

Administrative discretion under the APPC: opportunities and limitations

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The Administrative Procedure and Process-Related Code (the "**APPC**"), which comes into force on July 1, 2021, introduces a new legislative concept of administrative discretion within Kazakhstan. This article will examine the requirements, opportunities and limitations for application of this new legal instrument.

According to sub-paragraph 6 of paragraph 1 of Article 4 of the APPC, administrative discretion should be understood as the authority of an administrative body or an official to make a decision, for the purposes and within the limits established by the legislation of the Republic of Kazakhstan, based on an assessment of its legality.

At the same time, according to sub-paragraphs 1 and 2 of Article 11 of the APPC, an administrative body or an official is obliged to exercise administrative discretion within the limits established by the legislation of the Republic of Kazakhstan. Issuing an administrative act and/or performing an administrative action (inaction) in the exercise of administrative discretion must comply with the purpose of this authority.

As a consequence, administrative discretion as a power must, when being exercised, comply with at least two criteria: to be exercised within the limits established by law and for the purposes established by law.

In addition, by virtue of paragraph 1 of Article 10 of the APPC (principle of commensurability), the authority must ensure a fair balance between the interests of the participant in the administrative procedure and of society in the exercise of administrative discretion. The administrative act and the administrative action (inaction) must be commensurable.

It is important to note that according to paragraph 4 of Article 6 of the APPC, a violation of the principles of the APPC, depending on its nature and materiality, can render the administrative acts and administrative actions (inaction) illegal, and result in the cancellation of the issued judicial acts.

In turn, the criteria of commensurability in accordance with paragraph 2 of Article 10 the APPC are:

1. Suitability: acceptability for achievement of the purpose established by law;
2. Necessity: the minimum possible restriction of the rights, freedoms and legitimate interests of a participant in the administrative procedure;
3. Proportionality: the public good obtained as a result of restricting the rights, freedoms and legitimate interests of a participant in the administrative procedure must exceed the harm caused by such restrictions.

A striking example of the application of the requirements for the exercise of administrative discretion and the possibility of applying the criteria of proportionality is the procedure for initiating an administrative procedure. According to paragraph 3 of Article 62 of the APPC, the basis for initiating an administrative procedure may be an initiative (administrative discretion) of an administrative body or an official.

To give a concrete example, when initiating a fire safety inspection, the authorized body must ensure compliance with:

- The limits established by law: "...the frequency of special audit inspections carried out in a special procedure in relation to the inspected subjects (objects) of a high degree of risk must be no more than once a calendar year, that is, any period from January to December of the planned year..."¹ and
- The purposes established by law: "for the purpose of compliance with the legislation of the Republic of Kazakhstan in the field of civil protection."²

At the same time, since the authority must also comply with the criteria of commensurability, it is reasonable to assume that, for example, it would be unacceptable to appoint one special inspection in December and another in January of the next calendar year. This approach would violate the requirements for commensurability of administrative discretion in accordance with paragraph 2 of Article 10 of the APPC, despite the fact that such actions would formally be within the purposes and limits established by law.

Also, by virtue of the requirement of paragraph 2 of Article 116 and paragraph 2 of Article 155 of the APPC, the court will verify whether the administrative discretion complies with the limits of the law and is commensurable with the purposes established by the legislation of the Republic of Kazakhstan. If a violation of the requirements for administrative discretion is established, the court may impose on the respondent the obligation to issue an appropriate administrative act in favor of the claimant.

The APPC allows the possibility of settling a dispute between a claimant (applicant) and an administrative body (official) by concluding an agreement on conciliation, mediation, or by settling the dispute in a participative procedure. At the same time, according to sub-paragraph 2 of paragraph 1 of Article 120 of the APPC, conciliation of the parties is allowed if the administrative body (official) has administrative discretion.

Prior to the entry into force in June 2020 of the amendments to paragraph 3 of Article 174 of the Civil Procedure Code of Republic of Kazakhstan, there was a direct prohibition on the settlement of disputes with the use of conciliation procedures in cases arising from public law relations. The Supreme Court states that cases subject to special proceedings may not be ended by an amicable agreement, mediation or participative procedure.³

It remains unclear how the rules on the settlement of a dispute through conciliation will be applied, and to what extent the courts will take into account administrative discretion, given that administrative bodies (officials) tend to appeal against judicial acts negative for them until all procedural possibilities for their revision have been exhausted.

Taken together, the APPC rules governing administrative discretion provide for a fairly flexible approach to the issue of administrative acts or the performance of an administrative action (inaction). Nevertheless, the limits and purposes established by legislation, as well as the criteria of commensurability in the exercise of administrative discretion, should limit the possibility of abuse by administrative bodies (officials).

In addition, the APPC sets out the court's obligation to check the limits of administrative discretion and ensure that administrative act comply with the purposes established by the legislation of the Republic of Kazakhstan. In case of violations, the court is obliged to make a decision to either cancel the administrative act, compel the issuance of an administrative act, impose the obligation to take specific actions, or acknowledge the presence or absence of any legal relationship or its content.

1. See paragraph 7 of the joint order of the Minister of Internal Affairs of the Republic of Kazakhstan dated October 30, 2018 No. 758 and the Minister of National Economy of the Republic of Kazakhstan dated October 30, 2018 No. 31 "On approval of the criteria for risk assessment and checklists in the field of fire safety and civil defense".

2. See paragraph 1 of Article 36 of the RK Law On Civil Protection.

3. See paragraph 9 of the Normative Resolution of the Supreme Court of the Republic of Kazakhstan dated December 24, 2010 No. 20 on some issues of the application by the courts of the norms of Chapter 29 of the RK CPC.

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