

DOI <https://doi.org/10.51647/kelm.2021.1.2.25>

## W SPRAWIE FORM PRAWNYCH CZYNNOŚCI PROCESOWYCH W POSTĘPOWANIACH ADMINISTRACYJNYCH

*Mykhailo Maletych*

*kandydat nauk prawnych*

*ORCID ID: 0000-0002-2933-0623*

*e-mail: maletych\_m@gmail.com*

W niniejszym artykule autor dokonał przeglądu nowoczesnego europejskiego i krajowego podejścia do zrozumienia podstawowych prawnych form czynności w postępowaniach administracyjnych. Autor sformułował szereg propozycji rozwoju administracyjno-prawnych regulacji postępowań administracyjnych i zaproponował uchwalenie nowej ogólnej Ustawy o postępowaniu administracyjnym, z uwzględnieniem doświadczeń europejskich. Autor krytycznie ocenił krajowe doświadczenie rozwoju natury prawnej postępowania administracyjnego i podjął próbę określenia koncepcyjnych podstaw wznowienia istoty i administracyjno-prawnej regulacji postępowania administracyjnego na Ukrainie na podstawie proponowanych w prawie europejskim form prawnych czynności procesowych w postępowaniu administracyjnym.

**Słowa kluczowe:** postępowanie administracyjne, procedura administracyjna, akt administracyjny, demokracja, standardy, prawa człowieka, administracja, forma proceduralna, działalność administracyjna.

## ON LEGAL FORMS OF PROCEDURAL ACTIVITIES IN ADMINISTRATIVE PROCEEDINGS

*Mykhailo Maletych*

*Candidate of Legal Sciences*

*ORCID ID: 0000-0002-2933-0623*

*e-mail: m.maletich.61@gmail.com*

**Abstract.** In this article author's reviewed modern European and domestic approaches to understanding of the main forms of procedural activities in administrative proceedings. Author's formulated a range of proposals as to development of administrative legal regulation of administrative proceedings and proposed to adopt a new general Law on administrative proceedings, with respect to European experience. Author's criticized domestic experience of development of legal nature of administrative procedures and made an attempt to define conceptual basis for renewal of the essence and administrative legal regulation of administrative proceedings in Ukraine on the basis of the proposed in the European legislation legal forms of procedural activities in administrative proceedings.

**Key words:** administrative proceeding, administrative procedure, administrative act, democracy, standards, human rights, administration, procedural form, administrative activity.

## ПРО ПРАВОВІ ФОРМИ ПРОЦЕСУАЛЬНОЇ ДІЯЛЬНОСТІ В АДМІНІСТРАТИВНИХ ПРОВАДЖЕННЯХ

*Михайло Малетич*

*кандидат юридичних наук*

*ORCID ID: 0000-0002-2933-0623*

*e-mail: m.maletich.61@gmail.com*

**Анотація.** У статті автор розглянув сучасний європейський і вітчизняний підхід до розуміння основних правових процесуальних форм діяльності в адміністративних провадженнях. Автор сформулював ряд пропозицій щодо розвитку адміністративно-правового регулювання адміністративних проваджень та запропонував прийняття нового загального Закону про адміністративні провадження з урахуванням європейського досвіду. Автор критично оцінено вітчизняний досвід розвитку правової природи адміністративних проваджень та зроблено спробу визначити концептуальні підстави поновлення сутності та адміністративно-правового регулювання адміністративних проваджень в Україні на основі запропонованих у європейському законодавстві правових форм процесуальної діяльності в адміністративних провадженнях.

**Ключові слова:** адміністративне провадження, адміністративна процедура, адміністративний акт, демократія, стандарти, права людини, адміністрація, процедурна форма, адміністративна діяльність.

**Introduction.** Actuality of modern legal forms of procedural activities development in administrative proceedings according to the European legal practice & legislative standards is substantiated by numerous publications of foreign and domestic scientists in administrative proceedings & other types of administrative process. As for now Ukrainian effective legislation had not performed complex transformations as to the legal form of administrative proceedings

and unfortunately its rules and important features stay bound to the previous post-Soviet tradition. In this respect new review of modern approaches explained in European legislative acts and realized in administrative practice would have a possibility to contribute to the development of new conceptual & doctrinal basis of transformation of legal nature of domestic administrative procedures & development of mostly uncodified administrative proceedings.

**Main part.** The main aim of this article is to describe in comparative perspective existing demands as to the legal form of administrative proceedings in European and Ukrainian legislation and administrative practice and to propose new, effective approaches to development of conceptual basis of administrative proceedings transformation in the Ukrainian administrative doctrine and law-enforcement practice. As to the main assignments of this article, it is necessary to draw attention to the following most important aspects: 1) generalization of modern legislative grounds for legal forms of administrative proceeding differentiating in European legislation; 2) description of the main demands, standards, guaranties & presumptions as to positive administrative proceedings & to propose recommendations and conceptual provisions as to complex transformation of administrative proceedings in Ukraine and development of effective administrative legislation. As for the next important aspects for further scientific research, I should note about specifics of administrative procedural documents transformation and normative fixation.

Modern legal forms of procedural activities cannot be bound by state-centered concept, implemented in the most of effective Ukrainian legislative acts, as it lacks demands on legal certainty, reasonable time, responsibility provisions, making it possible to realize administrative capacity of administrative body as well as of other participants in administrative proceedings.

European legislation describes new approach to the competence of administrative bodies as to definition of new types of administrative procedural documents and types of administrative activities defined by the law. Instead for a strict limitation practice, European approach proposed implementation of the principle of a free form, i.e. upon decision of a competent body. Realization of such an approach in Ukraine is rather hard to imagine, as positivist approach to law-thinking demands strict fixation in the law or by-law of concretized types, forma, limits of administrative action. But still, in my opinion, Ukrainian legislation must take steps towards transformation of its administrative proceedings rules towards modern European practice of administrative decision-making.

Generalization of modern legislative grounds for legal forms of administrative proceeding differentiating in European legislation may be effectuated based on complex approach to positive and conflict proceedings in modern European practice. The main forms of administrative procedural documents are differentiated by type into: a notice, an order, a protocol, as well as others defined by the procedural law or code, stating demands as to the language, stylistics of the proceeding.

It should be outlined, that according to the effective European practice *administrative body has a discretionary power to decide upon possible types of administrative procedural documents*. According to the existing rules, administrative body stays bound by general rules of administrative proceedings defined by the law. As to the formal demands to the essence of administrative procedural documents, it should be defined by the effective law in order to specify the necessary type of the administrative document. But Ukrainian practice of administrative regulation of administrative decision-making still stays on previously formed procedural rules as to the main types of administrative procedural documents in conflict administrative proceedings. Such a state cannot contribute to development of trans-border co-operation with administrative bodies of European Union countries in the nearest perspective.

Notice is a new form of administrative procedural decision-making, providing the participants of the administrative proceedings with the necessary information about peculiarities of administrative proceeding. It is not bound by formal demands defined by the law except for the notice on refusal of administrative review or the notice on transmission to the competent body. Estonian Law "On administrative proceedings" does not preview any special demands as to the notices taken by administrative bodies, it showed example of such an open approach to a free form of procedural documents, based on the decision of a competent body. According to Art. 47 of the discussed law, administrative body may define special features of a notice in case of refuse in administrative action and appropriate administrative proceeding initiation. In general, such a type of administrative procedural documents is used for terms prolongation issues (Art. 33), transmission of the administrative case to another competent administrative body (Art. 79) (Аэдмаа, 2005: 94). It should be generalized, that the main aim of the notice as one of the main administrative procedural documents in administrative proceedings is to inform the society, participants about important decisions taken.

Protocol is another important type of administrative procedural documents in administrative proceeding that defines demands as to obligatory fixation of procedural actions. *Protocol in European practice doesn't have obligatory character for any administrative proceeding, except as prescribed by the law*. Although this type of administrative procedural documents is well-known to the Ukrainian administrative procedural practice, although the effective demands as to the form and essence are not the same. According to the demands of Art. 18 of the Estonian law on administrative proceedings, protocol may be written with the purpose to fix the procedural order of an administrative proceeding (Аэдмаа, 2005: 97).

But at the same time the mentioned law has no general obligation to make such a type of document in every administrative proceeding, so administrative bodies have a certain type of administrative discretion. Among the most wide-spread types of administrative protocols in administrative proceedings one should also mention public concern and initiative of a participant of administrative proceeding about protocol-based fixation of the administrative proceeding. Another example may constitute a claim submission by any participant of the administrative proceeding and need to submit proposals, explanations to an administrative body. And only in very rare cases, obligation to

make a protocol of administrative proceeding is directly imposed on administrative body by the effective law. In my opinion, such an approach shows means of significant procedural economy & providing protocol-based fixation only in certain cases.

Administrative body possesses *the right to refuse protocol-based fixation* and may take opposite decision and inform it to the participant of administrative proceeding. As mostly it may result into additional administrative expenditures, so such administrative expenditures must be substantiated in case of their payment by public body. Such an example is a well-grounded claim of a participant to administrative proceeding, but if a claimer asks to make a protocol-based fixation because only of his personal interest, i.e. to have a copy of the proceeding in written form, administrative body has the power to refuse such a claim and not to use such a form of administrative proceeding fixation.

It should be also mentioned, that *the administrative body is empowered at his own cost & decision to start protocol-based fixation*. Such a decision does not impose any additional obligations on the participants of administrative proceeding, so administrative body only makes a notice about it and is not obliged to motivate such a decision. In case of participation of experts, witness, oral explanations submission to administrative body, it is necessary to use protocol-based fixation, as it concerns due process and testimony fixation.

As to the essence of the protocol according to modern European approach, administrative body is entitled to mention time, place of procedural action, its beginning and final point, official names of administrative proceeding participants, names, surnames for physical persons, translators, experts, witness, and to substantiate legal grounds in case of legal representation. The aim of the proceeding should be clearly defined and formulated in the protocol, it is advisable to underline the kind of administrative action to be performed & fixed in the protocol of administrative proceeding. It should also fix any claims, proposals of administrative proceeding participants during hearing the case, as well as explanations of all another participants of administrative proceeding in a form of generalizations, and not as word-by-word details. Protocol must be signed by a person, who made it, and not obligatory – by participant of administrative proceeding, but preferably to provide their signatures to avoid in future any disputes about protocol's provisions. These rules may be taken into consideration for further reform of administrative procedural legislation in Ukraine, as it proposes effective methods for reduction of administrative expenditures connected with full protocol-based fixation of administrative proceedings.

Description of the main demands, standards, guaranties & presumptions as to positive administrative proceedings may be performed according to the legislative demands stated in effective legislation of the leading European countries. The main requirements to administrative proceedings vary upon the type of administrative proceeding and may be classified as to the essence and goal of the proceeding.

Administrative procedures can be described as a general procedural order of administrative cases hearing, prescribed by the code or special law, defining different stages and administrative procedural documents demands. Positive administrative proceedings may be also differentiated according to the goal of administrative decision-making, and in such an aspect to be specified relating to the order of initiative of a private person as to hearing of an administrative case.

Judicial administrative procedures have strict procedural rules and guaranties, realized by administrative court, not by administrative body, judicial procedural rules and guaranties are defined according to the national standards of administrative justice and cannot be reviewed without the parliament's concern. Among modern special features of judicial administrative proceedings may be underlined such important procedural principles as equality of arms, reasonable time, implemented from court practice of the European court of human rights.

Administrative proceedings on petitions constitute a separate type of administrative proceedings that prescribes general order for claims, petitions submission, in several European countries these proceedings are codified together with administrative procedures, but with special acknowledgements as to the form and order of administrative decision-making.

Amendment and, in fact, re-structuring of the Code on administrative offences of Ukraine should result into new classification of objects of administrative legal protection, that would, finally, lead Ukrainian practice of administrative sanctions application to a new democratic model, protecting a person, not a state, above all. Administrative conflict proceedings need significant review of the mechanisms applied, the powers realized, their limits and possibilities of review according to the concept of good administration, I mean, to provide at site implementation of the mentioned concept in administrative procedures and conflict proceedings.

And finally, to propose recommendations and conceptual provisions as to complex transformation of administrative proceedings in Ukraine and development of effective administrative legislation, it is necessary to generalize, that only complex, integrative approach may form modern conceptual basis for reform of administrative proceedings in Ukraine.

Democratization of administrative regulation in Ukraine had partial impact, as had been introduced only in the spheres non-influenced by powerful oligarch structures, as the formers do not need any transformations and development except for their own business interests (Авер'янов, 2005: 52).

Another negative feature of modern Ukrainian practice in realization of administrative positive proceedings is *lack of implementation of European principles of administrative law, common to the leading European countries*, that also has strong negative effect of citizen's rights realization. For example, right to be heard, right to review any administrative act are a rare doctrinal example, but not a legal framework necessary element, that needs further strengthening in Ukraine.

The same is true for implementation of *modern European standards of public administration activity* that is a necessary source for real transformation of administrative proceedings in Ukraine. Such amendments should take place at the level of the Constitution of Ukraine and substantive Laws of Ukraine “On the Cabinet of Ministers of Ukraine”, “On central executive authorities”, “On civil service” etc.

I would suggest to develop legislative provisions, covering common features of administrative proceeding both of conflict and non-conflict nature, as it is important to introduce a new kind of administrative proceedings, having complex features introduced in European practice, to avoid partial implementation of European standards of public administration activities. It could be named as Law of Ukraine “On general grounds of administrative proceedings”, that would provide legislative grounds for implementation of good administration rules and principles in the Ukrainian legislation, that till this time had not taken any act or by-law on this issue. The structure of such a Law should contain chapters on the definitions used, administrative proceedings types, administrative proceedings rules, administrative proceedings standards and principles applied administrative liability rules, administrative review and administrative execution modes, final provisions.

General legislative framework of administrative regulation should transform according to the introduced rules of the above-mentioned law according to the National Strategy and National Plan of administrative reform, developed by the Cabinet of Ministers of Ukraine, differentiating independent steps of such reforms and sharply concretizing the effects, results of such activities, their contribution and correlation with other actions of the Government and central administrative bodies.

Codified acts of administrative legislation of Ukraine should take first positions in the proposed National Strategy and National Plan of administrative reform, as they have prior influence on realization of administrative relations, protection of public interests. Among them I should admit drafting *Administrative procedural code of Ukraine* as a necessary complex legal normative act, defining not only general, but all necessary legal conditions, stages of administrative procedures, and administrative decisions to be taken by administrative bodies, that would make it possible to obtain a desired effective administrative acts during reasonable time and under effective external control of civil society.

**Conclusions.** The considered approaches to the administrative proceedings main types in the European countries and in Ukraine made it possible to propose general and specific recommendations as to development of perspective legislative law-making practice and to differentiate administrative proceedings not only within the codified legislative acts, but to provide complex, integrative review of the essence, main types of administrative proceedings, that would have chance to make domestic administrative legislation compatible with European standards rules.

Only a small part of administrative procedural documents in Ukraine partially correspond to the deemed criteria of the effective European legislation, as till this time administrative procedures had not received regulation by a general codified act, but by numerous by-laws, building strong administrative barriers to realization of individual’s rights in administrative proceedings.

Administrative reform in Ukraine had led to development of certain types of administrative proceedings, defined in the main codified acts, such as: draft Administrative procedure code, Code on administrative offences of Ukraine, Code of administrative adjudication of Ukraine, Law of Ukraine “On citizen’s applications”, Law of Ukraine “On the grounds of public health protection”, Law of Ukraine “On civil service” and a variety of others, that still have strong impact of a former Soviet legal tradition, having strong state-centered nature, not taking into consideration real needs of private persons and citizens.

#### Bibliography:

1. Аэдмаа А., Лопман Э., Паррест Н., Пилвинг И., Вэне Э. Руководство по административному производству. Тарту : Издательство Тартуского университета. 2005. 630 с.
2. Адміністративне право України. Академічний курс: Підруч. : У 2 т. : Т. 2 Особлива частина / Ред. колегія: В.Б. Авер'янов (голова) та ін. Київ : Юридична думка, 2005. 624 с.
3. Авер'янов В.Б. Національна доповідь «Соціально-економічний стан України: наслідки для народу та держави». Підрозділ 5.5. Політичні, соціальні та гуманітарні аспекти становлення нової культури управління. Новий курс: реформи в Україні. 2010–2015 : Національна доповідь за заг. ред. В.М. Гейця. Київ : НВЦНБУВ, 2010. 232 с.
4. Безверхнюк Т.М. Європейські стандарти врядування на регіональному рівні : монографія. Національна академія держ. управління при Президентові України, Одеський регіональний ін-т держ. управління. Одеса : Видавництво ОРІДУ НАДУ, 2008. 326 с.
5. Коліушко І.Б. Виконавча влада та проблеми адміністративної реформи в Україні. Ін-т держави і права ім. В.М. Корецького НАН України, Центр політико-прав. реформ. Київ : Факт, 2002. 259 с.
6. Пухтецька А.А. Про зміст і спрямованість принципів адміністративного права. *Адміністративне право і процес*. 2014. №3 (9). С. 73–86.
7. Европейский суд по правам человека. Избранные решения. Т. 1. М. : Изд-во «Норма», 2000. С. 396.
8. Шаповал В.М. Виконавча влада в розвинутих країнах (конституційно-правовий аспект) : навч. посіб. Українська академія держ. управління при Президентові України. Київ : Вид-во УАДУ, 1996. 60 с.

#### References:

1. Aedmaa A., Lopman E. Parrest N., Pilving Y., Vene E. (2005) *Rukovodstvo po administrativnomu proizvodstvu* [Manual on administrative proceedings]. Tarty: Izdatelstvo Tarysskogo universiteta. 630 p. [In Russian].
2. Averianov V. (2005) *Administrativne pravo Ukrainy*. [Administrative law of Ukraine]. Akademichny kyrs. Pidruchnyk u dvoh tomah. Osoblyva chastyna. Kyiv: Yurydychna doumka. 624 p. [In Ukrainian].



3. Averianov V. (2010) Natsionalna dopovid "Socialno-economicchnyi stan Ukrainy: naslidky dlya narody ta derzhavy". [National Report "Social -&- economic conditions of Ukraine: consequences for the people and the state"] Pidrozdil 5.5. Politychni, socialni ta humanitarni aspekty stanovlennya novoyi culture upravlinnya. Novyi kurs: reform v Ukraini. 2010-2015: Natsionalna dopovid za zagalnoyu red. V.M. Heitsya. Kyiv: NVTsNBUV. 232 p. [In Ukrainian].
4. Bezverhniuk T.M. (2008) Evropeiskie standarty uryadouvannya na rehionalnomy rivni [European standards of governance at regional level]: monografia. Natsionalna akademiya derzhavnogo upravlinnya pri Presidentovi Ukrainy, Odesskyi rehionalnyi instytut derzhavnogo upravlinnya. Odessa: Vydavnytstvo ORIDU NADU. 326 p. [In Ukrainian].
5. Koliushko I.B. (2002) Vykonavcha vlada ta problemy administrativnoyi reformy v Ukraini [Executive power and the issues of administrative reform in Ukraine]. Instytut derzhavy i prava imeni V.M. Koretskoho NAN Ukrainy. Kyiv: Fakt. 259 p. [In Ukrainian].
6. Puhtetska A.A. (2014) Pro zmist i spryamovanist pryntsyypiv administrativnoho prava [On the essence and orientation of administrative law principles]. Administrativne pravo i protses. # 3 (9). P. 73-86. [In Ukrainian].
7. Evropeyskyi sud po pravam cheloveka (2000). [European court of human rights] Izbrannyye resheniya. Tom 1. Moskva: Izdatelstvo Norma. 568 p. [In Russian].
8. Shapoval V.M. (1996) Vykonavch vlada v rozvynenykh krainah (konstitutsiyno-pravovyi aspekt) [Executive power in developing countries (constitutional legal aspect)]. Navchalnyi posibnyk. Ukrainska akademiya derzhavnogo upravlinnya pri Presidentovi Ukrainy. Kyiv. Izdatelstvo UADU. 60 p. [In Ukrainian].