listing the types of decisions which can be made by the authority (person authorized to perform the functions of the State or local self-government), without specifying the grounds for making a decision or with partial indication of such grounds;
- 3) by granting the right to the authority (a person authorized to perform the functions of the State or local government), once certain circumstances are detected (certain legal facts have taken place), to make or refuse making any managerial decision depending on their own assessment of such facts.

9. One should understand that there is no single or complete list of legislative (regulatory) rules which would clearly indicate that the public authority has the right (powers) to apply administrative discretion. Thus, the discretion powers must always be verified by way of detailed analysis of the law with proper consideration of the judicial opinions<sup>13</sup>.

## D. Types of Administrative Discretion

10. There are three main types of discretion:

- 1) **administrative discretion regarding a decision/action.** The public authority has the right to decide independently whether or not it will make a decision / act<sup>14</sup>;

### Example

<sup>11</sup> Jörg Pudelka The Concept of Discretion in the administrative Law of Germany and its Delimitation from Judicial Discretion // Bulletin of St. Petersburg University. Law Series, 2017, Volume 8, Issue. 4. - P. 444.

<sup>12</sup> General Administrative Law: textbook / [Hrytsenko I.S., Melnyk R.S., Pukhtetska A.A. and other]; gen. ed. I. S. Hrytsenko. - K.: Yurinkom Inter, 2017. - P. 442.

<sup>13</sup> General Administrative Law: textbook / [Hrytsenko I.S., Melnyk R.S., Pukhtetska A.A. and other]; gen. ed. I. S. Hrytsenko. - K.: Yurinkom Inter, 2017. - P. 442.

<sup>14</sup> Selivanov A.O. Administrative Process in Ukraine: Reality and Prospects of Development of Legal Doctrines / A.A. Selivanov. - K.: In Jure, 2000, p. 61; Kucheriavenko M.P. Peculiarities of Discretion in Tax and Legal Regulation // «ScienceRise: Juridical Science», 2017, P. 1 (1), P. 37-41; General Administrative Law: textbook / [Hrytsenko I.S., Melnyk R.S., Pukhtetska A.A. and other]; gen. ed. I. S. Hrytsenko. - K.: Yurinkom Inter, 2017. - P. 442; Melnyk R.S., Bevzenko V.M. General Administrative Law: Textbook / gen. ed. by R.S. Miller. - K.: Vaite, 2014, p. 278.

In case of violations by the supervised entities of the legislative requirements in the field of urban planning, chief inspectors for construction supervision have the right to initiate disciplinary action against officials of such supervised entities (paragraph 3 of part 4 of Article 411 of the Law of Ukraine "On Regulation of Urban Development"), i.e. the public authority has the right to *initiate or not to initiate* disciplinary proceedings against the perpetrators. Such a decision lays within the margin of appreciation of the chief inspector for construction supervision.

2) **administrative discretion regarding one of the options of a decision / action.** The public authority has the possibility to make one of the legally permissible decisions or to perform one of the legally permissible actions<sup>15</sup>;

#### **Example**

The National Commission for the State Regulation in the Area of Communications and Informatization has the right to make a decision on withdrawal (in whole or in part) of a frequency band from a telecommunications operator (part 4 of Article 70 of the Law of Ukraine "On Telecommunications"), i.e. a public authority **has the right to choose between full and partial** withdrawal of the frequency band.

3) **administrative discretion on the mode of action.** The public administration has the possibility to decide independently on how it will act in a particular situation<sup>16</sup>;

#### **Example**

In accordance with its tasks, the police take measures to ensure public safety and order in the streets, squares, parks, squares, stadiums, railway stations, airports, sea and river ports, and other public places (paragraph 10, part 1 of Article 23 of the Law of Ukraine "On Police"), i.e. the police **decide independently what measures they will take to perform this task.**

## **E. Requirements for Applying Administrative Discretion**

11. A mandatory prerequisite for its application is the fact that discretion is bound with regulations, which, as a consequence, excludes the existence of "free discretion" or discretion outside law. "The authority must (= is obliged to) "exercise its discretion in accordance with the purpose and powers granted and within the limits of discretion provided by law. If the authority fails to comply with these legal obligations, it acts "with erroneous use of discretion" and, therefore, illegally"<sup>17</sup>.

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<sup>15</sup> Yevseev O.P. Procedures in the Constitutional Law of Ukraine: PhD thesis ...; Yaroslav the Wise National Law Academy of Ukraine. - Kharkiv, 2008, p. 90; Fundamentals of administrative justice and administrative law / textbook, manual / gen. ed. by Kuybida R.O., Shishkina V.I., 2006, p. 167; Lahoda O.S. Administrative Procedure: Theory and Practice of Application: PhD thesis; National University of State Tax Service of Ukraine. - Irpin, 2007, p. 94-95 etc.

<sup>16</sup> Rezanov S. Classification of administrative discretion: Concepts and Types // Customs, 2015, No. 5 (101), Part 2, P. 181–184; Lagoda O.S. Administrative Procedure: Theory and Practice of Application: PhD thesis...; National University of State Tax Service of Ukraine. - Irpin, 2007, p. 94-95 etc.

<sup>17</sup> Maurer H. Allgemeines Verwaltungsrecht. Verlag C.H. Beck, München, 2011, S. 148.

12. In applying administrative discretion, as the German authors emphasize, the authority must also take into account fundamental human rights and that of a citizen<sup>18</sup> and general principles of governance (first and foremost, necessity and proportionality), which are objective limits for exercising discretion and at the same time arguments for comparative weighing (to determine whether there has been an excess or abuse of discretion). Violation thereof turns a discretionary decision (decision based on discretion) into an illegal one<sup>19</sup>.
13. The exercise of administrative discretion, according to Western European doctrine, also obliges the authority to comply with **procedural rules** clearly set out in the normative act which determines its jurisdiction<sup>20</sup>. But even outside these legal criteria in the narrower sense, the sphere of free expediency does not arise. We should not forget about the scale of effectiveness and economic feasibility. Accordingly, the exercise of discretion will be rendered as correct (non-erroneous) not only when no legal errors have been committed, but also provided that the public authority has **acted in a resource-efficient manner and is as reasonable and prudent as possible**<sup>21</sup>.
14. In decision-making process on the basis of administrative discretion, as French authors emphasize, there must also be taken into account factual circumstances that accompany the process of decision-making. If the relevant authority exercises its discretion, it should not make errors in stating the facts. Errors in the assessment of the facts, incorrect calculations made by it, all this can cause illegality (unlawfulness) of the decision made on the basis of discretion. Similar consequences are caused by cases when in adopting an act on the basis of discretion, the authority makes obvious errors in assessments. A manifest error from logical viewpoint is the same as abuse of power from moral viewpoint. The administration has the right to exercise its powers, but it has no right to act absurdly. У процесі прийняття рішення на підставі дискреції, наголошують французькі автори, мають бути враховані також і фактичні обставини, які супроводжують процес його прийняття. У разі якщо відповідний орган користується своїм дискреційним повноваженням, він не повинен допускати помилок при констатації юридичних фактів. Помилки в оцінці фактичних обставин, неправильні розрахунки, проведені ним, все це може викликати незаконність (протиправність) прийнятого на підставі дискреції рішення. Подібні наслідки викликають також і випадки, коли під час прийняття акту на підставі дискреції адміністративний орган допускає очевидні прорахунки в оцінках. Очевидна помилка під кутом зору логіки є тим самим, що і зловживання владою під кутом зору моральності. Адміністрація має право на здійснення своїх повноважень, але вона не має права вчиняти абсурдні дії<sup>22</sup>.
15. In addition, it must use **appropriate means** to achieve this goal. Costs should match the result or be lower. For example, it is impossible to destroy (demolish) something valuable (for example, an architectural monument of national importance) and build a less valuable building on this site (shopping center)<sup>23</sup>.

## F. Illegal (Unlawful) Administrative Discretion

<sup>18</sup> Schmidt-Assmann E. General Administrative Law as an Idea of Regulation: Basic Principles and Tasks of the Administrative Law System / Ebergard Schmidt-Assmann; [trans. From H. German. Ryzhkov, I. Soiko, A. Bakanov]; resp. ed. O. Syroid. - [2nd ed., revised and supplemented]. - K.: «K.I.S.», 2009. - P. 72.

<sup>19</sup> Maurer H. Allgemeines Verwaltungsrecht. Verlag C.H. Beck, München, 2011, S. 150.

<sup>20</sup> [1984] 3 All E.R. 935, p. 951

<sup>21</sup> Schmidt-Assmann E. General Administrative Law as an Idea of Regulation: Basic Principles and Tasks of the Administrative Law System / Ebergard Schmidt-Assmann; [trans. from German by H. Ryzhkov, I. Soiko, A. Bakanov]; resp. ed. O. Syroid. - [2nd ed., revised and supplemented]. - K.: «K.I.S.», 2009. - C. 239-240.

<sup>22</sup> Braibant G. French Administrative Law: Transl. from French / Edited and preceded with the article by S.V. Bobotov. - M.: Progress, 1988. - P. 194, 194.

<sup>23</sup> Administrative law of foreign countries. Textbook. - M. SPARK Publishing House, 1996. - P. 93.



16. Illegal (unlawful) administrative discretion concerns those cases when the authority violates the law, acting, for example, *extra vires*. In cases when it is a question of, say, the authority choosing the less expedient decision (from the list of possible), there is no ground to speak about illegal (unlawful) discretion<sup>24</sup>.
17. Illegal (erroneous) discretion, according to German doctrine, can manifest in various forms:
  - a) **extra vires exercise of discretion** occurs when the authority chooses a legal consequence that is outside the discretionary rule/norm authorizing to exercise that discretion;
  - b) **non-exercise/insufficient exercise of discretion** is manifested when the authority does not use the powers granted to it to exercise discretion, for example, due to negligence or erroneous assumption that due to the binding nature of the rule he was entitled to act/omission;
  - в) **abuse of discretion** occurs when the exercise of discretion is not aimed at the purposes prescribed by law or when in the exercise of discretion the relevant critical aspects are not properly taken into account. Powers are always given to the authority not in its own interests and not in the interests of an individual citizen, but in order to meet public interest. If the authority exercising discretion uses the authority for a purpose other than the achievement of the public interest, it acts illegally and its illegal actions (decisions) can be challenged in court<sup>25</sup>.
18. If there are none of the above errors, maybe the decision (action) of the authority is not the most appropriate, but it does not make it illegal (unlawful). Such errors (as to expediency) can be corrected only within the framework of the out-of-court (departmental) challenge procedure, and not within the framework of administrative proceedings<sup>26</sup>.
19. Administrative discretion, giving the authority an opportunity to choose between different ways of conduct in some cases may be narrowed down to the point of becoming a single alternative. This happens when only one decision is the correct and infallible exercise of discretion, and any other decision is an abuse of discretion. The authority, as noted in the German-language legal literature, is therefore obliged to "choose" the only solution that remains in this case. In such cases, discretion/discretion is reduced to "zero" or "discretion disappears"<sup>27</sup>.

#### Example

According to the law on the police, this body in principle has the discretion in whether or not to take any action, when and to whom to apply them in order to prevent threats to public safety and order. However, if there are certain threats to high-ranking protected legal benefits, such as constitutional law, the right of the police to act on its own (i.e. as to whether it is necessary to act at all) may be reduced to zero. In this case, omission will be a discretionary error and in this sense will be illegal<sup>28</sup>.

## G. Administrative Discretion and Vague Legal Concepts

<sup>24</sup> Maurer H. Allgemeines Verwaltungsrecht. Verlag C.H. Beck, München, 2011, S. 148.

<sup>25</sup> Maurer H. Allgemeines Verwaltungsrecht. Verlag C.H. Beck, München, 2011, S. 149; Braibant G. French Administrative Law: Transl. from French / Edited and preceded with the article by S.V. Bobotov. – M.: Progress, 1988. – С. 193.

<sup>26</sup> Пуделька Й. Понятие усмотрения в административном праве Германии и его ограничение от судебного усмотрения // Вестник Санкт-Петербургского университета. Серия Право, 2017, Том 8, Вып. 4. – С. 445-446.

<sup>27</sup> Maurer H. Allgemeines Verwaltungsrecht. Verlag C.H. Beck, München, 2011, S. 151.

<sup>28</sup> Jörg Pudelka The Concept of Discretion in the administrative Law of Germany and its Delimitation from Judicial Discretion // Bulletin of St. Petersburg University. Law Series, 2017, Volume 8, Issue. 4, P. 446.

20. Close to the issue of administrative discretion is the issue of vague legal concepts. This is due to the fact that in both cases the authority gives its own assessment of the situation (circumstances, facts, etc.) and makes the final decision. The difference between them is that if discretion is on the side of legal consequences of the rule ("discretion on legal consequences", "discretion on action", "discretion on the choice of one of the options"), the vague legal concepts are on the side of legal structure<sup>29</sup>, which requires the use of appropriate methods of interpretation of law to know the essence (content) of such concepts<sup>30</sup>.
21. Different legal concepts have different degrees of certainty. Certain categories that are enshrined in the texts of regulations, given their legal (official) definitions, or, taking into account the results of case law, are quite clear and unambiguous to understand. At the same time, legal acts are filled with many categories that must be interpreted in each case. Such concepts include the following: public interest, common good, important cause, reliability, suitability, need, especially severe case, distortion/pollution, damage to the natural landscape, etc.
22. Application of these concepts in each case requires an assessment, and often a forecast of the future; this, in turn, is possible only in the case of consideration, evaluation and comparative weighing of competing phenomena. It is not always possible to clearly establish the only possible legitimate decision in itself. Despite these difficulties, authority must reach certain decision in certain case<sup>31</sup>. For this reason, discretion and powers to interpret vague legal concepts do not constitute legal constructions that are clearly demarcated; they are conditioned by different legislative techniques and can be interchanged from different methodological viewpoints<sup>32</sup>.
23. In addition, it should be borne in mind that quite often one can find mixed legal norms, i.e. those containing provisions with vague legal concepts on the side of legal structure, and the power to exercise discretion on the side of its legal consequences. Each of these parts of the rule is subject to assessment according to rules specific to it<sup>33</sup>.
24. When interpreting vague legal concepts, authorities should take into account hierarchy of **interpretation methods**.
25. Every interpretation of legal concepts enshrined in law should begin with a study of the meaning of respective word.
26. Interpretation of the law should be based on wording priority. It is necessary to ask what is the objective meaning of the expression or sentence in general speech used by the legislator (interpretation of the wording). If this procedure leads to a clear result, it is authoritative and therefore other interpretations (such as historical interpretation [see preparatory work]) and teleological interpretation [what the intention was]) are unacceptable.
27. However, since each rule to be interpreted is expressed in a sentence, it is also necessary to pay attention to the position of the word to be interpreted in its grammatical (grammatical interpretation) or in the

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<sup>29</sup> Maurer H. Allgemeines Verwaltungsrecht. Verlag C.H. Beck, München, 2011, S. 151.

<sup>30</sup> More Details on the Methods of Interpretation of Law, see: Methods of Solving Legal Problems (Cases): Theoretical and Practical Aspects: manual / B. Shloier, V. Duel, I. Lukach, O. Kosilova; gen. ed. by R. Melnyk. - Kherson: Helvetica Publishing House, 2020; German Methods of Law: textbook / E. Sokolov, S. Rosner, R. Melnyk. - Kherson :. Helvetica Publishing House, 2019.

<sup>31</sup> Maurer H. Allgemeines Verwaltungsrecht. Verlag C.H. Beck, München, 2011, S. 153.

<sup>32</sup> Koch, Unbestimmte Rechtsbegriffe und Ermessensermächtigungen, S. 172.

<sup>33</sup> Maurer H. Allgemeines Verwaltungsrecht. Verlag C.H. Beck, München, 2011, S. 163.



structural context of the legal provision within the law (systemic interpretation). Thus, the interpretation of words in combination with grammatical and systemic interpretation, as a rule, prevails over all other methods of interpretation. However, sometimes teleological and historical interpretation should also be used (preparatory work and "what is the intention?")

28. Any interpretation should be in line with fundamental rights and the constitution/fundamental principles.
29. Some national legal structures have a tool for applying **the analogy of law (legislation)** which is part of case-law: it concerns the application of certain provisions of law in such situations. It is determined whether the law is imperfect from the viewpoint of own intention and teleology and is therefore vital.
30. Analogy is not the method of interpretation itself, but a special assessment of the law by the institution entrusted with the task of applying the law. Analogy is acceptable only in the case of a real (unplanned) legal loophole which exists in relation to current legislation but is not determined in any way. In doing so (closing this loophole with analogous application in similar situations), the authority should strive not to find a solution in each case, but to solve within the system; it should be used with caution.

#### **Examples**

. The selection of institution is provided by law, but the quorum is not mentioned. This is offset by a similar wording of a similar provision, which provides for the selection of a body with a certain quorum.  
2. If the law does not provide for time limits for appeal or refuse to review, even if the appeal or refusal to review is explicitly provided by law, this situation should be based on the analogy of time limits directly determined in comparable cases.

31. In the French legal tradition, no "analogy" as such applies, even to "legal loopholes" (which are not in the doctrine). Instead of applying "analogy", it refers to "general principles" or "general rules" derived from a law established by judges (legislation), or simply to general legal provisions.
32. EU Law must also be interpreted in its application by the national judges. The following principles of interpretation apply here also according to the judiciary of the European Court of Justice:
  - Word interpretation and grammatical interpretation;
  - Systematic interpretation;
  - Teleological interpretation;
  - Dynamic interpretation according to the "effet utile": The provision must be interpreted in such a way that its purpose is attained according to the possibility, that is, that it has that parky benefit. It is fundamentally a teleological interpretation and the benefits here lie particularly in the objectives of Community law;
  - Interpretation of secondary law in conformity with the primary EU law: when interpreting unclear passages in directives, regulations or decisions, care must be taken to ensure that the result of interpretation is compatible with the higher-ranking EU law (primary law, which includes also the general legal principles of EU law and Fundamental Rights Charter of the EU).

If an unambiguous clarification of the concept of EU law is not possible by interpretation, a request for a preliminary ruling must be made to the European Court of Justice.

33. Starting point for interpretation must begin with Article 31 (1) of the Vienna Convention on the Law of Treaties 1969. This provides that international conventions should be interpreted in good faith according

to the ordinary meaning of their terms in their context and in the light of their overall object and purpose. Several core principles for the interpretation of the Convention flow from this “teleological principle”.

34. First also here: it is an autonomous interpretation, irrespective of how it may be understood by the member States. The interpretation of the wording itself has priority. However, also the will of the parties to the treaty is relevant to be considered to interpret a norm. The interpretation must be done in good faith and the concrete context is also relevant to be considered as well as teleological considerations.
35. Based on the teleological interpretation by jurisprudence of ECtHR certain different general principles which can be applied when interpreting the Convention (like effective protection of the Convention rights, legality, subsidiarity, evolutive/dynamic interpretation and proportionality considerations) have been developed.
36. Just to be mentioned here (but not relevant for the work of national administrative authorities and national judges): The so called “margin of appreciation doctrine” of the ECtHR allows national administrative authorities as well as national judiciaries a certain amount of discretion in certain circumstances.
37. The scope of judicial review may extend to legally significant facts and the application of law in a particular case. What is important is the extent to which the court may exercise judicial control within the country. The separation of powers on the one hand and legal certainty / effective final decision are relevant denominators (*for more information on Council of Europe standards, see Section 3*).

## STANDARDS AND RECOMMENDATIONS OF THE COUNCIL OF EUROPE

1. National doctrines, best practices, and traditions are sources for the formation of international standards (recommendations). Subsequently, international standards influence the development of legislation and practice in most countries. International judicial institutions are another important international instrument of influence, since they develop certain rules when analyzing specific cases which involve breaches of international obligations with such rules becoming part of national jurisdictions.
2. The Council of Europe, through its bodies, has developed certain standards and recommendations – which are soft law, i.e. a source of law without normative content so that no obligation can be conferred by it. In order to counteract the arbitrariness of the administrative authorities, these recommendations set up certain limits and guidelines for the exercise of discretionary powers by administrative bodies, make the behavior of such bodies more predictable and fair. Let us consider the rules (principles) formulated by the Committee of Ministers of the Council of Europe, the European Commission for Democracy through Law (Venice Commission), and the European Court of Human Rights (ECtHR) on the discretion of administrative authorities and judicial oversight of its exercise.

### A. Recommendations of the Committee of Ministers of The Council Of Europe

3. The Committee of Ministers of the Council of Europe, being based on the preliminary expertise provided by experts from various countries (and even legal systems), has prepared a number of recommendation documents that raise some issues of administrative law, including various aspects of administrative discretion.
4. In 1977, the Committee of Ministers of the Council of Europe adopted the first one of a series of recommendations in the field of general administrative law, **Resolution (77) 31 on the protection of the individual in relation to the acts of administrative authorities** (later such documents started being referred to as recommendations)<sup>34</sup>.
5. The resolution refers to measures or decisions (administrative acts) that are taken/adopted when exercising public powers and which, given their nature, directly affect the rights, freedoms, or interests of an individual. In fact, it defined procedural guarantees for a person within the framework of administrative proceedings (regardless of whether discretion has been exercised at all), such as:
  - the right to be heard;
  - access to information;
  - assistance and representation;
  - indication of motives;
  - notification of methods of appeal (review).
6. The resolution defined the content of those principles, and for a better understanding and application, it is also appropriate to refer to the explanatory comment attached to the said Resolution<sup>35</sup>. Verification of

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<sup>34</sup> Resolution (77) 31 on the protection of the individual in relation to the acts of administrative authorities // <https://rm.coe.int/16804dec56>.

<sup>35</sup> The unofficial Ukrainian translation is available in the publication: Fundamentals of Administrative Procedure and Administrative Law: Manual / Gen. ed. Kuybida R.O., Shishkina V.I. – K.: Staryi Svit, 2006.

compliance with procedural safeguards is important to understand whether an administrative body, when exercising its discretion, has acted in good faith, with neither arbitrariness nor negligence.

**Example.**

Part 2 of Article 2 of the Code of Administrative Procedure of Ukraine (hereinafter – CAP of Ukraine) states that the court shall check, among other things, whether the administrative body acted taking into account the individual's right to participate in the decision-making process. Judicial practice often considers that involving an individual in the decision-making (aka hearing an individual) is a purely discretionary right of an administrative body, referring, for example, to such wording of laws as “the body may invite the concerned person” or similar. However, in reality such “discretion” would not be available in many cases if the court interpreted national law in the light of the principles of Resolution (77) 31: “*In respect of any administrative act of such nature as is likely to affect adversely his rights, liberties or interests, the person concerned may put forward facts and arguments and, in appropriate cases, call evidence which will be taken into account by the administrative authority.*” Thus, the right of a person to be heard should be ensured if the proceedings in respect of such a person may lead to an unfavorable decision, while de/she can report facts and arguments or call evidence that are important and may affect the content of the decision.

7. In 1980, the Committee of Ministers approved **Recommendation № R (80) 2 concerning the exercise of discretionary powers by administrative authorities** <sup>36</sup>. The document contains a definition of discretion, which is often cited in Ukrainian jurisprudence (“a power that an administrative body may exercise with a degree of discretion when making a decision - that is, when such a body can choose from several legally permissible decisions what it considers best for given the circumstances”).
8. First, the Committee of Ministers supplemented the general procedural guarantees set out in the previous Resolution with the following specific rules:
  - any general administrative guidelines concerning the exercise of discretion must either be made public or communicated to the person concerned, in an appropriate manner and to the extent necessary, at his request, be it before or after the taking of the act or concerning him;
  - where an administrative authority, in exercising a discretionary power, departs from a general administrative guideline in such a manner as to affect adversely the rights, liberties or interests of a person concerned, the latter is informed of the reasons for this decision either in the act issued in his respect, or at his request, in writing within reasonable timeframe.
9. The Committee of Ministers also indicated that an act adopted/exercised as part of discretion may be reviewed at least for legality by a court or other independent body.
10. Second, the Committee of Ministers has formulated principles that serve as meaningful guarantees for a fair decision (some of them, such as equality and timeliness, are also procedural guarantees).
11. An administrative authority, when exercising a discretionary power:
  - does not pursue a purpose other than that for which the power has been conferred;
  - observes objectivity and impartiality, taking into account only the factors relevant to the particular case;
  - observes the principle of equality before the law by avoiding unfair discrimination;

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<sup>36</sup> Recommendation No R (80) 2 concerning the exercise of discretionary powers by administrative authorities // <https://rm.coe.int/16804f22ae>

- maintains a proper balance between any adverse effects which its decision may have on the rights, liberties or interests of persons and the purpose which it pursues;
- takes its decision within a time which is reasonable having regard to the matter at stake;
- applies any general administrative guidelines in a consistent manner while at the same time taking account of the particular circumstances of each case.

All these principles – compliance with the purpose of power, impartiality, equality and non-discrimination, proportionality, reasonableness of time, reasonableness – are embodied in Part 2 of Article 2 CAP of Ukraine as criteria for verification of appealed decisions, actions or inaction of an administrative authority. These criteria do not contain any detailed description in the procedural law, so for their proper application it is advisable to refer to the above recommendation and an explanatory comment to it<sup>37</sup>.

12. In 1987, the Committee of Ministers supplemented the two previous recommendations with the **Recommendation No. R (87) 16 on administrative procedures affecting a large number of persons**<sup>38</sup>. The document covers taking of non-regulatory (individual) acts affecting a large number of persons. It contains the following principles:

- persons concerned should be informed in such manner as may be appropriate and be provided with such factors as will enable them to judge its possible effects on their rights, liberties and interests;
- the administrative authority may require from participants with common interests to choose one or more common representatives or be represented by an association or an organization;
- the administrative authority should provide, if requested, with information about all available factors which led to taking the act in question;
- the administrative authority may conduct the participation procedure under one or more of the following forms: written observations; private or public hearing; representation in an advisory body of the competent authority.
- persons concerned should also have the right to put forward facts and arguments and, in appropriate cases, present evidence, while an administrative authority should take them into account;
- the administrative act should be notified to the public; the persons concerned may gain access to the following: - the main conclusions emerging from the procedure; - the reasons on which the administrative act is based; - information on normal remedies against the administrative act and the time-limit within which they must be utilised;
- the administrative act should be subject to control by a court or other independent body;
- when the administrative act is likely to affect rights, liberties or interests in the territory of a neighbouring state, the participation procedure should be accessible to the persons concerned in that state, on a non-discriminatory basis.

13. **Recommendation 2004 (20) on judicial review of administrative acts**<sup>39</sup> contains requirements for instruments of administrative justice. It states that all administrative acts (regulatory and individual) are subject to judicial review; the court should have the power to review any violation of the law, including issues of the lack of jurisdiction, violation of procedural rules, or abuse of power.

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<sup>37</sup>The unofficial Ukrainian translation is available in the publication above.

<sup>38</sup> Recommendation No R (87) 16 on administrative procedures affecting a large number of persons // <https://rm.coe.int/16804eaa5c>. The unofficial Ukrainian translation is available in the publication above.

<sup>39</sup> Recommendation Rec 2004 (20) on judicial review of administrative acts // [https://search.coe.int/cm/Pages/result\\_details.aspx?Reference=Rec\(2004\)20](https://search.coe.int/cm/Pages/result_details.aspx?Reference=Rec(2004)20). The unofficial Ukrainian translation is available in the publication above.

**Attention!**

The explanatory memorandum states that *“The Recommendation does not preclude States from defining a very limited range of statutory exemptions from judicial control – this may, for example, apply to certain acts in the field of foreign affairs, international agreements, defense, or national security... As to the acts resulting from the exercise of a discretionary power, although such a power is not, in principle, subject to judicial review, the court may examine whether the relevant administrative authority went beyond the permitted limits when exercising such discretion and whether any obvious mistakes were committed”*

14. In 2007, the Committee of Ministers summarized its previous work in the field of administrative law in a comprehensive document – **Recommendation (2007) 7 on good administration**<sup>40</sup>. By this it considers that public authorities are active in numerous spheres and play a key role in a democratic society. The recommendation also mentions that the member states of Council of Europe shall ‘promote good administration within the framework of the principles of the rule of law and democracy’. Also this recommendation signifies the right of private persons to seek legal redress whenever their rights, liberties or interests are negatively affected when the public administration exercises its duties in an unlawful or inappropriate manner. The Appendix to the Recommendation – Code of good administration stated and specified, among others, the following principles:

- lawfulness;
- equality;
- impartiality;
- proportionality;
- legal certainty;
- taking action within a reasonable time limit;
- participation;
- respect for privacy;
- transparency.

## B. Opinions of the Venice Commission

15. The Venice Commission prepares opinions on the most important draft laws for both member states the Council of Europe and non-members from the point of view of the values and principles of the Council of Europe. Its opinions are not binding, but affect the legal systems of various states, given the reputation of this institution. It also prepares case studies and reports, where it summarizes its positions on certain issues.
16. One of the most comprehensive documents of the Venice Commission is **the Rule of Law Checklist**<sup>41</sup>. This document was also approved by the Committee of Ministers of the Council of Europe and the Parliamentary Assembly of the Council of Europe.
17. One of the components of the rule of law, under this document, is “prevention of abuse (misuse) of power”, which can be revealed through the question:

*Are there legal safeguards against arbitrariness and abuse of power (détournement de pouvoir) by public authorities?*

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<sup>40</sup> Recommendation CM/Rec(2007)7 on good administration // <https://rm.coe.int/16807096b9>.

<sup>41</sup> Rule of Law Checklist, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016) // [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2016\)007-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)007-e); переклад українською: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)007-ukr](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-ukr).

- i. If yes, what is the legal source of this guarantee (Constitution, statutory law, case-law)?
  - ii. Are there clear legal restrictions to discretionary power, in particular when exercised by the executive in administrative action?
  - iii. Are there mechanisms to prevent, correct and sanction abuse of discretionary powers (*détournement de pouvoir*)? When discretionary power is given to officials, is there judicial review of the exercise of such power?
  - iv. Are public authorities required to provide adequate reasons for their decisions, in particular when they affect the rights of individuals? Is the failure to state reasons a valid ground for challenging such decisions in courts?
18. Further on, the Venice Commission explains that an exercise of power that leads to substantively unfair, unreasonable, irrational or oppressive decisions violates the Rule of Law. It is contrary to the Rule of Law for executive discretion to be unfettered power. Consequently, the law must indicate the scope of any such discretion, to protect against arbitrariness. Abuse of discretionary power should be controlled by judicial or other independent review. Available remedies should be clear and easily accessible. The obligation to give reasons should also apply to administrative decisions<sup>42</sup>.

### C. ECtHR Case Law

19. The ECtHR is a court of law and the jurisdiction of the Court is limited to reviewing compliance with the requirements of the Convention. In its judgements the ECtHR first of all refers to provisions of ECHR itself, as it is the only binding source of law for ECtHR. However, it has also developed different legal sources to interpret the provision of ECHR: i.e. case law of the ECtHR itself, laws and practices of the contracting member states of the ECHR as well as legal documents (treaties and soft law including recommendations) produced by the Council of Europe.
20. The ECtHR case law, at the difference from the recommendations of the Committee of Ministers of the Council of Europe and the Venice Commission, is binding – not recommendatory.
21. The ECtHR has repeatedly emphasized the need for a legislative definition of the scope of administrative discretion and has itself assessed whether the exercise of discretion has led to an arbitrary violation of human rights or liberties.
22. The ECtHR often analyzes the interference of the authorities in human rights from the point of view of the following test:
- Was such interference prescribed by law?
  - Did it pursue a legitimate goal?
  - Was it necessary in a democratic society?
23. When asking these questions, the ECtHR goes beyond formal legality (even in the first question, the ECtHR requires that the law be of good quality – clear and foreseeable). This test is fully suitable for assessing the exercise of discretion, provided that such exercise has led to an interference with human rights and freedoms.

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<sup>42</sup> Idem (see para 64-68).

24. In matters relating to fundamental rights, granting legal discretion to the executive under the form of unfettered powers would be incompatible with the rule of law. Accordingly, the law should clearly define the limits of such discretion and the procedure for its application<sup>43</sup>.

**Example**

In *Koretsky and Others v. Ukraine*, the ECtHR encountered a situation where a justice sector institution denied the applicants' registration of their public association based on the alleged inconsistency of some provisions of the statute with the law: in particular the provisions on the right of the association with local status to have branches in other cities, involve volunteers as members, and carry out publishing activity. At that time, the law provided that *"the registration of a public association may be denied if its statutory or other documents submitted for registration of the association contradict the requirements of Ukrainian legislation"*. The ECtHR stated that such a law was not foreseeable because it gave room for a rather broad interpretation, was too vague, and allowed the authorities a too broad margin of appreciation in deciding whether a particular association could get registered. In such a situation, the judicial review procedure available to the applicants failed to prevent the arbitrary denial in registration. The ECtHR further acknowledged that the administrative authorities had resorted to a radical measure in respect of the applicants, which prevented the applicants' association from even commencing their main activities, despite the peaceful nature of such activities. The restrictions applied did not pursue a "pressing social need", that being so, the interference cannot be deemed necessary in a democratic society.

25. With regard to the exercise of discretionary powers, there should be sufficient formal (though not necessarily judicial) control to provide effective safeguards against their arbitrary exercise. However, it can be argued that in such cases there should be a clearer presumption in favor of judicial oversight, and if there is none, the respondent State should explain why <sup>44</sup>.

For example, the ECtHR negatively assessed attempts to remove certain types of acts from judicial control. In particular, in the case of *Capital Bank AD v. Bulgaria*,<sup>45</sup> the ECtHR found, from the point of view of the right to a fair trial, the decision of the Bulgarian national courts to refuse a discussion of the bank's insolvency judgment based on the Bank Law 1997, as unjustified, the latter taking decisions on the revocation of a bank's license for the reasons of insolvency, which are made by the Bulgarian National Bank, out of the scope of judicial review.

26. In the case *Ramons Nunes de Carvalho e Sa v Portugal* <sup>46</sup> the Grand Chamber summarized the general principles on the extent of judicial review (according to Art. 6 para. 1 of ECHR):
- "tribunal" in question must have jurisdiction to examine all questions of fact and law relevant to the dispute before it;
  - the requirement that a court or tribunal should have "full jurisdiction" will be satisfied where it is found that the judicial body in question has exercised "sufficient jurisdiction" or provided "sufficient

<sup>43</sup> See para 47 of the judgment in *Case of Koretsky and others v. Ukraine* // <http://hudoc.echr.coe.int/eng?i=001-85679>, para. 68 of the ECtHR judgement in *Case of Malone v. The United Kingdom* // <http://hudoc.echr.coe.int/eng?i=001-57533>.

<sup>44</sup> See for more details "The Margin of Appreciation: Interpretation and discretion under the European Convention on Human Rights", by Stevan Greer, Human Rights files, No 17, page 17 // [https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-17\(2000\).pdf](https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-17(2000).pdf).

<sup>45</sup> See para 98 - 116 of the ECtHR judgement in *Case of Capital Bank Ad v. Bulgaria* // <http://hudoc.echr.coe.int/eng?i=001-71299>.

<sup>46</sup> See para 176 and further ECtHR Grand Chamber rulings in *Case of Ramons Nunes de Carvalho e Sa v. Portugal* // <http://hudoc.echr.coe.int/eng?i=001-187507>.



review” in the proceedings before it. Thus “full jurisdiction” has an autonomous definition irrespective of the characterization in domestic law;

- it is not the role of Article 6, in principle, to guarantee access to a court which can substitute its own assessment or opinion for that of the administrative authorities;
- whether the review carried out was sufficient will depend on the circumstances of a given case: the ECtHR must therefore confine itself as far as possible to examining the question raised in the case before it and to determining if, in that particular case, the extent of the review was adequate

27. In assessing the “adequacy” of a judicial review, the ECtHR takes into account the following factors:

- the subject-matter of the decision, in particular, whether or not it concerned a specialized issue requiring professional knowledge or experience, and whether it concerned the exercise of administrative discretion and, if so, to what extent;
- the manner in which this decision was taken, in particular the procedural guarantees provided by the body;
- the content of the dispute, including the desired and real grounds for appeal.

In the context of an administrative appeal, the answer as to whether the limits of judicial review were “adequate” may depend not only on the discretionary or technical subject matter of the contested decision and the specific problem which the applicant wishes to raise as a central one, but also, more generally, on the nature of the “civil rights and obligations” that are affected and the nature of the policy pursued in the relevant national legislation. Therefore, the adequacy of the review is assessed in the context of each case<sup>47</sup>.

28. Thus, the intensity of judicial review of the exercise of discretion by administrative authorities may vary and may be less with respect to the exercise of discretion in a specialized legal area of law.

29. Case law of ECtHR to which it has referred in this judgement about different situations in which it has examined the intensity of the domestic courts’ review of the discretion exercised by the administrative authorities:

- *Tsanova-Gecheva v. Bulgaria* (case concerning the discretion of the Council of Justice in Bulgaria to appoint judges to administrative positions in local courts and the scope of judicial control over the implementation of the relevant discretion);
- *Bryan v. The United Kingdom* (case concerning the discretion of a local authority to decide on the demolition of construction sites on the basis of the lack of a permit for such construction);
- *Potocka and others v. Poland* (case concerning property expropriated in 1947 and jurisdiction of the administrative court to return it);
- *Sigma Radio Television Ltd v. Cyprus* (case concerning the discretion of the controlling agency in the field of broadcasting);

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<sup>47</sup> See para 154-155 of the ECtHR judgement in *Case of Sigma Radio Television Ltd v. Cyprus* // <http://hudoc.echr.coe.int/eng?i=001-105766>, para 179-181 and further ECtHR Grand Chamber rulings in *Case of Ramons Nunes de Carvalho e Sa v. Portugal* // <http://hudoc.echr.coe.int/eng?i=001-187507>.

- *Galina Kostova v. Bulgaria* (case concerning the discretion of the Minister of Justice of Bulgaria to deprive a bankruptcy trustee of the right to practice following a violation of bankruptcy law)
- *A. Menarini Diagnostics S.r.l. v. Italy* (case concerning the discretion of the antitrust authority to apply penalties for infringements of competition law).

## IV. LEGISLATURE AND JURISPRUDENCE OF THE EU MEMBER STATES

1. Because of the quite diverse systems of administrative jurisdictions in Europe it is a quite complex task to find out about the elaboration of judicial review of exercised administrative. However comparative insights contribute to avoid failings as well as to elaborate a good practice so that this Chapter is devoted to a brief comparative analysis.
2. European judicial systems are basically founded mainly on three different traditional approaches: the common law countries focus on procedural fairness and procedural correctness and intend to secure objective legality of decisions.

France also basically has the protection of objective legality of administrative decisions in its focus, whereas German-tradition countries primarily perceive the judicial control in order to protect certain subjective rights of individuals. These different approaches have also consequences for the respective scope of judicial reviews and density of judicial reviews in general and in particular with respect to exercised administrative discretionary decisions.

3. On continental Europe common law features have not much influence in judicial systems - but either German or French legal traditions have been of main influence for other judicial systems. Therefore this Chapter brings a brief, exemplified overview from some different European countries with specific focus on the French and German legal system hereinafter.
4. Effective legal protection standards:
  - At any stage an effective legal protection must also be guaranteed also concerning judicial review of discretion. Issues of separation of powers on the one hand and the legal certainty as well as efficient final decision are relevant denominators for all national approaches.
  - In general the intensity of judicial review of administrative acts differs according to national legal traditions and in all countries the judicial control of exercised discretion is limited compared to "average" density of control.
  - In general discretionary decisions enjoy less judicial scrutiny and the scope of review is generally limited.
5. In European judicial systems it is generally understood that administrative discretion refers to cases provided by the legislator in which the administrative bodies can have a different degree of freedom to act. Discretion is conferred on public authorities for different reasons, e.g. when the relevant circumstances cannot be foreseen, or the factual situation is so complex that the right decision can be taken only after the due consideration of all relevant facts of the case.

### A. Denmark

6. Unless law states otherwise judicial review includes also discretionary matters. However often the law reduces the review to legal matters (this includes the review of the facts of the case).

7. When the administrative decision does not rely on discretion the court may change the decision and decide in the merits, otherwise the court may always quash an illegal decision and refer it back to the decision making authority.
8. In those cases in which the law leaves it open to the administration whether a certain decision should be made, then only matters of law can be reviewed.
9. Sometimes the administration is granted a certain margin of appreciation in such instances, especially if knowledge of the local situation is better determined by the local administration<sup>48</sup>.

## B. Germany

10. Constitutional frame for the exercise of discretion by an administrative authority is the German Constitution, Art. 19 para 4 of the "*Grundgesetz*" on effective judicial protection principles and the above mentioned strictly understood principle of legality (execution operates "on the basis" of the laws). This is the fundament for the German jurisprudence on limits of judicial control and a "scope for decision-making"/"margin of appreciations"<sup>49</sup> for administrative authorities in case of individual administrative decisions. This means that according to the academia and jurisprudence it is the national legislator which grants the executive power these scopes/margins and the constitution foresees limits for the legislator to grant such scopes/margins. In any case it is relevant to have an effective judicial control, as mentioned above.
11. The German doctrine and jurisprudence are quite sophisticated compared to practice in other countries (e.g. France, UK). Therefore it is relevant to go into details also concerning legal-theoretical fundaments of the German doctrine concerning administrative (individual) decisions.
12. Some principle remarks:
  - The German legislation and jurisprudence<sup>50</sup> distinguishes between "bound administration" and "discretionary administration".
  - Interpretation of unclear legal terms ("undetermined legal notions") is not discretion (by some academics seen critically, but is still constant jurisprudence) and these two notions must be strictly separated from each other.
  - German doctrine and jurisprudence distinguish a legal norm between legal facts of a case and legal consequences of a case. Not all "scopes for decision"/"discretion" can always be done on both elements of a legal norm; "discretion" exists only on the level of legal consequences, not on the level of legal facts. However, recent developments in jurisprudence (in areas of sectorial politics) show that it cannot be distinguished clearly any more.
  - The judicial review is about the examination of legality of the decision, however the court can interpret and apply the law freely and judicial review is relatively unlimited, in general full judicial

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<sup>48</sup> Zoltan Szente and Konrad Lachmayer „The principle of effective legal protection in administrative law. A European comparison”, page 100.

<sup>49</sup> Leeway for decisions (i.e. "Entscheidungsspielräume"), see also article 40 of the German administrative procedural act, providing that administrative authorities may exercise discretionary powers according to the aim of the legal authorization and within the limits set by the law.

<sup>50</sup> This distinction exists also in Spain, Italy or UK, see Daniel Giltard "le pouvoir d'appréciation dans l'action administrative", Zbornik Radova Pravnog fakulteta u Splitu god. 52/2015, str. 11-24, page 12

control. In any case full judicial control is done concerning undetermined legal notions: they are judicially controlled in a comprehensive manner.

13. Concerning the “discretionary (individual) decisions” of administrative authorities the German jurisprudence distinguishes as follows: administrative authorities enjoy such “scopes for decision making”/“margins of appreciation” / “discretion” (*vis-à-vis* judicial control with the consequence to have only limited judicial control in all these cases) in the following categories of cases:
- a) There is a general discretion of the administrative authority: this is discretion for the administrative authority in a concrete case on specific legal consequences, once the legal facts are fully met/fulfilled; the legal facts are fulfilled and then the legislator grants different options to the administration which of several different alternative legal consequences to take, e.g. when there is an object which produces a certain danger for fire explosion in a house the administrative authority can oblige the owner OR the tenant to remove and eliminate the dangerous object;
  - b) There is certain margin of appreciation in land- and space-planning areas: this concerns discretion in cases of planning schemes/urban and regional planning regulations/construction planning regulations and is necessary because these legal regulations do not regulate content-wise but the procedure is goal-oriented.
  - c) There is a certain discretion concerning areas in which it is relevant to assess/evaluate legal terms: here the administrative authority enjoys a certain discretion to apply (! not: interpret) certain unclear legal terms: this is the case in cases of evaluation of a public servant or examination-decisions, decisions about/on the basis of an examination order and also in cases in which specific risk assessment must be done or predictive decisions/decisions on forecasts. In these assessments of performance cases (schools, universities, and public servants performances), prognostic decisions and risk assessment decisions a margin of appreciation(“discretion”) is granted to the administrative authority on the level of legal facts (not on the level of legal consequences) and judicial control is limited.
  - d) There is a certain discretion to regulate certain areas: this is based on quite recent jurisprudence: when regulatory authorities decide in areas of sectorial politics (energy, telecommunications, postal services, railways): E.G. judgment of the Federal Administrative Court<sup>51</sup> in which it has granted this discretion to the regulatory telecom authority when it had to decide on obligations to access the market and provide services on the telecom market for different competitors. This discretion is a novum and it is neither specifically on the level of legal facts nor on the level of legal consequences.
  - e) not as a matter of discretion/margin of appreciation, but more generally as a limited judicial control and permission of the administrative bodies to take the final decision without full judicial control reference must be made to a recent judgement of the Federal Administrative Court<sup>52</sup> in nature protection issues: Here the court has adjudicated that when according to the state of the art of scientific knowledge a question cannot be answered and all facts have been investigated and the state of knowledge has reached its limits then the judge takes the plausible assessment of the administrative authority as a basis for his/her decision.

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<sup>51</sup> Dated January 27. 2010, 6C22/08.

<sup>52</sup> Dated October 23, 2018 on the Environment Protection Law.

14. On the one hand side discretion exists not on the level of facts but only on the level of legal consequences. On the other hand side undetermined legal terms are interpreted. Although there is a certain margin of appreciation in the interpretation of the norm, this is not discretion. Therefore there is full judicial control in this respect by courts.

Exception: in certain cases of “margins of appreciation”/“scope for decision-making” under d) and e). Here is also likewise a limited judicial control - although it is not “discretion” *strictu sensu*.

15. In cases a) to d) Judicial review is limited as the court examines:
- whether the statutory limits (the frame within which discretion can be exercised and which must be legally provided in this applicable legal provision) of discretion have been overstepped, or
  - whether discretion/margins of appreciation has been used in a manner not corresponding to the purpose of the empowerment; and
  - whether the statutory criteria/aspects relevant for the exercise of discretion have been used wrongfully;
  - whether there were relevant procedural shortcomings, arbitrariness of the decision, violation of recognized basic principles.
16. Practically spoken relevant questions for a judge are:
- Has the authority realized and seen that the legislator grants discretion?
  - Did the administrative authority fully explore and established all relevant facts of the case?
  - Is the exercised discretion proportional vis-à-vis other laws and specifically constitution/fundamental rights (was the action of the administration necessary to achieve the legal aim? Was the action appropriate? Was the action adequate?
17. When the administration did not make use of its discretion in a specific case, when it used wrong criteria/aspects or when it gave the criteria/aspects wrong weight or when it chose an alternative to which it was not authorized by this legal provision, these are manifest errors.
18. As a consequence of such manifest errors, the court must not put its own discretion on the place of the authority in such cases but quashes and refers the case back. However, in a case in which discretion is *de lege* reduced to only one proportional action any way (“reduction to zero”) the court can decide in the merits of the case.
19. Furthermore the administrative authority has the possibility to “cure” defects concerning its exercised discretion during court proceedings: it may supplement its discretionary considerations <sup>53</sup>.

## C. France

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<sup>53</sup> Zoltan Szente and Konrad Lachmayer „The principle of effective legal protection in administrative law. A European comparison”, S. 152.

20. Unlike the German-tradition countries the French approach does not distinct between unclear (undetermined) legal terms and discretion; all “margins of appreciation”/“discretion” granted to administrative authorities is regarded to be “discretion”. Furthermore, in the French legal system “discretion” is not (only) on the level of legal consequences (like in the German tradition countries) but may also take into account the level of facts and includes a margin of discretion of the administrative authority to assess facts (it is a perception of general discretion to act and to decide).
21. So there are cases in which the administration is less bound by the law, but enjoys quite some freedoms to act (“margins of appreciation”) i.e. the administration enjoys discretionary powers (i.e. “*pouvoir discrétionnaire*”).
22. This is seen *vis-à-vis* those cases, in which the administration is bound, which are mandatory powers of the administration (i.e. “*compétence liée*”) <sup>54</sup>: this means that the administrative authority is legally bound to other decisions which themselves have legally binding effect or when the administrative authority has no other option than to adopt a given administrative decision (e.g. the applicant has asked for a building permit in an absolutely non-building zone. In this situation, the administrative authority is legally bound to refuse to deliver the permit; e.g. the specialized asylum administrative authority has denied the refugee status, the Prefect (as the other administrative authority) is legally bound to refuse the refugee residence permit).<sup>55</sup>
23. The doctrine and approach of the jurisprudence on kinds of “discretion” is not as sophisticated as the German approach which distinguishes even different kinds of “discretion” (see above) <sup>56</sup>. The same “relaxed” approach is seen with respect to jurisprudence of the CJEU and ECHR which also do not distinguish between “undetermined legal terms” and “discretion” (see at the end of this chapter).
24. Furthermore it is relevant to point out that in France the way of organization of judicial control has specific system-building character; thus this is the starting point for the analysis on judicial control of exercised administrative discretion. It is also noteworthy to stress that specifically jurisprudence of French courts (mainly the Supreme Administrative Court, i.e. the French *Conseil d'Etat*) has contributed a lot to the construction and development of this system-building approach.
25. The basic idea on judicial control is to control the objective legality of the administration and also to actually guarantee citizens' individual rights. This brings with it different conditions to bring in an action/legal complaint before administrative courts on the basis of different types of court proceedings.
26. The characterization of the different types of legal actions/complaint proceedings is combined with corresponding different judicial review and different competences of the reviewing administrative judge (including control of exercised discretion).
27. The main different types of complaints to administrative jurisdiction according to procedural law and jurisprudence of the French *Conseil d'Etat* (i.e. Supreme Administrative Court, State Council) are the following.<sup>57</sup>:

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<sup>54</sup> This differentiation is also made in the German legal system

<sup>55</sup> As a third category those cases in which an underlying individual right is at stake and for standards, such as “danger to public order” or “disproportionate infringement to family life” are regarded as limiting the administration's margins of appreciation.

<sup>56</sup> See for more details: Univ-Prof. Dr. Markus Ludwigs, “Kontrolldichte der Verwaltungsgerichte”, DÖV, Zeitschrift für öffentliches Recht und Verwaltungswissenschaft, Heft 10, Mai 2020, S 405-414.

<sup>57</sup> See e.g. decision of 16 February 2009, société Atom, with which the judicial control was changed from A) to B) or certain areas of administrative sanctions. The basis for which kind of judicial review is applicable is often found in the respective administrative law itself, e.g.: for environmental issues the code de l'environnement provides for different complaints (“recours”) for judicial review, like Art. L. 514-6, Art. L. 214-3 and some more (contentieux de plaine jurisdiction)

- a) “*Ultra vires* proceedings” (i.e. *Contentieux de l’excès de pouvoir*) or “full appeal proceedings” (*Recours en annulation*): this is the most important kind of legal action/judicial proceedings (as it is a general review) and it is a kind of “objective jurisdiction”, an objective control of legality of individual administrative decisions. Whenever one has a “legal interest” he or she can ask the court to annul the administrative act (or to declare it null). The legal action does not have suspensive effect. This action is available to contest individual administrative decisions or normative acts of the administration

Here judicial review is generally “full”, but in relation to this “full judicial control” judicial control is limited concerning the exercised discretion (which has been granted to the administration by the legislator). Judicial control is done to check the compliance of the administrative decision with certain legal standards (including general principles of law that can effectively protect individuals, e.g. like the right to lead a normal family life). A judge may (only) annul the administrative act (retroactively) and sometimes limiting the effects of the annulment so that there are no “manifestly excessive consequences”, according to specific jurisprudence of the French Supreme Administrative Court (i.e. Conseil d’Etat). Details on judicial review see below.

- b) “Judicial appeal” (i.e. *Contentieux*) or “*Recourse of full jurisdiction*” (i.e. *Recours de pleine juridiction*): depending on the area of law, it includes either an objective control of legality of administrative decisions or “subjective jurisdiction” issues similar to affairs submitted to civil justice in German-speaking countries (like contractual disputes with the administration or administrative liability – this means it concerns subjective legality of administrative decisions in between two parties). In this type of proceedings judicial review includes review of discretion exercised by the administration. In these cases the judge has full judicial control and is not bound to the arguments of the parties to the case and can modify or replace the administrative act.
- c) “Legal sanctions proceedings” (i.e. *Contentieux de la prépression*): this is relevant legal action in order to sanction a person (mainly e.g. disciplinary cases).
- d) Judicial powers in enforcement proceedings (i.e. *Pouvoir d’injonction/pouvoir d’astreinte*):

The classification between a) to d) is primarily done on the basis of the substance matter of administrative law<sup>58</sup>.

- 28. Also the approach concerning judicial control of “discretion” goes hand in hand with the above different sets of legal actions and the respective density of judicial review (relevant here: a) and b).
- 29. In general there is no final and definitive list by law on the kind of judicial control to apply in which category of cases, but it is mainly based on jurisprudence.
- 30. Based on this classification of which kind of appeal/proceedings we have, we come to the second step, namely to address which kind of judicial review on exercised discretion we face with respect to these different types of proceedings (“a” or “b”)
- 31. Judicial review on exercised discretion in cases of a) (i.e. “*Ultra vires proceedings*” or “full appeal proceedings”) is about a possible excess of the exercised “discretion”. Here the focuses of judicial review

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<sup>58</sup> Hugo Flavier, Charles Forger „Administrative Justice in France: between Singularity and Classicism”, BRICS Law Journal, Vol. III (2016), Issue 2



lies on the control of the concrete content of the discretionary decision itself and this is checked against the background if the decision follows the purpose of the law and the general interest and proportionality.

32. The jurisprudence tends to acknowledge such discretionary powers of the administration in more technical areas of administrative law or in matters of policy. In these situations, the judge will exercise a lighter control on the administrative act, and will only censor “gross” administrative mistakes (i.e. manifest error theory, “*erreur manifeste d’appréciation*”). Thus only in case of relevant, apparent flaws in the assessment of the administrative authority, it may come to an annulment of the administrative act.
33. Judicial review also includes the question of (in)competence of the administrative body to decide as well as some basic formal/procedural requirements to be met by the administration.
34. It must be stressed that there is a certain tendency towards full judicial control (*plein juridiction*) and an individual legal protection to limit the scopes of discretion (by jurisprudence). The more technical an area is, the more likely is a limited judicial control: e.g. to legally review if a theatre work is likely to appear in the repertoire<sup>59</sup>, assessment of job equivalence or equivalence of a diploma, equivalence of agricultural land. Also with respect to political considerations the judicial review is limited (e.g. with respect to grounds for dismissal of an agent of the government).
35. There is also a certain trend to start independent administrative authorities. These are independent authorities outside of the normal organizational setting of administrative authorities. They are independent vis-à-vis other administrative authorities as well as vis-à-vis administrative courts and are considered to be quasi-courts, they can be described as tribunals in the sense of Art. 6 ECHR<sup>60</sup>.
36. They have been established in areas of e.g. public telecommunication, data protection, access to administrative documents, financial market supervision. These authorities can take individual and regulatory decisions. Their decisions are subject to legal control only by the *Conseil d’Etat*, except sanction decisions imposed by these authorities (full judicial review by administrative courts).

## D. Hungary

37. In general the courts have full powers in tax or social security cases or when the controlled administrative authority is a national-level public authority and there was no superior administrative authority in between. However, if a court may change an administrative decision in the merits depends on the procedural law in which the sets of cases are enumerated in which the courts may decide in the merits.
38. Administrative decisions adopted in discretionary power may be overruled if the decision making administrative body has not established sufficiently the facts of the case or has not complied with the relevant procedural rules, when the criteria/aspects of the discretion may not be identified or the evaluation of evidences has not been reasonable. However, only such procedural mistakes which affect the final decision on the merits of the case lead to the annulment of the administrative decision.

## E. Netherlands

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<sup>59</sup> Judgement Conseil d’Etat 19 February 1954, Rec.p.118/of 27 April 1951, Rec.p.236/of 23 December 1960, Rec.p.730/of 13 March 1959, Rec.p.179

[https://translate.google.at/translate?hl=de&sl=fr&tl=en&u=https%3A%2F%2Fwww.lagbd.org%2Findex.php%2FPouvoir\\_discr%C3%A9tionnaire\\_en\\_droit\\_administratif\\_\(fr\)&prev=search](https://translate.google.at/translate?hl=de&sl=fr&tl=en&u=https%3A%2F%2Fwww.lagbd.org%2Findex.php%2FPouvoir_discr%C3%A9tionnaire_en_droit_administratif_(fr)&prev=search).

<sup>60</sup> Zoltan Szente and Konrad Lachmayer „The principle of effective legal protection in administrative law. A European comparison”, page 114.

39. Courts can quash administrative decisions. If – in a second step - the court refers the case back or decides in the merits itself, depends on whether there is only one lawful decision possible. If – after quashing – a number of lawful decisions would be possible, the court may then decide in the merits (instead of the administration) even in cases of discretion, when the court is convinced that the new decision of the administration would not be different from the court's decision. Doing so the court can take into consideration also the arguments of the parties to the case and the parties to the case can also request from the court to decide in the merits of the case.
40. Furthermore, it is noteworthy that administrative courts have also the power to give an interim ruling by which the administrative authority gets the opportunity to remedy a defect in the decision ("administrative loop" power)<sup>61</sup>.

## F. Slovenia

41. Here, discretionary decisions can be appealed based on the grounds that the discretionary powers were not used within the limits of the law or not following the legal aims, because of which these powers were granted to the administration "misuse of discretion"). A violation of discretionary powers can also occur if the discretion was not used in accordance with the principle of proportionality or could have been used in a more appropriate manner to satisfy public interests.

## G. Spain

42. The scope of review depends on the set of proceedings: in cases of complaints "acto reglado" the administrative courts have no limits (can quash, decide in the merits of the case, full judicial review). However, concerning "acto discrecional", i.e. when the administrative decision is a discretionary one, administrative courts restrain themselves to check only legality issues (i.e. if there were procedural mistakes, participation rights, competence of the decision maker). Courts tend to defer to administrative discretion as to the actual content of the decision: when there is a case of a complex balancing of conflicting interests, more discretion is granted to the administrative authority.
43. When there were mistakes in cases of discretionary decisions the decision is only quashed when the plaintiff can demonstrate that the authority has ignored clear statutory or procedural rights, the decision cannot clearly be grounded in the facts of the case or when the decision is clearly not sound or arbitrary.

## H. Influences on All EU-National Approaches by EU Law :

44. Both, the national German structure as well as the national French legal structure <sup>62</sup> are under a progress of change, caused by EU law: EU legal guidelines and demands are transformed into national administrative law of the member States when they implement or execute EU law. Furthermore certain formats of organized co-operation between different national administrations within the EU influence also the respective national administrative law.
45. Most of all the EU-principles of effectiveness and adequacy as well as good administration and the principle of effective judicial protection have major influence on national administrative procedural laws, also with respect to judicial review of discretion – as a bigger part of EU law is implemented by administrative jurisdictions within the EU. This has and will have future impacts on national procedural

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<sup>61</sup> Zoltan Szente and Konrad Lachmayer „The principle of effective legal protection in administrative law. A European comparison”, page 243.

<sup>62</sup> Like legal structures of all other EU member states

structures (as well as vice versa) and explains certain specificities in jurisprudence (and also changes of national jurisprudence as well as development of national jurisprudence) also concerning density of control (and discretion).

46. In certain specific areas, which are regulated by primary or secondary EU law, e.g. telecommunication, state aid, pharmaceutical products or asylum, certain standards of density of control are based on EU legislation.
47. Also the CJEU applies certain margins of appreciation for the administrative authorities in certain areas (which have their basis in EU law): e.g. EU-Visa Code, telecommunication (here: explicitly noted “discretion”) or in the area of tax law. In these areas certain margins of appreciation/discretion is granted to administrative authorities with limited judicial control. This affects directly the respective national procedural law and must be applied in this way.
48. On the other hand CJEU has also strengthened the requirements for judicial control which may also affect national procedural laws as to intensify judicial control in certain areas (e.g. asylum law).
49. Member States must apply this “EU-approach” even if it is not in line with national legal traditions and which will bring future changes in the density of control/judicial control of discretion as well as with respect to access to justice.
50. Limits of judicial control from the perspective of CJEU:
  - It lies in the discretion of the national (not supreme court) judge to refer a question to CJEU
  - It does not lie in the discretion of a member state whether a national institution is a “tribunal” or “Court” ; this is assessed autonomously by CJEU
  - In cases of economic relevance/highly technical cases the institutions (e.g. European Commission in state aid cases, decisions in competition law cases) have broader discretion and no economic facts and circumstances are reviewed by CJEU (including General Court of EU): only manifestly wrong assessment or a misuse of power may have the consequence that the act/decision of the European Commission is annulled..

# V. NATIONAL LEGISLATION AND JUDICIAL PRACTICE

## A. National legislation

### *Constitutional aspects*

1. Discretion, being a power of administrative authorities, may exist only within the limits set by legal rules. This conclusion follows from the provisions of part 2 of Art. 6 and part 2 of Art. 19 of the Constitution of Ukraine<sup>63</sup> binding on public authorities, authorities of the Autonomous Republic of Crimea, local governments, and subjects with delegated powers, requiring them to act only on the basis, within the powers and in the manner prescribed by the Constitution and laws of Ukraine. This means, as a consequence, that discretion,
  - first, it can be applied only if the law authorizes the relevant subject and
  - second, the exercise of discretion will not entail violations of law.

### *Forms of legislative authorization to apply discretion*

2. Wordings of law (regulation) which allow concluding that an administrative authority may exercise discretion include the following: “may”, “has the right to”, “shall promote”, “shall provide”, “shall prevent” etc.

#### **Examples**

1. Part 7 of Art. 21 of the Law of Ukraine “On Regulation of Urban Planning”: “To consider disputes arising in the process of public discussion, a conciliation commission may be set up.”
2. Part 5 of Art. 34 of the Law of Ukraine “On the National Police”: when conducting a superficial check of one’s vehicle, a police officer has the right to demand to open the trunk lid and/or the cabin door.
3. Part 2 of Art. 36 of the Law of Ukraine “On the National Police”: a police officer may restrict or prohibit vehicles and pedestrians from certain sections of streets or autoroads.
4. Subpara 27 of para 4 of the Regulation on the Ministry of Justice of Ukraine: The Ministry of Justice shall promote the development of legal services for greater enjoyment of the rights, freedoms, and legitimate interests by citizens and legal entities etc.

3. In addition, the exercise of discretion may be established by way of:
  - listing the types of decisions which can be made by an administrative authority, without either specifying any grounds at all, or mentioning them partially
  - ;

#### **Example**

<sup>63</sup> Part 2 of Art. 6 of the Constitution of Ukraine: ‘Legislative, executive, and judicial bodies shall exercise their authority within the limits determined by this Constitution and in accordance with the laws of Ukraine’.

Part 2 Art. 19 of the Constitution of Ukraine: ‘Public authorities and bodies of local self-government and their officials shall be obliged to act only on the grounds, within the powers, and in the way determined by the Constitution and the laws of Ukraine’.

In accordance with subpara 18 of para 1 of Art. 20 of the Law of Ukraine “On the State Border Guard Service of Ukraine”, bodies, units, servicemen, as well as employees of the State Border Guard Service of Ukraine have the right, depending on their competence, either limit or temporarily prohibit – in cases caused by circumstances related to either securing of the state border of Ukraine, or conducting exercises and practicing field firing, or performing various works, moving vehicles, watercraft, or allowing people to certain areas/objects in the border zone, controlled border areas, except for construction works conducted on the basis of an international agreement, and nation-important works aimed at the relief of the consequences of natural disasters or loci of a dangerous infectious diseases.

- granting an administrative authority, when having detected certain circumstances (in case of occurrence of certain legal facts), with the right (authority) to make or abstain from making a decision depending on its own assessment of these facts.

**Example**

In accordance with part 1 of Art. 33 of the Law of Ukraine “On the National Police”, a police officer *may interview a person if there are sufficient grounds to believe* that he has the information which is necessary to perform police duties

***Requirements for the application of discretion in accordance with the Code of Administrative Procedure of Ukraine***

4. In Ukrainian legislation, certain standards of discretion can be deduced from part 2 of Art. 2 of the Code of Administrative Procedure of Ukraine, which, in fact, lists the requirements that must be met by an administrative authority when making any decision that affects the rights, freedoms, or interests of an individual.
5. Thus, one may conclude that an administrative authority, when exercising discretion, is obliged to act:
  - *on the basis, within the powers and in the manner determined by the Constitution and laws of Ukraine.* In essence, this criterion follows from the principle of legality, enshrined in part 2 of Art. 19 of the Constitution of Ukraine. At the same time, one should understand that the term “law” should be interpreted broadly in this case, and cover not only acts of parliament, but also decrees of the President of Ukraine, acts of the Government, orders of central authorities, which may formalize the regulations on an administrative authority. In other words, an administrative authority shall be empowered by law to exercise discretion. “Law” should, *inter alia*, also set up the limits of discretionary powers and the manner (s) in which those powers will be exercised. The rule “no action without authorization under law”, accordingly, applies in the field of discretion.
  - *using the authority for the purpose such authority has been granted.* Granting discretion should have a purpose that would be a mandatory criterion for an administrative authority when deciding on taking a particular measure. The purpose of granting discretion is one of the tools that makes it possible to formulate the appropriate power-granting in accordance with the constitutional principle of legal certainty and to limit the discretion so that it does not become “excessively broad”. Initially, the purpose follows from the rule itself. However, it can be formulated separately in the text of the law, which grants the relevant discretion. If necessary, in order to establish the purpose, it should be deduced by interpreting the relevant law. If the interpretation methods do not work, then one should refer to the constitutional law, in particular to Art. 3 of the Constitution of Ukraine, which states that ensuring human rights shall be the main duty of the State. The purpose of the relevant powers may also be contained in

law that goes beyond a particular piece of legislation, in particular in other laws, as well as in treaties relating to the scope of the relevant law. The misuse of powers shall be deemed as abuse of power;

- *in a justified manner, i.e. taking into account all the circumstances relevant to the decision-making (action).* Discretion allows the administrative authority to make the most informed decision in specific circumstances, based on personal (internal) assessment of circumstances, rather than on a clear instruction of the legislator. Therefore, when exercising discretion, it is necessary to undertake to analyze and weigh thoroughly certain facts in the case while bringing them align with the legislative and other legal criteria relevant to the case. As opposed, those aspects that are not directly related to a specific case (decision, situation) cannot be taken into account;
- *impartially (unbiasedly).* This requirement means that, when exercising discretion, an administrative authority is obliged to take into account all the factors relevant to a case and to consider only such factors, taking due account of them. In the meantime, the representative of an authority shall avoid any illegal influence, not have any personal preferences/aversions in respect of the parties to a case, and not have any interest in the outcome of a case (i.e. shall avoid conflicts of interest);
- *in good faith.* This implies a duty to act with sincere intention (sincerely, truthfully, honestly), in good faith, making every effort. Dishonesty necessarily involves intent or negligence;
- *reasonably.* When exercising discretion, an administrative authority should, as a rule, weigh the seriousness of individual circumstances and make a decision based on their considerations and assessments. At the same time, he must act prudently (rationally), otherwise its decision would be unlawful. This rule defines the limits of irrational, i.e. describes a decision that would never be made by any reasonable officer. From the point of view of control over the application of discretion, this means that the administrative court should not exercise it until it can (still) be considered that the decision has been made reasonably. This is this rule that facilitates the administrative court to allow an administrative authority to exercise discretion. Accordingly, decisions, actions, omissions that are not in line with common logic and generally accepted moral standards should be considered unreasonable;
- *in compliance with the principle of equality before law, while preventing all forms of discrimination.* An administrative body shall treat equally people when making decisions in the same (similar) circumstances, i.e. the same legal consequences shall occur if the circumstances are the same. In a nutshell, the requirements of the principle of equality can be reduced to the formula “one cannot either treat in arbitrarily different manner what is the same/equal or treat in arbitrarily similar manner what is not the same/equal.” In order to find out whether these are the same or different things, it is necessary to compare all legally important facts. The practice is of great importance here: one should know how administrative authorities have already solved certain situations. If there is already relevant practice, then the authorities cannot deviate without proper justification. Adherence to the principle of equality may lead to the situation where the decision-making options of an administrative body are narrowed down to only one good option. However, the principle of equal treatment does not oblige to resume any illegal practice of exercise of discretion. Otherwise, by issuing illegal decisions, administrative authorities would nullify the validity of law;
- *proportionally, in particular with observance of due balance between any adverse consequences for the rights, freedoms, and interests of a person and the purposes which are aimed with such a decision (action) being made (taken).* This criterion reflects the principle of proportionality. The purpose of this principle is to achieve a reasonable balance between public interests, which are aimed at by decisions/actions of an administrative authority and the interests of a particular person. Adverse

consequences for the rights, freedoms, and interests of an individual must be significantly less than the damage that could occur in the absence of such a decision. To ensure respect of public interest, one should opt for means that are the least “harmful” for an individual.

On the other hand, this principle calls on the administrative authority to refrain from taking measures in cases where any measure at all may have consequences that are adverse to the rights of the person concerned and disproportionate to the aim pursued.

The application of the proportionality principle may result in the number of possible options (actions) to be chosen (taken) by the administrative authority will decrease, to the point where there is only one legitimate option, i.e. it comes to a situation of “narrowing discretion down to zero”

- *taking into account the person's right to participate in the decision-making process.* In accordance with the European standards, which are enshrined in the Constitution of Ukraine – part 2 of Art. 5, part 2 of Art. 34, part 1 of Art. 38 – any individual who enters into relations with public authorities, and especially on issues that may have adverse consequences for such an individual, should be given the right to express themselves, to state their position, to present relevant evidence, arguments and objections. Such a procedure is a mandatory pre-condition for the administrative authority's respect/compliance with other requirements – reasonableness, impartiality, good faith, prudence, etc;
- *in a timely manner, i.e. within a reasonable time.* This requirement means complying with a time frame set by law or not even defined, without undue delay. This principle is of particular importance in cases where, in order to carry out a lawful activity, one should first receive a license or other type of permit from an administrative authority. In such cases, it is extremely important for the applicant who seeks a license or other permit to obtain as soon as possible accurate information about the decision of the authority issuing such a license/permit. The absence of a statutory deadline for such a decision may put the applicant in a state of uncertainty for an indefinite period of time, which may cause them significant practical problems and be a covert form of arbitrariness. The same applies to cases where the actions of an administrative authority in a particular case create a situation of uncertainty as to the limits within which the person concerned may exercise their rights, freedoms, or interests. Determining what should be considered an acceptable deadline in a given case depends on several circumstances – in particular, the complexity of the issue to be resolved, the urgency of the decision, and the number of persons concerned by the case<sup>64</sup>.

6. At the same time, it should be noted that in some cases the law directly restricts the court's capacity to interfere in the activities of administrative authorities regarding the exercise of discretion. This is justified by the common approach in European countries, which says that courts usually should not substitute the expertise of a specialized authority with their assessment.

### Example

<sup>64</sup> Code of Administrative Procedure of Ukraine // Bulletin of the Verkhovna Rada of Ukraine, 2005, № 35-36, № 37, Art. 446; Practical Commentary on the Code of Administrative Procedure of Ukraine / under gen. ed. R.S. Melnyk. - Kherson: Helvetica Publishing House, 2019, General Administrative Law: textbook / [Hrytsenko I.S., Melnyk R.S., Pukhtetska A.A. and other]; under general ed. I. S. Hrytsenko. - K.: Yurinkom Inter, 2017; Recommendation № R (80) 2 on the exercise of discretion by administrative authorities, adopted by the Committee of Ministers on 11 March 1980 at the 316th meeting of the Ministers' Deputies // See: Administrative Procedure and Administrative Services. Foreign experience and proposals for Ukraine / Compiled by V.P. Tymoshchuk. - K.: Fakt, 2003, pp. 469-480.

Pursuant to Art. 266-1 of the CAP of Ukraine, when considering administrative cases concerning the recognition of a bank as insolvent, or revocation of the bank's banking license, or liquidation of a bank, withdrawal of an insolvent bank from the market, or introduction of the temporary administration in the bank, etc., the court uses as a basis for its assessment and relies on quantitative and qualitative assessments and conclusions of the National Bank of Ukraine, the Deposit Guarantee Fund, the Cabinet of Ministers of Ukraine, the Ministry of Finance of Ukraine, the National Commission on Securities and Stock Market, which underline the respective decisions, unless:

- 1) the appealed decision / act was adopted with a significant violation of the established procedure for its adoption (violation that significantly affected the result of assessment);
- 2) quantitative, qualitative assessments and conclusions are based on obviously erroneous information and / or do not take into account significant circumstances (facts), which if duly considered, would make it impossible to make the decision/act which is currently contested;
- 3) there are obvious discrepancies and/or logical contradictions between quantitative, qualitative assessments and/or conclusions;
- 4) the appealed decision/act has been adopted/ in the absence of authority or with the use of authority contrary to their statutory purpose.

### *Perspective legislation*

7. Enshrining requirements for decisions and actions of an administrative authority in the CAP of Ukraine can be explained by the fact that at the time it was adopted there was no law on administrative procedure where these requirements should have been enshrined, because this law is intended to set out standards for such authorities.
8. The Law on Administrative Procedure is an extremely important regulatory act that should streamline relations between individuals and administrative authorities. The main task of this law is that it can mitigate the strategically weak position of an individual before the authorities, or, in other words, through legal binding and imposing on the administrative authority certain responsibilities before the individual, manage to balance the parties and compensate for the relative weakness of an individual in relations with the State<sup>65</sup>. Along with this, this law is important also because it will help improving the quality of administrative services provided to individuals by administrative authorities, which, in particular, can be achieved through the formalization (standardization) of procedures for their activities.

#### **Attention!**

Paragraph 7 of part 1 of Art. 2 of the draft law "On Administrative Procedure"<sup>66</sup> suggests the following definition of "discretionary power": margin of appreciation given by law to an administrative authority to make a decision or choose one of the possible decisions in accordance with the law and the purpose for which such power has been granted.

Although the given definition is different from the one suggested in the Methodology of Anti-corruption Expertise, the essence is the same. Key emphasis is on the fact that administrative authorities have the right to choose one of the possible solutions while acting within the law and with the purpose for which such power is granted. However, it should be noted that these definitions do not take into account one more type of discretion which consists in the administrative authority deciding whether it will take any actions at all.

9. The draft law "On Administrative Procedure" lists operation standards (principles) of the administrative authority in Art. 4. These standards (principles) must be observed, including, when making decisions (taking

<sup>65</sup> Liukhterhandt O. Draft Administrative Procedure Code of Ukraine and modern administrative procedural law // Yuridichniy zhurnal, 2002, № 5. - p. 25

<sup>66</sup> Draft Law of Ukraine "On Administrative Procedure" // [http://search.ligazakon.ua/l\\_doc2.nsf/link1/JI02091A.html](http://search.ligazakon.ua/l_doc2.nsf/link1/JI02091A.html)



actions) on discretionary basis. It should be noted that most of them (standards) repeat those recorded in part 2 of Art. 2 of CAP of Ukraine. Therefore, we will further analyze only those which have not been mentioned yet.

10. These include, in particular:

1) *rule of law*:

The core of this principle is set forth in the Rule of Law report, approved by the Venice Commission, which was heard on 25-26 March 2011, and later in the Commission's document The Rule of Law Checklist (see Section III of this publication for more details). The rule of law principle is a complex structure that contains a number of mandatory elements, such as: legality; legal certainty; prohibition of arbitrariness; access to justice delivered by independent and impartial courts; respect for human rights; prohibition of discrimination, and equality before the law. The administrative authority's failure to comply with at least one of these elements would mean violation of the rule of law.

The legal certainty requirement, which must be observed by way of granting discretion under law (regulation), is important in the context of discretion. This means, in particular, that the power itself should not be so "broad" that it will not be clear when and how an administrative authority can make its decisions<sup>67</sup>;

2) *legality*;

3) *equality before law*;

4) *validity and certainty*;

5) *impartiality (unbiasedness) of an administrative authority*;

6) *good faith and prudence*;

7) *proportionality*;

8) *openness*:

Administrative authorities have a hierarchical structure, so higher levels can instruct their subordinates on how to behave and, among other things, on how to exercise certain discretionary powers. The form of such instructions may vary: from a specific to a general rule of application of a specific legal power. Such bylaws (e.g., instructions, letters, etc.) serve to making certain standard decisions, that have arisen from particular discretionary practice, a rule or obligation, but they cannot completely exclude the discretionary powers established by law. If some discretionary practice already exists, it is important for people to know it, because it gives them better understanding of how the relevant laws are applied. Besides, given the the principle of equal treatment, openness of administrative practice may have certain legal implications for people. Therefore, the Council of Europe Recommendation No. (80) 2 stipulates that such provisions on discretionary powers should be made public<sup>68</sup>;

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<sup>67</sup> General Administrative Law: textbook / [Hrytsenko I.S., Melnyk R.S., Pukhtetska A.A. and other]; under general ed. I. S. Hrytsenko. - K.: Yurinkom Inter, 2017.

<sup>68</sup> General Administrative Law: textbook / [Hrytsenko I.S., Melnyk R.S., Pukhtetska A.A. and other]; under general ed. I. S. Hrytsenko. - K.: Yurinkom Inter, 2017

9) *timeliness and reasonable time*;

10) *efficiency*:

Administrative authorities, when exercising their duties: on one hand, dispose of (public) resources, which are often limited, and on the other hand, make decisions that may affect the amount (preservation) of resources that belong to individuals. In this view, when choosing options in the framework of discretion, such entities should take into account their managerial efficiency. The efficiency principle implies administrative authorities making sure that all their actions (decisions) are reasonable and evidence-based, resting on the assessment of future impact and, where possible, previous experience. Efficiency also requires achieving good results while minimizing costs in terms of resources, processes, activities, time, and volume<sup>69</sup>;

11) *presumption of legality of actions and requirements of the individual*:

Given the provisions of part 2 of Art. 3 of the Constitution of Ukraine, according to which Human rights and freedoms, and guarantees thereof shall determine the essence and course of activities of the State and the State shall be responsible to the individual for its activities, it is presumed that the requirements and actions of an individual in relations with an administrative authority are legitimate. Accordingly, the administrative authority is obliged to prove otherwise;

12) *formality*:

The formality principle is manifested in the fact that the administrative body shall determine the circumstances that must be established to resolve an administrative case; shall determine which documents or other materials must be provided by an individual to resolve the relevant case, and in case where the applicant cannot obtain them, shall request (demand) them from other public authorities or private persons. This principle requires an administrative authority to be pro-active position and aim at creating favorable conditions so that an individual could resolve their administrative case. The principle additionally implies exclusively formal communication with individuals, with respect of established procedures during official working hours of the relevant authority;

13) *guaranteeing to an individual the right to participate in administrative proceedings*;

14) *guaranteeing effective legal remedies*. This principle requires the administrative authority to provide an individual with all the necessary information on the terms and procedure for appealing the decision.

11. The draft law explain in details how the principle of legality applies in relation to actions and decisions taken by an administrative authority on the basis of discretion, in particular, it is considered that they are lawful if the following conditions are respected:
- discretionary powers are provided by law;
  - discretionary powers are exercised within the limits provided by law;
  - the administrative authority made the legitimate choice in order to achieve the purpose for which it was granted with discretionary powers and in compliance with the general principles of the administrative procedure;

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<sup>69</sup> Kharchenko V. Principles of Set-up of the System of Strategic Management of Industrial Enterprise Development // Economics, 2014, № 4. - p. 69.

- the legitimate choice of the administrative authority does not unreasonably neglects previous decisions made by the same administrative authority in the same or similar cases.
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#### **Attention !**

Understanding the content of the requirements set out in part 2 of Art. 2 of CAP of Ukraine, and similar principles (standards, requirements, etc.) set forth in other laws and bylaws, should be the same, as all these regulations govern the managerial (administrative) activities of the same range of entities – executive authorities, local governments, authorities of the Autonomous Republic of Crimea, other entities vested with public authority functions.

12. The above standards (requirements, principles) concerning the administrative activities of administrative bodies «repeat» those set down in at the Council of Europe instruments, including in Recommendation No. R (80) 2 on the exercise of discretion by administrative authorities adopted by the Committee Ministers on March 11, 1980<sup>70</sup>.

## **B. National judicial practice**

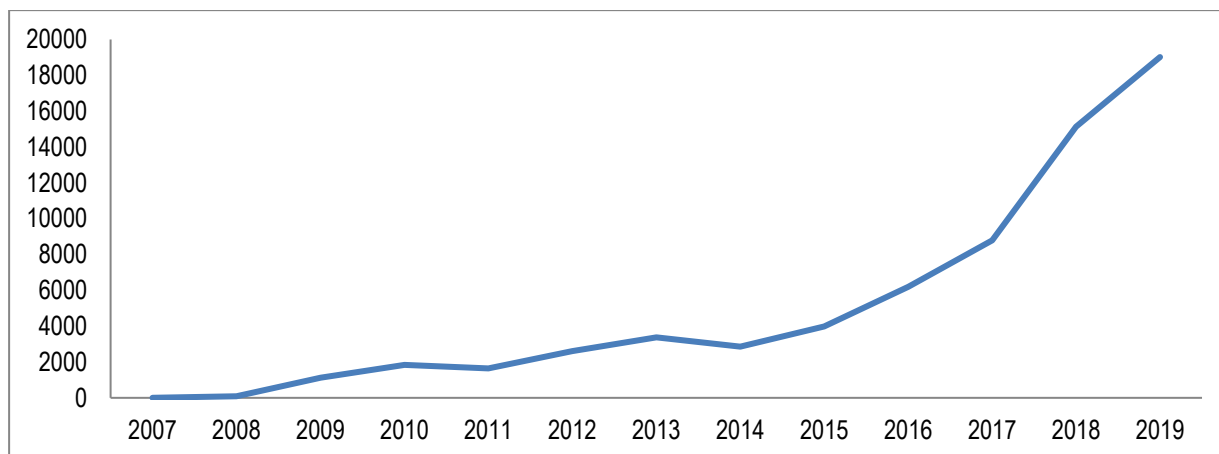
### ***Використання судами поняття дискреції адміністративного органу***

13. The terms “discretion”, “discretionary powers” and the like are not used in Ukrainian legislation – in either Parliament, or President, or Government acts, except for anti-corruption policy documents in the context of the need to reduce discretion for administrative authorities. However, the weight of these concepts in judicial practice is growing, which indicates that they are no longer purely doctrinal.
14. According to the Unified State Register of Court Decisions, when this report was being drafted (October 2, 2020), the term “discretion” and derived words have been mentioned in 83,890 administrative judgments, representing 0.34% of all judgments rendered in such cases since 2006, when this register was launched.

With time, the use of these terms in judicial practice has increased significantly - almost exponentially (see Chart).

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<sup>70</sup> Recommendation № R (80) 2 concerning the Exercise of Discretionary Powers by Administrative Authorities, adopted by the Committee of Ministers on March 11, 1980 at 316th meeting of the Ministers' Deputies // See: Administrative Procedure and Administrative Services. Foreign experience and proposals for Ukraine / Compiled by V.P. Tymoshchuk. - K.: Fakt, 2003, pp. 469-480.



15. This has been facilitated, in particular, by the development of the new Supreme Court practice. Thus, in almost three years of operation, the new Supreme Court has issued more than 4,000 court decisions which mention this concept of which the SC Cassation Administrative Court – 3,950, and the SC Grand Chamber – 199 court decisions. Their predecessors used these terms much more rarely over the ten years preceding the new Supreme Court establishment – they are mentioned in 1,681 court decisions of the Higher Administrative Court of Ukraine and 53 administrative decisions of the Supreme Court of Ukraine.
16. Judicial practice refers to discretionary powers of an administrative authority mainly within two contexts:
  - when courts state that the administrative authority had no discretionary powers to make certain decision and indicate which decision should have been made, or analyze the compliance with the scope of discretionary powers of the administrative authority, when recognizing the existence of such powers;
  - when the courts, having found a violation by the administrative authority in capacity of defendant, refrain from imposing on it the obligation to make a specific decision in favor of the plaintiff, so as not to interfere with its discretion, and instead oblige to reconsider the individual's issue.
17. The most difficult and ambiguous issue for the administrative practice is defining the scope (limits) of judicial control over proper application of discretion of the administrative authority. Thus, in certain cases, courts would only assess formal compliance with the statutory requirements, and if not violated, the relevant decisions, actions, or omissions would be recognized as lawful. While in some cases, the courts apply certain principles, some of which are intrinsic to the administrative procedure, as defined in part 2 of Art. 2 of CAP of Ukraine as criteria for judicial assessment of activities of the administrative authorities. They also often pay attention to the quality of reasoning of decisions of the administrative authorities which have been adopted with discretion. Violation of these principles, improper motivation often gives grounds to recognize the decisions, actions, or omissions of an administrative authority as unlawful.
18. There are cases where courts would assess also the opinion of an administrative authority, which result from its exclusive expertise and is not of legal but – for example, economic or financial – nature.

### ***Opinions of the Grand Chamber of the Supreme Court on discretion of administrative authorities***

19. Given the large body of judicial practice on discretionary powers, this report focuses on the opinions of the Grand Chamber of the Supreme Court ("Grand Chamber") on discretion. Most of the opinions of the Grand

Chamber are issued in cases involving the High Council of Justice (hereinafter – HCJ) and the High Qualifications Commission of Judges of Ukraine (hereinafter – HQCJ), where it is usually the appellate and final instance.

20. Among other problematic aspects, the Grand Chamber sought to give answers to the following questions: what discretionary powers are and when the powers of a body are not discretionary; which discretionary powers cannot be overseen by the court, and the court should not interfere with their application; when and how the court can still oversee the exercise of discretionary powers.

### Definition of discretionary powers

21. In its rulings<sup>71</sup>, the Grand Chamber uses the following (standardized) definition of discretionary powers:

*"According to the Recommendation of the Committee of Ministers of the Council of Europe No. R (80) 2 to Member States concerning the exercise of discretionary powers by administrative authorities, the term "discretionary power means a power which leaves an administrative authority some degree of latitude as regards the decision to be taken, enabling it to choose from among several legally admissible decisions to which it finds to be the most appropriate.*

*Discretionary powers in a narrower sense mean the possibility to act at one's own discretion, within the legal framework; the possibility ability to apply the law and take specific actions (or steps), each of which is relatively correct (lawful)».*

22. The first paragraph is indeed a quote from the Recommendation of the Committee of Ministers of the Council of Europe No. R (80) 2, the second one probably comes from an article by Mykola Zakurin, judge of an economic court. However, this combination is not the best one, as it seems that the above definitions correlate as a broader and narrower approaches to understanding of discretion, although it may seem that these definitions are identical. Moreover, it is unclear what the word "relatively" means in the phrase "relatively correct (lawful)", which in this context calls into question the correctness (lawfulness) of such actions.

### Existence/absence of discretionary powers

23. The Grand Chamber has repeatedly faced the issue of whether certain powers are discretionary or not. In some cases, the existence of such powers was recognized even in view of a fairly clear and seemingly unalterable provision of the law, while in others it was denied. At the same time, this indicates the unique nature of each dispute rather than the inconsistency of practice.

For example, one dispute arose due to the deviation of an administrative authority from a fairly clear provision of the law. The Grand Chamber concluded that the administrative authority had rightly used its discretion to achieve the legitimate goal by moving away from the literal application of the law in order to comply with the principles of law.

#### Example

<sup>71</sup> See, for instance, the Grand Chamber rulings No. [748483399](#), [87053613](#), [87857869](#) and others).

The HQCJ has announced a competition for vacant judicial positions, but only among pre-selected judicial candidates. The judge, who also wished to take part in the competition to exercise her right to be transferred, challenged the appointment under the competition to the Supreme Court because she considered herself discriminated against. She referred to the provisions of the Law “On the Judiciary and the Status of Judges”, according to which the HQCJ “shall hold a competition to fill vacant positions in local courts based on the ranking of judicial candidates and judges who intend to be transferred to another local court, based on qualification examinations taken within the procedure of selection of judges or within the procedure of qualification evaluation, respectively”.

The first instance court upheld the claim, recognizing that the provision of the law did not give the HQCJ any options – a single competition should have been announced for both – judicial candidates and judges. Instead, the Grand Chamber, as a court of appeal, disagreed with that opinion. It referred to the fact that judges and judicial candidates were initially in different positions when taking the qualification examination, the admission score being higher for judicial candidates. Having a single ranking would put judicial candidates in a clearly disadvantaged position. A single ranking is possible only when the selection and evaluation conditions are identical (equal) for all participants (candidates and acting judges) so that the winners could be fairly determined. However, in this case, the relevant selection/evaluation procedures took place at different times and according to different methodologies.

The Grand Chamber ruling also stated in the following<sup>72</sup>:

*“With purposes of the proper set-up of the judiciary, the HQCJ enjoys broad discretion. The Grand Chamber of the Supreme Court considers that the way the HQCJ opted for to ensure a non-discriminatory approach to the competitions, namely holding separate competitions among judicial candidates and acting judges who intend to be transferred to another local court, prevents the discrimination against participants. ... the conduct of two separate competitions, chosen by the HQCJ, solves the issue of proper set-up of the judiciary.”*

In other cases, the Grand Chamber would acknowledge the absence of discretion with the administrative authority taking into account clear statutory rules.

### **Example**

The HQCJ regulations have established the admissibility criteria for the opinions of the Public Integrity Council within the judicial qualification evaluation procedure. In case of non-compliance with these requirements, the HQCJ Board could leave the opinion without consideration. In practice, there were such cases, but the HCJC panel, while leaving the opinion without consideration, recognized the judge as compliant with the position, but at the same time noted in the decision that it would take effect only if supported at the HCJC plenary session. The judge challenged that note, arguing that if the opinion did not comply with the HQCJ rules, it could not be considered as legally existing, and therefore there were no legal grounds to bring the matter to plenary.

The Grand Chamber disagreed with the plaintiff's position and indicated that the HQCJ panel had no other legitimate option:

*“... If in the process of qualification evaluation such a legal phenomenon or circumstance as the PIC opinion emerges, the law shall determine imperatively and without alternative when the HQCJ Panel decision on the judge's ability to administer justice in the respective court gains final force as well as who, how and with how many votes should support such a decision.*

*This legislative wording brings us to a conclusion that the HQCJ Plenary Board can assess the validity of the PIC opinion and answer other questions relating to such opinion, including those relating not only to its content (essence), but also its validity, reliability, objectivity, truthfulness, formal compliance, terms and procedure of approval and submission.*

*... The HQCJ Panel, when raising before the HQCJ Plenary Board the issue of approval of the decision on the judge's ability to hold office in a relevant court, does not use any of its powers and does not apply*

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<sup>72</sup> See the Grand Chamber ruling No. [87985471](#).

*any qualitative or quantitative criteria, or other evaluation characteristics, or margin of appreciation; it only implements what is written in the law. In the said legal situation, the HQCJ Panel does not exercise any discretionary power.”<sup>73</sup>*

### **Discretionary powers that cannot be reviewed by the court**

24. In a number of rulings, the Grand Chamber has recognized the impossibility of judicial review of the exercise of certain discretionary powers, although it has used various arguments.
25. In particular, according to the opinion of the Grand Chamber, the right of the President to sign or veto a law, although a discretionary power, cannot be deemed as a managerial one reviewed in the administrative court. As a result, the plaintiff was denied the right to initiate proceedings in an administrative case where he claimed that the President’s opinion, expressed when vetoing the law, was unlawful.
26. The Grand Chamber also acknowledged as purely discretionary the powers of the President of Ukraine to appeal to the Constitutional Court of Ukraine with a constitutional motion to declare a law unconstitutional, and considered that to be a ground for refusing to oblige him – President – to submit a constitutional motion on a particular piece of legislation<sup>74</sup>. It is interesting that this time the Grand Chamber does not call in doubt that the requirement falls within administrative jurisdiction, although from the legal standpoint, this power is not managerial in nature.
27. The Grand Chamber also stated that the court could not reassess the decisions of competent authorities as to whether a judge or a candidate judge meet the relevant criteria, such as integrity. For example, during the selection of judges to the High Anti-Corruption Court, the Grand Chamber found that “*a special body [to assess a candidate’s compliance with the statutory evaluation criteria – author’s note] is the HACJ assisted by PCIE [Public Council of International Experts – author’s note], and therefore, their powers to resolve the issue decide on candidates’ compliance with such a criterion are discretionary and lay within the scope of their exclusive competence*”<sup>75</sup>. According to the court, the assessment of such general concepts as “integrity” and “public trust” is always subjective, so the personal conviction of each member of the joint sit of the HQCJ and the PCIE is decisive and in the end, determines how they vote.
28. In one case, the Grand Chamber assessed the provisions of a by-law and, without finding a direct violation of the law, found that its content falls within the discretion of the body that approved the act.

#### **Example**

The judicial candidate challenged the provisions of the HQCJ Procedure for Conducting the Examination and the Methodology of Assessment of its results within the qualification evaluation procedure, which envisaged the “dropout” of candidates who failed to demonstrate certain level of competence when taking the examination. The plaintiff considered it wrong to terminate exclude candidates from the competition based on one evaluation criteria (competence), while under to other criteria (integrity, professional ethics) they could have better results than other candidates.

In response, the Grand Chamber noted that “... *the provisions of the Law stipulate that the procedure and methodology of the qualification evaluation, indicators of compliance with qualification evaluation criteria and means of their establishment, as well as the procedure of examination and methodology of assessing the results shall be approved by the Commission.*

*These norms regulate the discretionary powers of the HQCJ as an authority responsible for setting out the judiciary with people possessing sufficient qualifications for deciding on the procedure of the Supreme*

<sup>73</sup> See the Grand Chamber rulings No. [90458948](#), [90458949](#).

<sup>74</sup> See the Grand Chamber rulings No. [87902766](#), [90458897](#).

<sup>75</sup> See the Grand Chamber rulings No. [89819921](#), [85679190](#), [84899470](#), [84899470](#).



29. In several cases, the Grand Chamber refused to review the HQCJ's recommendation to dismiss a judge following the failure of the qualification assessment which had been submitted before the HCJ and closed the case, arguing that it was an interim rather than a final decision in the "qualification" process. It can be subject to review only if this recommendation is implemented by way of the HCJ's deciding to dismiss a judge alongside such a decision. Otherwise, the court will duplicate the HCJ's functions, which may disagree with the HQCJ's opinion during the consideration of the HQCJ's motion.
30. While it may seem that Grand Chamber's practice is not well-defined, as in many cases it had analyzed the HQCJ's decisions on unsuccessful qualification evaluation before they were brought before the HCJ, the Grand Chamber did not declare any change in its approach.

### **Judicial control over the discretion of administrative authorities**

31. The Grand Chamber considers it necessary to exercise judicial control over the exercise of discretion, but such control is limited. It "tests" the implementation of discretion by the administrative authority depending on the case factual background by way of giving answers to various questions:
- whether the body pursued a legitimate goal and whether it acted in a transparently and the most consistent manner<sup>77</sup>;
  - whether procedural guarantees have been respected<sup>78</sup>;
  - whether the decision has been duly reasoned<sup>79</sup>;
  - whether the decisions (conclusions) of the administrative body are arbitrary (unreasonable), irrelevant, groundless or erroneous on the facts; biased<sup>80</sup> or manifestly unfair<sup>81</sup>.
32. The Grand Chamber formulates these criteria either independently or by reference to the case law of the European Court of Human Rights (usually without pointing to the Court judgments). In the second case, the following text (template) usually goes:

*"Regarding the possibility for courts to assess acts and actions of public authorities when the latter exercise their discretion, the European Court of Human Rights (hereinafter – ECtHR) concluded in its judgments that in such cases judicial control shall be limited.*

*In particular, the ECtHR stated that, as a general rule, national courts should refrain from examining the validity of such acts, however, the courts should check whether the administrative authorities' conclusions on the case factual background were arbitrary and irrelevant, groundless or erroneous; in any case, courts should examine such acts of their objectivity and validity are a key issue in the legal dispute."*<sup>82</sup>.

33. For the most part, the Grand Chamber does not apply the criteria for assessing decisions, actions, or omissions of administrative authorities as set out in part 2 of Article 2 of the CAP of Ukraine, although in many cases this would provide a sufficient legal basis for the conclusions it made, or perhaps even lead to other conclusions.

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<sup>76</sup> See the Grand Chamber ruling No. [86206231](#).

<sup>77</sup> See, for instance, the Grand Chamber ruling No. [87985471](#).

<sup>78</sup> See, for instance, the Grand Chamber rulings No. [86401189](#), [90458931](#).

<sup>79</sup> See, for instance, the Grand Chamber rulings No. [86903843](#), [90458913](#).

<sup>80</sup> See, for instance, the Grand Chamber rulings No. [90458936](#), [87053613](#), [86877154](#).

<sup>81</sup> See the Grand Chamber ruling No. [89903936](#).

<sup>82</sup> See, for instance, the Grand Chamber rulings No. [89397027](#), [87857869](#), [87053613](#) etc.



Here are some examples of applying these questions-criteria to specific situations.

In the above-mentioned dispute over the competition for vacant positions (see paragraph 28 above) for judicial candidates, where the acting judges considered that they were entitled to participate in such a competition on equal ground with the selected candidates, the Grand Chamber acknowledged that the HJCJ acted with a legitimate goal, transparently and consistently, as it launched the competition among candidates to address the pressing issue of a lack of judges (transferring judges following the competition results actually leads to migration rather than increase in number of judges), while preventing unfair discrimination due to disproportionate scores of candidates and acting judges.

In several cases, citing breaches of procedural safeguards, the Grand Chamber found unlawful the HCJ's refusal to nominate judicial candidates. The HCJ refusal decisions on refusal referred to circumstances that could adversely affect public confidence in the judiciary in connection with such appointments. These circumstances were specifically mentioned only in the decision, while not being raised either before or during the discussion on candidates at the HCJ meeting which was attended by the respective candidates. The Grand Chamber noted that *"the HCJ is endowed with a wide margin of appreciation when considering the submission of a nomination to the President of Ukraine, but all procedural guarantees and principles of selection of candidates must be observed, including the possibility of each candidate to have access to all information underpinning the respective decision"*<sup>83</sup>.

In another case, the judge challenged the HJCJ's refusal to review the results of the practical task being part of the qualification evaluation, in particular by referring to the fact that he had not been informed of the time of consideration of his application for review. The Grand Chamber, while ruling in favor of the defendant (HJCJ), stated that review of decisions made by the HJCJ Chamber or Board is a discretionary power of the HJCJ rather than the imperative duty, and the HJCJ's violation of the plaintiff's improper notification about the review of his application cannot mean that the HJCJ's decision is unlawful in view of the lack of reasonable grounds for reviewing the HCCJ decision on the results of the examination<sup>84</sup>.

34. The Grand Chamber recognized as unlawful the discretionary decisions which were not properly reasoned. For example, the Grand Chamber ruled that the HJCJ's refusal to admit a judge to a competition in the High Anti-Corruption Court because of a pending disciplinary action was unlawful.

#### **Example**

The plaintiff applied for the competition, but was not admitted by the HJCJ Board with reference to the law prohibiting individuals with pending disciplinary actions from being admitted to the competition. The plaintiff challenged that decision before the HCCJ claiming that she was a whistleblower in a corruption crime, but than was held disciplinarily liable, which was unlawful in her opinion, because the law prohibits imposing negative measures on a whistleblower for exposing a corruption crime. Non-admission to the competition is also a negative measure, which is prohibited by law. The HJCJ confirmed the Board's decision not to admit her to the competition with reference to the same provisions of the law as the Board made.

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<sup>83</sup> See the Grand Chamber ruling No. [90458931](#). See also the ruling in a similar case – No.86401189, which emphasizes not only the right to know information that compromises, but also to comment or refute it in the adversarial environment.

<sup>84</sup> Perhaps the court's decision would have been different if it had paid attention to what is mentioned in part 2 of Art. 2 of the CAP of Ukraine, namely the individual's right to participate in the decision-making process (the right to be heard). The explanatory note to Resolution (77) 31 of the Committee of Ministers of the Council of Europe on the protection of individuals against acts of administrative authorities during administrative proceedings says that the individual should be entitled to have their case heard: they should be given the opportunity to present facts and arguments. The person concerned being able to exercise their right effectively, they must be properly informed of the possibility of submitting facts, arguments, and evidence.

The Grand Chamber upheld the claim, noting that: *“The HCJ should, even more – must have stated the reasons for disagreeing with them [the plaintiff’s arguments]. Instead, the plaintiff’s arguments about her status of a whistleblower and related guarantees established by law, including the impossibility of prosecuting the whistleblower or applying negative measures for exposing a corruption crime, were in no way refuted, rejected, or, on the contrary, recognized as reasonable... The Grand Chamber of the Supreme Court does not deny the HCJ’s discretion in taking an appropriate decision... in the event where an individual applying for a vacant judicial position has a pending disciplinary. In the meantime, such a fact being established, the HCJ shall not remain passive and fail to clarify information and grounds that arose from the law and may prevail over the provisions the HCJ actually favored.”*<sup>85</sup>

35. In another case, the Grand Chamber ruled in favor of a judge who the HCJ refused to file for lifetime appointment claiming the judge having issued a politically motivated decision. The Grand Chamber noted that the HCJ had file for the appointment of two other judges who took part in making that decision under the same circumstances. The HCJ failed to justify in any manner why the role of the plaintiff judge was so different that it gave rise to a different legal consequence. The Grand Chamber stated that the HCJ violated the principle of equality and the requirement on proper reasoning of judgments<sup>86</sup>.

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<sup>85</sup> See the Grand Chamber ruling No. [90458913](#).

<sup>86</sup> See the Grand Chamber ruling No. [86903843](#).

## VI. GUIDELINES ON OVERSEEING THE DISCRETION OF AN ADMINISTRATIVE AUTHORITY

### A. Recommendations for cumulative control over the implementation of discretion

1. Judicial control over discretion, being part of the general powers of administrative courts, follows primarily from the idea that individuals have a subjective right related to the errorless (correct) application of discretion by an administrative body<sup>87</sup>. This right, depending on the area where it is implemented and the conditions (legal situation) of an individual, may be either a substantive subjective right (the content of which is the interest related to the obtaining of a specific result (decision) in a case ) or a formal procedural law (the content of which is the interest related to the proper arrangement (organization) of the decision-making procedure)<sup>88</sup>, which in any case opens up opportunities for its (right's) judicial protection.
2. Following the analysis, it becomes clear that the understanding of the limits and scope of judicial control over the discretion of an administrative authority has changed over time. If (in the countries where administrative justice has been in place since late XIX century – early XX century) at first the practice fully rejected the possibility of verification of a discretionary decision on merits, today the so-called internal limits of discretion (in some part, for example, the obligation to act reasonably) may be subject to review by the administrative court. It seems more correct and up-to-date that the administrative court can and should review compliance with the substantive framework of the decision, which follows from the statutory limits of discretion, as well as with the constitutional principles such as the prohibition of excessive interference and equality<sup>89</sup>. In addition, it should be noted that even this list of elements (circumstances) that can be verified by the administrative court, when assessing the decision of an administrative body, which was adopted on the discretionary basis, remains incomplete and should be expanded.

#### Attention!

Unlike German Regulations on Administrative Courts, whose Art. 114 clearly states that administrative courts, when reviewing decisions (actions, omissions) adopted on the discretionary basis, shall control only their legality, the CAP of Ukraine does not contain such provisions. This is essential to determine the broader scope of judicial control over the discretion of an administrative authority.

To confirm the above conclusion (on the expansion of judicial control), part 3 of Art. 43 of the Law of Ukraine "On Local Public Administrations"<sup>90</sup> shall be mentioned, according to which the acts of the head of the local public administration may be appealed in court, *inter alia* on the grounds of inexpediency, inefficiency, and/or ineffectiveness.

3. Taking into account European standards and recommendations, national legislation, and judicial practice, the general algorithm of judicial control over the discretion of an administrative authority when making a decision may be as follows:

<sup>87</sup> Details reasoning and evidence: Haueisen, DVBl. 1952, S. 521-524 та NJW 1954, S. 418 and further., and from the judicial practice of Berlin Federal Administrative Law (BVerwG) y Bachof, VerfR 1, Teil 1 B 64. S. 65 та Teil 2 B 99. S. 223; VerfR II B 257, S. 243.

<sup>88</sup> Michael Hoffman Becking Zum Stand der Lehre vom Recht auf fehlerfreie Ermessenentscheidung // Deutsches Verwaltungsblatt, 1970, Heft 21, S. 850-858.

<sup>89</sup> Michael Hoffman Becking Zum Stand der Lehre vom Recht auf fehlerfreie Ermessenentscheidung // Deutsches Verwaltungsblatt, 1970, Heft 21, S. 850-858.

<sup>90</sup> On Local State Administrations: Law of Ukraine of April, 9 1999, No. 586-XIV // Bulletin of the Verkhovna Rada of Ukraine, 1999, No. 20-21, P. 190.

- Find out whether the administrative authority has the right of discretion and, if so, what its nature is (administrative, purely political, legislative, related to the administration of justice);
- Verify whether the authority acted, while exercising discretion, within the limits envisaged in regulations and in the manner prescribed by law;
- Find out whether the discretion is absolute, whether the administrative authority acted for a legitimate purpose, whether the necessary procedural guarantees were observed, and whether the proper quality of the decision (action taken) has been ensured.

Let us take a closer look.

## **B. General algorithm for checking the legality of the exercise of discretionary power**

In every case where the decision, action or omission of an administrative authority is challenged, in order to satisfy the claim, the court must establish not only the illegal behavior of the administrative authority, but also the violation of the plaintiff's rights, freedoms, or interests.

This algorithm is a consistent list of questions, and after having answered to which, the court will know whether the exercise of discretion was unlawful or not. At the same time, this algorithm cannot be applied by court to check whether the administrative authority has violated any rights, freedoms, or interests of the plaintiff arising out of the rules of substantive law, in each particular case.

