SUMMARY REPORT[1]

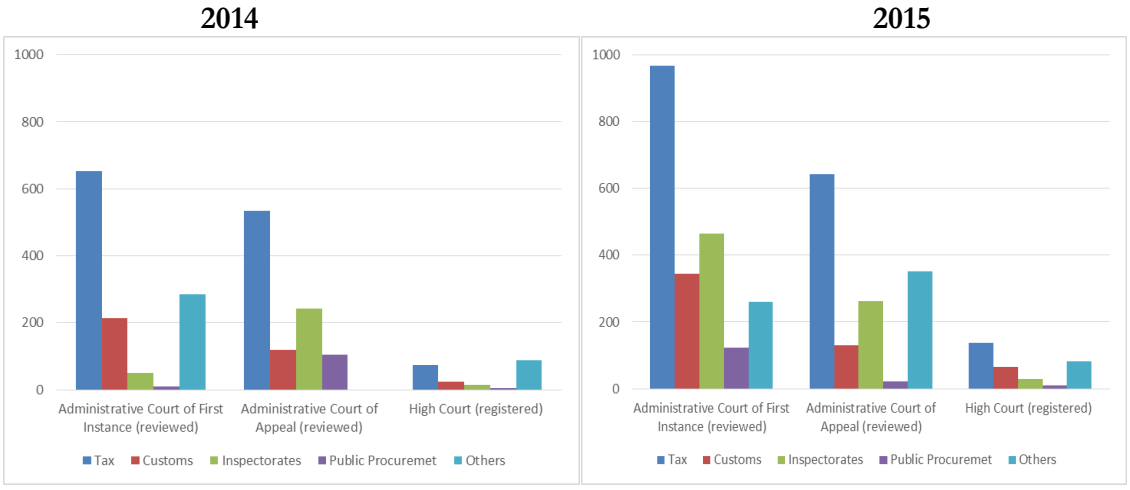
ON THE IMPROVEMENT OF DISPUTE RESOLUTION MECHANISMS BETWEEN THE BUSINESS AND PUBLIC ADMINISTRATION

23 February 2016

Disputes between public administration institutions and businesses bear considerable costs for both parties and, at the same time, cause uncertainties and lack of trust for further investing to local and international businesses. For this reason, a fast, efficient and fair resolution of such disputes remains indispensable for encouraging investments in the country. In many of the meetings held with businesses and in the Surveys conducted by the Secretariat, businesses underline that: "*budget institutions and the staff employed in these institutions often ignore or do not know the laws of their functioning, the rules, and take decisions that are arbitrary and incompliant with applicable laws.*"

This paper aims to identify the main problems about administrative appeals[2], while focusing on the profile of disputes that occur more frequently between businesses and public administration institutions, as well as on the mechanism that parties have at their disposal to resolve disputes.

In order to define the profile of disputes, we have collected the number of disputes between business and administration which have ended up at the Administrative Courts for the last two years (2014 and 2015). In the figure below are displayed the lawsuits of the business with the public administration during this period.



Source: Ministry of Justice

[1] *This document is a synthesis of the Analytical Working Document prepared by the Secretariat on Dispute Resolution. The Working Paper will be presented in the Meeting of the Investment Council (IC) on March 2, 2016 and will be posted on the IC Website.*

[2] *Administrative appeal is a judicial means of an entity, used to request the revocation, abrogation or amendment of an administrative act.*

Data indicates that more than 75% of the total number of administrative appeals from the businesses[3] filed to the administrative courts, pertain to taxes, customs, inspections and public procurement. Thus, the Secretariat looked more in depth the functioning of the appealing systems in those institutions.

Referring to institutional data, *the public administration bodies have endorsed in only few cases the administrative appeals filed by businesses*. Concretely, only 4% of cases by the Tax Appeal Directorate (TAD), about 2% of cases by Customs Administration and 0% to 40% of cases by State Inspectorates. Whereas, the Public Procurement Commission (PPC) provides a different picture, decisions in favour of businesses in relation to the number of examined cases are about 40% during 2014 and 50% during 2015.

In the meantime, *administrative courts do not possess capacities to objectively review cases* within legal deadlines, taking into account the high number of cases filed in such courts and the limited number of judges. A total of about 12,000 cases is the backlog in the Administrative Court of Appeals alone, pending adjudication by 7 judges. Delays result from the broad object of administrative disputes that are adjudicated in these courts, where about 50% of the administrative cases are not directly linked to the business. Consequently, these courts are not responding timely to the requests from the business and to the dynamics of the problems it faces. It is found that, for purposes of meeting the tighter adjudication deadlines, the quality of their decisions is often questionable, with 70% of the decisions clearly in favour of the public administration.

Appeal procedures related to administrative acts of the tax administration are generally clear for the businesses, but they remain almost uninformed or disinterested about the appeal/complaint procedures in other institutions, with the reasoning that it is worth solving it "differently", rather than deal with the long administrative practice and worthless "paperwork". There is room here for investment from the businesses to increase in-house professional capacities, to get to know and to respect adequately the procedures of institutions about the specificities of the administrative appeal, as well as principles envisaged in the Administrative Procedure Code.

In our analysis, we have made efforts to confront the findings with the most concrete concerns that businesses have in general, as well as by focusing on problems of specific sectors, such as the banking sector, hydrocarbons, etc.

For purposes of this Paper, data from the Ministry of Justice, Administrative Court of First Instance in Tirana and the Administrative Court of Appeal were collected on judicial cases of businesses for 2014 and 2015. The analysis is also based on the statistics of the Central Inspectorate, General Tax Directorate (GTD), General Customs Directorate (GCD), Public Procurement Commission (PPC), National Agency of Natural Resources (NANR) and the National Registration Centre (NRC) for cases of administrative appeals and their progress in these institutions. The analysis of the Secretariat is based on the relevant Albanian legislation.

For purposes of recommendations, reference was made to models of different countries such as Kosovo, Macedonia, Lithuania, etc. Interviews were conducted (about 40) with legal firms, lawyers, experts, businesses, as well as representatives of the above-

[3] *Company, pursuant to the specifications of Law No. 9901, date 14.4.2008 "On Entrepreneurs and Commercial Companies" (amended)*

mentioned institutions. The interviews were conducted in line with a standard of predefined questions.

Our suggestions have been prioritised considering the urgency of problems from the point of view of an investor. Elements pertaining to practical aspects relating to principles, procedures and deadlines for the review of administrative complaints, particularly those of institutions the decisions of which have a considerable financial impact for the business, such as tax and customs institutions, or the NANR, were considered.

Based on the above, the analysis is organised in 3 main pillars:

1. **Efficient access to the procedures of the administrative appeal**
2. **Efficiency of appeal structures within public institutions**
3. **Transparency of the activity of these structures**

FINDINGS AND RECOMMENDATIONS

1. Limited access to the administrative appeal procedures due to preconditions of financial nature

The right to appeal in administrative ways to a superior appeal body is guaranteed from the formal-juridical aspect, being provisioned in all laws that are applied by the above-mentioned institutions. Some laws explicitly limit the right to efficiently file an appeal in practice, by setting forth some financial preconditions that businesses must meet. Interviews with the businesses indicate that the obligations set forth for the prepayment of customs and tax duties[4], are important restraints and non-objective impediment to the efficient exercise of the right to appeal before the administrative body.

There is a general perception on the fact that, often *the reassessment of tax or customs duties is done arbitrarily* by the respective administrations to *collect revenues and to meet* their objectives and budget plans, by utilising these legal "opportunities". In this aspect, businesses are of the opinion that the provisions of the substantive applicable legislation, especially in the areas of tax and customs, favour the administration in taking arbitrary decisions. Fiscal institutions are *"de facto"* legally superior to businesses, because the latter must prepay liabilities before the review of the dispute. The prepayment of the tax liability and a portion of the fine as related to the Customs procedures has established a climate of mutual lack of confidence. According to the business, these structures and the entire administration should not have as an evaluation criteria for their work or consider as a fulfilment of the budget objective, the amounts collected as a result of prepayment of liabilities or fines.

Another real concern relates to certain subjects which are *de facto* bankrupt and cannot prepay their liabilities in accordance with the above legal requirements. In the absence of the fulfilment of these conditions, administrative appeals are "*rightly"* rejected by the

[4] *Payment in advance of the liability before the administrative appeal procedure in the amount of 100% (or bank guarantee for the tax liabilities). In the case of complaints against acts of the customs authority 40% of the sum of the fine imposed must also be paid.*

appeal bodies, by essentially limiting the right of these subjects to appeal to the administrative body and to the court.

Recommendation 1: Facilitation of access in exercising the right to administrative appeal for businesses.

1.1 The pertinent laws in particular on fiscal areas need to alleviate the preconditions for administrative appeal of the administration's acts in order to increase the business access. Better access may be achieved through one of the following alternatives:

a) Business pay in advance, as they currently do, only a small portion of the re-estimated tax or customs liability amount (not including fines); or

b) Instead of paying in advance part of the liability, businesses pay only a non-refundable administrative fee for filing an administrative appeal at the appellate structure (according to the model currently applied for complains by the business at PPC).

From the point of view of the Secretariat, and of the interviewed businesses and experts, the second alternative is considered as the most appropriate. The administration fee, paid in this case, would be dedicated only to cover the administrative expenses of the independent structure which examines the administrative appeals in the area of tax and customs[5]. This would facilitate not only the business access in the administrative appeal procedures, but at the same time would alleviate the appealing structures from the "burden" to protect in any case the actions of the tax and customs administration and on the other had it would increase their effective independence.

1.2 The legislation on tax and customs should give the opportunity to appeal also to the *de facto* bankrupt entities, when the latter are able to prove insolvency (for example through a report of an independent expert in this area).

2. Administrative appealing to the appeal structures – an inefficient process

Generally, businesses consider the administrative appeal to the appeal structures within the public administration as inefficient, doubtful and, moreover, as a preliminary condition or mandatory stage that must be met before addressing the dispute to the administrative courts. The decisions of these structures are prejudiced due to the way they are established, organized and functioning, as well as due to elements of "*conflict of interest*" that collegial bodies dealing with the review of appeals often have. The following problems that have an impact on an efficient appeal process have been identified:

- ***Appeal structures do not function as independent***

Even though the *Tax Appeal Directorate* (TAD) is largely known by the businesses, it is not perceived by them as an independent structure from the rest of the tax administration, or impartial in its decision-making. Its decisions are mostly to the

[5] *Refer to Recommendation no.3*

disadvantage of businesses, while favouring the tax administration. TAD rules in favour of the businesses in only 4% of cases. The role of TAD and its decisions are also questionable by the Law no. 9920, date 19.05.2008 "On tax procedures" (amended), literally foreseeing that the decisions of the TAD can be challenged in court by the tax administration (regional directorates), when the latter disagrees with them. Referring to data from the Tirana Administrative Court, the latter has ruled in favour of the tax administration (regional directorates) when they have appealed against the decisions of TAD in only 1.4% (2014) and 2.4% (2015) of cases. Basically, this appealing opportunity that Law no. 9920 provides for the regional directorates is fully used by these directorates and it is deemed that this is done on purpose, so that the taxpayer is not given an opportunity to receive back the prepaid sum of money, thus increasing artificially the costs for the business and for the administration to carry out the lawsuits.

The Customs Administration has different appeal model from tax administration, regardless of their similarities and importance. The appeal at the General Directorate of Customs depends exclusively on the General Director. There is no legitimate structure for the review of administrative complaints. Concrete cases are reviewed by the Legal Department, which deals with administrative complaints, among other things. Only 1.6% of complaints reviewed during 2015 are in favour of the businesses. The rest of the complaints are appealed in almost all administrative courts. Regardless of the above, the interviewed businesses do not know well enough the system of administrative appeal against acts issued by the customs authorities. In a considerable number of cases they react to these problems through *simple complaints* or direct contacts. Businesses that have continuous relations with the customs administration consider this as a faster way. For example in cases when there are discrepancies between customs declarations and data in the customs system, businesses aim to solve the matter through paperwork, as long as there is no administrative act from the customs authority.

The Appeal Commissions established as appeal structures within certain state inspectorates have in some cases in their composition, the inspector who issued the administrative act for the respective administrative measure (for example fine), by creating, thus, a flagrant situation of conflict of interest and, as a result, doubts on the impartiality of the judgement of these commissions. *The Immovable Properties Registration Offices (IPRO)* manage the appeals inefficiently and do not provide fast, high quality and sustainable solutions for businesses. Almost all the banks give a low score to the services and decisions of IPRO regarding the quality and respect of legal deadlines.

PPC and NRC bring a different pattern, which is more functional concerning the review of complaints in general and administrative appeals more specifically. NRC addresses problems mainly in the framework of simple requests from the businesses about matters of an operational nature such as: registration or deregistration of commercial entities, publication online of confidential data (data about the administrator or financial data of companies which damage competition).

- ***Failure to respect basic principles of the administrative appeal***

In general, it is deemed that the TAD and PPC follow a consolidated procedure for organizing hearing sessions on the appealed cases, providing therefore to the claimants the opportunity to be heard and to submit their evidences and arguments. *While, the other appeal structures are limited to the review of the written acts submitted by parties*, for example, as in the case of the review process by the State Health Inspectorate (SHI) or the GCD.

The competences provisioned in the substantive laws[6] for different institutions leave room for interpretation. Even when these competences are well-defined, the appeal structures again decide to go beyond such competences, for example, the TAD provides additional duties for the Regional Tax Directorates, to reassess the obligations of the taxpayers through fiscal visit inspections, even though it does not have such competence, pursuant to the provisions of Article 108 of Law No. 9920. *This results from of the fact that these appeal structures do not recognize the principles and provisions of the Administrative Procedure Code, but are inclined to rigidly apply only the provisions of the substantive law based on which they are organized and function.*

In many cases the administration bodies do not interpret the legal provisions of the legislation in the conditions of trust and do not guarantee the general legal principle, according to which when a legal provision regulating a certain situation is vague, the provision will be interpreted in favour of the other party and not of the State. This is particularly evident in relation to the implementation of laws by the tax administration. For example, the classification of subjects for purposes of VAT tax liability is often done by overlooking the requirements of Decision of Council of Ministers (DCM) No. 953, date 22/12/2014 "For the implementing provisions of law no. 92/2014, 'On the value added tax in the Republic of Albania'" regarding the classification of profession or the sum of annual turnover for the effect of classification as a tax paying entity with VAT tax liability. Such cases result in a considerable number of disputes which are later on followed in administrative and judicial ways by artificially increasing the caseload for these administrations, respectively.

In practice it is noted *a lack of institutional coordination, contradicting instructions, legal vacuums or substantial violations of the principles of law which become a cost to the businesses, making their activity more difficult*. For example, the procedures over the years for the acknowledgement of the expenses in the hydrocarbon operations, as exempted from the VAT (the hydrocarbon sector) have been unclear and unmonitored, creating thus confusion among the businesses of the sector, which brings an important contribution to the economy of the country. Today these procedures are becoming a *boomerang* for these businesses, causing endless costs and uncertainty for further investments.

Furthermore, practices of requests for the Authorization to acknowledge the exempted expenses, submitted by businesses, have been carried over the years and, which even to date, the NANR has not responded yet. An absurd and exhaustive example of basic violations by the administration is the request by one IPRO, to the Bank of the second tier to equip IPRO with the text of legal basis (DCM) with the ink stamp of the Council of Ministers!

- ***The lack of capacities of appeal administrative structures***

In almost all the meetings held with the business, a concern was raised regarding to the frequent staff turnover in institutions which interact closely with the business (for example, IPRO, Tax Administration, etc.) *Dissatisfactions were expressed regarding the professional skills of the administration, its knowledge on updated legislation and communication with the businesses*. The infrastructure for the implementation of the administrative appeal review sessions between the businesses and the administration is unsatisfactory, and it affects the right of the parties to be heard, provision of evidences and the quality of the adjudication.

[6] *Base laws applicable by these institutions*

- ***Lack of consolidated and unified practices by the administration, further hindered by frequent legal changes***

In the meetings held with businesses and associations, but also with public institutions, there is a consensus regarding to the *necessity of unified practices by the administration especially by tax and customs administration*. In many cases, businesses are not clear on how to address specific cases such as loan loss provisions in the banking sector, and VAT for financial services; for the acknowledgment of expenses exempted from VAT in the case of hydrocarbon sector (research and development operations); in the case of IT sector for importing computer programs or in the case of construction sector. There is an ambiguous approach to the stance and clarity of final responses given to the businesses, leaving at any time, "*an open window"* for the tax administration to find businesses guilty and penalize them. For example, the case of fines issued for certain types of businesses for not being equipped with the fiscal device, although performing transactions only through bank, were obliged to be equipped with the fiscal device. Only recently the TAD published a decision on how to address such cases.

- ***Unequal position of the businesses in front of the state institutions***

The main concern for the businesses, but also for the experts, is that during the administrative review of disputes related to an administrative act, the business is placed in an inferior position and not equal with that of the administrative body. For example, in cases when the appeals related to the illegality or invalidity of the administrative act/decision are sent to the courts, businesses have to simultaneously confront several institutions. The most typical cases are the appeals against the decisions of TAD, General Customs Directorate or Public Procurement Commission, to which are being added also the State Advocate Office, by duplicating in this way the functions of defending the state interests in a dispute under review. These institutions tend always to further appeal the decisions of administrative courts when they are not in their favour, in all administrative court levels. The institutions interviewed by the Secretariat confirm the fact that this situation is the result of an institutional internal contraction – of the need "*to be compliant with the duty and not feel prejudiced,"* and to accomplish the mission to protect at any case the interests of the State, even in those cases when *the judiciary practice, in a final and consolidated manner, has confirmed the flagrant violation made by the administration*.

At the same time, another reason for confronting the business in any case, is related to the fact that public administration bodies are "*obliged*" to fulfil the recommendations as decided by the Supreme State Audit. Although, the public administration bodies do not agree with the recommendations of the Supreme State Audit, which are not obligatory for them to be *a priori* implemented, these bodies still prefer to apply them even when such recommendations unlawfully damage the legal and economic rights of the business. In this way, the administration bodies feel protected by the "prejudices", administrative penalties, or criminal charges which could be recommended by the Supreme State Audit, increasing so the cost of the business for violations/irregularities performed by the administration itself.

The public administration is not properly familiar with the role of the institution of the State Advocacy Office and its competences. Public administration does not request from the State Advocacy Office interpretations, professional legal assistance or the unification of stances for several practices, not utilizing in this way the capacities of this institution.

Recommendation 2: **Decisions of TAD, as the upper administrative unit that decides on Appeal matters, should be automatically binding for the Regional Tax Directorates.** The right of the Regional Tax Directorates to appeal the decisions of TAD further in court, according to the provisions of Article 109/3 of Law No.9920, should be abrogated.

Recommendation 3: **To effectively increase the independence of TAD and separation of its functions from the structure of General Tax Directorate (GTD).** It is recommended the establishment of collegial body of appeal, in the form of a "*quasi court*" in the framework also of the plans for the unification of tax and customs administration. This appealing structure should be established via a specific law and have competence to review the administrative appeals (above a certain amount) in respect to tax and customs administration acts. In its composition should be professionals of high integrity from the areas of law and economy with experience in tax and customs issues. The functioning of this structure should be based on the arbitration principles, where the dispute parties should have the right to choose the relevant commission (or only some of its members) which will perform the administrative appeal review. The decisions of this structure may be appealed as currently done before administrative courts. Unified timelines are recommended for the submission of appeal requests for administrative acts; 30 days from day of the acknowledgment about the administrative act.

Recommendation 4: It is also suggested to merge and centralize Inspectorates' appeals at the Central Inspectorate, in order to enhance the professionalism, independence and trust regarding the appeal in the State Inspectorates.

Recommendation 5: To establish the mechanisms of prior consultation with businesses for discussing the problems and potential solutions. The lack of prior consultation with businesses in several initiatives increases the number of administrative disputes which have to be handled by the appeal structures. It is assessed that the existence of these mechanisms would encourage dialogue among parties and would also reduce the number of disputes.

Recommendation 6: **Unification of the timelines for exercising the right of the administrative appeal is deemed necessary. It is recommended a timeline of 30 days from day of the acknowledgment about the administrative act.** Referring also to the EU Progress Report for 2015, the entry into force of the New Code of Administrative Procedures[7], drafted pursuant to European standards, is expected to further facilitate administrative procedures for businesses and citizens. In this framework, it is required to prepare, review, publish in due time the special administrative procedures to be in conformity with the New Code and the respective awareness of the institutions.

Recommendation 7: **Staff sustainability and continuous professional advancement of appeal structures in institutions.** Joint training programs between businesses and administration would prevent disputes among parties. It is also suggested to organize joint training programs for the Administrative Courts, Tax and Customs Administrations through the school of Magistrates with the assistance of business associations, such as for example, the Albanian Association of Banks. This would help also in the unification of practices for both, the administration and the Judiciary.

[7] *Law No. 44/2015 "Code of Administrative Procedures of the Republic of Albania" enters into force on May 29, 2016.*

Recommendation 8: **The unification of practices and preparation of commentaries for similar cases, especially in Tax, Customs and Inspectorates, possibly in the sectoral viewpoint, such as banking, agro-industry, natural resources, etc.** From the viewpoint of businesses, experts and groups of interest contacted by Secretariat, *the unification of consolidated practices* is considered as one of the most necessary elements which would reduce to a considerable extent the number of appeals filed against the decisions of the tax administration and improvement of business perception indicator related to it. An important role in the unification may be played also by the State Advocacy Office through its active role in interpreting legal cases for the entire public administration. This requires also legal amendments to Law No. 10018, dated 13.11.2008 "On the State Advocacy Office".

Recommendation 9: Improvement of institutional coordination, computerization of systems between institutions of the administration and exchange of information, possibly *electronically* and in real time, such as for instance among the tax administration, customs administration, IPRO, transport directorates, etc. This would relieve businesses from going back and forth looking for official documents in different institutions. Preliminary cooperation among institutions and the opinion of the State Advocate are very important before cases end in Courts, so that the burden of costs for both, businesses and the administration, can be reduced.

Recommendation 10: It is suggested that the Council of Ministers should instruct its subordinate public administration bodies for procedures to be followed regarding recommendations reported by Supreme State Audit. Public administration bodies should review with working groups the tasks and recommendations made by the Supreme State Audit, in order to avoid their *a priori* implementation, especially in cases when their arbitrary implementation violates the legal security and the business legal rights. This would also reduce the costs of State Budget, in cases when the business rights are put in place by courts, and the State would be obliged to compensate the business for the caused damages.

3. Lack of transparency regarding appeal procedures and decision-making

The conducted analysis indicates that only some public institutions provide clear, complete and accurate information regarding the appeal procedures of the administrative acts, as already made by DAT, PPC, NRC or Central Inspectorate which have published relevant information on their official websites. On the other side, only the PPC has periodically **posted** its decisions and satisfactory justifications about them. The other institutions leave a lot to be desired as regards to the online posting of the decisions and there are cases when they do not even have a website, such as in the case of some inspectorates like the Mining Inspectorate.

As regards the posting of decisions by TAD it is found out that TAD does not yet publish periodically its decisions[8]. The published decisions do not clarify the main problems that concern big businesses and have an impact on them (for example regarding bank loss loan provisions), deductible and non-deductible expenditures, etc.

8 Only 34 decisions result to have been made public until 11.02.2015 at https://www.tatime.gov.al/sq al/Sherbimet/Apelimet%20Tatimore/Pages/Vendime.aspx

The annual work reports and other instructions of TAD about how the structures of the administration must address certain cases are only for internal use by the administration and are not made public.

Recommendation 11: The decisions of TAD/Inspectorates/GCD must be made public systematically (by ensuring the protection of confidential data to the extent possible). This obligation should be clearly stipulated under the respective applicable legislation.

Recommendation 12: The publication of annual reports of GTD, GCD and special Inspectorates. The inclusion of the outcome of administrative appeals and their progress in Court must be included in the annual reports.

Apart from the above, the Working Paper prepared by the Secretariat, which will be made public in the meeting of the Investment Council on March 2, 2016, includes other concrete recommendations, as well, suggested during the meetings of the Secretariat with experts and chambers of commerce to facilitate the work of Administrative Courts or appeal structures in institutions.

Some of these recommendations are listed below:

1. *When the Administrative Court of Appeal leave into force, with the same reasoning, the decision of the Administrative Court of First Instance, it should not be obliged to provide reasoning for the decision, except for cases when one of the parties so requests. This recommendation would relieve the burden of the Administrative Court of Appeals and would make its work faster.*

2. *Preliminary consultation with businesses about legal and institutional initiatives that affect them is indispensable. Institutions should apply the provisions of Law No. 146/2014 "On public Notification and Consultation". This would reduce the number of administrative disputes.*