



ReSPA

Regional School
of Public Administration

GAPA Network Meeting

FROM ADMINISTRATIVE CONTRACTS TO RESTRUCTURING GAPA LEGAL REMEDIES IN THE WESTERN BALKAN

Danilovgrad, Montenegro, 23-24 June 2014

Discussion Paper and Draft Programme

Background

The domain of (general) administrative procedure and administrative justice is of special importance for the EU and, consequently, for ReSPA, SIGMA and other engaged field institutions since it represents a fundamental tool for good administration building. In particular, for the Western Balkan area, an additional impetus should be dedicated to modernisation of the general administrative law framework (GAPA) innovative institutes, such as participation driven fundamental principles, administrative contracts and effective legal remedies.

Following consultations and expressed interest of ReSPA members and earlier experiences in field networking it has been decided that ReSPA should organize further regional events and expand GAPA networking in the region. Both activities are devoted to exchange good practices by bringing together participants from the Western Balkans (Albania, Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Kosovo^{*}).

The GAPA networking meeting is designed as a follow up of the first networking workshop in June 2013 in Belgrade and second in January 2014 in Zagreb. The first networking workshop in Belgrade in June 2013 was titled “Europeanization of the Western Balkan Laws on General Administrative Procedure”. The networking workshop in Zagreb in January 2014 under the title “Efficiency and Simplifications of Administrative Procedure and Administrative Justice (AP & AJ)” was devoted to identification of ongoing trends in fostering efficiency and simplifications in administrative procedures and administrative justice in the Western Balkans, because they are of special interest in terms of legal framework development and institutional capacity building in the Region.

This Meeting will take place on 23-24 June 2014 in Danilovgrad, joined up with the celebration of the UN Public Service Day.

Furthermore, the GAPA network is initiated to develop holistic and more tangible reforms’ results and enhance regional cooperation in order to introduce EU right(s) of good administration.

Objectives

The GAPA network meeting is dedicated to administrative contracts institute as an innovative GAPA approach and restructuring of legal remedies’ system, following explicitly expressed interests of ReSPA representatives on the field so far.

** This designation is without prejudice to positions on status, and it is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence*

The key topics and goals of this event are:

- To design a system of administrative contracts and to implement this institute into new laws;
- To assess *pros et cons* of administrative contracts as indicated in particular in practice, including legal protection of contractual parties;
- To reconsider the role and list of legal remedies in the light of immense changes in the citizens – public administration relations (citizens' rights, right to good administration, horizontal approach, participation, etc.), including discussion to redefine extraordinary remedies as the legally grounded possibility of public bodies to intervene into the enforceable administrative acts (annulment and revocation);
- To design and implement a legal remedy in the field of services of general interest.

The purpose of this paper is to provide a basis for contributions from and discussion among the selected representatives on the reflections in the domains of administrative procedures and administrative justice development, recent supra – and national reforms and further challenges.

The objective of the event from aspect of participants and ReSPA is threefold. The first objective is to analyse development trends and recent legal and organizational progress in the field of administrative procedures' regulation and its implementation by countries and in the overall Western Balkan region, specifically on selected institutions of administrative contracts and legal remedies.

Secondly, the objective of the networking event is to share best practices and experiences among most competent ReSPA members' representatives, including development of organizational and decision-makers' capacity on the national level to design further steps of administrative modernization in this and other public sector areas.

Finally, this event is to represent initial point of overall GAPA network establishment by conducting specific activities identified as most relevant for policy makers in the Western Balkan when preparing and implementing GAPAs and closely connected legislation. By different approaches, mainly comparative studies, we aim to create knowledge base useful in long run reforms.

By harmonization of efforts ReSPA supports the EU integration policy co-ordination in a wider general policy co-ordination perspective on public administration reforms, as a mode to stimulate the success in preparing of the states in the Western Balkan for the EU membership and afterwards for the effective participation in EU policy-making.

The Preliminary Agenda attached will provide additional guidance on the subject matters for this particular meeting. However, it is not intended that the Agenda and the discussion paper limit but rather open up the discussion on all relevant and related topics. Thus participants are invited to provide suggestions, comments and prepare speeches, Power Point Presentations or any other relevant comments.

Content

General administrative procedure is recognized as a traditional mode of multileveled goals, primarily aiming to ensure *Rechtsstaat* and effective implementation of public policies. However, following crucial societal changes the role of authority and state as its key holder have to change as well, comparatively in EU and broader by understanding administrative procedures as a dialogue tool between public administration and addressees of public law norms. The role of participants in administrative procedures is consequently hugely redefined in direction of their active involvement, participation, conciliation of public and parties' private interest etc. Reform of (general) administrative procedures (and administrative justice) in this respect has been a common issue in the Western Balkan recently as well, supported also by EU integration processes. The right to good administration as covered by Article 41 of EU Charter of Fundamental Rights requires even on national level to guarantee implementation of classical and contemporary administrative law principles, basically grounded by partnerships, networking, amicable resolution of conflicts and similar.

Public bodies can conclude private law contracts (civil contracts) and public law contracts (administrative contracts). Administrative contracts as a separate legal institute were developed in the French judiciary and doctrine in the period following the Revolution (*contrats administratifs*). After that, this legal institute has spread to other countries. Along with the French model, there is the German model of administrative contracts (*öffentlich-rechtlicher Vertrag, Verwaltungsvertrag*). Today, the administrative contract is a very well known and widely used legal institute in the field of administrative law of many European countries (Italy, the Netherlands, Portugal, Austria, etc.). Both main models, French and German, have been constantly developing, harmonizing and influencing other countries' administrative law.

The French approach has been significantly changed in more than two centuries. Administrative contract has spread to many new categories. In today's France, administrative contracts are majority of those considering public procurement, concessions, public-private partnership, civil service contracts, provision of public services (contract with users of such services), execution of public works (roads, tunnels), cooperation between municipalities, départements, regions, and state, etc. In the vast majority of cases, at least one of the parties to an administrative contract is a public body. It means that administrative contracts are very well known among the public bodies and are frequently used in practice, too. In France, traditionally, the administrative contract followed an administrative act, i.e. administrative contract was admissible if there had been an administrative act adopted by the public authority. Administrative contract was, in a way, the instrument for execution of the previously issued administrative act. However, modern trend is towards the usage of the administrative contract as a separate legal instrument, different than administrative act.

In Germany, the administrative contract is an instrument, along with administrative act, for establishment, modification and termination of an administrative law relationship. It has its

own legal life, independent of any administrative act. There is no need to issue an administrative act before concluding the administrative contract. Rather, the administrative contract and administrative act are two competing instruments for performing the tasks of public bodies and regulating relationships between public bodies and citizens (including businesses and other legal subjects).

There are two basic types of administrative contract: subordination-contract and coordination-contract. The first type is characterized by the fact that parties to the contract do not have an equal legal position – one of them has a stronger position. It means that it can control the other party, give specific service orders to the other party, issue sanctions, unilaterally terminate contract, or similar. Coordination-contract is characterized by the equality of parties and is very often used as an instrument for fostering inter-authority cooperation. There are certain mixed types of administrative contracts, as well. The administrative contract is subject to strict legality regime and cannot be used for avoiding legal restraints. It is subject to administrative court control. The administrative contract gives better legal position to the other party, whose consent is necessary for concluding an administrative contract. In certain cases it can be substituted by an administrative act, if a party is not willing to give its consent.

The practice of using administrative contracts in the countries in WB region is relatively new, not very well documented and characterised by the lack of comprehension and lack of court practice. Even administrative law doctrine is weak in that regard. However, the EU law influence is going in direction of adoption of the administrative contract and the processes in wider European space are in favour of contractualization of the relationships between public authorities and citizens. The citizen has a better legal position and better protection from arbitrary decisions of public authorities even where subordinate-contract is concerned.

There are two main methods of identification of administrative contracts. The first occurs when they are regulated by law covering certain area (concessions, public-private partnerships, regional development, health insurance, communal utilities, etc.). The other occurs when they are identified through case law (court practice). Because of that, underdeveloped court practice is the main obstacle to the attempt to fully identify all kinds of administrative contracts that are used in the region. Administrative science and doctrine has developed several characteristics that can be of certain importance when identifying administrative contracts:

- one of the parties is a public body and the contract is concluded in performing its public competencies (public works, public services, even several traditional services in some countries, such as prisons, etc.),
- contract is subject to administrative justice control (not to civil courts control),
- contract includes condition(s) from the public law or has an onerous clause (special clauses and conditions, different from the private law contracts),

- public body can interfere with the contract (modify, control, etc.) but is obliged to pay all the costs for such an intervention (for example, when a public authority wishes that private transport service provider increase the number of buses for school children, etc.).

The aim of proceedings in administrative matters is an overall balance of public and private interests and, more specifically, of an administrative appeal in particular both in terms of protecting the rights of the parties as a uniform, legitimate and effective dispute resolution between authorities and private parties to ensure public interest implementation. Rationality and effectiveness of administrative proceedings are in fact essential for solving complex societal issues. Hence, a modern state measures the effectiveness of its administration through elements of administration accessibility (dispositiveness of legal remedies), speed of asserting the rights and legal interests (time limits), equality of the parties before the law, suspensiveness and devolution of legal remedies, etc. However, legal protection of citizens is a complex system consisting of procedural protection within public administration, national and international court control over administrative acts and actions, etc.; hence systems approach is required in GAPAs' legal remedies reconstruction.

In order to strive for redefined notion of administrative procedures as a dialogue tool in the society, holistic reform of GAPA's legal remedies is inevitable. Main trends are the following:

- With regard to most recognized GAPA legal remedy, namely an appeal, it is rather reduced by grounds of its use or even exclusion and replacement by increased judicial protection, to reach for speedier enforceability of administrative decisions; However, the appeal is, as a general rule, still largely admissible in the principle, devolutive and almost always suspensive, which makes it an effective legal remedy also under the criteria of the ECHR. On comparative theory there are two major systems of administrative appeals – mandatory (as in German oriented and majority of the WB legal environment) and optional, the latter offering as an alternative for more effective parties' protection and reduction of courts caseload. Furthermore, an appeal is less often used when a positive fiction in the case of administrative silence is set. Despite being a constitutional and international defense right, an appeal as such is in consequence decreasing.
- Extraordinary legal remedies are understood as a measure diminishing legal certainty and hence the number of, time limits and reasons for their use are reduced too.
- Given broader scope of GAPA over type of administrative acts, in particular services of general interests, other administrative activities (real acts), and administrative contracts, a new institute of complaint is introduced, following effective problem resolution as non-devolutive way of settling the dispute.

In administrative relations, what is effective is that which generally contributes to the main purpose of administrative procedures, i.e. to balance the parties' rights and assert the public interest in accordance with the purpose and content of sector-specific regulations. The entire

administration can be assessed in qualitative terms if its “complaint system” (as a set of all legal remedies in administrative relations) features several characteristics. Any legal remedy must be according to Harlow and Rawlings (1) easily accessible and well publicised, (2) simple to understand and use, (3) speedy, (4) fair with a full and impartial investigation, (5) effective, providing appropriate redress, and (6) informative. In this respect, the effectiveness of adjudication must be considered as value-based rationality, whereby any legal remedy is effective only if the related rules are implemented in accordance with the principles of good administration in the light of social values. But in reduced legal remedies system preserved options are even more important for the appellant to invoke not only legality issues, but also opportunity ones.

Although administrative proceedings are an instrument of authority, public governance is changing over time and new methods of (a more) participative regulation of administrative relations should be introduced. The first significant challenges are offered by conciliation of legal interest in administrative affairs in agreements and partnerships. Administrative contracts and legal remedies as effective system of dispute resolution are undoubtedly one of first moves to be taken on national and supra national level.

Target audience and participants’ role

Two representatives fulfilling conditions set in Terms of Reference on the GAPA network initiative from: Albania, Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Kosovo*, from the related ministry or other competent central regulatory body on LGAP. Theoretical knowledge and practical expertise of selected representatives are expected, with good English communication skills of the case studies’ presenter(s), but above all proven interest of GAPA modernization is desired.

Since it is expected that two participants will come from each counter - side, we are kindly asking you to agree whether one person will be delegated a role to make the presentations and present them while the other will support and contribute to the design of the two presentations and to the clarifications during the event if required. The participants are required to provide two presentations on their experience and to actively participate in the discussions and practices exchange. Methods of presentations, case studies and group works will be applied during the working session.

Tasks of the ReSPA members’ and Kosovo* representatives at the event:

- I. each country a presentation of 10 minutes on the **potentials and impediments on administrative contracts’** introduction in the Western Balkan and own state:

**This designation is without prejudice to positions on status, and it is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence*

** This designation is without prejudice to positions on status, and it is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence*

- a. In case the country already regulates administrative contracts in general law (for instance Croatia) or field legislation presentation of a **case study of selected administrative contract(s) in practice** is required (presenting legal framework, initiative objectives, its stakeholders, results expected and achieved with lessons learned);
 - b. In other respective countries focus on constitutional, legal, political and economic **pros et cons for administrative contracts** implementation as debates indicated in national level.
- II. each country a presentation of 15 minutes on the **main differences in comparison of valid/previous and new GAPA legal remedies system** (i.e. legal remedies before and after new GAPA);
- a. State of the art and de lege ferenda situation in respective country presenting **list of legal remedies, their scope, time limits, reasons and legitimation to apply, effects** - from devolutionary and suspensory to revocation and annulment;
 - b. Selected countries (for instance Montenegro due to new GAPA) including **case study specifically on complaints/objections in public services**, presenting legal framework, goals, expected results and concerns.

Workshop experts

Professor Dr. Ivan Koprčić has almost 30 years of professional experience in law, public administration, science, and consultancy. He graduated from the Faculty of Law in Zagreb; took M.Sc. degree in public administration and politics; while his PhD thesis was in administrative law, public administration and organization theory. He is president of the Institute of Public Administration (Croatia) as a national expert non-governmental organization. He is head (vice-dean) of the Study Centre for Public Administration and Public Finances at the Faculty of Law, University of Zagreb, Croatia. He is president of the Scientific Committee of the Academy of Legal Sciences of Croatia. He is a member of the Scientific Council for the State Administration, Judiciary and the Rule of Law within the Croatian Academy of Sciences and Arts. He is a member of several parliamentary and governmental committees, councils and working groups (on constitutional issues, decentralisation, restitution, state administration, local elections, open government, etc.). He is the editor-in-chief of the international scientific journal Croatian and Comparative Public Administration, as well as the editor-in-chief of the book collection Contemporary Public Administration with 25 books so far. He teaches at the studies of law, public administration, and social work, including doctoral degrees. He has been engaged in many international scientific and consultancy projects. He is the author or co-author of a dozen of books (European Administrative Space, 2012; Administrative Science, 2014; Modernization of General Administrative Procedure and Public Administration in Croatia, 2009; The New Law on

General Administrative Procedure: Practical Issues and Application Problems, 2009; Agencies in Croatia: Regulation and Privatization of Public Services at the State, Local and Regional Level, 2013; Public Administration, 2006; Reform of Local and Regional Government in Croatia, 2013; Modernisation of the Croatian Public Administration, 2003; Legislative Frameworks for Decentralisation, 2003; Structure and Communication in Administrative Organisations, 1999; etc.). He is the author or co-author of some 250 scientific and other papers in Croatia and abroad. Professor Koprić has extensive consultancy and expert experience in public administration, administrative procedural law, and related areas, in Croatia and abroad. He was a member of several working groups in Croatia, and an expert for preparation of the new Croatian GAPA during 2000s. Recently, he is an OECD-Sigma expert for administrative law and public administration reform engaged with modernization of administrative procedural law in Montenegro and Macedonia. He has been an UN, UNDP, USAID, LGI, and WB expert, acted in all SEE countries.

Associate Professor Dr. Polonca Kovač finished her PhD Studies in 2006 at the Faculty of Law, University of Ljubljana. She has been employed as a researcher and lecturer at the Faculty of Administration, University of Ljubljana, since 2001. She is the (co)author of over 100 scientific articles and 100 conference papers and several monographs, including Administrative-Legal Dilemmas (2012, 2010), Commentary on the Slovene Constitution (2011), The Administrative Procedure and Administrative Dispute (2010), Regulatory Impact Assessment (2009). She is active in many national and supranational committees (such as Slovene Officials Council and working groups on new *acquis communautaire* driven umbrella legislation) and networks or organizations (in EGPA as a co-director on PSG PA and Law, NISPAcee, TED, TAD, etc.). Her international experience also include guest lecturing on foreign universities, work in EU granted research projects and consultancy. She acts as an editor (of monographs, within scientific journal committees and as a chief editor in national project of Administrative Consultation Wiki) and under- and postgraduate studies mentor. She is an active reviewer for several national R&D and higher education agencies and an OECD, SIGMA and WB expert on the fields of public administration reforms and administrative (procedural) law, from general to field regulation (such as tax collection, organization and functions of regulatory agencies or inspections, building permits optimization, access to public information, etc.).

Rosana Lemut Strle, MSc - Deputy of the Information Commissioner, Slovenia since April 2009. She finished her undergraduate studies at the Faculty of Law, University of Ljubljana, in 1995. In 2002, she passed the legal state examination, and she finished her post-graduate studies at Law faculty in Ljubljana in 2008; her thesis was "Personal data processing at the Health Insurance Institute of Slovenia". She worked at Administrative unit Litija, continued her career at Municipality Litija and later at the Health Insurance Institute of Slovenia, including the director of mandatory health insurance on the national level. She is the author of numerous articles and conferences papers. She has also acted in several international projects, in particular under the auspices of European Commission TAIEX programme as an external expert.

AGENDA

Day 1, Monday, 23/06/2014

Part one – Marking UN Public Service Day

09.30	-	10.00	Registration
10.00	-	11.00	Opening address <i>Mr Raško Konjević</i> , Minister of Interior of Montenegro <i>Mr Suad Musić</i> , ReSPA Director <i>Amb. Mitja Drobnič</i> , Head of EU Delegation to Montenegro <i>Mr Rastislav Vrbensky</i> , UN Resident Coordinator/UNDP Resident Representative to Montenegro and <i>Mr Aleksandar Bogdanović</i> , Mayor of the Old Royal Capital Cetinje
11.00	-	11.30	Press conference
11.30	-	12.15	<i>Cocktail</i>
12.30	-	14.00	Workshop on GAPA – “Right to good administration” - "New administrative justice and administration as a key element of the European Administrative Space", <i>Prof. Ivan Kopriv</i> - Good Administration as an EU Framework of Administrative Procedures' Modernisation, <i>Assoc. Prof. Polonca Kovac</i> - Transparency and Right to Information as a Pillar of Good Administration, <i>Ms. Rosana Lemut-Strle</i> <i>Discussion</i>
14.00	-	15.00	<i>Lunch break</i>

Part two – GAPA Network Meeting

15.00	-	18.00	GAPA network meeting 1/2
15.00	-	15.30	Introduction to the Conference and of the participants
15.30	-	16.15	Administrative contracts - expert presentation and discussion on: <ul style="list-style-type: none">• The notion and key elements of administrative contracts• Public-public and public-private administrative contracts• Legal protection in administrative contractual relations
16.15	-	16.30	<i>Coffee break</i>
16.30	-	17.45	Potentials and impediments on administrative contracts' introduction in the Western Balkan - presentations of the participants (7x10 min.) with experts' and participants' reply
17.45	-	18.00	Wrapping up Day 1 by experts and participants

Day 2, Tuesday, 24/06/2014

09.15	-	17.00	GAPA network meeting 2/2
09.15	-	09.45	Warming up – key considerations on the new GAPAs scope
09.45	-	10.30	Reconstruction of legal remedies in modernized GAPAs - expert presentation and discussion on: <ul style="list-style-type: none">• Goals and limits of legal remedies and judicial review in administrative matters: from ex officio stand to ADR• Key changes in administrative remedies in comparative practice• Types of legal remedies and their characteristics (appeal, objection/complaint, revocation ...)
10.30	-	10.45	<i>Coffee break</i>
10.45	-	13.00	Legal remedies before and after new GAPA in the Western Balkan Presentations of the participants (7 x15 min.) with experts' and participants' reply
13.00	-	14.00	<i>Lunch</i>
14.00	-	15.00	Case studies of objection/complaints in public services and other administrative actions - Presentations of the participants (2 x15 min.) with experts' and participants' reply
15.00	-	15.15	<i>Coffee break</i>
15.15	-	16.15	Comparative analysis of legal remedies in the WB – insights and reflections on the goals, content and methodology, with experts' outline & participants' discussion
16.15	-	16.45	Final conclusions by experts and organizer and participants comments