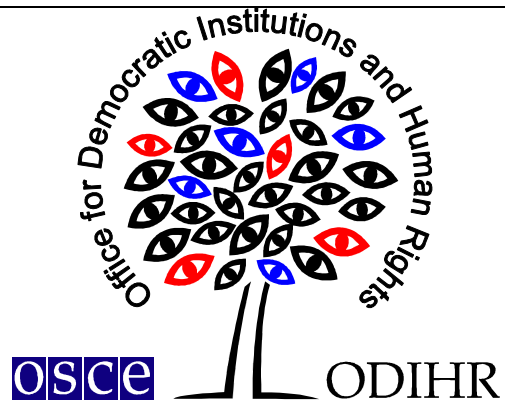


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**OPINION**

**ON THE DRAFT LAW**

**OF THE REPUBLIC OF KAZAKHSTAN ON**

**ADMINISTRATIVE PROCEDURES**

**Based on an unofficial English translation of the draft Law**

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**TABLE OF CONTENTS**

- 1. INTRODUCTION**
- 2. SCOPE OF REVIEW**
- 3. EXECUTIVE SUMMARY**
- 4. ANALYSIS AND RECOMMENDATIONS**
  - 4.1. International Standards Related to Administrative Procedure**
  - 4.2. General Scope of the draft Law**
  - 4.3. Relationship of the draft Law to other Relevant Legislation**
  - 4.4. Terminology**
  - 4.5. Basic Principles**
  - 4.6. Administrative Procedure**
    - 4.6.1. Main Procedural Provisions*
    - 4.6.2. Stages of Administrative Procedure*
  - 4.7. The Administrative Act**
  - 4.8. Appeals Procedure**
    - 4.8.1. Appeals Procedure before Administrative Bodies*
    - 4.8.2. Appeals Procedure before Courts*
  - 4.9. Liability under the draft Law**
  - 4.10. Implementation of the draft Law**

**Annex 1: Draft Law of the Republic of Kazakhstan on Administrative Procedures (*Annex 1 constitutes a separate document*)**

**1. INTRODUCTION**

1. *On 24 August 2009, by Decree of the President of the Republic of Kazakhstan, a Legal Policy Concept Paper for the period 2010-2020 was passed. Among other things, this Concept Paper mentioned the creation of a legal framework for administrative reform to establish effective and compact governance and improve administrative procedures. While administrative reform had been conducted in Kazakhstan since its independence, the Presidential Decree of 24 August 2009 enhanced and renewed activities in this regard.*
2. *On 8 September 2010, the Director of the Legislation Research Institute of Kazakhstan sent a letter to the ODIHR Director in which he informed the latter of this Institute's Concept Paper and draft Law on Administrative Procedures (hereinafter "the draft Law") and requested ODIHR's expert opinion on the draft Law. The Concept Paper and draft Law were attached to this letter.*
3. *This Opinion is provided as a response to the above request for expertise.*

**2. SCOPE OF REVIEW**

4. The scope of the Opinion covers only the above-mentioned draft Law. Thus limited, the Opinion does not constitute a full and comprehensive review of all available framework legislation governing public administration or administrative procedure in Kazakhstan.
5. The Opinion raises key issues and indicates areas of concern. The ensuing recommendations are based on international standards and good practices related to administrative procedure standards and general rule of law standards, as found in the international agreements and commitments ratified and entered into by the Republic of Kazakhstan. The recommendations are aimed at providing a framework for further discussion with key stakeholders on the issues raised.
6. This Opinion is based on an unofficial translation of the draft Law, which constitutes Annex 1 hereto. Errors from translation may result.
7. In view of the above, the OSCE/ODIHR would like to make mention that this Opinion is without prejudice to any written or oral recommendations and comments to this or other legislation related to public administration and administrative procedure that the OSCE/ODIHR may make in the future.

**3. EXECUTIVE SUMMARY**

8. At the outset, it should be noted that the draft Law contains many important principles and safeguards to ensure good administration and the rights of the individual. In the interests of concision, this Opinion will however focus on those areas which could benefit from improvement. In order to ensure the full compliance of the said legislation with international standards, it is recommended as follows:

### ***3.1 Key Recommendations***

- A. to specify in the draft Law that it is the primary piece of legislation in administrative procedure which takes precedence over aspects of administrative procedure in other laws and mention exceptions to this rule clearly in the draft Law and other relevant legislation; [par 19]
- B. throughout the draft Law, to replace the term “interested persons” with two definitions to distinguish between persons who are party to administrative proceedings and interested third parties; [pars 25 and 43]
- C. to discuss and clarify the nature and purpose of the principles listed under Chapter 2; [pars 27 and 80]
- D. to enhance Article 44 to include more information on permissible investigation methods in administrative proceedings; [par 55]
- E. to review and re-draft administrative appeals procedures, bearing in mind the need to differentiate between different types of appeals and different appeals organs; [pars 86-90]
- F. to include in the draft Law, either directly or by reference to other legislation, clear information on administrative appeals procedures before courts; [pars 96-98]
- G. to clarify Articles 78 and 79 by providing more detail on nature and types of liability for violating the draft Law, and on the legal consequences of such liability; [pars 100-103]
- H. to ensure sufficient funding and training for a proper implementation of the law once it has been passed; [pars 104-105]

### ***3.2 Additional Recommendations***

- I. to clarify which rights Article 4 par 14 is referring to; [par 14]
- J. to state exactly which provisions in which other legislation regulate aspects of administrative procedure; [par 16]
- K. to delete Article 3 par 2; [par 17]
- L. to review the draft Law and the draft Law on Access to Public Information simultaneously to avoid inconsistencies; [par 20]
- M. to merge different paragraphs of Article 1 par 3 into one clear and concise definition of the term “administrative act”; [par 21]
- N. to review Article 1 par 7 and clarify the difference between the terms “public service” and “administrative act”; [par 23]
- O. to scrutinize and amend the definition of discretionary powers under Article 1 par 8; [par 24]
- P. to include under Chapter 2 the following:
  - 1) the principle outlining the need to respect at all times the privacy of the individual; [par 29]

***OSCE ODIHR Opinion on the draft Law of the Republic of Kazakhstan on Administrative Procedures***

- 2) the principle that all administrative acts shall indicate clearly and precisely possible remedies; [par 30]
  - 3) the requirement for all administrative agencies to adopt guidelines reflecting Chapter 2 principles; [par 32]
- Q. to amend Article 8 as follows:
- 1) review and revise the term “any other circumstances; [par 31]
  - 2) include in the protected characteristics discrimination based on political grounds; [par 31]
  - 3) include the possibility of permissible differences in treatment based on objectively justified reasons; [par 32]
- R. to clarify in Article 12 which information will lead to liability under Article 12 and what the consequences of such liability will be; [par 33]:
- S. to incorporate into Article 13 a reference to Article 19 par 2 to specify that individuals are not obliged to submit official documents or certificates received from other agencies; [par 34]
- T. to make clear in Article 14 the obligation of administrative agencies to public and inform the population about all applicable legislation; [par 35]
- U. to define the term “personal interest” in Articles 20 and 31; [par 36]
- V. to amend Article 23 as follows:
- 1) clarify in par 2 that providing assistance to other administrative agencies is not a right, but an obligation; [par 38]
  - 2) specify in par 2 (3) (and Article 46 par 2) that information may only be denied on a case by case basis, after extensive review (principle of maximum disclosure); [par 39]
  - 3) distinguish more clearly between pars 2 and 3; [par 40]
- W. to state in Article 25 par 2 that persons with insufficient knowledge of local languages shall be informed of their rights promptly; [par 41]
- X. to define the term “persons assisting in administrative proceedings on the case” mentioned in Article 26; [par 42]
- Y. to amend Article 27 as follows:
- 1) include the right to receive documents duly sealed and the right to be informed at all stages of administrative procedure; [par 44]
  - 2) clarify the meaning of “other rights” mentioned in Article 27 par 1; [par 45]
- Z. to amend Article 28 as follows:
- 1) change the title of this provision so that it speaks of “obligations of administrative agencies”, not of “powers”; [par 46]

***OSCE ODIHR Opinion on the draft Law of the Republic of Kazakhstan on Administrative Procedures***

- 2) differentiate between various participants of administrative procedures, namely administrative agencies on the one hand, and individual parties and interested third parties on the other; [par 47]
  - 3) include additional important obligations such as the obligation to provide reasoned administrative acts and information on the right to appeal and the right to be heard; [par 48]
  - 4) remove par 1 (6) and include it in the general obligation of transparency under Article 14; [par 49]
  - 5) delete par 4 (3) and (4); [par 53]
- AA. to amend Article 29 par 3 so that proxies of applicants are obliged to always submit written confirmation of authorization; [par 54]
- BB. to adopt a wide approach to the question of when members of collegial bodies or officials must exclude themselves from proceedings under Article 31; [par 56]
- CC. to amend Article 33 as follows:
- 1) extend the scope of the provision so that both individuals and legal entities may initiate administrative proceedings; [par 58]
  - 2) delete par 1 (3); [par 59]
- DD. to clarify the nature of and legal background for the payment for documents and information mentioned in Article 35 par 2 (6); [par 60]
- EE. to specify in Article 40 par 1 (3) that the examination of an application for formal reasons may only be refused if formal errors still persist even after applicants have been informed of them; [par 61]
- FF. in Article 43 and other relevant provisions, to replace the term “participants in proceedings” with the more differentiated term “individuals/legal entities who are parties to proceedings or interested third parties”; [par 62]
- GG. to differentiate between applications and documents or information in Article 44 par 2 and specify in which cases documents and information may be rejected by administrative agencies; [par 63]
- HH. to clarify the procedure for exercising the right to be heard in Article 45; [par 64]
- II. to specify in Article 49 which party shall bear the burden of proof; [par 65]
- JJ. to amend Article 50 as follows:
- 1) explain the term “separate actions” in par 2; [par 66]
  - 2) clarify the references to publication of information under par 4; [par 67]

***OSCE ODIHR Opinion on the draft Law of the Republic of Kazakhstan on Administrative Procedures***

- KK. to elucidate the scope of Article 52 par 2 and, if necessary, regulate the liability of administrative agencies for negative consequences of failing to adopt an administrative act within the statutory time period; [pars 68 and 69]
- LL. to outline in Article 53 the nature of the expenses mentioned therein; [par 70]
- MM. to distinguish between the different types of administrative acts mentioned in Article 54; [par 71]
- NN. in cases where verbal and other non-written administrative acts have negative effects on individuals, written confirmations of these acts shall be registered with the competent administrative agency and submitted to the individual; [par 72]
- OO. to delete Article 56 par 3; [pars 73 and 74]
- PP. to specify which “other cases” Article 57 par 4 is referring to; [par 75]
- QQ. to amend Article 58 so that administrative agencies are obliged to correct errors, misprints, or slips of pen in administrative acts; [par 76]
- RR. to clarify the nature of “subject matter administrative acts” mentioned in Article 59; [par 77]
- SS. to amend the draft Law so that competent agencies are informed of null and void acts under Article 60, following which they should be obliged to initiate procedures to issue legal administrative acts promptly in the respective case; [par 78]
- TT. to correct the numbering and references to other provisions in Article 61 par 5; [par 79]
- UU. to delete Article 62 par 2 (2) and (3); [par 82]
- VV. to specify in Article 73 that the execution of an administrative act should be as soon as possible and that enforcement measures should start 7 or 14 days after the administrative act has acquired effect; [par 83]
- WW. to clarify in Article 76 which type of procedural law the execution procedure will follow; [par 84]
- XX. to amend Article 68 as follows:
- 1) ensure that appeals are only rejected for formal reasons if lack of formal deficiencies of the appeal persist even after the applicants have been informed of the errors; [par 91]
  - 2) amend par 2 to the effect that administrative agencies are obliged to give reasons for abandoning the appeal; [par 92]
- YY. to specify in the draft Law in which circumstances the execution of administrative acts shall be suspended during appeals procedures; [par 93]

ZZ. to remove references to allowing appeals from the wording of Article 72 par 2; [par 95] and

AAA. to amend Article 65 par 4 so that court procedures will be suspended until the end of administrative appeals procedures. [par 99]

#### **4. ANALYSIS AND RECOMMENDATIONS**

##### **4.1 International Standards Related to Administrative Procedure**

9. Legislation related to administrative procedure generally regulates different aspects of the relationship between the individual and public administration. Public administration in the above sense involves governmental agencies with direct contact to the population.<sup>1</sup>
10. Administrative procedure codes or laws differ greatly from State to State – it is thus impossible to speak of international standards focused specifically on such procedures, as each administrative system is based on a State’s individual cultural, economic and historic background. Also within the OSCE region, different states follow different models of administration and of administrative procedure.
11. Nevertheless, despite these differences, it is imperative that administrative procedure laws enable effective administration and promote respect for the rights of individuals towards the government.<sup>2</sup> As other legislation, such laws will also need to be clear and foreseeable, promote the principles of legality and non-discrimination, and must follow basic rule of law standards.<sup>3</sup> They must also follow the principle of proportionality. The importance of the different principles mentioned are also laid down in numerous documents aimed at synergizing administrative procedure in Council of Europe<sup>4</sup> and EU countries<sup>5</sup> and have also been the basis for OSCE/ODIHR’s work in

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<sup>1</sup> See Per Bergling, Lars Bejstam, Jenny Ederlöv, Erik Wennerström and Richard Zajac Sannerholm (eds): “Rule of Law in Public Administration”, published by the Folke Bernadotte Academy in 2008, which defines public administration agencies as the “interface between the state and the individual”, p. XV.

<sup>2</sup> See Galligan, Denis: Administrative Procedures and the Supervision of Administration in Hungary, Poland, Bulgaria, Estonia and Albania, SIGMA Papers No. 17, OCDE/GD(97)167, OECD Publishing, 1997, at Item 1.1.

<sup>3</sup> See Gerard Marcou: The Legal and Regulatory Framework of Public Administration, Department of Development Support and Management Services, UN Secretariat, UN Document ST/SG/AC.6/1995/L.4, par 23.

<sup>4</sup> See Council of Europe Recommendations CM/Rec R (80)2 Concerning the Exercise of Discretionary Powers by Administrative Authorities, adopted by the Committee of Ministers on 11 March 1980, CM/Rec R (87) 16 of the Committee of Ministers to Member States on Administrative Procedures Affecting a Large Number of Persons, adopted on 17 September 1987, CM/Rec R (91)10 of the Committee of Ministers to Member States on Administrative Sanctions, adopted on 13 February 1991, CM/Rec (2003) 16 of the Committee of Ministers to Member States on the Execution of Administrative and Judicial Decisions in the Field of Administrative Law, adopted on 9 September 2004, CM/Rec (2004)10 of the Committee of Ministers to Member States on the Judicial Review of Administrative Acts, adopted on 15 December 2004, and CM/Rec (2007)7 of the Committee of Ministers to Member States on Good Administration, adopted on 20 June 2007.

<sup>5</sup> See EU Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (Official Journal L 376 , 27/12/2006 P. 36 – 68), - Chapter II on “Administrative Simplification”. See also the SIGMA & OECD European Principles for Public

administrative law reform in the OSCE region, specifically in the Commonwealth of Independent States (hereinafter “CIS”).<sup>6</sup>

12. Some of the above principles are reflected in the Constitution of the Republic of Kazakhstan<sup>7</sup> (hereinafter “the Constitution”), namely in Article 14 on equality before the law, Article 20 par 2 on the right to receive and disseminate information, and Article 33 on the right to participation in governance and the equal right to serve in public office. Whereas, human rights and freedoms are guaranteed by Article 12 of the Constitution.

#### **4.2 General Scope of the draft Law**

13. While the Preamble of the draft Law sets out the aim of the draft Law in general terms, the scope of the draft Law is covered in greater detail in Article 4 of the draft Law. This latter provision stipulates that the draft Law applies to activities of administrative agencies leading up to the adoption of administrative acts, but also to actions or inactions of administrative agencies entailing factual consequences for persons.
14. While the list of examples of activities of administrative agencies under Article 4 par 1 is mostly quite detailed, Article 4 par 1 (14) would benefit from more clarification. This provision mentions the provision, registration and suspension (termination) of “other rights” of interested persons, but does not specify which rights it is referring to. It is recommended to establish which rights shall be covered by Article 4 par 1 (14) and to amend this provision accordingly.

#### **4.3 Relationship of the draft Law to other Relevant Legislation**

15. According to Article 2 of the draft Law, legislation of the Republic of Kazakhstan on administrative procedures shall be based on the Constitution of Kazakhstan and shall consist of this law and other legal acts (essentially other legislation) of the Republic of Kazakhstan. Such acts may establish specific details of administrative procedures for “separate types of administrative cases”, concerning mainly the list of documents necessary for administrative case review and the terms of review (Article 2 par 3). However, such details may not contradict the fundamental provisions on administrative procedures under Article 3 of the draft Law (Article 2 par 4).
16. Vague references to “other legislation” have been noted in previous OSCE/ODIHR legislative reviews on other draft laws of Kazakhstan.<sup>8</sup> Article

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Administration, SIGMA Papers, No. 27, CCNM/SIGMA/PUMA(99)44/REV1, of 22 November 1999. See also Francisco Cardona: SIGMA & OECD Checklist for a General Law on Administrative Procedures (2005), and SIGMA & OECD, Checklist on Law Drafting and Regulatory Management in Central and Eastern Europe, SIGMA Papers, No. 15 (1997)

<sup>6</sup> See Eva Grina and Scott Carlson: The Consolidated Response No. 09-005 of the International Network to Promote the Rule of Law (INPROL) “Assessing the Status of Administrative Law” of July 2009, p. 1.

<sup>7</sup> The Constitution of the Republic of Kazakhstan was approved by referendum on 30 August 1995 and last amended in 2007.

<sup>8</sup> See, as a recent example, the ODIHR Opinion on the draft Law of the Republic of Kazakhstan on Access to Public Information of 16 November 2010, Opinion-Nr.: FOI – KAZ/164/2010 (AT), par 14. See also: ODIHR Opinion on the draft Law on Crime Prevention of the Republic of Kazakhstan of 13

2 of the draft Law does not appear to be consistent with the principle of legal certainty, since individuals applying the law are not informed in detail about which legislation applies for administrative procedures aside from the draft Law and the Constitution.<sup>9</sup> It is recommended to amend this provision by specifically stating which provisions in which legislation regulate different aspects of administrative procedure aside from the draft Law.

17. Article 3 of the draft Law stipulates under which circumstances normative legal acts shall be deemed inconsistent with the draft Law, mainly in cases where such acts are inconsistent with provisions or principles of the draft Law. In this context, it is noted that par 2 of Article 3 merely repeats the contents of par 1 and should thus be removed.
18. It is assumed that the term “normative legal acts” implies secondary legislation, in other words legislation that is not passed by the legislative, but rather by the executive, including administrative agencies. In this case, Article 3 merely serves to reiterate the general rule of law principle that secondary legislation may not override or amend primary legislation (passed by the legislative).
19. As for the draft Law’s relationship to other (primary) pieces of legislation, it is noted that the adoption of a Law on Administrative Procedure will only fulfill its purpose properly if it is the primary piece of legislation in this field and as such takes precedence over aspects of administrative procedure found in other legislation. Exceptions to this rule of precedence must be named specifically in the draft Law (by name and provision of the respective law) and in the relevant other legislation. It is recommended to amend relevant provisions of the draft Law accordingly. Particularly, Article 50 par 1 referring to “other legal acts of the Republic of Kazakhstan” that may establish other terms of administrative proceedings, or Article 70 stating that other laws may take precedence in determining administrative appeals procedures should contain references to specific laws.
20. It is noted that while this draft Law is being discussed, work on the draft Law on Access to Public Information is continuing. Given the fact that certain parts of this draft Law (particularly Article 14 and Article 28 par 2 on informational resources online) appear to overlap with the draft Law on Access to Public Information, it is recommended to review both draft laws simultaneously to avoid inconsistencies. It should be clear that the primary law in administrative procedures is this draft Law, while the draft Law on Access to Public Information shall be the primary law in all matters pertaining to access to information.

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October 2009, Opinion No. CRIM-KAZ/140/2009 (MA/AT), par 19, and ODIHR Opinion on the draft Law of the Republic of Kazakhstan on Migration of Population of 24 September 2009, Opinion No. MIG-KAZ/137/2009, pars 20-21.

<sup>9</sup> In this context, see, *inter alia*, also Articles 7, 27 par 2 (4), and 50

#### **4.4 Terminology**

21. Main terms used in the draft Law are laid out in Article 1. Administrative acts are defined in Article 1 par 3 as legal acts with an individual application with external impact, issued by an administrative agency based on the results of administrative cases reviewed in line with this draft Law. In addition to this definition, Article 1 par 3 foresees three separate alternative elements to what may constitute administrative acts. Some of these appear to have overlapping definitions. For example, Article 1 par 3 states that an administrative act is also an act that applies to a certain person or certain group of persons, which appears repetitive as it implies individual application already mentioned earlier in this provision. The same holds true for a third element for an administrative act that “establishes, changes, terminates or suspends rights and obligations of a certain person or limited group of persons”, a definition which again speaks of individual application and forms the essence of an administrative act. In order to avoid repetition and overlaps throughout this Article, it is recommended to merge the above elements into a clear and concise definition of administrative act.
22. Article 1 par 7 defines the term “public service” as an activity of administrative agencies and other individuals or legal persons to issue administrative acts. First of all, this definition of public service appears to be quite restrictive, as generally, public service would be understood to encompass all services provided by public administration, not only the issuance of administrative acts. Further, it is not clear which “other individuals or legal persons” this provision is referring to, as all individuals/legal persons authorized to issue administrative acts are already covered under the definition of administrative agency. Moreover, the term “public service” is almost not found throughout the draft Law, which begs the question of whether it needs to be included in the list of terms defined under Article 1.
23. One of the few examples of where “public service” is mentioned is Article 1 par 2 (definition of administrative agency). In this provision, however, administrative agencies are defined as individuals/legal entities authorized to provide public services and issue administrative acts, which would imply that public services and the issuance of administrative acts are not the same after all. It is recommended to review Article 1 par 7 of the draft Law and clarify the difference between a public service and an administrative act.
24. Under Article 1 par 8, discretionary powers are described as “legal rights of an administrative agency for choosing one out of several possible decisions consistent with law”. In this context, it should be noted that discretionary powers are not legal rights conferred on administrative bodies or officials. Instead, discretion is the degree of latitude or flexibility exercised by public administrators when making decisions or conducting any agency activities.<sup>10</sup> It is thus the counterpart to a law or regulation leaving room for choice to a public administration body. It is recommended to review and amend this definition accordingly.

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<sup>10</sup> See Kenneth F. Warren: Administrative Discretion, published in the Encyclopaedia of Public Administration and Public Policy, Second Edition, USA, published on 15 April 2008, last updated 11 November 2010.

25. The term “interested person” is defined in Article 1 par 10 and appears to refer to both persons (natural and legal) applying for the issuance of an administrative act and to persons whose rights and interests are affected by such acts. This definition thus appears to combine two different sets of persons – persons applying for a certain administrative act and persons who did not apply for the act, but who may be affected by it. In the interests of clarity, it would be beneficial to distinguish between the two, as the individual/legal entity initiating administrative procedures is the direct party to such procedures and other persons/entities affected by administrative decisions would rather be interested third parties. This distinction should be maintained throughout the draft Law, particularly in the provisions on administrative procedure under Chapters 3 and 4 (see further discussion of this issue under pars 43 and 47 *infra*) and on appeals. It is recommended to replace the definition of interested person with two definitions – one for persons who are party to administrative proceedings, and one for interested third parties.

#### **4.5 Basic Principles**

26. Principles of administrative procedure are listed under Chapter 2 (Articles 5-20) and include important factors of good administrative governance, such as the principles of legality, equality, proportionality, transparency and efficiency.
27. Generally, the purpose of this Chapter and of the principles listed therein is unclear, as it is not apparent whether these principles are merely guidelines for administrative agencies, or whether they can be invoked as bases for the invalidation of administrative acts by courts. The draft Law does not explicitly state the consequences of violations of one or more of these principles. While Article 6 speaks of the rights of individuals in the context of the supremacy of law principle, the principles themselves are not mentioned therein. They are also not included in Article 7 as actionable legal grounds. It is therefore recommended to discuss and clarify the nature and purpose of the principles under Chapter 2, so as to ensure that they do not remain mere declarations without legal force.
28. In addition to the principles listed under this Chapter, it is recommended to include other main principles of administrative procedure to this list, for example the obligation to give proper reasoning or motivation for administrative acts, in particular in cases where these are negative administrative acts. While this obligation is mentioned in Article 56, its overall importance could warrant special mention in the list of principles under Chapter 2, possibly Article 14 on transparency and openness.
29. Another principle that should be added under Chapter 2 is the principle on the protection of respect for privacy of the individual, especially with regard to the treatment of private data. Personal documents and data should be treated with the utmost confidentiality.
30. Further, it is recommended to add to this list the principle that any administrative decision issued should contain a clear and precise indication of possible remedies, in other words information on the right to appeal and relevant procedural details.

***OSCE ODIHR Opinion on the draft Law of the Republic of Kazakhstan on Administrative Procedures***

31. Article 8 of the draft Law embodies the principle of equality and the ban on discriminatory behaviour by administrative agencies. It is noted that prohibiting discrimination on the basis of “any other circumstances” may be overly broad and may lead to problems when implementing the law. At the same time, in addition to the protected characteristics listed under Article 8, it is recommended to include the prohibition of discrimination based on political grounds.
32. The wording of Article 8 should also imply that difference in treatment may be justified if based on objectively justifiable reasons and not only, as currently laid down in par 5, if the administrative agency intends to change its discretionary decisions in future. Also, it would be preferable to oblige administrative agencies to adopt internal guidelines reiterating that when issuing administrative acts, discretion should be exercised in a manner that takes into account the principles laid down in Chapter 2 of the draft Law. Such rules should only be reviewed or amended in exceptional circumstances and if there are good and objectively justified reasons for doing so.
33. Article 12 on the presumption of authenticity of information submitted by persons also includes a liability provision (par 3) which states that in case persons submit untrue data and information, they shall be held liable. It is not clear what type of liability such behaviour would entail, in particular whether it would be administrative or criminal in nature, and whether such liability requires the intent to deceive or not. In order to ensure that individuals submitting information to administrative agencies are aware of which type of action will entail which kind of consequences, it is recommended to clarify the nature of the behaviour occasioning liability, and the legal consequences that will follow (for an in-depth discussion of liability under the draft Law, see pars 100-103 *infra*).
34. Under Article 13, administrative agencies are prohibited from burdening interested persons with obligations or to refuse a right “solely for the purpose of meeting formal requirements”. It may be useful to specify in this provision that individuals are not obliged to submit official documents or certificates received from other administrative agencies – such specification could be achieved by referring to the contents of Article 19 par 2, which deals with this question in greater detail.
35. Transparency and openness of administrative procedures are guaranteed by Article 14 of the draft Law. The right of individuals to “get familiar with enforced normative legal acts” mentioned in par 3 of Article 14 does not cover the positive obligations imposed on the State with regard to every person’s right to information. Rather than reiterate that people may familiarize themselves with such secondary laws, it is recommended to specify in Article 14 that administrative agencies are obliged to publish and inform the population about all applicable legislation. Such awareness-raising is paramount in ensuring the proper use and implementation of legislation.
36. Article 20 stipulates the impartiality of administrative agencies, stating that authorized public officials and members of collegial administrative agencies may not participate in administrative procedures in case their personal interest or other circumstances may influence adoption of an administrative act. While Article 31 gives examples of when such persons should exclude themselves

from proceedings, neither Article 20 nor Article 31 clearly define the term “personal interest”. It would be important to clarify this term to avoid it being interpreted too narrowly. For further discussion on related matters, see par 56 *infra*.

#### **4.6 Administrative Procedure**

37. In the draft Law, administrative procedure is covered in Chapter 3 (Main Procedural Provisions) and Chapter 4 (Stages of Administrative Procedure).

##### ***4.6.1 Main Procedural Provisions***

38. Article 22 deals with mutual assistance between administrative agencies, which is mandatory according to Article 23 par 1. Article 23, on the other hand, deals with those cases where administrative agencies have no right to provide mutual assistance. In this context, it should be borne in mind and clarified in Article 23 par 2 that providing assistance to other administrative agencies is not a right, but rather an obligation.
39. Under Article 23 par 2 (3), inter-agency assistance shall be denied if documents necessary for assistance contain legally protected secrets, the provision of which is prohibited by law, even if confidentiality of these secrets can be guaranteed. The principle of maximum disclosure to the public already discussed in ODIHR’s recent Opinion on the draft Law on Access to Public Information<sup>11</sup> would by default also apply in this case where information classified as secret is needed to perform administrative activities, often in favour of individuals/legal entities. It is thus recommended to amend Article 23 par 2 (3) to the effect that information may only be denied on a case by case basis, after an extensive review has determined that the public interest is better served if certain data or information remain undisclosed. The same principle applies with regard to Article 14 par 3 of the draft Law on limitations of access to administrative legal acts and Article 46 par 2 on limitations to the material provided to administrative procedure participants.
40. Further, Article 23 has two sub-paragraphs which both deal with instances where administrative agencies have no right to provide mutual assistance. Since par 2 deals with actions that would be illegal or outside the competence of a certain agency, this paragraph presumably deals with cases where administrative agencies are prohibited from providing assistance to other agencies. Par 3, on the other hand, appears to deal with situations where provision of assistance is not prohibited, but rather unnecessary or disproportionate, and thus not obligatory. It is recommended to amend Article 23 so that the distinction between par 2 and par 3 becomes more apparent.
41. The language of administrative procedure is the national language, if necessary also the Russian language or other languages (Article 25 par 1). Persons with insufficient knowledge of the national language shall be informed about their rights and responsibilities and have the right to free

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<sup>11</sup> ODIHR Opinion on the draft Law of the Republic of Kazakhstan on Access to Public Information of 16 November 2010, Opinion-Nr.: FOI – KAZ/164/2010 (AT), pars 11 and 30.

- interpretation (Article 25 par 2). In order to ensure that these persons are provided with the same rights as others, this provision should specify that they should be informed of their rights “promptly”.
42. Article 26 par 1 lists the participants of administrative procedures. Next to interested parties and administrative agencies, this includes “persons assisting in administrative proceedings on the case”. Since this term is used several times in this draft Law, it would be better to define it under Article 1.
  43. Also, Article 26 should differentiate between individuals/legal entities who are parties to administrative proceedings and persons/legal entities who are interested third parties (see par 25 *supra*). Furthermore, the rights and responsibilities of interested persons listed in Article 27 should also distinguish between these two groups of persons accordingly. While the rights listed in par 1 (1) – (6) are traditionally rights that belong to persons who are parties to proceedings, the right to be heard under par 1 (7) should be granted to interested third parties as well in cases where an administrative act could affect their interests. Also, both persons parties to proceedings and interested third parties should have access to interpretation services (par 1 (8)), and be informed about the results of an administrative case (par 1 (10)). Appeals proceedings, on the other hand, should only be initiated by persons who are parties to the procedure (par 1 (11)). In cases where interested third parties wish to complain against an administrative act, they will always be able to initiate administrative proceedings applying for a new administrative act that would be more favourable to them. Par 2 on the responsibilities of interested parties would appear to apply to both persons who are parties to proceedings and interested third parties; nevertheless, both should be mentioned in this provision.
  44. The rights mentioned in par 1 of Article 27 should also include the right to receive documents duly sealed by the administrative authorities, as well as the right to be informed about the status of proceedings at all stages of proceedings. This latter right is not adequately covered by Article 27 par 1, which in (2) only mentions information about the procedure as such, and in (4) and (5) appears to refer exclusively to oral hearings.
  45. The last sentence of par 1 states that during administrative procedures, a person shall implement other rights stipulated by the draft Law. The meaning of this provision is vague – it will be impossible for persons applying the law to know which rights are being referred to. As such rights will presumably be mentioned in other provisions of the draft Law, this sentence would appear to be redundant and should thus be deleted.
  46. Article 28 deals with powers of the administrative agencies. First of all, it would appear that the first paragraph of this Article deals mostly with obligations of such agencies, e.g. the timely involvement of interested persons, as well as the obligation to inform, notify and provide access to interested persons. It is recommended to amend the title of the provision accordingly.
  47. The obligation to inform administrative procedure participants under Article 28 par 1 (2) should differentiate between the participants. While the administrative agency is considered a participant in administrative proceedings under Article 26 par 2, it will surely not need to be informed about its own

rights and responsibilities in each administrative procedure. It is therefore recommended to clarify in this provision that the obligation of administrative agencies to inform extends to interested parties (or better, to persons who are parties to the procedure and interested third parties), as well as to persons assisting in administrative proceedings on the case.

48. It would also be advisable to specify in Article 28 some of the most important obligations of the administrative agencies or rights of individuals/legal entities participating in administrative procedures, e.g. the obligation to provide reasoned administrative acts and information on the right to appeal, as well as the right to be heard.
49. Article 28 par 1 (6) obliges administrative agencies to publish information about their activity and the public services they provide (which again, based on the definition of public service, appear to be the same thing (see par 22 supra). Par 2 of Article 28 then outlines in detail what type of information the online resources of administrative agencies shall contain. These parts of Article 28 appear to stipulate a more general obligation to be transparent and open about the overall work of the agencies, but do not really fall under Chapter 2 of the draft Law, which deals specifically with procedural provisions. Instead, such obligations should be mentioned as part of the general obligation of transparency and openness mentioned in Article 14 of the draft Law.
50. Par 3 of Article 28 embodies the interested persons' right to be heard prior to the adoption of an administrative act. According to par 4 of Article 28, this right may be limited if, *inter alia*, the administrative act is adopted by special technical tools and electronic equipment (3), or if measures are envisaged for the compulsory enforcement of an administrative act (4).
51. The rationale for depriving persons/legal entities of their right to be heard is not evident in the above cases. While it may be justified to dispense with the hearing of parties/interested third parties in cases of emergency or danger (Article 28 par 4 (2)), it is not clear why the adoption of administrative acts with special technical tools or electronic equipment should be sufficient justification for depriving persons of their right to be heard.
52. At the same time, it is not comprehensible in which cases the compulsory enforcement of administrative acts should warrant the deprivation of parties/interested third persons of their right to be heard. Compulsory execution takes place under Article 76 in cases where administrative acts are not implemented voluntarily and cannot be implemented at the expense of the responsible person/legal entity. Generally, the form of execution should have no bearing on the contents of an administrative act, since it occurs once the act has already been passed. As the necessity to perform this type of execution will usually not be clear at the time when the contents of the administrative act are being discussed (prior to adoption), the rationale of not hearing persons in such cases is not apparent.
53. Given the above arguments, it is thus recommended to delete Article 28 par 4 (3) and (4).
54. Article 29 of the draft Law covers representation in administrative procedures, which is permissible following the rules on authorization of third parties

envisaged by the Civil Code of the Republic of Kazakhstan. Par 3 of Article 29 provides that proxies of parties in administrative procedures shall produce a power of attorney or other document confirming them as legal representatives upon demand of the administrative agency. Given the importance of ensuring that persons claiming to be representatives of others have actually been authorized to do so, it is recommended to amend Article 29 par 3 so that proxies are always required to submit written confirmation of their authorization, not only upon request. This would also be in line with Article 35 par 2 (4), which includes the power of proxy as one of the core documents required for the administrative procedure.

55. Generally, the draft Law is not very detailed on the investigating phase of the procedure, with the exception of Article 30 on the appointment of experts and specialists. It is not clear whether this phase is only based on documentary analysis, or whether it also includes other investigatory elements (e.g. the “motions” mentioned in Article 38). Also, there is no mention of whether opinions of other bodies would be accepted as part of the investigating phase, e.g. public or private bodies, private persons other than those parties to proceedings, or inspectorates. Article 44 on the versatility, completeness and objectivity of administrative procedures could be enhanced to include more information on permissible investigation methods.
56. The circumstances in which members of collegial bodies or officials must exclude themselves from proceedings are listed in Article 31 of the draft Law. The definition of relatives mentioned in par 5 of this provision appears to be quite limited, as it does not include uncles, aunts, or cousins, or relatives of spouses, nor would it include cases where relatives of the decision-maker have a personal interest in the matter (except in cases where they have stocks or shares in legal entities involved in proceedings). An overly limited interpretation of when parties to proceedings shall exclude themselves could be avoided by adopting a wide definition of the term “personal interest” in Article 20 (see par 36 *supra*). It is recommended to amend the draft Law accordingly.

#### ***4.6.2. Stages of Administrative Procedures***

57. Under Article 33, administrative cases may be initiated by the application of an individual or juridical person (par 1 (1)), the initiative of an administrative agency (par 1 (2)) or through an administrative complaint/appeal (par 1 (3)).
58. The term “individual” would not appear to cover legal entities, which should surely also have the right to initiate administrative procedures, nor is it consistent with the term “interested party” used throughout the draft Law. It is recommended to amend Article 33 par 1 (1) to the effect that individuals and legal entities (or natural and legal persons) may initiate administrative procedures. It should also be clarified that as of this point, they shall be considered applicants (as in subsequent articles, e.g. Article 34-36). The point at which applicants will be considered interested parties or parties to proceedings shall also be clarified in the draft Law – presumably this will happen once the administrative agency has accepted the application and informed the participants of proceedings about the procedure under Article 43.

***OSCE ODIHR Opinion on the draft Law of the Republic of Kazakhstan on Administrative Procedures***

59. Mentioning an administrative appeal as the initiation of administrative proceedings appears to confuse the primary administrative procedure and the appeals procedure. In order to avoid this, it is recommended to delete item (3) from the wording of Article 33 par 1. The fact that appeals proceedings shall follow the same rules as the usual administrative procedure under Chapter 4 is sufficiently mentioned under Article 71.
60. Article 35 lists the documents enclosed within the application for administrative procedures. The nature of the payment for documents and/or information requested by the authorized agency under Article 35 par 2 (6) is not clear. If the document/information requested by the administrative agency is in fact an administrative act by another administrative agency, then this should be made transparent in the wording of Article 35 par 2 (6). Further, the law which requires such payment to be effected by individuals/legal entities should be mentioned explicitly by name and relevant provision, as such payment would appear to be an exception to the general rule that expenses are paid for by the administrative agencies (Article 53 of the draft Law). Generally, any such payment should not be excessive or prohibitive.
61. Under Article 40, administrative agencies may refuse to examine administrative complaints in certain circumstances. These include cases where application requirements under Article 34 were disregarded (Article 40 par 1 (3)). In this context, it would be preferable if Article 40 par 1 (3) would specify that such disregard will only lead to the non-examination of an application if the lack of formal application requirements persists even after applicants have been informed of certain formal errors under Article 36. Such errors that are based on lack of proper understanding of the procedure and that have not been called to the attention of the individuals/legal entities submitting the application should not lead to the discontinuance of administrative proceedings.
62. Under Article 43, the administrative agency shall notify the participants of administrative proceedings of the initiation of such procedure. In this context, it is reiterated that according to Article 26, next to interested persons and persons assisting in the case, administrative agencies are also considered to be participants of administrative proceedings (see par 47 *supra*). However, the rights of notification, to be heard and of access to documents laid down in Articles 43 – 47 appear to be rights provided by administrative agencies to individuals/legal entities, which such agencies need not provide to themselves. It is thus recommended to review Article 43 and other relevant provisions speaking of “participants in proceedings” and substitute this term with the term “individuals/legal entities who are parties to proceedings or interested third parties”.
63. According to Article 44 par 2, administrative agencies shall not reject applications and documents, submitted by administrative procedure participants, if these are relevant to the procedure and fall within the administrative agencies’ competences. As far as applications are concerned, this requirement appears to be redundant, as Articles 40 and 41 are sufficiently clear as to the conditions in which applications may be rejected. It would be preferable for the draft Law to differentiate between applications and documents/information and to clarify in Article 44 par 2 in which cases

documents and information may be rejected by administrative agencies (presumably in cases where they are not relevant to the case). Article 44 par 2 should be amended accordingly.

64. The right to be heard guaranteed to such individuals/legal entities is mentioned in Article 45, but this provision does not outline the procedure to be followed in such situations. Nor is such procedure clarified in Article 15 par 2, which merely specifies that this right may be exercised in writing, verbally, or in another form that is convenient for the person. Article 45 should mention respective time limits for written feedback. With regard to oral hearings, this provision should mention the circumstances of appointment of such hearings, at which stage in proceedings such hearings will take place, who will be permitted to participate and what type of order such hearings will follow. As for par 2 stipulating that hearings shall not be mandatory in the cases listed under, *inter alia*, Article 28 par 4 (3)-(4), see the discussion on this issue under pars 51-53 *supra*.
65. Article 49 deals with the burden of proof in administrative proceedings. While reiterating the responsibilities and obligations of administrative agencies and administrative procedure participants with regard to establishing the facts of the case, this provision does not specify which party to proceedings – the individual or the administrative agency – shall bear the burden of proof. This issue is very important and needs to be clarified in Article 49.
66. The term of an administrative procedure is listed under Article 50 par 1 as 30 days upon registration of an application or initiation of an administrative procedure. Par 2 of Article 50 states that separate actions pertaining to administrative procedures shall be conducted within the terms specified by the draft Law “and other laws of the Republic of Kazakhstan”. The nature of such separate actions is unclear. It is advised to define the term “separate actions” or to clarify what is meant under Article 50.
67. In par 4 of Article 50, if the term of administrative procedures was specified by an administrative agency, the onset of such procedures is the moment of notification of the interested person or publication of corresponding information in cases stipulated by the laws of the Republic of Kazakhstan. The latter reference to the publication of information is quite vague and does not reveal to persons or administrative agencies applying the law which type of corresponding information is meant and what the modalities of publishing it are. It is thus recommended to clarify this part of Article 50.
68. Article 52 very rightly specifies that in case of non-adoption of an administrative act within the statutory deadline, the administrative act shall be considered adopted and the applicant shall be released from obligations or responsibilities caused by the lack of documents confirming or verifying some fact (par 2). This paragraph does not appear to apply to all types of administrative acts – e.g. a license not issued within the statutory time limit may not be considered “a document confirming or verifying a fact”. Should par 2 intend to cover all types of administrative documentation, then this should be made clearer in the wording of this provision.
69. If, on the other hand, it is intended as restrictive provision referring only to declaratory documents such as birth or death certificates, then Article 52

should also deal with the liability for consequences of other types of non-issued administrative acts. These should include damages for financial loss – e.g. if an applicant requests a license for his/her business, and this license is not provided, the applicant could face financial losses, which should be borne by the administrative agency that did not deal with his/her application within the required time.

70. Article 53 deals with the costs generated by administrative proceedings and specifies that administrative agencies shall pay for such expenses (par 1). In order to enhance clarity and foreseeability of the draft Law, this provision should outline in detail which type of expenses are meant here, also in order to avoid unjustified claims for reimbursement by individual parties to proceedings.

#### **4.7 Administrative Act**

71. The form and contents of administrative acts are regulated in Chapter 5 of the draft Law. According to Article 54 par 1, administrative acts shall be adopted in writing in the form of a decision, order, decree, resolution or other form prescribed by law. These different types of administrative acts are not defined – thus it is not clear from the wording of Article 54 how one may be distinguished from the other. It is recommended to clarify the nature of each of these types of administrative acts. At the same time, the draft Law should clarify that all types of administrative acts, regardless of their denomination, should follow the same procedure.
72. According to Article 54, administrative acts may also be adopted verbally, or in the form of light or vocal signals or signs. In the case of verbal administrative acts, they may be confirmed in writing upon request of the addressee. In cases where such types of administrative acts occasion direct negative effects for individuals (e.g. fines), some sort of written confirmation of a verbal administrative act should be registered with the administrative agency and submitted to the individual party, regardless of whether this was requested or not.
73. According to Article 56 par 3, no reasoning is required in cases where the administrative act is favourable to the affected individuals and does not concern interests of third parties, and where administrative acts are published. Both cases do not appear to justify a lack of reasoning in an administrative act. Even if an administrative act is considered to be favourable for a recipient, this does not mean that this recipient will not want to know why such decision was taken. This is particularly the case where, despite the positive effect of the administrative act, this recipient may wish to appeal against it, e.g. to obtain an even more favourable administrative act, or because he/she asked for a different act than the one that was eventually adopted.
74. As for the second case mentioned in Article 56 par 3, the fact that an administrative act is published does not replace a recipient's right to know the reasons for this act. Article 56 par 2 of the draft Law should thus be deleted, with the consequence that all administrative acts will be required to contain an appropriate reasoning or motivation.

75. The notification of administrative act adoption is mentioned in Article 57 of the draft Law. In certain cases, namely if the administrative agency has no information on the persons whose interests may be affected by the act, if the act affects more than fifty persons, and in other cases at the administrative agency's initiative, an administrative act may be published in the mass media (Article 57 par 4). It is recommended to specify which type of "other cases" this provision is referring to. In any case, names and other personal information on individual parties to proceedings shall be removed from the published information in these cases.
76. Article 58 states that administrative agencies may correct errors, misprints, slips of the pen in an administrative act on their own initiative or upon request of interested persons. In order to guarantee the accuracy of such documents, Article 58 should be amended to read that administrative agencies are obliged to correct errors, misprints, or slips of the pen. In cases where administrative acts were published according to Article 57, the errors, misprints or slips of the pen should also be published.
77. In Article 59 on the effectiveness of administrative acts and terms, par 2 states that verbal and subject-matter (specialized) administrative acts shall take effect on the moment of notification. The nature of such "subject-matter" administrative acts is not clear. It is recommended to clarify which type of administrative acts this provision is referring to.
78. The nullity of administrative acts is regulated by Article 60 of the draft Law. Examples for void administrative acts are, *inter alia*, administrative acts adopted by an unidentified administrative agency, acts that fail to identify the addressee or acts that are adopted by an incompetent administrative agency. In the second case, it is assumed that "unidentified administrative agency" implies that the administrative act does not reveal with agency issued the act. In such cases, the administrative act should be considered null and void from its adoption (*ex tunc*). The draft Law should require that the competent agency be informed of the null and void act; it should then be obliged to initiate administrative proceedings promptly, to ease negative repercussions for applicants.
79. Article 61 deals with the revocation of illegal administrative acts. While par 8 refers to sub-item 10, item 5 of this Article, it is noted that par 5 of Article 61 does not have a sub-item 10 and that the numbering of this paragraph in general appears to be incorrect. It is recommended to correct the numbering in Article 61 par 5 and to clarify which provision under Article 61 is being referred to in par 8.
80. Generally, it is noted that neither Article 60 nor Article 61 mention the violation of the draft Law's principles under Chapter 2 as one of the reasons for rendering an administrative act void or illegal. As stated previously under par 27 *supra*, it is recommended to discuss the intended consequences for violations of specific basic principles of the draft Law under Chapter 2. Ideally, serious violations should conceivably also lead to the nullity or illegality of an administrative act.
81. Article 62 lists the conditions in which it is permissible to revoke administrative legal acts. Under par 2 of this provision, favourable acts may

also be revoked if such revocation is explicitly provided by law ((1)). According to Article 62 par 2 (2), revocation of favourable acts is also possible if interested persons failed to use privileges provided by the administrative act. This appears to be a very strong restriction of the rights of interested persons and not in line with the principle of legal certainty – persons benefiting from a positive administrative act should not be deprived of the rights bestowed by such act merely because they did not “use” it.

82. Further, Art. 62 par 2 (3) states that a favourable administrative act may be repealed if “the staying in force of this act may cause damages to the state or public interests in relation to changes in the legal or factual circumstances”. This provision appears to be too broad, as it could lead to revocations and repeals of acts in literally all types of situations, including situations where damages have not even been caused yet. This is a serious limitation to the rights of the interested parties, which would need very compelling justification. Generally, a favourable administrative act should only be repealed ex post if there are very compelling reasons for this. As such reasons cannot be detected in the wording of Article 62 par 2 (2) and (3), it is recommended to delete these provisions.
83. The execution of administrative acts is regulated under Chapter 7 of the draft Law. At the outset, it should be noted that the numbering of Articles needs to be corrected in this Chapter, as there are currently two Articles with the number 73. In the second Article 73 on the execution term of administrative acts, the term for voluntary execution of administrative acts is 10 days. This term should be considered, as it is quite lengthy and could well delay the execution of administrative acts. Instead, it may be preferable to replace the 10 day term with an indication that execution of the administrative act should be effected as soon as possible. The enforcement measures mentioned under Article 74 should then start at a later date, possibly 7 or 14 calendar days after the administrative act has acquired effect. It is recommended to discuss these options and amend the draft Law accordingly.
84. The procedure for direct enforcement is not outlined clearly in Article 76. This provision merely refers to “corresponding measures prescribed by legal acts of the Republic of Kazakhstan”, which does not adequately inform persons consulting the law about the procedure set in motion by a failure to execute an administrative act. The authorized administrative authority competent to apply direct enforcement measures is also not identified sufficiently in par 3 of Article 76, as this provision merely refers to an agency “authorized according to the procedure established by law”. The draft Law remains silent on which procedure and which law it is referring to. This is another example of the vague referrals to other legislation discussed under par 16 *supra*. Article 76 should be amended to state in a clear and concise way the procedural law which the execution procedure will follow in such cases.

## **4.8 Appeals Procedure**

### ***4.8.1. Appeals Procedures before Administrative Bodies***

85. The administrative appeals procedure is regulated in Chapter 6 of the draft Law. According to Article 64, interested persons have the right to appeal against administrative acts, a refusal to adopt an administrative act, and against actions or inactions of administrative agencies. Throughout the text of the draft Law, other appeals options are: Appeal against the denial of mutual assistance (Article 23 par 5), appeal against a decision on exclusion (Article 32 par 9), appeal against a decision not to examine an application (Article 40 par 2) and disputes regarding notification (Article 57 par 8).
86. Article 65 describes the procedure for administrative appeals. According to par 1 of this provision, such appeal may be lodged with the administrative agency that issued the act, or a higher administrative agency. Appeals to the latter may also be sent via the issuing agency (par 2). It is noted that while the draft Law foresees several different types of appeals, the only kind of appeal mentioned in Article 65 is the appeal against an administrative act. The same is true in the case of Article 72 on the resolution of appeals. It would be advisable to mention all types of appeals in the provisions under Chapter 6 of the draft Law.
87. It would appear from the wording of Article 65 pars 1 and 2 that appeals may be sent to both the issuing agency and a higher agency, with no regard for any form of appeals hierarchy. Such lack of differentiation between the different types of appeal and the different appeals bodies may lead to confusion in practice, and possible capacity overloads with certain bodies. In order to prevent this, the appeals procedure in the draft Law should be described in greater detail, and it should be clear which body should receive appeals in the first instance, and whether the rejection of an appeal will then be open to further appeal to either a higher administrative body or a court. Possibly, different types of appeals will be directed at different appeals bodies. For example, appeals/complaints against an agency's decision not to examine an application (Article 40 par 2) or complaints concerning lack of proper notification (Article 57 par 8) could be directed against the issuing agency, which would then have the opportunity to correct potential errors. A renewed rejection could then be dealt with at a higher administrative level.
88. Another possibility would be for all appeals to be filed with the issuing agency. If this agency does not satisfy them within a short period of time, then it should be obliged to forward them to its superior agency, along with all available documentation.
89. Other types of appeals, e.g. against administrative acts, refusal to issue administrative acts, the denial of mutual assistance, or appeals against a decision on exclusion, could be brought directly to a higher level administrative authority. In such cases, it may be assumed that the issuing agency's decision was based on more extensive analysis of the issue, so that the chances of a different decision by the same agency, without the involvement of an administrative body, may be lower.

***OSCE ODIHR Opinion on the draft Law of the Republic of Kazakhstan on Administrative Procedures***

90. Based on the above considerations, it is recommended that the administrative appeals procedure be reviewed and re-drafted, bearing in mind the need to differentiate between different types of appeals and different appeals organs.
91. The form and content of administrative appeals are regulated in Article 67 of the draft Law. According to Article 68, administrative appeals shall not be considered if, e.g., an appeal is not lodged in the form foreseen by Article 67 par 1. In order to ensure consistency in the draft Law, it is recommended to ensure that appeals shall only be rejected for formal reasons if the lack of formal appeals requirements persists even though appellants have been informed of certain formal errors under Article 67 par 2 in combination with Article 36.
92. If the administrative agency decides to abandon the appeal, it shall notify the interested person of this within three days of receiving the appeal (Article 68 par 2). As in cases where applications are rejected (Article 40 par 2), it is recommended to oblige the administrative agency to issue a decision in which it gives reasons for abandoning the appeal. If such decisions are to be appealable, then they should also include information on possible appeals procedures.
93. Article 69 of the draft Law states that administrative appeals shall not lead to the suspension of execution of the administrative act, except in cases where the administrative agency decides that such suspension may take effect. This decision shall be taken either upon request of the interested person, or at the agency's initiative. In the interests of legality and clarity of the draft Law, it would be preferable to list in the draft Law under which circumstances the execution of administrative acts shall be suspended during appeals proceedings. Leaving such decisions up to the administrative agency itself could potentially lead to great differences in the application of the law, e.g. while certain agencies will always order the suspension of execution, other agencies may never do so. The practical consequences for affected individuals or legal entities will be an unequal implementation of the law. To avoid this, Article 69 should be amended.
94. Under Article 71, administrative appeals shall be handled according to the procedure specified in Article 4 of the draft Law. Presumably, Chapter 4 dealing with administrative procedure is meant here, not Article 4 on scope of the law.
95. Article 72 on the resolution of administrative appeals lists several options for appeals decisions. Under par 2, the options are: To fully or partially revoke or modify the appealed act, adopt a new administrative act, or allow the appeal fully or partially. It appears that this last option confuses decisions on the merits and decisions on the admissibility of appeals. Allowing an appeal (fully or in part) concerns the question of whether or not the appeal is admissible and should be debated before deciding on the merits of an appeal. Since issues of admissibility of appeals are already dealt with under Article 68 on the non-consideration of appeals, it is recommended to remove the reference to allowing administrative appeals from the wording of Article 72 par 2.

***4.8.2. Appeals Procedures before Courts***

96. Next to appeals before administrative bodies, Article 65 par 3 also foresees judicial settlement in cases involving “administrative claims”. Such claims are not defined in the draft Law, nor are there any references to pertinent definitions in other legislation. The distinction between them and administrative complaints is thus not clear, aside from the fact that administrative claims appear to be addressed to courts, not administrative agencies. It is advisable to clarify the nature of administrative claims and the procedure to follow when lodging them.
97. Next to the brief mention in Article 65 par 3, however, the draft Law does not mention appeals procedures before courts, despite the fact that the introduction of an administrative justice system is mentioned in the Concept Paper on the draft Law (item 2.2). In the interests of offering an effective remedy in administrative proceedings as well, it may well be worthwhile to establish appeals procedures before courts as a last second-instance appeals mechanism, either in this draft Law, or in a separate law on administrative court procedure. The main argument in favour of such an approach is the fact that the administrative bodies involved in the administrative appeals process may not be truly independent, since they all belong to the same executive and are often linked hierarchically to the respondent administrative agency. Appealing to courts as a final remedy would ensure an independent and impartial scrutiny of the appealed act or action. Virtually all administrative acts should be open to judicial review, including discretionary acts. Exceptions to this principle should be limited, mentioned clearly in the draft Law and justified by compelling reasons.
98. If judicial review of administrative acts exists, then it needs to have a proper legal basis, either in a separate law, or in general legislation on courts. In such legislation, it would be advisable to clarify which courts will be competent to hear such cases, and formal requirements for bringing cases to court (including the exhaustion of administrative remedies). It should also be clear which proceedings such appeals to court will follow. Relevant stakeholders in Kazakhstan will need to debate whether to create specialized administrative courts or chambers, or expand the competences of existing courts. Both models have their own benefits and drawbacks. The extent of court scrutiny will also need to be clarified, as will the outcome of court proceedings and the execution of sentences. Finally, the relevant laws should be clear on the scope of such a judicial review, specifically whether such a review will be limited to reviewing the legality of administrative procedure, or whether it will be a “full review” that will also go into the merits of the case. The draft Law or other law should also specify whether or not court proceedings will occasion a stay of the execution of administrative acts or have other effects.
99. According to Article 65 par 4, administrative appeals proceedings shall be discontinued in cases where court proceedings are simultaneously initiated through administrative claims. In the interests of expediency and efficiency, it may well be more practical to have it the other way around: Court proceedings will not need to be continued if the issue has already been initiated (and possibly resolved) on an administrative level. In compliance with previous recommendations concerning appeals hierarchy and court proceedings as a last

instance remedy, it is thus recommended to include in the draft Law a provision specifying that in cases where administrative appeals proceedings are pending, proceedings before court shall be stayed until the end of the administrative proceedings.

#### **4.9 Liability under the draft Law**

100. As in other draft legislation from Kazakhstan previously reviewed by the OSCE/ODIHR<sup>12</sup>, liability for harm inflicted on interested persons (Article 78) and for violations of the draft Law (Article 79) is mentioned in a very vague manner. Neither these provisions, nor any other provisions in the draft Law provide adequate information on the consequences of harm caused by administrative agencies or non-compliance with the draft Law by individual officials. In addition, it is not clear how an administrative agency could be held liable for harm inflicted on individuals and what consequences such actions could have. The references to the Civil Code of the Republic of Kazakhstan in Article 78 do not appear to resolve this issue, as they presumably refer to proceedings for damages based on individual liability, not the liability of an administrative agency. It is therefore recommended to clarify these issues in Article 78, to enhance legality and foreseeability of the draft Law. In this context, it may also be helpful to include a solution for cases where two separate administrative bodies are jointly responsible for damages caused (e.g. in a situation where each administrative office declares itself non-competent to deal with an issue, thereby engendering delays in proceedings that lead to financial harm on the side of the applicant).
101. Also, the wording of Article 79 does not specify exactly which actions will be considered violations of the draft Law. Moreover, there is no information on which type of violations will lead to which type of liability, e.g. it is not clear whether an individual official's failure to issue an administrative act will result in disciplinary proceedings, or administrative proceedings, or even criminal proceedings.
102. Further, the consequences of such proceedings are not described. The draft Law does not inform administrative agencies and officials as to which behaviour will lead to which legal consequences and what these consequences will look like (neither directly, nor by reference to relevant legislation). It is recommended to enhance Article 79 of the draft Law by listing the types of behaviour that would be in violation of the draft Law, e.g. delays in issuing administrative acts, unjustified refusal to issue an administrative act, or failure to provide all parties to proceedings with the necessary materials and documents. Either Article 79 or a separate Article of the draft Law should specify the consequences or sanctions for each type of behaviour in detail.
103. Additionally, Article 79 should contain information on which procedure will be applied in which case, how individuals and legal entities may initiate such procedures, and which body or organ will preside over such proceedings.

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<sup>12</sup> See, as a recent example, ODIHR Opinion on the draft Law of the Republic of Kazakhstan on Access to Public Information of 16 November 2010, Opinion-Nr.: FOI – KAZ/164/2010 (AT), pars 64-67.

**4.10 Implementation of the draft Law**

104. It should be noted that once the draft Law has been adopted, its proper implementation requires sufficient funding and training of administrative and possibly judicial staff. While item 10 of the Concept Paper on the draft Law states that the enforcement of the draft Law will not entail any financial costs, there are numerous aspects of the draft Law that would suggest otherwise. First of all, new laws will also require a certain level of awareness-raising and training to ensure that both the population and the public officials implementing the law are aware of their rights and obligations under such legislation.
105. Further, certain provisions of the draft Law stipulate that the State will cover certain expenses during administrative proceedings, e.g. costs for interpretation and services of interpreters in cases where persons involved in administrative proceedings do not speak the State language or Russian (Articles 25 par 3 and 27 par 8), and expenses occasioned by experts (Article 30 par 4). Overall, Article 53 notes that administrative agencies shall pay expenses related to administrative procedures. Proper budgeting for administrative agencies to allow them to cover such expenses will need to be ensured before passing the law.

*[END OF TEXT]*