Answers to the Questionnaire of 10th IASAJ Congress

Review of administrative decisions of government by administrative courts and tribunals

1. Jurisdiction or competence

1.1 Which categories of administrative decisions are eligible for review (administrative regulations/individual decisions)?

Part 2 of article 2 of Code of Administrative Justice of Ukraine (further on referred to as CoAJ) provides that any decisions, actions or inactions on behalf of public authorities can be appealed against to the administrative courts. An exception is when Constitution or laws of Ukraine provide other judicial examination procedure for such decisions, actions or inactions. It means that competence of administrative courts covers all disputes concerning statutory and individual acts of public authorities, except those qualified by law as disputes of constitutional, civil, criminal, economic jurisdiction. Competence of administrative courts does not extend on such disputes:

1) disputes concerning constitutionality (compliance with Constitution) of by-laws of Verkhovna Rada (Parliament) of Ukraine, statutory and individual acts of President of Ukraine, Cabinet of Ministers of Ukraine, Verkhovna Rada of Autonomous Republic of Crimea belong to competence of the Constitutional Court of Ukraine. At the same time disputes concerning lawfulness of such acts fall within administrative courts competence.

2) disputes between persons or legal entities that simultaneously make a claim on same property, particularly land plot, should be heard due to subject composition in compliance with civil or economic proceedings irrespective of state body act or local self-government act concerning such property (concerning a right to property, its registration etc.).

Person’s right of property can not be protected in such disputes by means of administrative justice by recognizing an act of public or local self-government authority as illegal and by abrogating it, or by invalidation of a property agreement that was concluded on behalf of another person.

If there is an act of public or local self-government authority on some property which is the matter of property dispute between a person and a legal entity, the court should value it as evidence in the case in its declaration.

The same criteria should be applied for intellectual property disputes between a person and a legal entity, and disputes over organization of economic entities, their reorganization and liquidation, including disputes over invalidation of their statutory acts, discontinuation of legal entity’s activities. Court’s conclusion on lawfulness of state registration certificate, registration actions, documents that confirm a respective right is stipulated in the substantive provisions part of the court decision on such a dispute.

The following disputes should be heard in compliance with civil (economic) proceedings – disputes concerning conclusion, execution, dissolution and invalidation of purchase agreement, leasehold or other disposition of state or public property, incl. land plot - if the state authority or the local self-government body is a party to the contract. In such disputes courts can make legal evaluation only of those acts of state authority or local self-government body that are direct ground for conclusion, execution and dissolution of mentioned contracts. In their turn other acts of public authorities that are prior to conclusion of such contracts are subject to the administrative courts’ review.
3) disputes concerning those decisions, actions or inactions on behalf of investigation bodies, prejudicial inquiry bodies, public prosecution office that were passed during criminal proceedings. Such disputes should be adjudged in order of criminal proceedings.

1.2 According to which criteria is the jurisdictional competence of the court or tribunal (hereafter “court”) determined? Are there certain decisions of the executive or public authorities which cannot be submitted to review, by reason of nature or substance of such decision?

As provided by CoAJ competence of administrative courts covers disputes that meet two main criteria. Firstly such disputes should have public nature. That means they originate apropos of public activity (general criterion). Secondly activity that gives rise to such disputes should have administrative nature (qualifying criterion). Third criterion is much subjective and foresees exceptions to application of the first and the second criteria. That means it excludes a part of public administrative disputes from the competence of administrative courts. First of these criteria allows to detach administrative disputes from private disputes that must be tried in civil and economic proceedings. Second criterion (administrative nature of the relevant public activity) allows detaching administrative disputes from those public disputes that must be tried in constitutional and criminal proceedings. Third criterion is laid down in article 2 part 2 of CoAJ: any decisions, actions or inactions on behalf of public authorities can be appealed against to the administrative courts except when other judicial examination procedure of Ukraine is provided by law.

The national legislation provides several categories of public administrative disputes that should be tried by such “other judicial examination procedures”. Decisions, actions or inactions on behalf of the State Executive Service organs (they are executive power organs), that were taken for the purpose of compulsory enforcement of courts’ decisions in civil, economic or criminal cases should be appealed not in administrative but in the corresponding court of civil, economic or criminal jurisdiction.

Article 55 of Constitution of Ukraine provides the general rule: «every person has a right to appeal against decisions, actions or inactions taken on behalf of government agencies, local self-governments and their officials». Most of these decisions and actions fall under the cognizance of administrative courts. The rest of decisions and actions that don’t fall under the cognizance of administrative courts may be appealed against under civil, criminal, economic judicial examination procedure or may be reviewed regarding their constitutionality by the Constitutional Court of Ukraine.

1.3. Please provide relevant case-law illustrating the extent and limits of the scope of the competence of the court in charge of review.

An example of the above-mentioned distinction between administrative disputes and public disputes that should be heard by virtue of other types of proceedings is the administrative court decision in the case LTD “A” vs. South railway Office of the Ministry of Interior of Ukraine about recognition as invalid and revocation of the decision about arrest of funds. September 2006 the plaintiff took legal action vs. South railway Office of the Ministry of Interior of Ukraine about recognition as invalid and revocation of the investigator’s decision about arrest of funds. Determination of the District court of the city of Kyiv from 15.09.2006 that was sustained by the Court of Appeal of the city of Kyiv on 08.12.2006 rejected the plaintiff’s motion concerning initiation of an administrative case. Argumentation of court decisions of the first and appellate instances was the following. The case should be tried in compliance with the Criminal Procedure Code of Ukraine and not CoAJ. The High Administrative Court of Ukraine reviewed the said determinations as court of cassation. In its ruling from 24.06.2008 the HACU arrived at a conclusion, that appeal of LTD could not be upheld because of the following.

The plaintiff asked the court to invalidate and to recall decision of investigator for particularly important cases of Detective department of South railway Office of the Ministry of
Interior of Ukraine on arrest of company funds. That decision was made within the frame of criminal proceedings.

In compliance with paragraph 2 part 2 article 17 of CoAJ competence of administrative courts does not extend on public disputes that should be tried in compliance with criminal proceedings. Thus courts of first and appellate instance delivered justified decisions in this case according to the law.

2. Procedure.

2.1. General description of applicable procedural rules:

- Where can these rules be found; by which statute or regulations are they defined?

Rules of administrative judicial procedure are laid down in the Code of Administrative Justice of Ukraine, which was adopted by the Verkhovna Rada (Parliament) of Ukraine on 6th July 2005 and came in force from 1st September 2005. Everybody can acquaint himself with the Code text on official web-site of the Verkhovna Rada. In addition private publishers publish non-official editions of the Code with commercial purposes (as a rule, immediately after amendments made by the Verkhovna Rada). The Code text also can be found in pay and free information retrieval legal databases. Such databases as a rule contain also all legal acts which constitute legal system of Ukraine. They exist like Internet resource or/and software product that is distributed on digital storage (especially on CD).

- Are the various procedural steps in the hands of the parties and/or the court and which role do they respectively play?

The administrative legal procedure principle of optionality foresees a plaintiff’s will to be the active force for starting both court proceedings in toto and certain procedural actions. Administrative legal procedure as adversary procedure implies also the initiative of a defendant. If the defendant has no defensive pleading, there is no need in further proceedings and administrative claim should be sustained.

The Ukrainian administrative legal procedure also is based on the principle of officiality. This principle provides for the court an active role. In court proceedings a person is opposed to the powerful administrative machine. For this reason parties have unequal possibilities beforehand. In order to balance them an administrative court should play an active role during proceedings to assist a person in protecting his or her rights. That is why administrative court should take all measures provided by law to protect rights violated by authorities. Courts should play such role because it is a public administration that causes conflicts or doesn’t take any measures to prevent them.

The principle of officiality comes out particularly in following:

1) the court determines circumstances to be ascertained for adjudication of a dispute; it ascertains what evidences parties can use to establish their arguments or objections concerning such circumstances (paragraphs 3 and 4 of part 4 of article 111 CoAJ);

2) if required the court should invite parties to add or explain some circumstances, and also provide additional evidences to the court indicating them (part 5 article 11, part 1 article 114 CoAJ);

3) in case of need the court on its own initiative should uncover and discover missing evidences (parts 4-5 of article 11, part 4 of article 65, part 5 of article 71, paragraphs 1 and 3 part 2 of article 110 and other of CoAJ);

4) the court may recognize it compulsory that a party or third person should be present in court in case of need to hear them personally (paragraph 2 of part 2 of article 110, article 120 of CoAJ);
5) the court may consider it necessary to examine evidences recognized by parties in case it has doubts about their reliability and their voluntary recognition (part 3 of article 72 of CoAJ).

Thus initiative in proceedings belongs to the parties, but in order to ensure the plaintiff’s rights it is additionally supported by the initiative of the court.

- **Is there a prosecutor? If so which role does he/she play?**

Prosecutor represents in the court interests of citizens or state as provided by CoAJ and other laws. Representation can be made on each stage of administrative proceedings (part 3 article 56 and part 2 article 60 of CoAJ).

As defined in article 56 of the Law of Ukraine „On Public Prosecution” prosecutors in administrative proceedings are: General Prosecutor and his deputies, subordinate prosecutors and their deputies, senior aides and aides of prosecutor, heads of department or division, their deputies, senior prosecutors and prosecutors of department or division who act in accordance of their competence.

The fact that the law gives a prosecutor the right to represent interests of citizens or the state in the court does not mean that he/she has the preferred position during proceedings in comparison with other participants in a trial.

In addition paragraph 8 part 1 of article 3 of CoAJ provides that public authority can act as a plaintiff in administrative case if such authority brings case before a court to execute its powers. But such public authority can act as a plaintiff in administrative case only in cases provided by part 4 of article 50 of CoAJ and also in cases provided by other laws (paragraph 5 part 1 of article 50 of CoAJ).

According to parts 1 and 4 of article 21 of the Law of Ukraine „On Public Prosecution” prosecutor, his deputy brings protest against law-breaking act to the body that issued such an act or to a senior body. In case of rejection of a protest or avoidance to investigate it prosecutor can bring to the court application to recognize this act as law-breaking act. In this case prosecutor as public authority can appear in court in the capacity of plaintiff, he shouldn’t assign body or person for whose benefit he goes to the court.

- **Are the court proceedings mainly written or oral i.e. do the parties communicate by exchanging written presentations or in the form of an oral debate before the court?**

CoAJ provides that an administrative case can be examined in written proceedings or can be adjudged in judicial sitting with summoning all persons who participate in a court case. Paragraph 10 part 1 of article 3 of CoAJ determines written proceedings as investigation and adjudication of administrative case in court of first, appellate and cassation instance without citation of all persons who participate in a court case, and on the basis of current materials without court sitting (in cases provided by CoAJ).

CoAJ provided the general rule – the first instance courts should adjudge all administrative cases in court sitting. But there is one exception: if all persons who participate in a court case made a motion to investigate a case in their absence, court should investigate case in written proceedings.

The same applies to appellate courts. But there is one rule in appellate proceeding that is missing in the first instance court proceeding – if during written proceedings appellate court comes to a conclusion that case should be adjudged in court sitting, it sets it for hearing in appellate court sitting.

Courts of cassation take guidance from general rule contrary to that one for appellate and first instance courts. According to article 222 of CoAJ court of cassation investigates case in written proceedings if no person who participate in a court case made a motion to investigate a case in his/her presence. In addition CoAJ determines variety of judgments that in any case should be reviewed in preliminary hearings (type of written proceedings). Particularly these are judgments: 1) determined by incompetent composition of the court; 2) determined by judge who
was challenged because of doubt about his/her impartiality, and court of cassation recognizes
his/her challenge as reasonable; 3) determined or signed by judges who did not investigate the
case; 4) determined as a result of a court sitting when persons who participate in a court case
were absent because they were not informed about date, time and place of court sitting
accordingly; 5) defining rights, freedoms, interests and duties for persons who were not informed
about possibility to intervene; 6) not containing findings on some part of plaintiff's claim, and
this shortcoming was not and can not be eliminated by supplementary decision.

- **Is the case determined by a single judge or a panel of judges?**

  Article 23 of CoAJ provides that all administrative cases should be examined and
determined in first instance court by single judge (except cases as provided in part 2 article 24 of
CoAJ.

  Part 1 of article 24 of CoAJ provides the list of administrative cases to be determined by
a panel of judges in district administrative court. Subject of the appeal in such cases are
decisions, actions or inactions of President of Ukraine, Cabinet of Ministers of Ukraine, ministry
or other executive central authority, National Bank of Ukraine, their officials, Election
Commission (referendum commission), member of this commission. In this case panel consists of
three judges. This rule strengthens guarantees of court independence in determination of
judgment.

  Part 2 of article 24 of CoAJ gives a right to one party of administrative proceedings to ask
for examination of a case by panel of judges. In this case panel consists of three judges of district
administrative court. If case is of special complicity judge can also initiate examination of case by
several judges.

  There is no need for the parties to cite grounds for such motion, though the
judge’s initiative should be grounded on objective criterion. Here it is the judge initiative
what is of paramount importance, and then only complicity of case. So even if a case is of special
complicity but there is no judge’s initiative the case will be examined and determined by a
single judge.

  According to part 1 of article 50 of CoAJ parties of administrative proceedings
are plaintiff and defendant, so only these persons (their representatives) have the right to
ask court for examination of a case by panel of judges. Also such right belongs to third parties
(their representatives) who have independent demands concerning case subject because
they have plaintiff’s rights after laying independent claim to the parties.

  So while in district administrative courts case may be examined and determined
by a single judge or by panel of judges, appellate review in appellate administrative courts
should be provided by panel of three judges.

  The same rule of solely collegiate reviewing of judgments in administrative
cases is provided for cassation proceedings. The difference is quantitative composition
of a panel — in cassation proceedings a panel consists of at least five judges.

  Judicial review of judgments in administrative cases in the Supreme Court of
Ukraine on extraordinary circumstances is also provided be a panel of judges of the
Chamber on administrative cases of the Supreme Court of Ukraine. Judicial review of
judgments in administrative cases should be provided by at least two thirds of judges of
the Chamber (at least five judges) or by a panel of judges of corresponding chambers of the
Supreme Court of Ukraine (provisions of part 2 of article 241 of CoAJ).

  Non-observance of the rule of the panel trial of an administrative case should be
ground for compulsory reversal of a judgment with sending the case for a new trial. Ungrounded establishment of a panel of judges in first instance court and determination of case by such panel can not be ground for judgment’s reversal.
2.2. What conditions must be fulfilled in order to confer the right to make a claim for review? Must the plaintiff show some form of personal interest? If so, is it defined in a broad or narrow manner? Please provide relevant case-law.

Administrative claim is form of judicial recourse in administrative proceedings.

Right to judicial recourse (to initiate proceedings) can be implemented with subjective (plaintiff’s passive and active legal capacity) and objective preconditions.

Nationals of Ukraine, foreign nationals, stateless persons and enterprises, institutions, organizations (legal entities) can be plaintiffs in administrative case (they have passive legal capacity). Ability to perform plaintiff’s procedural rights and duties personally (administrative procedural active capacity) belongs to adult person sui juris, and to non-adult persons in public cases proceedings where they according to the law can take part personally. Ability to exercise procedural rights and duties personally including ability to instruct (administrative procedural active capacity) belongs to enterprises, institutions, organizations (legal entities).

Objective preconditions of judicial recourse can be divided into positive and negative preconditions.

According to CoAJ positive preconditions are: a) dispute belongs to administrative jurisdiction; b) liability of corresponding administrative court to consider the case; c) claim was raised by authorized representative on behalf of plaintiff. If any of these preconditions is absent court refuses to open proceedings.

For example in case S vs. arbitral administrators R, U and M first instance court admitted that mentioned defendants are public authorities and disputes on their activity are to be examined in administrative proceedings. Appellate court decided this decision as inaccurate and closed proceedings because case didn’t belong to administrative jurisdiction. The High Administrative Court of Ukraine confirmed this legal opinion of appropriate court.

Negative preconditions are: a) when parties to dispute, subject of the dispute and dispute’s ground are the same there should be no court decision in force on denial of administrative proceedings, on cessation of administrative case proceedings because of plaintiff’s dismissal of a claim or conciliation of parties;

b) there should be no proceedings in case of dispute between equal parties, with equal subject and on equal grounds in this administrative court or another one;

c) there is no such fact as plaintiff’s death before taking a decision to open proceedings.

According to article 104 of CoAJ a person may go to court to protect solely her/his rights, freedoms and interests. As long as mentioned article had set this rule clearly enough, in fact there are no disputes in the case-law raised by person in contravention of CoAJ to protect rights of a sundry of other persons. In case such a claim is raised, court should refuse to open proceedings as long as such case shouldn’t be examined in administrative proceedings. Claims raised by prosecutor as a result of general supervision over public authority decisions are only exception of this rule. Law provides that if decision is unlawful the prosecutor should bring protest against such decision to the body that issued such an act for its reversing. If the public authority rejects a protest or a voids examining it the prosecutor can bring the claim to the court to reverse such decision.

2.3. Does the plaintiff have direct access to the court, or is he/she obliged to submit his/her demand through a counsel/attorney?

Yes, CoAJ provide for possibility of direct judicial recourse in the administrative court (without compulsory assistance of a lawyer or other representative). Article 105 of CoAJ provide for that a plaintiff can bring an administrative case before a court personally or by his/her representative.

2.4. Can a legal demand be submitted to an administrative court using electronic technologies (Internet)?

No, CoAJ does not provide for such procedure.
The Code has provided two alternative ways for submission of a legal demand: 1) a complaint with necessary copies (subject to number of defendants) can be submitted straight to the corresponding court’s office; 2) a complaint with necessary addenda can be sent by post.

2.5. Is there some form of public or private legal aid system aimed at providing assistance to a person who cannot afford an attorney?

Parties of administrative litigation during the proceedings in the court may be entitled to the legal aid provided by attorneys or other experts in the field of law who are authorized by law to do this, the legal aid being provided in the manner and upon conditions stipulated by law.

The court releases a person from the duty to pay fees for the legal aid in full or in part and provides the legal aid in cases and in the manner stipulated by law when the relevant authority refused to provide the legal aid to a person.

Entitling to the free legal aid is a guarantee of complying with the constitutional principle of equality of individuals irrespectively of their material well-being.

The current Ukrainian legislation determines the categories of persons entitled to the free legal aid. In particular, they are as follows: veterans of war who have the right to legal aid in disputes on social security (part 2 of article 22 of Law of Ukraine ‘On status of veterans of war and their social guarantees’); persons affected by illegal actions of inquiry, pretrial investigation, prosecution or judicial bodies who are entitled to the legal aid in cases on reimbursement of damage caused by such actions (part 4 of article 3 of Law of Ukraine ‘On reimbursement of damage caused by illegal actions of inquiry, pretrial investigation, prosecution or judicial bodies’) etc.

According to part 4 of article 5 of Law of Ukraine ‘On social services’ the following persons are entitled to the legal aid by virtue of consulting them on legislation, protecting their rights and interests, promoting compulsory enforcement and imposing liability on other persons who act illegally against a person:

1) persons incapable to take care of themselves due to the age, decease, invalidity, who have no relatives responsible to provide care and assistance to them;
2) persons in a difficult social situation caused by unemployment if registered by public administration for employment, natural disasters, catastrophes;
3) children and youth in a difficult social situation caused by invalidity, decease, orphans, unsheltered or facing conflicts or cruelty in the family.

Payment to the defender designated by court is done with the budget funds in the manner and in the amount established by the Cabinet of Ministers of Ukraine.

2.6. When a claim is made to a court, is the right of the relevant public authority to implement the decision stayed or suspended until the court has determined the case?

The general rule established in part 3 of article 117 of CoAJ is that applying with a legal demand and instituting administrative proceedings do not terminate implementation of the public authority’s decision contested. However, the CoAJ envisages that special laws may provide for exemptions establishing that filing an administrative claim immediately suspends enforcement of the administrative act contested (e.g. Law of Ukraine ‘On legal status of foreigners and stateless persons’, article 28).

In order to avoid irreversible damage which an administrative act in question may cause to a plaintiff before the proceedings will be finalized, the CoAJ envisages the instrument for securing an administrative claim. This means that the court may rule on suspending the contested decision or prohibiting relevant authorities to perform certain actions.

2.7. Can the court deliver an injunction ordering the Executive or a public authority to produce a document to which the other party could not previously have access? (Please provide relevant case-law).
The court has the right to call for evidences necessary for the consideration of the case. If the evidence demanded by court, written or material, is not produced without proper reasons the court may rule out on provisional compulsory seizure of this evidence to be considered by the court. Such evidence may be called both from the public authority and another person possessing the evidence. An example is the case of a citizen appealing against unlawful actions of the chief sanitary inspector of the city of Kharkiv. When considering the case the court of the first instance requested the LTD “K.” to produce the copy of the work plan for construction of a shopping-mall in Kharkiv rejected by the municipal sanitary and epidemiology inspection on 31 March 2006, as well as the copy of the work plan for the same construction approved by the municipal sanitary and epidemiology inspection on 3 May 2006. On 26 October 2007 in the court hearing P. who is the representative of the LTD “K.” stated the enterprise had refused to provide the documents mentioned to the court so far as they were necessary to set the buildings into operation. Non-delivery of the documents made the consideration of the case unable and the court of the first instance referring to article 166 of CoAJ adopted the ruling on non-compliance imposing the LTD “K.” to execute the previous court ruling on call for evidence. The LTD “K.” protested this ruling of non-compliance. The appellate court stated that in case of non-compliance the court had to adopt the ruling on provisional compulsory seizure of the evidence.

2.8. Are there emergency or interim procedures? Are they simply aimed at delivering preliminary injunctions (such as a Temporary Restraining Order) or at taking provisional measures, or can they also resolve a fundamental question?

The CoAJ envisages the range of procedures allowing the court to tackle properly and timely any of the abovementioned issues:

a) Preliminary injunctions (articles 117-118 of CoAJ provides for so called ‘measures for securing an administrative claim’). Article 118 of CoAJ establishes that the plaintiff’s motion for securing an administrative claim is considered by the court no later than the next day after its filing with the court and when grounded and immediate must be decided upon immediately, notifying of the plaintiff and other litigants not being required. The motion on amending or canceling measures for securing an administrative claim should be decided upon by the court in short time as well (no later than the next day after its filing with the court or immediately when the demand is grounded and immediate, notifying of the plaintiff and other litigants not being required);

b) Securing of the evidences (articles 73-75 of CoAJ). Article 75 envisages that the motion for securing of the evidences should be decided upon by the court immediately when the demand is grounded or if later the relevant liable person will not be definable, the person who initiated the motion participating in hearings on the motion;

c) Fundamental questions (hearings on merits):

• Adjudication of a claim in part. Article 164 of CoAJ prescribes that the court may adjudicate a claim in part before finalizing the proceeding upon the motion of a litigant provided that such adjudication does not affect consideration of other demands of the plaintiff.
• Adjudication on merits by emergency procedure. Article 110 of CoAJ prescribes that the court adjudicates a claim immediately upon the motion of the plaintiff. Summoning of litigants or sending court decisions to them should be done by virtue of courier, telephone, fax and electronic mailing or by other technical means.
• Adjudication on legal acts. Article 171 of CoAJ provides for that an administrative case on appealing against legal acts should be considered within the reasonable term not exceeding one month after instituting proceedings. On exceptional base when extraordinary circumstances the court may rule out on prolonging consideration for the period not exceeding one month. The general rule should be mentioned envisaged in article 121 of CoAJ saying that an administrative case must be considered and adjudicated within the reasonable term not exceeding two months after instituting proceedings;
• Adjudication on electoral disputes. Article 172, part 11 of CoAJ provides for that
an administrative case on appealing against decisions, action or inaction of electoral and
referendum commissions and their members should be considered within the 5-days term after
filing the claim with the court. Administrative cases on claims received before the day of voting
should be considered within the 5-days term but no later than two hours before the voting.
Article 173, part 4 of CoAJ provides for that the court considers administrative case on list
of voters within the 2-days term after filing the claim with the court but no later than the day
before voting or, if the claim received the day before or the day of voting, the case must be
considered immediately but no later than 30 minutes before the closure of voting;
• Some other types of demand to consider which the CoAJ provides for the
emergency terms.

3. The powers of the administrative judge

3.1. What is the hierarchy of legal standards (Constitution, international law, statutes)
that the court takes into account when carrying out review?

Article 9 of CoAJ sets up the hierarchy of legal acts applied by the court when
considering the case by their legal force, which is as follows:
• Constitution of Ukraine;
• international treaties approved by the Verkhovna Rada of Ukraine (parliament);
• laws of Ukraine;
• other legal acts.

The Constitution of Ukraine has the superior legal force (part 3 of article 8 of the
Constitution of Ukraine) which means that it has priority to the laws and international treaties.
International treaties approved by the Verkhovna Rada of Ukraine are prior to the laws of
Ukraine (part 6 of article 9 of the CoAJ). When they do not comply with the Constitution of
Ukraine the court applies its provisions as they have direct effect.

The legal force of certain categories of other legal acts is established by the Constitution
of Ukraine, For instance, decrees of the Verkhovna Rada of Ukraine and President of Ukraine in
relevant spheres have priority to the decrees of the Cabinet of Ministers of Ukraine. In this
connection part 3 of article 113 of the Constitution of Ukraine provides for that the Cabinet of
Ministers of Ukraine in its activity is bound by the Constitution and laws of Ukraine, and also
decrees of the President of Ukraine and the Verkhovna Rada of Ukraine adopted in accordance
with the Constitution and laws of Ukraine.

3.2. When the Executive or a public authority gives its interpretation of a statute, can the
lawfulness of such interpretation be challenged in court? If so, according to which standards and
criteria? Is the court bound by policy decisions of the Executive or a public authority?

Article 150 of the Constitution of Ukraine authorizes only the Constitutional Court of
Ukraine to give official interpretation of the Constitution and laws of Ukraine. Therefore public
authorities may only give unofficial interpretation of the statutory acts mentioned. According to
CoAJ such interpretation may be challenged in the administrative court.

CoAJ envisages no special procedure for considering cases on interpretation of the
Constitution and laws of Ukraine given by public authorities, so far they are subject to general
rules of administrative proceedings. The national legislation also stipulates no specific criteria
for judicial supervision over such interpretations. When considering cases on interpretations the
administrative courts must apply the same criteria as applied usually for considering any other administrative dispute – which is lawfulness of an administrative act.

3.3. If the Executive gives its interpretation of treaty law, is the court bound by such interpretation?

Courts when delivering justice are not bound by interpretation of international treaties given by executive authorities. Article 9 of CoAJ (principle of legality of administrative justice) does not empower an administrative court to refer to such interpretation when considering a case.

3.4. Insofar as discretionary measures are concerned, which type of review does the court exercise? Provide, if possible, relevant case-law to show how the court verifies the reasonableness of a decision of the Executive or a public authority and checks whether the reasons are consistent with the substance of the decision.

The administrative court exercises the judicial review of administrative acts to examine their lawfulness and not authorized to evaluate their reasonableness.

The scope of such a review of discretionary administrative acts can be seen in the case of a citizen who in February 2004 addressed the court to appeal against the decree of the Board of the National Bank of Ukraine of 4 June 2003 N 240 ‘On banks’ activity’ as breaching article 35 of the Law of Ukraine ‘On banks and banking’. The NBU was alleged to unlawfully raise minimum standard of banks’ capital requirement which violated the rights of the plaintiff who was a stakeholder of the commercial bank ‘P.’ The court of the first instance in its decision of 6.05.2004 satisfied the claim and annulled the said NBU decree as violating the Law of Ukraine ‘On banks and banking’. On 19.08.2004 the court of appeal cancelled the decision of the court of the first instance and rejected the claim, the High Administrative Court of Ukraine supported the appellate court opinion in its ruling of 12.04.2006. The court of appeal stated that the court of the first instance gave wrong interpretation of the Law of Ukraine ‘On banks and banking’. The judgments of the appellate court and the HACU were appealed against by the plaintiff in the Chamber on administrative cases of the Supreme Court of Ukraine. The later upon consideration of the case cancelled all court decisions mentioned and returned the case to the court of the first instance for reconsideration. The Supreme Court grounded its decision on non-examination of the correctness of the NBU decree by lower courts which means they did not request the NBU to explain the following issues:
- the reasonability of the minimal level of banks’ capital requirement,
- possible negative effect for banks stakeholders and owners in case of non-raising of the minimal standard of banks’ capital requirement, as well as possible negative effect for banks in case if raised,
- the balance of such negative effects,
- the way for banks to act in order to comply with the NBU decree and how such compliance may influence rights, liabilities and interests of stakeholders, whether such compliance compel them to act in a certain way.

3.5. Is the court simply empowered to quash (to declare null and void) the decision or to dismiss the legal demand? Instead of quashing the decision, is it within the authority of the court to amend or modify the decision? Can the court substitute an entirely new and different decision? Can the court reconsider the merits of the decision?

Upon consideration of the case an administrative court should decide on redressing or dismissing the appeal (article 161 of CoAJ). If a demand is subject to redress the court acting within various powers granted by law may annul the decision of the public authority
(defendant). At the same time the court may chose to act in accordance under another power when necessary for more comprehensive protection of a person who is plaintiff. For instance, the court may hold the public authority (defendant) liable to adopt certain decision.

The general rule is that the administrative courts are not entitled to amending decisions adopted by public authorities. There is the only exception when the law empowers a court to act in such way which is the disputes concerning imposing of administrative penalties by public authorities. However, the High Administrative Court of Ukraine by its case-law established that this law (paragraph 4, part 1, article 293 of the Code on Administrative Offences, 1984) should not be applied as it contradicts article 6 of the Constitution of Ukraine (division of powers principle) and when applied makes administrative courts intervene into the competence of relevant public authorities.

3.6. When the court quashes a decision taken by a public authority, does this take effect retroactively, when the original decision was made, or simply when the court rules? Does the judge have power to fix the time from which the annulment operates? On what principles is a date chosen?

CoAJ does not determine the moment when the public authorities’ decisions reversed by the court become invalid. Other laws normally also contain no such indication. Therefore a court when abrogating an unlawful decision of a public authority must stipulate the moment of invalidating the decision in its judgment. Practically administrative courts have three options to act. In some cases particularly when a public authority’s decision is obviously unlawful the court declares such decision null and void from the moment of its adoption. Another way is to annul an unlawful decision from the moment when the relevant judgment enters into force. And finally, the third way is to invalidate a decision after its adoption from the time when the circumstance making such decision subject to annulment comes. The first and third approaches demand that courts when requested so by plaintiffs decide on reversion of execution which means retrieval of social relations to the status-quo before the moment of invalidating the decision. The second approach courts on demand of plaintiffs must decide on reimbursement of damages caused by unlawful decisions.

3.7. What means are available to a judge to compel the administration to enforce a decision which the executive does not wish to carry out?

If the public authority who is defendant in the case did not execute the judgment, the court upon demand of the plaintiff issues the execution order. This order being produced to the State Executive Service, the plaintiff may initiate compulsory execution of the judgment. The compulsory execution of administrative courts judgments is conducted by the State Executive Service, in the same way as it conducts compulsory execution of all judgment of general jurisdiction courts (the Law of Ukraine ‘On executive proceeding’).

The administrative court supervises execution of the relevant judgment. For example, the court which adjudicated the administrative case may impose upon the public authority against which the judgment was ruled the liability to produce the execution report to the court within the specified term. The results of report’s consideration by the court or non-compliance with this requirement may be subject to a separate ruling of the court.

When sufficiently grounded, the court states in its separate ruling that the public authority provided no due execution of the relevant judgment and suggests for its relevant actions for the execution to be appropriate. The public authority to whom the ruling is addressed must inform the court on its performance within one month.

If necessary the court may adopt a separate ruling on bringing the officials guilty of non-appropriate execution to the responsibility by the relevant authorities.
Failure to execute a judgment is subject for:

- liability by imposition of fine (articles 87-88 of the Law of Ukraine ‘On executive proceeding’, 1999) implied by the State Executive Service when executing an administrative judgment on compelling an official to act in a certain way, on employment restoration;
- administrative liability by imposition of fine (part 1 of article 185-6 of the Code of Administrative Offences, 1984) implied by the local court in administrative offence proceedings upon the initiative of a court secretary when an official fails to consider a judgment, to eliminate the indicated violations and to respond to a court on time; criminal liability as imposition of the fine, limitation or deprivation of freedom, deprivation of the right to hold certain positions and undertake certain activities (article 382 of the Criminal Code of Ukraine, 2001) imposed when an official intentionally refuses or prevents judgment’s execution.

Also, when the failure to execute a judgment is breach of official duties this can be subjected to disciplinary liability of an official (article 14 of the Law of Ukraine ‘On civil service’ of 1993, article 147 of the Labor Code of Ukraine of 1971).