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Albania Investment Council

Improving Transparency and Investment Climate

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

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This working document was prepared by the experts of the Secretariat of the Investment Council in the frame of Meeting IV of the Investment Council (2 March 2016), Mr Elvis Zerva, Legal Expert and Ms Ermelinda Xhaja, Economic Expert, under the direction of the Head of Secretariat, Ms Diana Leka (Angoni). Supported in the organisation of meetings with partners and language editing of the material, Ms Elisa Lula, Administrative and Communications Officer of the Secretariat. We thank the business associations (Amcham, FIAA, the Trade Union of Albania, Confindustria Albania, Albanian Association of Banks), public administration institutions (Central Inspectorate, Ministry of Justice, Tirana Administrative Court, Administrative Court of Appeal, Public Procurement Commission, State Advocate's Office, National Registration Centre and the General Customs Directorate), independent experts, businesses and law firms that contributed to the analysis and discussions with valuable views on the topic. The views expressed herein are those of the authors and do not necessarily reflect those of the Investment Council or the EBRD.

ABBREVIATIONS

ACO	Albanian Copyright Office
CI	Central Inspectorate
DCM	Decision of the Council of Ministers
GDC	General Directorate of Customs
GDM	General Directorate of Metrology
GDT	General Directorate of Taxation
NAMMP	National Agency of Medicine and Medical Products
NANR	National Agency of Natural Resources
NFA	National Food Authority
NRC	National Registration Centre
NTPI	National Territory Protection Inspectorate
PPC	Public Procurement Commission
RDT	Regional Directorates of Taxation
RPO	Radiation Protection Office
SIE	State Inspectorate of Education
SIEF	State Inspectorate of Environment and Forests
SILSS	State Inspectorate of Labour and Social Services
SIH	State Inspectorate of Healthcare
TAD	Tax Appeal Directorate
VAT	Value Added Tax

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CONTENTS

CONTEXT

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 domestic and foreign businesses when it comes to making further investments. In many of the meetings held with businesses and in the surveys conducted by the Secretariat, businesses have emphasised that: "*budgetary institutions and their relevant staff often ignore or do not know the laws and rules pertaining to their operations and take decisions that are arbitrary and incompliant with effective laws.*"

This paper aims to identify the main problems related to administrative complaints/appeals, while focusing on the profile of disputes that occur more frequently between businesses and public administration institutions and the mechanism that parties have at their disposal to resolve disputes.

The identification of institutions with the most frequent disputes with businesses started with data received from administrative courts during 2014 and 2015. Institutions pertaining to spheres such as taxation, customs, and inspectorates, the decisions of which have a considerable financial impact for businesses[1], result in having the highest number of lawsuits[2] filed by businesses at all levels of the Administrative Courts during 2014 and 2015.

Meanwhile, administrative courts do not possess capacities to review cases within legal deadlines objectively. Considering the high number of cases filed in such courts and the limited number of judges (the backlog in the Administrative Court of Appeals alone is about 12,000 cases, pending adjudication by 7 judges), it is clear there are obvious problems. Delays also result from the broad range of administrative disputes adjudicated in these courts, where about 50% of the administrative cases are not directly related to business.

Therefore, a quick, efficient and fair resolution of such disputes remains indispensable for encouraging investments in the country. This requires the improvement of the country's institutional capacities.

1 *Companies in accordance to the provisions of Law No. 9901, dated 14 April 2008 "On Entrepreneurs and Commercial Companies" (as amended).*

2 *Approximately 75% of all lawsuits filed by businesses against the administration regard the abovementioned institutions.*

On the other hand, businesses themselves must make more efforts to enhance their internal capacities with expertise to be informed and fulfil their legal obligations towards institutions.

In the framework of analysing all potential dispute resolution mechanisms between businesses and the administration, the Secretariat also took into account Mediation and National Arbitration as alternative dispute resolution methods. However, they have not been addressed in detail in this paper for as long as also in the practice of EU countries, the administrative disputes continue to be the domain of internal administrative jurisdiction and administrative courts established by law.

This paper is not intended to exhaust all issues related to the administrative appeal but to *analyse those elements that are often pointed out and identified by businesses as needing necessary improvement to facilitate the investment climate in the country*. In this context, we have included some examples of problems related to administrative appeal pertaining to the banking sector and the oil and gas research and development sector.

METHODOLOGY

1. LEGISLATION RESEARCH

To make a realistic analysis of the subject of this paper, we preliminarily processed the concerns expressed by businesses and recorded by the Secretariat through surveys conducted during 2015. Moreover, we consulted the Administrative Procedure Code (as updated in October 2015), the New Administrative Procedure Code, and substantive laws regulating the organisation and functioning of institutions pertaining to the areas of taxation, customs, inspections, and public procurement, as well as the secondary legislation, which stipulates concrete aspects of administrative appeal. Furthermore, we made a comparative view of legislations and practices of different countries (Kosovo, Macedonia, Lithuania) regarding the models applied to review administrative appeals.

2. INDIVIDUAL MEETINGS

During January-February 2016, the Secretariat organised about 40 individual meetings and group meetings with experts, representatives of legal offices, businesses, chambers of commerce, heads of administrative courts and public institutions, and the results of the meetings have been analysed in this paper. All findings and recommendations have been preliminarily consolidated with all above-mentioned stakeholders to deliver, for as much as possible, all perspectives of those stakeholders. This paper also includes some comments, findings, and recommendations submitted in writing to the Secretariat of the Investment Council by the American Chamber of Commerce and the Albanian Commercial Union Association regarding administrative appeal issues.

3. DATA

For this paper, the Secretariat also analysed data on cases filed by businesses to administrative courts, intending to have a profile of institutions to address and make the relevant analysis. The Ministry of Justice and the Tirana Administrative Court provided data on administrative cases involving businesses and the Public Administration from 2014 -2015. Moreover, we received statistical data from business surveys conducted by CI, GDC, NRC, PPC, etc.

ADMINISTRATIVE APPEAL

1. MEANING OF ADMINISTRATIVE APPEAL[3]

Dispute resolution between business and administration is carried out in 2 stages of administrative review[4], internal administrative review[5] and administrative judicial review[6].

Internal administrative review may be pursued through 1- informal requests addressed to the body responsible for the act or administrative decision, 2- through administrative appeal. An informal request bears the features of a *simple complaint*, which does not include the necessary procedural elements of an administrative appeal, but for the body to carry out the review, it has the same legal effects. That body is obliged to send a reasoned reply to the appellant within 1 month from the submission of the request[7].

Whereas ***administrative appeal is a more comprehensive legal tool used to request the abrogation or the alteration of an administrative act, as it requires following a special review procedure. Formally speaking, this type of appeal is almost identical to the judicial review of an act triggered by a lawsuit in the relevant court***.

The appeal against an administrative act is initially addressed to the body issuing the act /decision or the one that has refused to do so, as well as to the superior body of the body in question[8]. ***In principle, the interested parties may address the court only after exhausting the administrative recourse.***

3 *The administrative appeal is a legal tool of entities, through which they may request revoking, abrogation, or change of the administrative act.*

4 *The principle of internal and judicial review, sanctioned by Article 18 of the Administrative Procedure Code, which states: In order to protect the constitutional and legal rights of the individuals, the administrative activity shall be subject to: a) internal administrative review in accordance with the provisions of this Code concerning the administrative appeal; and b) judicial review in compliance with the provisions of the Civil Procedure Code (Administrative Courts). The principle of internal review is also known as administrative recourse.*

5 *Internal review of the administrative act*

6 *The judicial review of the administrative activity is carried out by Administrative Courts pursuant to and for the purpose of Law Nr. 49/2012 "On the Organisation and Functioning of Administrative Courts and Resolution of Administrative Disputes" and the Administrative Procedure Code (as updated in October 2012).*

7 *Article 136 of the Administrative procedure Code (as updated in October 2012).*

8 *Article 137 of the Administrative Procedure Code (as updated in October 2012).*

Entities are obliged to administratively pursuit an administrative appeal before addressing it to courts, only if the substantive law regulating the respective administrative activity explicitly states that *against the administrative act, the administrative appeal may be exercised and it clearly determines the concrete administrative body or bodies to which eventually the administrative appeal is addressed, according to the hierarchy*.

Substantive laws also stipulate the concrete modalities on the deadlines, conditions, and procedures to abide by to make the administrative appeal admissible for review on the merits, the review procedures, and the nature of the decision by the administrative body. In the case of institutions analysed for this paper, it can be observed that in every case the relevant laws stipulate *an appealing structure* within the administration to review appeals made by businesses before the parties send the case to court.

2. PRINCIPLES OF INTERNAL ADMINISTRATIVE REVIEW

The Administrative Procedure Code into force stipulates the general mandatory principles to be applied by the public administration and eventually by appealing structures that review administrative appeals of businesses. These principles have been further detailed in the New Administrative Procedure Code[9]. The latter also provides some other additional principles compared to the current Code, setting higher standards of applicable guarantees for the parties during the administrative review.

The basic principles stipulated in the Albanian legislation in this regard are almost identical to the applicable principles of administrations of western countries. *The problem remains in sanctioning them in the applicable substantive laws of certain institutions, their implementation into practice, and making sure the administration endorses their essence*. The analysis made by the Secretariat shows the administration is more inclined to strictly apply the provisions of substantive laws than other legal provisions, including here the principles sanctioned in the Administrative Procedure Code, which is a law approved by qualified majority and is *"more important"* in the context of the hierarchy of legal norms.

For this reason, we deem it necessary to provide a summary of the groups of main principles[10] that are mandatory for the administration in general. Their implementation during the internal review procedure is of particular importance.

a. Open and transparent administration[11]

As a general rule, the activity of the public administration must be transparent and open. Cases must be kept secret or confidential only in special circumstances, such as when national security is affected and alike. An essential element of *the open and transparent administration* is the publication of the activity of the administrative body through the systematic publication of reasoned decisions, especially decisions of appeal

9 *Law No. 44/2015 "Administrative Procedure Code of the Republic of Albania" will enter into force on the 29th of May 2016.*

10 *For the purpose of this paper, reference was made to the document "European Principles for Public Administration"- Sigma Publication No.27*

11 *The principle of openness and transparency of the public administration serve two specific purposes. On the one hand they protect public interest, as they reduce the potential of mismanagement and corruption. On the other hand, they are essential for the protection of individual rights, because they supply reasons for the administrative decision and eventually assist the interested party to effectively exercise the right to appeal. Each entity (read: business) must have effective possibilities at its disposal to appeal an administrative act.*

structures, and the publication of annual performance reports.

b. Credibility and Predictability

There is a series of principles aimed at the credibility and predictability of actions and decisions of the public administration, known as *legal certainty*. The public administration must decide on effective rules and interpretative criteria set by courts without any other consideration. *Administration bodies may only decide on issues for which they have legal authority*.

c. Accountability

Each administration institution must be held accountable for its actions by other administrative, legislative, and legal authorities. No institution should be exempted from an investigation from other institutions, e.g., a higher administrative body, courts, etc. Accountability is an instrument that shows the degree of compliance with the principles of lawfulness, openness, transparency, impartiality, and equality before the law. Accountability is essential to ensure values such as efficiency, effectiveness, credibility, and predictability of the public administration.

d. Efficiency and effectiveness

Efficiency is, in essence, a managerial value related to keeping an adequate ratio between resources and results achieved by the administration. Due to fiscal limitations, many states are increasingly studying the efficient and effective performance of the public administrations when it comes to providing public services for society. Effectiveness is about ensuring the performance of the public administration is successful in achieving the goals and providing solutions to public problems, as determined by laws and by the government. Effectiveness requires analysing and evaluating public policies in place and assessing how the public administration and civil servants implement them. In Albania, where human and budgetary resources are limited, the efficiency and effectiveness of the administration are not just necessary, they are indispensable.

e. Fairness and impartiality

When exercising its functions, the public administration protects in every case the public interest as well as the constitutional and legal rights and interests of private entities. When discharging its functions, it must provide fair and impartial treatment for all entities it operates with. On the grounds of this principle, it is essential for the administration to apply *the same standards for businesses and guarantee that its decisions and stances are the same, for as much as possible, for similar administrative cases.*

ANALYSIS AND FINDINGS

The groups of principles identified above are all important when it comes to being applied in all procedures followed by public administration bodies, *but they are of an essential and special nature in the case of administrative structures established to review administrative appeals of businesses in the areas of taxation, customs, inspection, and public procurement.*

These appeal structures[12] are the ones who make the final decisions, which lead to legal and financial consequences for businesses. Based on the meetings held and on the issues raised in the surveys of the Secretariat, we decided to focus the analysis on 3 main principles as follows:

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

None of these principles was analysed separately from the others and from the institutional and functional context of appeal structures established to review administrative appeals in Albania. As mentioned above, our analysis started with identifying the number of administrative court cases (recorded, reviewed, and backlog) in which one of the parties is a business entity.

Table 1. Number of cases between businesses and public institutions in Administrative Courts

	2014	2015
First Instance Administrative Courts (total)	1250	2744
Administrative Court of Appeal (total)	2820	1638
High Court (recorded)	228	322

Source: Ministry of Justice

First Instance Administrative Courts, as shown in *Table 1*, and especially the one in Tirana, have a large caseload of administrative cases related to businesses for 2014 and 2015.

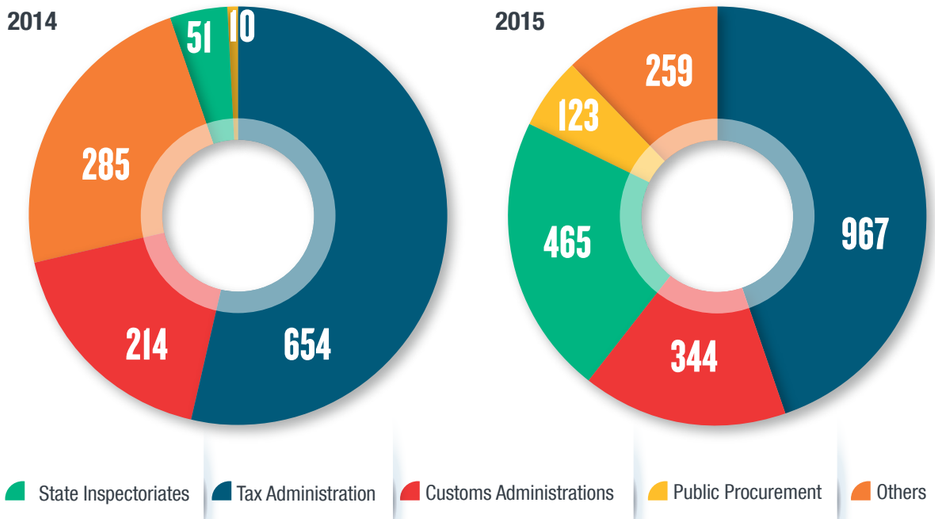
12 *They are named differently depending on the institution: 1) in the taxation sphere, appeals are reviewed by the Tax Appeal Directorate, 2) in the customs sphere, appeals are reviewed by the General Director of Customs, 3) in the sphere of inspections, appeals are reviewed by Appeal Commissions established within each inspectorate, 4) in the procurement sphere, appeals are reviewed in the last stage by the Public Procurement Commission.*

In the meantime, these courts report having limited human capacities for adjudication since their scope of work includes all types of administrative disputes. Business-related cases comprise only 50% of the caseload of these courts, and the Administrative Court of Appeal has a backlog of about 12,000[13] cases to be reviewed by only 7 judges.

Figures 1, 2, and 3 show in detail the data regarding the institutions that were most appealed by businesses at all instances of the judiciary during 2014 and 2015

13 *According to official statistics until the end of 2015.*

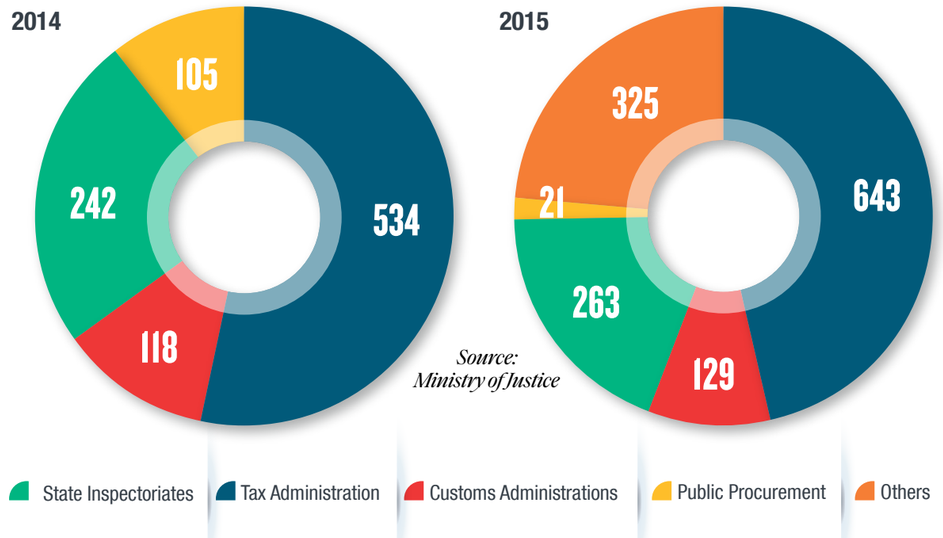
Figure 1. **Administrative lawsuits of businesses against public administration institutions reviewed by the first instance administrative courts**



Source: Ministry of Justice

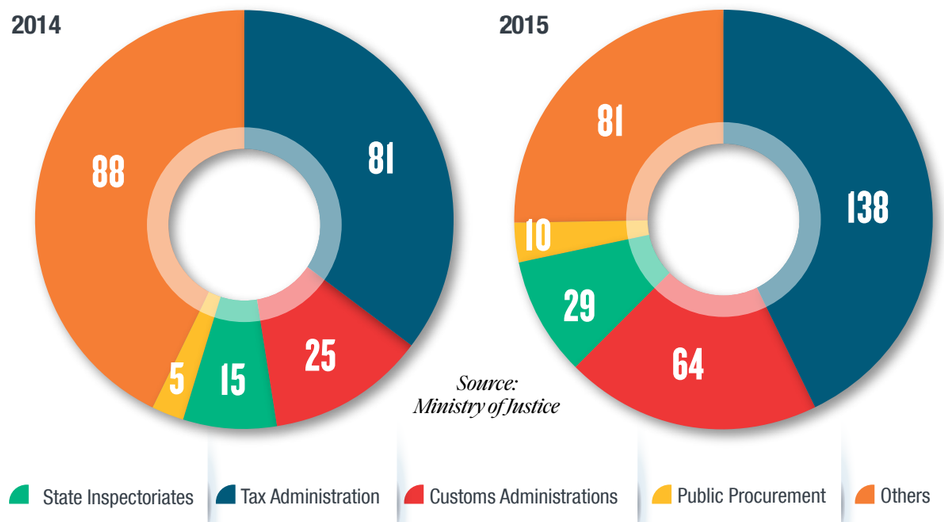
Data show that approximately 50% of lawsuits filed by businesses to the First Instance Administrative Courts regard the tax administration, followed by state inspectorates, customs administration, and public procurement institutions (PPA and PPC). The same trend applies to other instances of administrative courts, as shown in Figure 2 and Figure 3, which include data about 2014 and 2015.

Figure 2. **Administrative lawsuits of businesses against public administration institutions in the administrative court of appeals**



Source: Ministry of Justice

Figure 3. **Administrative lawsuits of businesses against public administration institutions filed to the high court**



Source: Ministry of Justice

The data above show that administrative courts cannot review the cases within legal deadlines, considering the high number of cases filed in such courts, the limited number of judges, and the fact that approximately 50% of cases are not directly related to businesses. It has been observed that for the sake of meeting the speedy trial deadlines, the *quality of decisions* is put into question, with a visible prevalence of decisions in favour of public administration institutions at an average level of 70%.

The data above, along with the profile of business concerns identified during meetings and surveys of the Secretariat during September and November 2015, comprise the grounds for framing the analysis on dispute resolution in the below institutions:

1. **Tax Appeal Directorate**
2. **General Directorate of Customs**
3. **Appeal Commissions (Inspectorates)**
4. **Public Procurement Commission**

On the other hand, data from these institutions show there are only a few cases when the appeals of businesses have been accepted. In tangible figures, only in about 4% of cases by TAD, about 2% of cases by Customs, and from 0% up to 40% by state inspectorates. Meanwhile, the PPC provides a different landscape, as decisions in favour of businesses against the number of cases, were about 40% during 2014 and 50% during 2015. These institutions also represent the most typical models within the administration when it comes to addressing administrative appeals.

1. ADMINISTRATIVE APPEALS REVIEW BY INSTITUTIONS

Below, you may find some specific elements for each complaint/appeal structure taken into account for this paper. The Secretariat focused on how these elements are stipulated in substantive laws:

1. **Subordination of the relevant complaint/appeal structure**
2. **Principles of administrative review**
3. **Access to administrative appeal procedures**
4. **Administrative appeal deadlines**
5. **How administrative appeals are reviewed – decision-making**
6. **Transparency of the administrative review process and decision-making**

a. Tax Appeal Directorate (TAD)

Appeal procedures against acts of the tax administration are stipulated in articles 106-110 of Law no.9920, dated 19 May 2008 "On Tax Procedures in the Republic of Albania" (as amended) (Law No.9920).

Taxpayers may appeal against any notice of assessment, decision affecting their tax liabilities, request for reimbursement or tax facilitation, and any particular executive tax act regarding the taxpayer. *The appeal must be in writing.*

Diagram 1. Functioning of TAD

STRUCTURE	• Directorate part of the Tax Administration • Director appointed by the Minister of Finance
PRINCIPLES	• Right to be heard and produce evidence; Burden of proof is of the taxpayer; • Decision reasoned by TAD
ACCESS	• To fully p repay the amount of the appealed tax liability (excluding fines), or • To place a bank guarantee for a minimum of 6 months for the amount of the liability
DEADLINES	• 30 days to submit the appeal • 60 days for TAD, which can be postponed by 30 days in special cases
DECISION	• The decision may be appealed at the First Instance AdministrativeCourt, within 30 days
TRANSPARENCY	• Stances must be posted in the GDT webpage. Information on the procedures is provided in the website.

b. Public Procurement Commission (PPC)

The appeal procedures to the Public Procurement Commission are stipulated by the following:

1. Law no. 9643, dated 20 November 2006, "On Public Procurement" (as amended)
2. Law no. 125/2013 "On Concessions and Public-Private Partnership"
3. Law no. 9874, dated 14 February 2008 "On Public Auctions" (as amended)
4. DCM no. 184, dated 17 March 2010, as amended, on the approval of the Rules of Procedure "On the organisation and functioning of the Public Procurement Commission "

Diagram 2. Functioning of PPC

STRUCTURE	• PPC is a public juridical person subordinated to the Council of Ministers. It is composed of 5 members, the Chair, Deputy Chair, and three members appointed by set mandates.
PRINCIPLES	• The appeal suspends the procedure of the Contracting Authority. PPC is a specific quasi-judicial state body. Transparency, a basic principle.
ACCESS	• Payment of 0.5% of the total estimated procurement value (VAT excludet) • Payment of 10% of the bid security or 2% of the amount of the concessionary contract; • 0.5% of the initial auction estimate
DEADLINES	• 5 days, 7 days, and 10 days in accordance with the procurement model. PPC must take a decision within 7 days.
DECISION	• Decisions are approved by majority of votes. They are binding by law. They may be appealed to the First Instance Administrative Court
TRANSPARENCY	• Info rmation, decisions, appeal forms, annual reports are posted in the PPC webpage

e. General Directorate of Customs (GDC)

Procedures of appeal against acts of the customs administration are stipulated in article 289 of law no. 8449, dated 27 January 1999, "Customs Code of the Republic of Albania". This provision will be effective until the 1st of June 2017, when the provisions of the New Customs Code, approved by law no. 102/2014, dated 31 July 2014, enter into force. Entities may submit administrative appeals against any decision of customs authorities related to a liability or customs sanction.

Diagram 3. Administrative appeal to GDC

STRUCTURE	• It has no dedicated structure. The appeal procedure is reviewed by the Legal Directorate and approved by the General Director
PRINCIPLES	• The Customs Code does not stipulate specific appeal review principles. The appeal does not suspend the Administrative act
ACCESS	• The entity must prepay 100% of the customs liability. Prepay 40% (100% in the event of excise) of the fine determined in the decision of the customs authority
DEADLINES	• 5 days to appeal; 30 days in the event of excise. GDC must give a decision within 30 days
DECISION	• The decision may be appealed within 30 days to the First Instance Administrative Court
TRANSPARENCY	• The Customs Code doesn't specify the specific principles on appeals review

f. State Inspectorates

The basic law related to inspections is law no. 10433, dated 16 June 2011 "On Inspection in the Republic of Albania." This law stipulates the main principles of inspection, while the procedural aspects of administrative appeal are stipulated by the relevant specific DCMs that regulate the organisation and functioning of specific inspectorates.

Diagram 4. **Administrative appeal to State Inspectorates**

STRUCTURE	• It has no dedicated structure.Thereis a collegial appeal unit or troop established within the state inspectorate
PRINCIPLES	• In accordance with Provisions of the Administrative Procedure Code.
ACCESS	• No specific conditions
DEADLINES	• Entities must apeal within 30 days • The Inspectorate must review the appeal within 30 days
DECISION	• Within 30 days from the decision, to appeal to the Court
TRANSPARENCY	• Template appeal form in the webpage of the Central Inspectorate. Thereis no information on appeal procedures in SIH and TISI or other Inspectorates

2. FINDINGS OF THE ANALYSIS

g. Access to administrative appeal procedures is limited

As presented above, the right to administratively appeal to a superior complaint/appeal body is formally and legally guaranteed, as it is stipulated in all laws applied by the above-mentioned institutions.[14]

The analysis shows that the rules of administrative appeal against administrative acts are in general organised and are easily identifiable by businesses through simple research of the content of laws. Regardless of the differences among them and their wording, the laws reflect the basic principles used as grounds for reviewing administrative appeals.

Some laws explicitly limit the right to the effective exercise of administrative appeal through stipulation of *some financial preconditions to be fulfilled by the businesses.* This is especially evident for laws applied by the fiscal administration (taxation and customs), which, according to official statistics and compared to other intuitions analysed in this paper, have the highest number of administrative appeals to their relevant appeal structures and appeals to administrative courts.

a. Article 107[15] of law no. 9920, dated 19 May 2008 "On Tax Procedures" (as amended) stipulates that the appeal of taxpayers is taken into consideration only in the event the taxpayer meets one of the following conditions:
   - » pays the tax liability object of the appeal, or;
   - » submits a banking document certifying the bank guarantee for not less than 6 months for the amount of the liability.

In the absence of fulfilment of one of the above conditions, Tax Appeal Directorate has the right to *refuse* to review the appeal and not to review it on the merits, even though the taxpayer may have met all other procedural conditions and

14 The right to appeal is regulated by the following provisions:
Administrative appeals in the sphere of tax procedures: Articles 38 and 106 ff of Chapter III of Law No.9920, dated 19.05.2008, "On Tax Procedures in the Republic of Albania" (as amended)
Administrative appeals in the customs sphere: Article 289 of Law No.8449, dated 27.01.1999, "Customs Code of the Republic of Albania". This provision is currently into force and will remain as such until the 1st of June 2017, when the new provisions of the New Customs Code, approved by Law No. 102/2014, dated 31.07.2014, enter into force.
Administrative appeals in the sphere of inspections: Article 51 of Law no.10433, dated 16.06.2011, "On Inspection in the Republic of Albania"; the concrete provisions of the relevant DCMs regulating the organisation and functioning of the relevant inspectorates as well as the provisions of substantive laws applied by each inspectorate.
Administrative appeals in the sphere of public procurement: Article 63 ff of Law no. 9643, dated 20.11.2006, "On Public Procurement" (as amended)

15 1. The taxpayer seeking to appeal, in accordance with point 1 of Article 106 of this law, must, along with the appeal, pay the full amount of the tax liability or place a bank guarantee for a minimum of 6 months, but not less than the deadline according to which the decision becomes of a final form for the full amount of the tax liability, determined in the notice of assessment of the tax administration.
2. The payable amount or the amount placed as bank guarantee, in accordance with point 1 of this article, shall exclude the fines included in the appealed tax assessment.
3. The appeal shall be reviewed only in the event the taxpayer pays the tax liability that is object of appeal, or produces a banking document that certifies the placement of the guarantee, in accordance with the provisions of points 1 and 2 of this article.
4. Administrative acts issued by the tax administration, which are not appealed administratively, may not be appealed judicially.

those related to the appeal submission deadlines in accordance with the provisions of law no. 9920.

b. Article 289 of law no.8449, dated 27 January 1999, "Customs Code of the Republic of Albania", stipulates that the appellant, before appealing the decision of a customs authority to the General Director of Customs, must cumulatively meet the following conditions:
» pay 100% of the liability determined in the decision of the customs authority.
» pay 40% of the amount of the fine determined in the decision of the customs authority.

c. Article 105 of Law No.61/2012, "On Excise in the Republic of Albania" (as amended) stipulates that the entity submitting an administrative appeal must cumulatively meet the following conditions:
» pay 100% of the excise liability determined in the decision of the customs authority.
» provide a Guarantee[16] on 100% of the amount of the fine specified in the decision of the customs authority.

The Legal Directorate, which is the structure in the General Directorate of Customs to address cases of administrative appeals, reviews them only when the relevant customs authorities confirm the above conditions have been fulfilled. In many cases, this directorate provides advice to businesses to meet the preconditions for submitting administrative appeals.

Interviews conducted with businesses show that: the obligations to prepay liabilities (in the event of tax liabilities) and to prepay the liability plus 40% of the fine imposed (in the event of customs liabilities) are considered to be substantial limitations and non-objective obstacles to the effective exercise of the right to appeal before the administrative body. According to businesses, these conditions (especially the prepayment of the fine in the event of customs re-assessment) are disproportionate and penalising, creating artificial barriers for businesses to appeal arbitrary decisions of the tax and customs administration. This indeed constitutes a significant problem for businesses that wish to appeal administrative decisions.

There is a general perception that the relevant administrations arbitrarily perform *re-assessment of tax or customs liabilities* for the sole purpose of *generating income and meeting* their objectives and budgetary plans by exploiting these legal "opportunities". In this aspect, businesses believe that the provisions of the applicable legislation, especially in the areas of taxation and customs, favour the administration in making arbitrary decisions. Fiscal institutions are *"de facto"* legally superior to businesses since the latter must prepay liabilities before the dispute is essentially reviewed.

Another concern relates to certain entities that are *de facto* bankrupt and cannot prepay their liabilities in accordance with the legal provisions mentioned above. In the absence of fulfilment of such conditions, appeal bodies *"rightfully"* reject administrative appeals.

Following the explanations above, there are two negative aspects:

» The internal review of administrative acts issued by the relevant administrations is not carried out (Notices of Assessment and Customs Liability Notices are not reviewed);
» Entities face limitations in effectively exercising the right to administrative appeal by not having the possibility to produce evidence, reason the violations of the administration, and object to the elements of administrative acts.

The findings above, were already identified by the Secretariat in the Working Document "*Recommendations for Improvements on Tax Inspection: Analysis in the framework of Improving Business Climate in Albania*"[17] drafted in September 2015. The Secretariat believes that such preconditions place businesses in an inferior position and the tax administration in a dominant position.

Regarding administrative appeals submitted to the state inspectorates, the legislation in force does not stipulate any precondition of a financial nature for the appealing entity.

The same situation applies to administrative appeals to the Public Procurement Commission[18]. The paid fee is returned to the appellant to public procurements, auctions, and concessions/PPP, in case the appeal of the entity is accepted at the conclusion of the appeal process. In case the appeal is rejected, the entire amount of the appeal fee is deposited in the State Budget.

b. Administrative appeal to appeal structures – an inefficient process

Our analysis shows that businesses are doubtful about the administrative appeal to appeal structures established within administration institutions. There is no trust between the parties. As a legal tool to oppose acts of the administration in these structures, the administrative appeal is perceived by businesses more like a condition or a mandatory preliminary stage to fulfil to be able to, later on, address administrative courts[19].

This finding is also based on the statistics above regarding the low number of decisions in favour of businesses, especially regarding administrative appeals reviewed by the Tax Appeal Directorate and the General Director of Customs, where the financial impact for businesses is higher. Also, the fact that in *almost* all cases of dispute with these institutions, businesses address the judiciary to resolve administrative disputes is another indicator of the high degree of the businesses' mistrust towards the decisions of these structures. Despite being at a lower degree, the same perception exists for decisions of the Appeal Commissions, established as appeal structures within certain state inspectorates. During 2015, there was an increase of appeals to administrative courts against decisions of such structures.

The decisions of the above-mentioned institutions are often subject to prejudice due to the way they are established, organised, and function as

16 *The guarantee on 100% of the amount of the fine, pursuant to Order No.4, dated 14.04.2015, "On rejection of guarantees issued by insurance companies for the purpose of administrative recourse in the framework of Law No.61/2012" (as amended) is accepted only when issued by Second-Tier Banks. Moreover, this guarantee must be in compliance with the format approved in accordance with Article 76 and Annex 23 of DCM No.612 dated 05.09.2012, "On applicable provisions of the law "On Excise" (as amended).*

17 *https://www.investment.com.al/sq/events/mbledhja-nr-2-5-tetor-2015-1600-2/*

18 *What is specific here is that the administrative appeal to the Public procurement Commission is subject to fees. Concretely, paragraph 10 of Article 63 of Law No. 9643, dated 20.11.2006, "On Public Procurement" (as amended) stipulates that "each appeal to the Public procurement Commission shall be made against payment. The rules and fees for the payment shall be determined by Decision of the Council of Ministers". The applicable DCMs for this purpose are as follows:*
Regarding procurement procedures, a fee is to be paid in accordance with DCM No.261, dated 17.03.2010, which is equal to 0.5% of the amount of the total estimated value (VAT excluded);
Regarding concessions/ppp procedures, a fee is to be paid in accordance with DCM No. 401, dated 13.05.2015, which is equal to 10 % of the bid security, when bid security is required, or 2% of the amount envisaged in the concessionary contract.
Regarding auction procedures, a fee is to be paid in accordance with DCM No.56, dated 19.01.2011, equal to 0.5 % of the initial auction estimate.

19 *In principle, the interested parties may address the court only after exhausting the administrative recourse (Article 137/3 of the Administrative Procedure Code (as updated in October 2012)*

stipulated by the law and due to the *"conflict of interest"* elements of collegial bodies dealing with the review of appeals. To make it more tangible, we analysed two cases below:

> ***Case 1:*** *The Tax Appeal Directorate (TAD) is not perceived as a structure independent from the tax administration and impartial in its decisions. In the majority of cases, the decisions of this directorate are against businesses and in favour of the administration itself.*

According to law no. 9920, dated 19 May 2008, "On Tax Procedures" (as amended), administrative appeals against acts of tax directorates are appealed to the Tax Appeal Directorate (TAD). The law equips TAD also with the competence of reviewing acts of regional directorates by reviewing tax appeals of taxpayers. After the administrative proceeding, it has the right to: a) *uphold the act that is subject to appeal and reject the appeal; b) abrogate /revoke the act that is subject to appeal; c) change the act that is subject to appeal, by partially accepting the appeal*.

TAD is formally[20] envisaged as an independent unit within the administration, but the fact it operates under the structure of the General Directorate of Taxation, and with structure and personnel provided by the General Directorate, raises suspicions on the sovereignty of its decisions on administrative appeals. Moreover, as also previously identified by the Secretariat,[21] the low number of decisions in favour of taxpayers has led for this body to be perceived as an extension of the tax administration rather than an independent body. Furthermore, the role of TAD is put into question by law no. 9920 itself, as it stipulates that: *decisions of TAD are again appealable by the tax administration when the latter does not agree with them*.[22] According to data from the Tirana First Instance Administrative Court, the latter has adjudicated in favour of the tax administration (regional directorates), when they appealed the decision of TAD, in only 1.4% (2014) and 2.4% (2015) of cases.

In essence, the opportunity for appeal that law no. 9920 grants to regional directorates are exploited in 100% of cases by the latter, and it is estimated this is done on purpose; to make it impossible for taxpayers to be refunded on the amount prepaid for the appeal review, in accordance with the provisions of article 110 of law no.9920, this way artificially increasing the costs of businesses and the administration in the form of judicial pursuit of cases.

20 *Paragraph 4 of Article 16: "The appeal directorate shall be an independent unit within the central tax administration". Article 18: "The Tax Appeal Directorate shall be under the composition of the central tax administration an d shall have independent decision-making. The Tax Appeal Director shall be appointed by the Minister of Finance"*

21 *https://www.investment.com.al/sq/events/mbledhja-nr-2-5-tetor-2015-1600-2/*

22 *Paragraph 3 of Article 109: "The tax administration, which issues the administrative decision, may appeal the decision of the tax appeal directorate to the court within 30 days from being informed on the decision". Decision No. 39, dated 30.06.2014, of the Constitutional Court of the Republic of Albania, in a struggling reasoning, rejected the request of the Tirana Court of Appeal to abrogate Article 109/3, as incompatible with the Constitution, reasoning, inter alia, that: The Regional Directorate of Taxation and the Tax Appeal Directorate with the General Directorate of Taxation do not have a relation of hierarchic subordination among them, since the lawmaker hasn't stipulated the main element of administrative hierarchical subordination, namely the element of accountability; the obligation of the Regional Directorate of Taxation to provide information and explain its stances about the inspection activity. In absence of such features, according to the majority, the existence of the Tax Appeal Directorate by law, inter alia, also with the competence of abolishing/ revoking acts of the Regional Directorate of Taxation, is not an expression of hierarchy between these two bodies, but it represents control mechanisms on the exercised of activity of the regional Directorate of taxation in compliance with the law"*

> ***Case 2:*** *In some cases, the inspector issuing the administrative act of the relevant administrative penalty (e.g., a fine) is a member of Appeal Commissions, established as appeal structures within state inspectorates. This is a flagrant case of conflict of interest, which is prohibited by the principles of the Administrative Procedure Code and provisions of law no.10433, dated 16 June 2011, "On Inspection in the Republic of Albania".* An example of this is the Chief Inspector of the ACO, who reviews administrative appeals and takes final decisions in the event of administrative appeals against penalties imposed by him in the first place.

The analysis of the Secretariat and the information collected by experts of the area led to the observation that administrative appeals are not effectively reviewed within appeal structures. This is due to several reasons, which we are presenting below in brief:

1. **There are no proper sessions of internal administrative review or administrative appeal review.** Except for the Tax Appeal Directorate[23] and the Public Procurement Commission[24], which follow a **consolidated** procedure regarding the organisation of meetings for appealed cases, giving the possibility to appealing entities to be heard and to produce evidence and arguments, other appeal structures just carry out a review of written acts submitted by the parties. Complaining to the General Directorate of Customs depends exclusively on the General Director. There is no proper structure for the review of administrative appeals. Concrete cases are reviewed by the Legal Directorate, which deals with administrative appeals, among other things. Only 1.6% of appeals reviewed by the GDC during 2015 are in favour of businesses. The rest of the appeals are almost all appealed in administrative courts. In the meantime, other appeal structures just carry out a review of written acts submitted by the parties in the absence of the latter. This is evident in the event of appeals review in the GDC and Inspectorates.

2. **The competencies stipulated in substantive laws for different institutions leave room for interpretation.** Even when these competencies are well-defined, the appeal structures again decide to go beyond such competences[25]. This is because these appeal structures do not recognise the principles and provisions of the Administrative Procedure Code but are inclined to rigidly apply only the provisions of the substantive law

23 *Paragraph 4 of Article 108 of Law No.9920 stipulates the following: "Taxpayers shall have the right to personally present the case before the tax appeal directorate or to appoint a person to represent them before this directorate".*

24 *Article 19/1 of Law No. 9643, dated 20 November 2006, "On Public Procurement" (as amended) stipulates the following "The Public Procurement Commission shall be the highest body in the area of procurements to review appeals on procurement procedures, in compliance with the requirements of this law. The Public Procurement Commission shall be a collegial body organized as a quasi-court, which, in comparison to all other parallel structures of different institutions, shall have broad competences and rights which adequately guarantee the fulfilment of administrative review principles, in accordance with the principles sanctioned in the Administrative Procedure Code.*

25 *In some cases, TAD also decides on issues that are not called for review by the appealing party, tasking the tax administration to carry out inspections or fiscal visits to re-evaluate the tax liability.*

pertaining to their organisation and functioning.

There are several cases in which the provisions of substantive laws/instructions go against those of the Administrative Procedure Code, which should nevertheless enjoy priority as part of a law with a higher[26] hierarchy compared to simple laws.

3. **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 particular situation is vague, the provision will be interpreted in favour of the other party and not of the State**. This is particularly evident, especially concerning 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 the decision of the Council of Ministers (DCM) no. 953, date 29/12/2014 "On 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 bring about a considerable number of disputes which are later followed in administrative and judicial ways by artificially increasing the workload for the respective administrations. In other cases, the latter presumes *"a priori"* that taxpayers have committed a violation by putting taxpayers in a position where they have to prove that they have not committed any tax violations. The contrary should be the case: the administration should provide evidence and arguments to prove the violation and then the taxpayer should have an obligation to present his counterarguments or evidence. However, different laws, such as Law No. 10433, dated 16.06.2014 "On inspection" have brought some novelties to certain principles of the administrative law provisions that guarantee that inspection administrations provide a highly honest treatment. Concretely, Article 8 *"The principle of the favourable legal provision,"* provides the following: *1. When legal provisions based on which inspection works are vague or contradict each other, the inspector shall act in a way that less affects the object of inspection. 2. When the object of inspection has acted in accordance with a legal requirement that contradicts another legal requirement, its action shall not be considered as breaching the law".*

4. **In practice, a lack of institutional coordination, contradicting instructions, legal vacuums or substantial violations of the principles of law 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 ongoing costs and uncertainty for further investments. Also, practices of requests for the *Authorisation to Acknowledge the Exempted Expenses* submitted by businesses and which the NANR has yet not responded, even to date, have been carried over the years. 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!

5. **Lack of consolidated and unified practices by the administration, further hindered by frequent legal changes.** In the meetings held with businesses, associations, and public institutions, there is a consensus regarding the necessity of unified administration practices, especially 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 acknowledgement 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 the 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 penalise them, for example, the case of fines for the installation of fiscal devices for certain types of businesses which, even though performing transactions through banks, were obliged to be equipped with fiscal devices. Only recently, the TAD published a decision on how to address such cases.

6. Lack of adequate infrastructure to hold sessions to review the administrative appeal.

7. **Lack of sustainable capacities, trained and updated with the legislation, dynamics of its changes, and shaped with the spirit of treating business as a partner.** In almost all the meetings held with the business, a concern was raised regarding the frequent staff turnover in the institutions offering services for the business[27]. They think that this results in a loss of the "institutional memory", the need to conduct training constantly and delays in responding, even regarding simple and already consolidated procedures, which artificially increase the number of disputes between businesses and the administration. There is dissatisfaction regarding the professional skills of the administration and the knowledge/update of legislation, the dynamics of its changes and, at the same time, communication and spirit in treating businesses.

8. **Businesses themselves are not fully knowledgeable on the administrative appeal system against administration acts.** In many cases, they are content with following their problems through simple complaints or direct contact, when the administration responds on delay or does not respond at all, by not following the procedures and deadlines for submitting formal administrative appeals. There is room here

26 *Codes are adopted with qualified majority of 3/5 of members of the Assembly of Albania.*

27 *Examples presented by businesses: IPRO*

for investment from the businesses to increase in-house professional capacities, adequately get to know and respect institutions' procedures regarding the specificities of the administrative appeal and principles outlined in the Administrative Procedure Code.

b. 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.

Concretely, regarding the administrative appeal procedures at DAT, PPC, NRC or Central Inspectorate, there is information in the online designated sections regarding the appeal and actual tools that businesses have at their disposal to appeal the decisions of these institutions.

On the other side, only the PPC has periodically posted its decisions and satisfactory justification about them. These published decisions give way to the administrative unification[28] of the practice in solving similar cases related to public procurement, they provide to entities a complete picture of the stances regarding particular or specific cases and charge the administration with the "burden" of standing up to the interpretations it has provided earlier by limiting excessive discretion.

The PPC also publishes the institution's annual working reports, which contain statistics regarding the number of examined cases, the results of such examination, the number of cases appealed at the court, the manner and deadlines within which problems have been addressed as well as their complete picture. The other institutions leave a lot to be desired regarding the online posting of the decisions. There are cases when they do not even have a website, such as some inspectorates like the Mining Inspectorate.

Regarding the publishing of decisions by TAD, it is found out that TAD does not yet periodically publish its decisions/stances[29]. The published decisions do not clarify the main problems that concern big businesses and impact them (for example, regarding bank loss loan provisions deductible and non-deductible expenditures, etc.) The annual work reports and other instructions of TAD about how the administration structures must address certain cases are only for internal use by the administration and are not made public.

In the absence of a Manual on Tax Procedures, it is becoming more difficult for the business to have an idea regarding the approaches of the tax administration and the latter itself has difficulties in establishing consolidated practices. The absence of unified approaches of the tax administration has been addressed previously by the Secretariat.[30] In the case of the tax administration, the treatment of informal complaints submitted by the businesses and the failure of the tax administration to respond within the general 30-day deadline remains a problem. In most cases, the answers and reasoning related to specific cases about which the business requests final interpretation are unclear and further confuse businesses.

28 Judicial unification is a competence of unified colleges of the Supreme Court only.

29 It results that until 11.02.2015 only 34 decisions are published at https://www.tatime.gov.al/sq al/Sherbimet/Apelimet%20Tatimore/Pages/Vendime.aspx

30 https://www.investment.com.al/sq/events/mbledhja-nr-2-5-tetor-2015-1600-2/

The CI[31], TAD[32] and PPC[33] have posted some standard forms regarding the administrative appeal by providing reasonable assistance to entities regarding the administrative appeal. If, in the case of TAD or Central Inspectorate, the administrative appeal forms are only for orientation purposes, the administrative appeal at the PPC must be carried out in accordance with the Standard Form endorsed for this purpose.

b. Other findings

1. **Unequal position of the businesses in front of the state institutions**
   a. The main concern for the businesses and 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 to that of the administrative body. For example, when the appeals related to the illegality or invalidity of the administrative act/decision of the appeal bodies are sent to the courts, businesses have to confront several institutions simultaneously. The most typical cases are the appeals against the decisions of the Tax Appeal Directorate, the General Directorate of Customs or the Public Procurement Commission, to which is also added the State Advocate Office, by duplicating the functions defending the state interests in a dispute under review. The institutions interviewed by the Secretariat confirm 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.
   b. Also, another reason as to the above pertains to the fact that public administration bodies feel "obliged" to fulfil the recommendations as decided by the Supreme State Audit (SSA), by being, thus, in any case, face to face with the business. 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.
   c. In this way, the administration bodies feel protected by the "*prejudices*", administrative penalties, or criminal charges recommended by the Supreme State Audit, increasing the cost of the business for violations/irregularities committed by the administration itself.
   d. The public administration is not adequately familiar with the institution's role of the State Advocacy Office and its competencies. The public administration does not request from the State Advocacy Office interpretations, professional legal assistance or the unification of stances for several practices, not utilising the capacities of this institution. The State Advocacy Office has, in no case, been

31 Standard inspection form – Appeal for the final decision

32 Tax appeal form

33 Procurement complaint form

engaged by the public administration bodies, even though the latter has the capacities and possibilities to do so in compliance with the provisions of Article 17[34] of Law No. 10018 date 13.11.2008.

Everything mentioned above has caused constant pressure on businesses, courts, and parties involved in accomplishing the actual mission, which is to assist businesses and not punish them.

2. The business is not guaranteed legal certainty and fair treatment. The lack of institutional cooperation - cost to the business

The administration's awareness of treating businesses, especially strategic businesses, has increased according to the contractual provisions. However, gaps in institutional coordination violate essential principles of law, and it is the business to bear often the costs that come with such gaps.

Below there is a concrete case in the hydrocarbon sector, exhausting at the same time many of the problems mentioned above.

a. Investors who operate based on pertinent contracts in petroleum research and development can't be exempted from VAT regarding several expenses incurred by their subcontractors. These expenses are directly related to hydrocarbon operations.

b. For these expenses not to be an object of the 20% VAT, investors/subcontractors would have to apply at the NANR[35] within 30 days from the issuance of the relevant invoice by presenting in advance several explanatory documents (among which the tax invoice which was issued in advance with 0 VAT). The purpose for such application is to be equipped with the pertinent authorisation that certifies the acknowledgement of these expenses for the effects of hydrocarbon operations and, consequently, their exemptions from 20% VAT in accordance with the tax legislation regarding the VAT.

c. The Authorisation issued by the NANR was to be kept by the subcontractors, as evidence for the tax bodies, to prove that the invoices issued by the subcontractors for the expenses incurred are valid because the NANR confirmed the nature of the expense for hydrocarbon operations.

d. It results that several practices carried over from 2012 until the end of 2014 by these subcontractors, who request to be exempted from VAT with regards to their services, have not yet been reviewed by the NANR. Due to this delay, the NANR has neither addressed nor decided on whether to endorse these applications or not. As a result, investors can't enjoy their legal rights regarding VAT exemption for the supplies provided by their subcontractors. In the absence of an administrative act by the NANR, authorising or rejecting the acknowledgement for VAT exemption, these entities are incapable of objecting through judicial ways. On the other side, the legislation, in this case, has not provided for a procedure for the internal administrative appeal. Even in those cases for which until 2015 the NANR has issued the Authorisation within 40-45 days, the tax bodies have again not acknowledged it for businesses, on the pretence that the VAT declaration was made monthly, by forcing their annulment and the issuance of VAT invoices.

e. On the other side, instruction[36] no. 17 dated 12.06.2015 sets forth that: *"the NANR must confirm (issue the Authorisation) for every supply or supplies made, within 30 calendar days from the date of the issuance of the fiscal invoice by its contractor/subcontractor. In case the contractor/subcontractor has not obtained the authorisation from NANR within the 30 days, the supply subject of authorisation will be considered as taxable with VAT, and the contractor/subcontractor should correct the invoice".* This provision contradicts the general principles of law, according to which the silence of the administrative body regarding a request by the entity means the endorsement of that request. **Legal experts, businesses and the Secretariat view that the provision mentioned above is legal nonsense. Moreover, this provision contradicts the principles sanctioned in Article 97[37] of the New Administrative Procedure Code. Regardless of this law's delayed entry into force, it should have been taken automatically into consideration when the Instruction was drafted.**

f. It results that the NANR and entities themselves are also under the pressure of the recommendations of the Supreme State Audit, according to which several authorisations previously issued by the NANR for the VAT exemption are to be revoked. In such cases, the principle of legal certainty is also violated through the revocation of legal rights which were granted earlier to businesses by the Albanian state institutions. When such authorisations are revoked, it results in financial collapse for these businesses and their contractors' and subcontractors' chain due to unusual financial costs related to a) cancellation of invoices; b) their correction by re-issuing them with VAT; c) payment of fines for purposes of carrying out such corrections; d) corrections in the accounting books of respective companies.

34 *Article 17 "Mediation and reconciliation"*
1. The State Advocacy shall mediate for a dispute settlement resolution between central bodies of the public administration and the public entities. The State Advocacy Office shall send the settlement, which the parties have agreed for, to the Minister of Justice and the Minister of Finance. Their endorsement shall be materialized in a joint order and, only upon that order, it shall be made biding for the parties in dispute.
2. The State Advocacy Office shall recommend a dispute settlement resolution between a public administration central or local body and another central or local body, when they so require. There cannot be provided recommendations regarding cases of dispute over competencies.

35 *The National Agency of Natural Resources – a specialized body that monitors and confirms the performance or not of hydrocarbon operations in the research-development stage and their concrete nature. The NANR has not been confined by any binding legal timeframe within which it should have issued these Authorizations.*

36 *Joint instruction of the Minister of Finance and Minister of Energy, issued more than 6 months on delay from the moment of the entry into force of Law No.92/2014 "On Added Value Tax in the Republic of Albania" which resulted in a legal gap of consequence for the entities involved in this specific sector.*

37 *"Article 97 – Assent in silence 1. If the party has requested during the administrative procedure the issuance of a written administrative act and the public body does not inform on its decision within the extended deadline, the request shall be considered as granted and the requested written administrative act as assented in silence [the act of silence] in cases when special laws have so stipulated.*
2. The party shall have the right to request from the public authority, which has not issued the requested administrative act, a written confirmation that its request is considered approved pursuant to point 1 of this Article. The confirmation shall contain the text of the request, the date of its submission and the fact that the public body did not inform on its decision within the deadline set forth in accordance with point 1 of this Article.
3. If the authority does not issue a confirmation pursuant to point 2 of this Article within 7 days from the date of the filing of the request of the party pursuant to point 2 of this Article, or, at the same time, does not issue the requested administrative act, the party may file a lawsuit at the competent administrative court to specify the rights and obligations between the plaintiff and the public body."

The problem mentioned above must be swiftly addressed to provide a final solution for the concerns of businesses in this regard. The principle of legal certainty must prevail over the institutional lack of coordination to date.

2. Problems identified in the banking sector

All the findings presented above are also a reflection of the comments made by the banking sector regarding various aspects of administrative appeal within the administration and, further on, at the administrative courts.

Below we address a summary of some of the concrete concerns of this sector, which cause administrative disputes between banks and public administration bodies.

a. The most typical problems regarding administrative appeals are those related to taxes. The tax administration has conducted the re-assessment of liabilities in several banks due to non-recognition of the provisions carried out by banks as deductible expenses, in compliance with the standards of the Bank of Albania regulations. According to the tax administration, the criteria of international accounting standards should have applied to the provisions' criteria because they offer a different reporting mechanism of provisions for bad loans, unlike the one provided for in the regulations of the Bank of Albania.

b. The frequent staff turnover at the IPROs. It is claimed that they are not knowledgeable on the applicable legislation. Practices of the IPROs are often abusive because there are delays in the filing of decisions of the Court or Judicial Bailiffs. Such abuse leads to the incapacity to request at the court the application of the right. They do not know the reality, and they do not implement the rules and principles for the codification of administrative practices. The unification of practices by the administration is viewed as another problematic aspect at the core of which stands the administration's lack of will.

c. The orders for account blocking by tax directorates are uncoordinated and cause conflict with the customers who, in many cases, are not notified in advance by the tax bodies for the voluntary execution of tax liabilities. The shift of the payments' priority resulting from tax liabilities, pursuant to article 605 of the Civil Code, has brought about the need to prepare a joint execution procedure, inexistent so far, with other relevant entities (bailiff, customs authorities, etc.), because the "clash" of payment orders issued by these entities in line with the respective procedure of each of them, brings about problems and managerial difficulties for the Bank in handling the situation. The latter has a limited role and must obey the orders of the relevant entities authorised by law by performing actions to block and/or execute. When the time limits of performing these actions are different for every entity and often contradict one another, the Bank is found in a difficult situation and cannot "choose" the preferred creditor. The Bank is put in an absurd situation because, whatever action it performs, it will be nonetheless penalised by the dissatisfied entity/entities. In light of the above concerning the tax institution and judicial bailiffs, the Bank is obliged to undergo a process of information processing in line with the requests of these entities, a fact, which is reflected in the extensive need for human resources working hours, consumption material, etc.

d. According to banks, it is evident that the decisions of administrative courts favour state institutions. The administrative court judges are inclined to prioritise state institutions, especially central ones and those that are part of the fiscal administration. Obviously, in the case of an administrative appeal with a second-tier bank as a party in the dispute, court decisions mainly favour state institutions. If a commune or municipality is the opposing party in a dispute with a bank, it is easier for the court to implement the law and recognise the rights to the advantage of banks.

RECOMMENDATIONS

RECOMMENDATION 1:

Facilitate the access of businesses to their administrative appeal right.

1. Respective laws, especially laws in the fiscal area, must facilitate the preconditions for the administrative appeal against the administration's acts to increase business access to it. Although some improvements in this perspective have been made (i.e., Banking Guarantee as an alternative to prepayment has been stipulated under the Law 9920), further improvements are requested. Improved access can be achieved through one of the following alternatives:
   a. Businesses prepay only a small portion of the reassessed tax or customs liability amount (excluding fines); or
   b. Instead of prepaying a portion of the liability, entities pay only an irretrievable administrative tariff to deposit the administrative appeal at the appeal structure (*for example, pursuant to the model currently used for the appeals submitted by businesses at the PPC).*

The Secretariat, interviewed business and experts, think that the second alternative is the most appropriate. In this case, the administration fee would be dedicated to cover only the administrative expenses of the independent structure reviewing the tax and customs related administrative appeals[38]. This would facilitate not only the access of the business to the administrative appeal procedures, but it would also alleviate the appeal structures from the "burden" to protect in any case the actions of the tax and customs administration, and on the other hand, it would increase their effective independence.

2. The legislation on tax and customs should also allow appealing to the de facto bankrupt entities when the latter can prove insolvency (for example, through an independent expert report in this area).

38 *Refer to Recommendation No. 3*

RECOMMENDATION 2:

The 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 abolished.

RECOMMENDATION 3:

To effectively increase the independence of TAD and separate its functions from the structure of the General Directorate of Taxation (GDT).

In the framework of the plans for the unification of tax and customs administration, it is also recommended that a collegial body of appeal be established in the form of a "quasi court".

This appealing structure should be established via a specific law and have the competence to review the administrative appeals (above a certain amount) regarding tax and customs administration acts. Its composition should be professionals of high integrity from law and economy with experience in tax and customs issues. The functioning of this structure should be based on the arbitration principles, where the litigating 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 submitting appeal requests for administrative acts 30 days from the day of the acknowledgement of the administrative act.

RECOMMENDATION 4:

It is also suggested to merge and centralise inspectorates' appeals at the Central Inspectorate 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 to discuss problems and potential solutions.

The lack of prior consultation with businesses in several initiatives has increased the number of administrative disputes handled by the appeal structures. It is assessed that the existence of these mechanisms would encourage dialogue between parties and would also reduce the number of disputes.

RECOMMENDATION 6:

The unification of the timelines for exercising the right of the administrative appeal is deemed necessary. We recommend a timeline of 30 days from the day of the acknowledgement of the administrative act (as above).

Referring to the EU Progress Report for 2015, the entry into force of the New Code of Administrative Procedures, [39] drafted according to European standards, is expected to facilitate administrative procedures for businesses and citizens further. In this framework, it is required to prepare, review, publish in due time the special administrative procedures to be in

39 *Law No. 44/2015 "The Code of Administrative Procedures in the Republic of Albania" shall enter into force on May 29, 2016.*

conformity with the New Code and for awareness-raising purposes in the respective institutions themselves.

RECOMMENDATION 7:

Staff sustainability and continuous professional advancement of staff working at the appeal structures in institutions.

Joint training programs between businesses and administration would prevent disputes among parties. It is also suggested to organise joint training programs for the Administrative Courts, the Tax and Customs Administrations through the school of Magistrates with the assistance of business associations, such as the Albanian Association of Banks. This would also help in the unification of practices for both the administration and the judiciary.

RECOMMENDATION 8:

The unification of practices and preparation of commentaries for similar cases, especially in the Tax, Customs and Inspectorates, possibly in the sector viewpoint, such as banking, agro-industry, natural resources, etc.

From the viewpoint of businesses, experts and groups of interest contacted by the Secretariat, *the unification of consolidated practices* is considered as one of the most indispensable elements, which would reduce to a considerable extent the number of appeals filed against the decisions of the tax administration and would improve the business perception indicator related to it. A crucial 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 also requires legal amendments to Law No. 10018, dated 13.11.2008 "On the State Advocacy Office".

RECOMMENDATION 9:

The improvement of institutional coordination, computerisation 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 from the bureaucracy, and looking for official documents in different institutions. Preliminary cooperation among institutions and the opinion of the State Advocate are essential 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 instructs its subordinate public administration bodies for procedures to be followed regarding recommendations reported by the Supreme State Audit.

Public administration bodies should review with working groups the tasks and recommendations made by the Supreme State Audit to avoid their a priori implementation, especially when their arbitrary implementation violates the legal certainty and the businesses legal rights. This would also reduce the costs of the State Budget in cases when the business rights would be put in place by courts, and the State would be obliged to compensate the business for the caused damages.

RECOMMENDATION 11:

The decisions of TAD/Inspectorates/GDC 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 applied by these institutions.

RECOMMENDATION 12:

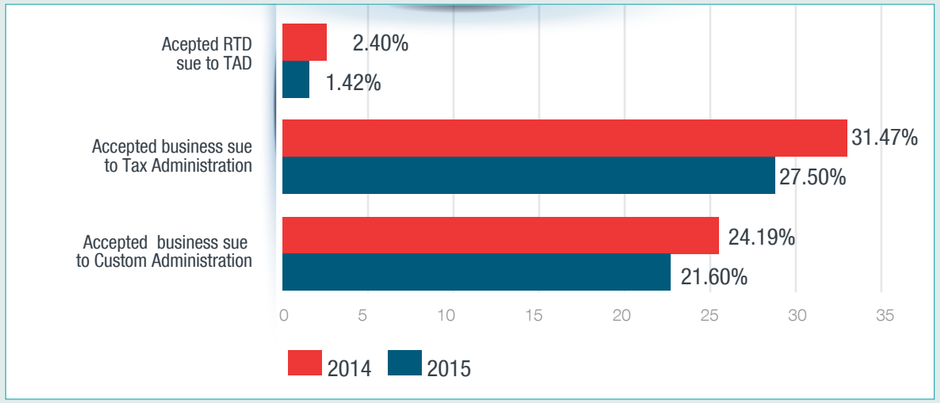
The publication of annual reports of GDT, GDC and special Inspectorates, including the outcome of administrative appeals and their progress in court.

There have also been concrete recommendations suggested during the meetings of the Secretariat with courts, experts and chambers of commerce to facilitate the work of Administrative Courts or appeal structures in institutions.
e would like to mention the following recommendations:

1. When the Administrative Court of Appeal leaves into force, with the same reasoning, the decision of the Administrative Court of First Instance, it should not be obliged to provide a reason 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.

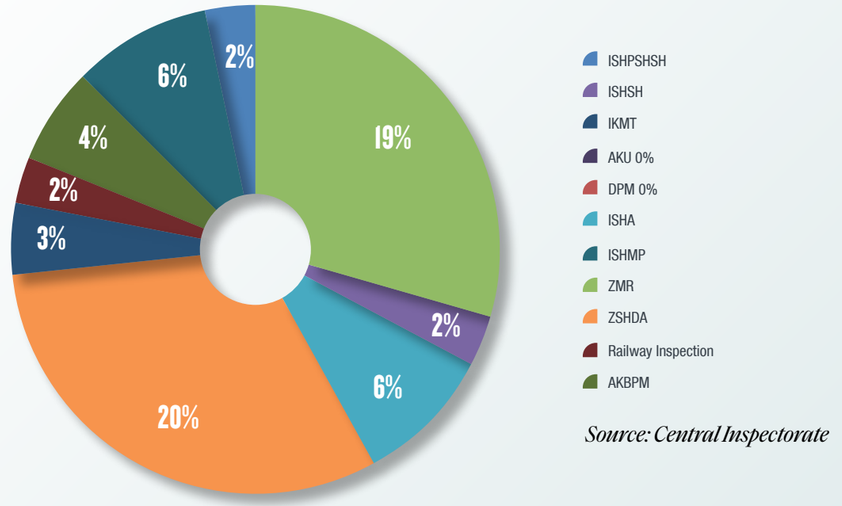
ANNEX 1
STATISTICAL DATA

Figure 4. The outcome of cases reviewed by the Administrative Court of Tirana District



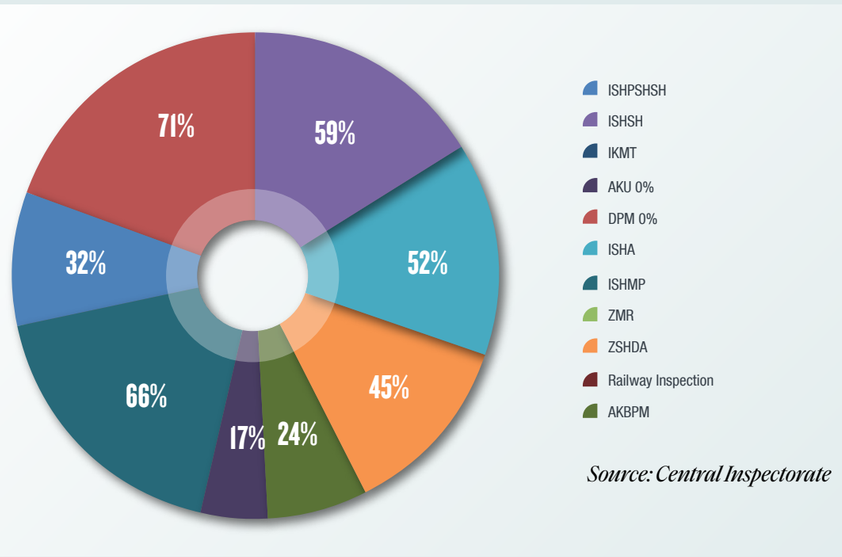
Source: Administrative Court of Tirana District

Figure 5. Ratio between administrative penalties and inspections (2015)



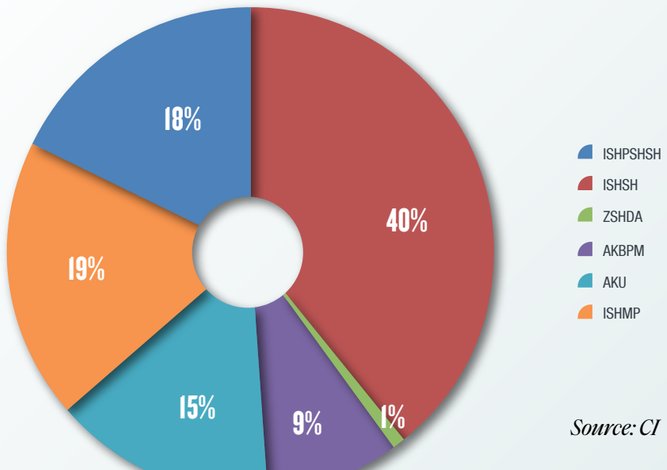
Source: Central Inspectorate

Figure 6. Ratio between administrative appeals and administrative penalties in Inspections (2015)



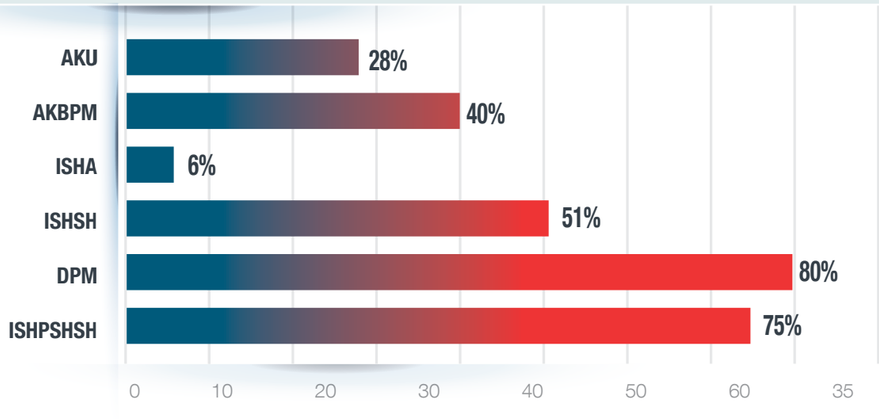
Source: Central Inspectorate

Figure 7. Ratio between Business appeals accepted by Inspectorates (2015)



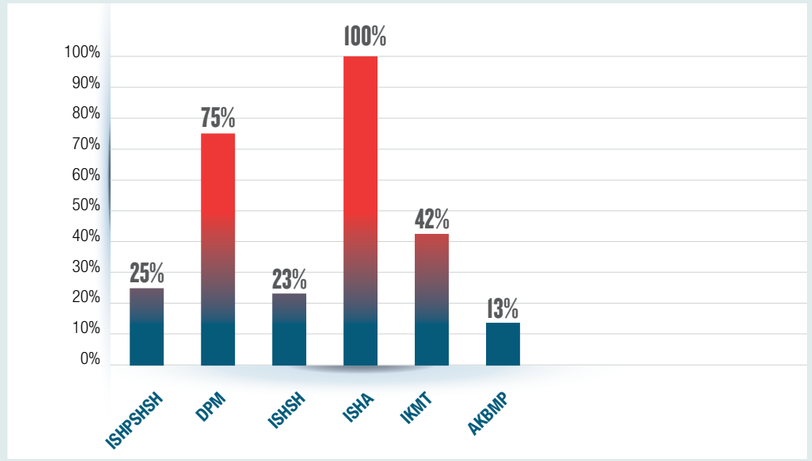
Source: CI

Figure 8. Ratio between trial cases and appeals rejected in Inspectorates (2015)



Source: CI

Figure 9. Ratio between Inspectorates' Administrative Penalties abrogated/amended by Court decision and penalties objected at the court by the business (2015)

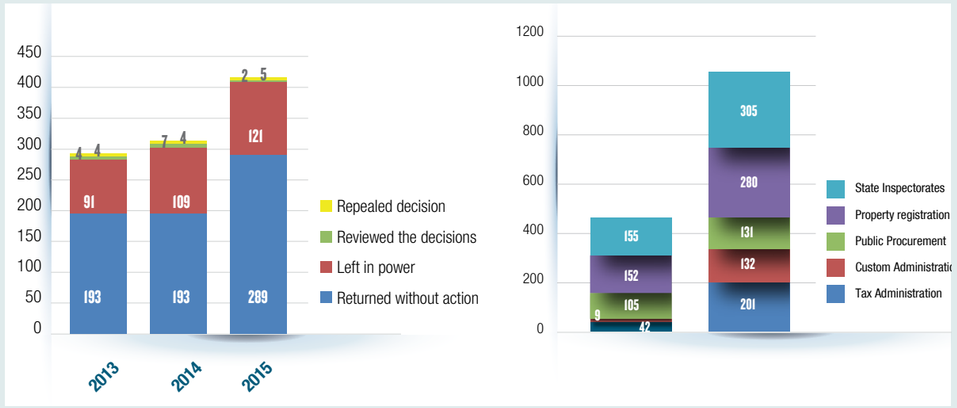


Source: CI

Table 2: Results of appeals at the NRC (2015)

Type	Number	%/ of the total of reviewed cases (156,241 registrations alone)
Administrative appeals	90	0,05 %
Judicial proceedings: NRC as respondent	29	0,01%
Judicial proceedings: NRC as a third party	21	0,01%
Total	**140**	**0.08%**

Figure 10. Outcome of Administrative Appeals at the General Directorate of Customs

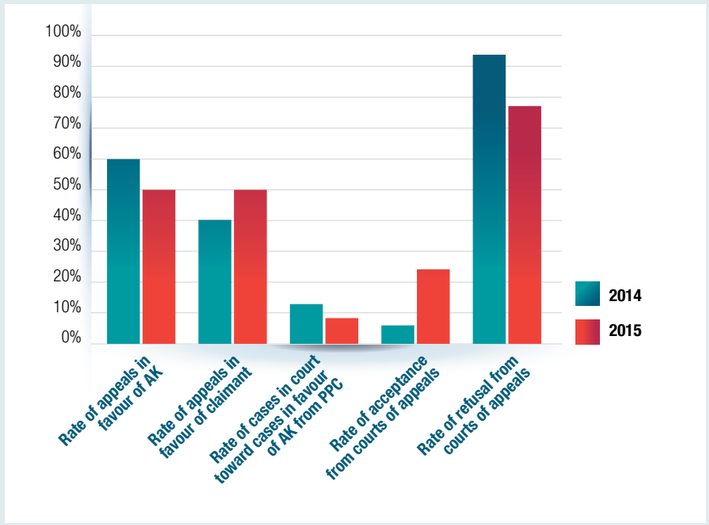


Source: GDC

Figure 13. Cases followed by the State Advocate

Source: State Advocate Office

Figure 11. Outcome of appeals at the PPC



Source: PPC

ANNEX 2

THE QUESTIONNAIRE OF INTERVIEWS WITH STAKEHOLDERS

The purpose of the questionnaire is to identify concrete concerns of the business in its relations with the public administration and, more concretely, during the process of appealing a decision of the administration within the administrative jurisdiction. The analysis of the Secretariat will be focused on current mechanisms and the efficiency of resolving disagreements in Administrative Jurisdiction and offering practical recommendations to facilitate the process within public institutions and to reduce the burden of the business for further legal actions (for example, judicial system) with an impact in the business climate in the country.

No.	Question/Issue intended for discussion	Comments
1	Have you appealed any decision/procedure of the public administration, such as Tax, Customs, State Inspectorate, Public Procurement, etc.? What were the concrete problems and the most typical issues you have submitted an administrative appeal against (clarity of legislation, arbitrary treatment by public administration, non-compliance of deadlines, the attitude of businesses, lack of legislation knowledge, notification in due time, etc.)?	
2	Was the appeal resolved within the administrative components, or did you have to address the issue at the court?	
3	Any assessments regarding the appeal costs (time, human resources, legal fees and hidden costs)	
4	Do you believe in a fair and honest resolution of your appeal within the administrative jurisdiction?	
5	How do you see the quality of decisions of the administrative jurisdiction? Are they justified, are there valid legal grounds and are they unified or not?	
6	Difficulties encountered in addressing disputes to the public institutions (burden of proof, institutional capacities, bureaucracies, communication, ethics, etc.)	
7	List the three most applicable recommendations to address institutional and legal issues to facilitate dispute resolution at and within the administration.	

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Këshilli i Investimeve ka si qëllim rritjen e besimit të ndërsjellë midis biznesit dhe qeverisë duke kontribuar në institucionalizimin e dialogut mbi politikat në vend. Kontribuon në reformat kombëtare dhe procesin e tranzicionit ekonomik duke ndihmuar në përmirësimin e institucioneve, ligjeve dhe politikave që promovojnë mirëfunksionimin e tregut.

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