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ADMINISTRATIVE PROCEDURES OF PROVIDING ADMINISTRATIVE SERVICES IN THE EUROPEAN UNION AND UKRAINE

The article investigates administrative procedures of rendering administrative services in the European Union and Ukraine. Special attention is devoted to compare general grounds of rendering administrative services and to formulate proposals for improvement of domestic legal regulation taking into account positive European experience.

Key words: providing of administrative services, administrative procedure, phase of administrative procedure, the administrative act, codification of administrative procedure, Administrative Procedure Code of Ukraine, Code on Good Administration.

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Bearing in mind the European integration direction of the internal and foreign policy of Ukraine and the necessity of gradual adaptation of Ukrainian legislation to the legislation of the Member States of the European Union (hereinafter — the EU) in accordance with the general European standards, a significant part of attention should be paid to the legal regulation of rendering of administrative services and administrative procedure.

The provision of administrative services to citizens or legal entities shall be made pursuant to the modern forms and standards of administrative services provision that were developed by the European administrative legal doctrine and practice that reflect the essence of a «public and service» state.

Both Ukrainian and foreign scholars, such as V. Averianov, K. Afanasiev, Y. Bytiak, V. Beschastnyi, I. Holosinchenko, A. Komziuk, T. Kolomoiets, O. Kuzmenko, O. Lahoda, I. Lazariev, H. Pysarenko, V. Tymoshchuk, Y. Tykhomyrov etc., devoted their scientific researches to the question of investigation of the legal regulation of administrative services provision.

One should mention among European scholars who made their research in the area of legal regulation of public services and relations between the public administration authorities and private persons, such researchers as J. Bell, J. Gyford, H.C.H. Hofmann, W. Weiss, V. Vankovich, B. Delzangles, S. Cassis, W. Capman, M. Clark, M. Knauff, P. Kotler, M. Labous, O. Meyer,

J. Murdoch, A. Mowbray, C. Pateman, T. Paez, M. Seneviratne, R. Cirdan, J. Simmonds, K. Friedman, R. Forrest, E. Forsthoff, C. Forsyth, L. Fuller, H. Heinze, H. Harris, J. Henderson, J. Schwarze, F. Schnapp, etc.

The aforementioned scholars made significant contribution to the investigation of procedures of administrative services provision; however, the issues concerning the administrative procedures in the area of administrative services provision, particularly in terms of legal comparison of the EU and Ukraine, require a separate study.

The main objective of this article is to compare general grounds of rendering administrative services and to formulate proposals for improvement of domestic legal regulation taking into account positive European experience.

The tasks of the present article are: to review theoretical approaches to understanding of the concept of administrative procedure in the EU Member States and Ukraine; to describe modern aspects of administrative services rendering in EU; to formulate proposals and recommendations concerning improvement of domestic legal regulation respecting law-making and law enforcement practices of administrative procedures in the process of administrative services provision. The codification of administrative procedure legislation became one of the most difficult directions in the administrative reform. The abovementioned direction has not been accomplished throughout a relatively long time of implementation of the reform. The current situation is caused by many factors, such as complexity and versatility of relations to be regulated, as well as by a large amount of legislation to be reviewed. However, the most serious problem that resulted in delay of codification in administrative procedure legislation, is the lack of interest of the State, public authorities, their officials in the adoption of the Administrative Procedure Code of Ukraine (hereinafter — «APC») since, in a new legal environment built in accordance with European principles of good administration, it would lead to the situation when public officials would have limits on use of their privileged position in the society in comparison to private persons. A clear-cut regulation of administrative procedure will put activities of public authorities into a definite legal framework, which infringement would be the ground for challenge of such actions, inactivity or public authority's decision, or, in determined cases, would result in legal liability provided by the law.

An academic discussion concerning understanding and correlation among administrative process, administrative procedure, and administrative proceedings is a very widespread in domestic legal literature. «Administrative procedure» is usually meant as «the order of consideration of individual administrative cases and subsequent decision delivery by administrative authorities» [3, p. 24].

The administrative procedure is not homogeneous, since it includes different kinds of administrative proceedings. In particular, V. B. Averianov defines following procedural institutes: an «institute of internal organizational administrative proceedings», an «institute of service administrative proceedings» and an «institute of jurisdictional administrative proceedings» [1, p. 9–10]. In view

of the aforesaid, administrative services proceedings should be considered as service administrative proceedings.

Administrative procedure has its own structure and consists of phases that should be understood as «a relatively isolated, limited in time and logically connected array of procedural actions that are intended for the achievement of a certain goal and for the fulfillment of relative tasks of certain administrative proceedings; this array shall also have a range of certain subjects and be implemented in procedural protocols» [2, p. 214].

As a general rule, administrative procedure is divided into following basic and optional phases: 1) a phase of initiation of administrative proceedings (previous phase); 2) a phase of hearing the case; 4) a phase of adoption of a decision in the case; 4) a phase of appeal of the decision adopted by an administrative authority (facultative phase); 5) a phase of implementation of the adopted decision. The abovementioned phases of administrative procedure are distinctive for the whole administrative services provision procedure in general.

There is no unified administrative procedure of administrative services provision since administrative services are quite various. Accordingly, procedures of different administrative services provision also vary. For instance, registration of ownership of real estate is an administrative service which is done within registration proceedings; and an administrative service concerning the issue of a permit for placement of an outdoor advertisement object is done within permission proceedings. Nevertheless, the establishment of general requirements to the procedure of administrative services provision is possible and necessary.

The understanding of the notion of administrative procedure in academic research and legislation of the EU Member States is quite ascertained. First of all, it could be explained by the existence of the developed and unified administrative procedure legislation in the most of Member States.

The sources of European legal literature define an administrative procedure as «the formal path, established in legislation, which an administrative action should follow»; «usually, an administrative action has to be carried out through a number of steps, which should be known in advance» [11, p. 3]. Also the administrative procedure is «defined loosely, to mean no more than a course of action, or steps in implementing a policy, or part of an administrative process» [7, p. 2].

In the Model Rules on EU Administrative Procedure developed by the Research Network on EU Administrative Law (hereinafter — «ReNEUAL»), administrative procedure is defined as «the process by which a public authority prepares and formulates administrative action» [8, p. 46] which, in turn, «means activity of a public authority as results in: a legally binding non-legislative act of general application, a decision, a contract, mutual assistance, information management activities» [8, p. 46].

Hence, the notion of administrative procedural activity is relative only for public authorities performing their duties regarding relations with private persons when it results in the adoption of an administrative protocol or conclusion

of an administrative contract. The aforementioned understanding of administrative procedure laid the ground for laws and administrative procedure codes of the EU Member States. Activities of administrative courts with relation to consideration and resolution of cases are provided by other regulatory administrative acts and do not concern administrative procedure.

As opposed to Ukrainian experience, many European countries adopted, as it was already mentioned, codes or laws regulating administrative procedure. Significant attention is paid to the unification of administrative procedure legislation within the whole European Union.

Particularly, the aforementioned ReNEUAL that is functioning «with the goal of providing support to endeavours of codification of administrative procedure at EU level, has opted for the formula 'statements and restatements' for its work, which is intended as a support to codification by the legislator» [12, p. 17]. Moreover, the coordinators of the above-mentioned Network give special consideration, in particular, to the administrative procedure law of the EU and to the question of adoption of the EU Administrative Procedure Act.

Staff members of the ReNEUAL stress the necessity of adoption of the EU Administrative Procedure Act and note that «ageneral codification of EU administrative law might contribute to simplification and clarification but only if it took into account the conflicting needs of general applicability of its principles and rules and of adaptability to sectorial differences. Furthermore, a general codification of EU administrative law which would be limited to EU institutions, bodies, offices and agencies would nevertheless have to take into account the needs of cooperation with Member States' institutions, bodies, offices and agencies in almost all EU policy fields» [13, p. 10].

Nowadays public administration activities without a Law of Administrative Procedure are regulated by «separated procedural norms in primary and secondary law and shaping of the general principles of administrative procedure by the Court of Justice» [9, p. 107].

Special attention during finalization of Ukrainian APC should be paid to the ReNEUAL Model Rules on Administrative Procedure that consist of six books, namely: 1) General Provisions; 2) Administrative Rulemaking; 3) Single Case Decision-Making; 4) Contracts; 5) Mutual Assistance; 6) Administrative Information Management. The aforementioned project considers peculiarities of legal regulation of administrative procedures of most EU Member States with reference to the specificity of legislation of such supranational formation as the European Union.

A majority of European countries adopted and made effective legal acts directed at management of relations of private persons and public authorities. Such kind of legal acts usually precede adoption of specialized legislation and set general principles of public authorities' activities.

Nevertheless, the Ukrainian approach to legal regulation of administrative procedures is vice-versa, since, first of all, the government adopts specialized legislation (The Law of Ukraine «On Administrative Services»), and the general legal act (The Administrative

Procedure Code of Ukraine) hasn't been adopted yet. Furthermore, a lot of legal practitioners advocate for simplified legal regulation of procedural relations concerning activities of public authorities.

Accordingly, it is possible to compare the current situation to the legal regulation of judicial process, since the most accurate requirements of procedure codes concerning the actions of a court during consideration of cases ensure the observance of rights of the process participants, equality before the law and a court, participation in court proceedings, etc.

The legal regulation of administrative procedures should be given the same importance as the legal regulation of the judicial process. If public authorities would have strictly prescribed rules of their activities, including administrative services provision to citizens, and if in the event of violation of such rules the legal liability would be provided, the procedure of administrative services provision will be duly conducted. This is the reason why the requirements concerning regulation of administrative procedures shall not be simplified significantly in comparison to the rules of judicial process.

In the context of procedural requirements to administrative services provision, the relevance of the research in the field of procedural principles of relations of public authorities with private persons if very high, since the modern understanding of those principles should inevitably be used in the draft of the APC of Ukraine. The above-mentioned principles constitute, actually, the general requirements to administrative procedures.

Since 2005 the Working Party of the Project Group on Administrative Law, established on the basis of the Council of Europe, has fine-tuned and improved the principles of public authorities activities that were laid out in the Code on Good Administration. Material and procedure requirements concerning public administration activities, including the provision of administrative services, are enshrined in the aforementioned Code on Good Administration that was adopted by the Council of Europe. The material requirements include such requirements as «lawfulness, equality, impartiality, proportionality, legal certainty, taking action within a reasonable time limit, participation, respect for privacy and transparency» [10].

The fundamental procedure requirements that are enshrined in the Code on Good Administration, are as follows: requests from private persons, the right of private persons to be heard with regard to individual decisions, the right of private persons to be involved in certain non-regulatory decisions, the contribution of private persons to costs for administrative decisions, requirements to the form of administrative decisions, the order of publication of administrative decisions, requirements concerning the entry into force of administrative decisions, peculiarities of execution of administrative decisions, the order of bringing changed to individual administrative decisions [10].

The aforementioned principles and requirements laid down in the Code on Good Administration, shall be considered in time of the improvement of the APC of Ukraine; particularly, in relation to the principle of legal determination

and of the order of adoption, amendment, and repeal of the legislation.

Also it is necessary to pay attention to the provisions of Article 298(1) of the Treaty on the Functioning of the European Union (TFEU), which is an innovation of the Lisbon Treaty, providing that, in carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration [6]; and to Article 41 of the Charter of Fundamental Rights of the European Union enshrining the right to good administration by granting to every person the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union [5].

Some procedural rules concerning provision of administrative services are enshrined in Article 9 of the Law of Ukraine «On Administrative Services», *inter alia:* the methods of administrative services provision; jurisdiction of cases concerning provision of administrative services; the form of an application and the order of its submission; requirements to documents and information required of the applying person; the order of adoption of documents and information by an authority providing administrative services from other public authorities; the order of obtainment of application forms, etc. [4].

First of all, it is essential to draw attention to certain problematic issues that arise from the provisions of the above-mentioned article of the Law of Ukraine «On Administrative Services». Particularly, it is an absence of amendments to special laws that define an order of provision of administrative services of some particular kinds. Those laws are as follows: the Law of Ukraine «On State Registration of Legal Persons and Private Entrepreneurs», the Law of Ukraine «On Licensing of Particular Kinds of Business Activity» and the Law of Ukraine «On the System of Permits in the Area of Business Activity». In the event of the existence of legal collisions between the aforementioned laws and the Law of Ukraine «On Administrative Services», a public authority would tend to apply the way of behavior that is more favourable to it.

Secondly, the legislator restricted unreasonably in the Law of Ukraine «On Administrative Services» the methods of application for provision of administrative services; many other states provide a significantly wider range of such methods. Therefore, it would be reasonable to enshrine in the Law of Ukraine «On Administrative Services» the possibility of application through telephone, mobile communications or Skype concerning particular services that could be provided on the basis of oral application; also it would be reasonable to establish such ways of administrative services provision as mobile offices and delivery of services at the place of citizens' residence.

Thirdly, it is worth mentioning that a positive issue that was indicated in the Law is the prohibition of demanding of citizens of additional documents or information that are not provided by law for the sake of provision of administrative services. Nevertheless, in some situations, public authorities demand to submit additional documents referring

to some departmental acts; this infringes the rights of citizens and creates additional mechanisms of corruption. Therefore, the list of documents that shall be submitted by an applying person should be enshrined in the law solely and have to be exhaustive.

Fourthly, there are still problems with access of applying persons to public authorities with the aim of acquisition of administrative services. First of all, it is caused by limited office hours for citizens. The legislation established the requirements to the office hours of the centers of administrative services provision that, in principle, correspond to practices of the Western Europe; but, bearing in mind that a significant number of services is provided directly by public authorities, it is necessary to implement provisions concerning the minimum time of office hours for citizens at authorities that directly provide administrative services. At least, office hours should not be less than a general working time of such an authority; it is a widespread practice that some authorities provide administrative services to citizens in a limited period of time, e. g. one or two days in a week of two or three hours in a day.

Consequently, the codification of legislation in the area of administrative procedures is of great importance for the sake of regulation of administrative services provision, since administrative procedural legislation is the key factor that defines principles of relations between public authorities and citizens. Nevertheless, the adoption of the Law of Ukraine «On Administrative Services» did not settle a number of lacunas in the legal regulation of administrative procedural relations that could be solved only by the adoption of the APC of Ukraine.

In order of justification of the codification of legal regulation of administrative procedures, it is necessary to draw attention to the principle of «innovative codification» that was designed in European legal theory and is used during the elaboration of the EU Administrative Procedure Act. «Innovative codification has the advantage that it allows resolving contradictions and filling gaps» [12, p. 16–17]. The comparison of European and Ukrainian doctrines of administrative law has shown that the understanding of the notion of administrative procedure is duly formed in the European doctrine and comprises the area of legal relations between public authorities and private persons concerning the performance of administrative actions. Respectively, it is important for the Ukrainian doctrine of administrative law to form a stable notion of administrative procedure that should be understood as the order of consideration and decision by public authorities of individual administrative cases. The administrative services provision is not homogeneous and is performed through different administrative proceedings, namely: registration proceedings, permission proceedings, licensing ones, etc.

Currently, the legal regulation of administrative services provision in the EU is directed at the unification of administrative procedures at the level of the Union as a whole by means of the adoption of the EU Administrative Procedure Act on the basis of the effective provisions of the primary and

secondary legislation of the EU, judicial practice of the Court of Justice of the EU, the European Court of Human Rights and pursuant to the aforementioned recommendations of the Council of Europe.

Taking into account the foreign experience of legal regulation of administrative procedures, it is necessary, for the sake of due regulation of the procedure of administrative services provision in Ukraine, to adopt the APC of Ukraine which would also comprise the area of administrative services provision. The existing drafts of the APC of Ukraine are outdated and have to be improved by the development of a new version of the aforementioned act of codification with regard to the modern standards of functioning of good administration; particularly, the attention should be paid to the Code on Good Administration proposed by the Council of Europe, to the examples of legal regulation in the EU Member States on the basis of their codes and laws. The most important issues of the foreign experience that should be considered are as follows: the issue of legal regulation of administrative protocols (requirements concerning their form, the order of adoption, amendment, withdrawal and loss of the effect) and the issue of realization of the administrative procedure (the order of acceptance of applications and documents from private persons, the consideration of them, the participation of private persons in the process of consideration), etc.

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Михайлюк Я. Б. Адміністративні процедури надання адміністративних послуг у країнах Європейського Союзу та в Україні

Статтю присвячено дослідженню адміністративних процедур щодо надання адміністративних послуг у Європейському Союзі та Україні в порівняльному правовому аспекті, сучасного стану їх правового регулювання та формулювання пропозицій щодо вдосконалення вітчизняного законодавства з врахуванням позитивного європейського досвіду. У статті виокремлено основні напрямки подальшого вдосконалення правового регулювання інституту адміністративних актів (вимоги до їх форми, порядку прийняття, внесення змін, відкликання та втрати чинності), а також правового регулювання адміністративних процедур (порядку прийняття від приватних осіб заяв і документів, їх розгляду, участі приватних осіб у процесі розгляду заяв).

Ключові слова: надання адміністративних послуг, адміністративна процедура, стадії адміністративної процедури, адміністративний акт, кодифікація адміністративних процедур, Адміністративний процедурний кодекс України, Модельний кодекс належної адміністрації.

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