

# European Administrative Space: Spreading Standards, Building Capacities

**Edited by:**  
**Ivan Koprić**  
**Polonca Kovač**



**NISPAcee**

THE NETWORK OF INSTITUTES AND  
SCHOOLS OF PUBLIC ADMINISTRATION  
IN CENTRAL AND EASTERN EUROPE





European Administrative Space:  
Spreading Standards, Building Capacities



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The Network of Institutes and Schools of Public Administration  
in Central and Eastern Europe

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# Part A

## European Administrative Space in Eastern and Western Europe





# 1. Introduction to European Administrative Space as a Base for Spreading Standards and Building Capacities

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Polonca Kovač

## 1.1 Notion of European Administrative Space and its Elements in West and East

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European Administrative Space (EAS) is a notion, highly acknowledged and respected in certain times and countries as a joint set of fundamental good administration principles and standards. However, it is a complex concept in progress, both theoretically and practically. One can agree that EAS is therefore supporting tackling contemporary political-administrative issues effectively, as rapidly changing society demands global wide and interdisciplinary responses. On the other hand, we should develop a harmonised understanding of EAS if we wish the concept to be a developmental tool.

The EAS was created and is driven by various European players, facilitated by civil servants' learning, and fuelled by the expectations of European citizens. The EAS is based on and comprises a set of values, social and citizen expectations, governance principles and standards of public administration organisation and functioning defined by law, whose application is supported by the appropriate procedures and accountability mechanisms.

EAS has been recognised as a unique concept in the late nineties to meet the needs of EU enlargement as a complement to the *acquis communautaire* in the field of public administration and the improvement of national administrative law and administrative capacity. EAS principles and requirements were originally designed and implemented to meet the needs of the enlargement process of the EU through special SIGMA publications, published in 1998 and 1999. SIGMA papers define the main principles of EAS as follows (cf. OECD, 1999: 9 et seq.; Cardona & Freibert, 2007: 53, Koprić et al., 2014: 320–324; more on administrative principles see in Galleta et al., 2015):

1. rule of law with reliability, predictability and legal certainty;

2. openness and transparency, based on consistency;
3. accountability, in connection with pursuing lawful actions; and
4. efficiency in the use of public resources and effectiveness in accomplishing the goals established in legislation.

Today, EAS represents more than that since it incorporates fundamental principles to be followed by all administrators globally. EAS is an important tool in the absence of a formal EU *acquis* in the field of public administration, but leads to a necessary integration of EU values, goals, activities and methods to enable effective and equitable implementation of EU legal order.

Both formal and informal dimensions of Europeanisation are addressed by the EAS to strive for the so-called “shared sovereignty” (see Hofmann, 2008). The first aspect is indicated in the horizontal criteria for EU membership, including PA expressing the capacity to implement the *acquis communautaire*. However, EAS is especially important when there is a question of informal and in-depth understanding of the European standards, since EAS is, after all, about the implementation of the principles.

EAS is based on the assumption that EU Member States share common values and beliefs. The EAS has served and still serves as a common European administrative infrastructure for the joint formulation and execution of public policy (Trondal & Peters, 2013: 295). Moreover, even once purely nationally related public administrations need to cooperate, due to globalisation of business and daily life in the EU. Consequently, there should be a common platform for governance structures, processes and management approaches, although each country has defined, at least in part, its own legal system and structure of government. EAS means obligation to results rather than the means to reach them.

The essence of the EAS is hence not the unification in terms of identical national standards for administrative organisations and procedures, but harmonisation of administrative bodies in relation to public services users. Administrators shall, according to EAS, provide legitimate and predictable legislation, lawful actions, open and transparent execution of power, accountability, simultaneously with resource-wise efficient and effective conduct that leads to the implementation of the aims set. EAS therefore provides the ability to co-design and implement transnational public policy, especially in the most exposed areas. For instance, EAS pursues public administration professionalization with a contemporary civil service system based on Human Resources Development, effective cross-section coordination within multi-layered governance levels, entities and practices, strategically targeted use of public finances and investments, effective and service-minded administrative procedures, transparent and amicable resolution of interests collisions and disputes, etc.

Regarding informal standardisation and principles, another form of EAS is also good governance and good administration doctrines (cf. Vienna Commission, 2011). However, the latter pursue practically the same values, principles, approaches and perceived results, so it is more about the title than the content. In other words, EAS ultimately strives for good governance developed principles and good administration, right for sustainable societal progress. The actual point of good administration within the EAS for PA is to act proactively and synergistically at both national and European levels.

However, EAS development has been rather inconsistent and fluid despite initial ambitious system approach prospects, both in the west and east of Europe, with some additional difficulties in the latter (see Koprić, 2012; Vintar et al., 2013). At EU level, we can see several phases of EAS integration: first, values then institutional cooperation, third, legal harmonization (cf. Hofmann, 2008: 662, 671) and last, multilevel EU governance. Some argue that the process of institutionalization within EAS indicates three dimensions: independence, integration and co-opting of PAs (more in Bauer & Trondal & Peters, 2015). They continue that “EAS I” therefore represents initial convergences of administrative systems, but “EAS II”, as a further phase, represents the development of new institutional constellations and configurations. There are also some more ambitious principles and elements of EAS to be developed after countries first of all take care of basic transformations, especially in Eastern Europe (Cardona & Freibert, 2007: 56; Trondal & Peters, 2013: 297). However, we will have to wait to see such development.

For instance, as several analyses reveal, governance modes are mostly asymmetric and multi- instead of interdisciplinary (more on this in Raadschelders, 2011), as well as fragmented and inconsistent. They often focus more on building up formally joint values, laws and policies as opposed to more ambitious long-term principles (cf. Trondal & Peters, 2013, Hofmann, 2008: 663). Scholars should, in this sense, support the systemic efforts of individual countries towards gradual development.

Nevertheless, European standards and best practices have spread and influenced the capacity building processes at all governance levels throughout Europe and the neighbouring areas. In order to explore research and practical implications of EAS in different European regions in depth, NISPAcee, together with a local organiser, the Faculty of Law, University of Zagreb, opted to dedicate the 2016 annual conference to this emerging topic in Eastern Europe and beyond. NISPAcee is an umbrella network aiming to foster interdisciplinary study of the practice and theory of public administration, administrative science and policy at national and European levels. The NISPAcee annual conference is most widely recognized among academicians and practitioners in its region but also outside the region. Furthermore, the idea of a special publication has been decided to address selected elements of EAS, particularly characteristic for the NISPAcee region.

The themes, research questions, issues and subjects that have been put forward as the most acute, are, amongst others, the following:

- What is the doctrinal and theoretical content of European good governance?
- Which mechanisms and methods of policy diffusion are in-built into EAS? What are the methods, drivers and impacts of spreading European administrative standards?
- Which policies, rights and standards are being distributed within the EAS and how do these processes influence administrative capacities at the various levels (national, regional, local, and supranational)?
- To what extent is the EAS responsible for the improvement of administrative capacities in different administrative milieus and can it harmonise traditional public administration models in Europe?
- How can the transparency and open government concept contribute to better administrative capacities?
- What are the challenges for public administration schools with EAS standards?

Hence, the concept of the European Administrative Space was addressed as a “soft law” or rather governance mode framework aiming to enhance harmonised standards in public administrations Europe-wide. EAS is, in Eastern and Southern Europe, promoted mostly by the EU, which seems a positive external initiative for reforms in our region rather than a limitation of national autonomy. The conference brought together renowned scholars, researchers, experts and professionals, students and other participants from the NISPAcee region and all over the world and deepened our understanding of the importance, driving forces and factors, as well as the consequences and impacts of EAS that emerged throughout Europe as shown in this book.

The EAS was after all created and is driven by various European players, facilitated by civil servants’ learning, and fuelled by the expectations of European citizens. There is evident progress in practices of individual countries to conduct simultaneously democratic and efficient administrative services and procedures. However, much still needs to be improved due to the usually present implementation gap in the area, for instance regarding principles of transparency and accountability. Although we agree on the importance of the right to good administration, it is unfortunately sometimes understood at a declarative level only. The focus of the discussion must also be placed on the challenges related to increased requirements for administrators, who, on the other hand, have to face rationalisation oriented reforms in the public sector, e.g. austerity measures within the civil service or regarding multi-layered local governance. Moreover, the debates indicate further opportunities to develop more contemporary tools in administrative relations too, such as alternative dispute resolution. Finally, further and systemic support to the

EAS, on theoretical, policy making, administrative and judicial levels, is currently the most promising way to build up governance capacities.

We strongly believe that a scientific approach to public administration and hence EAS, by analysing best and other practices in individual countries and regions and synthesizing their key items to new governance models is required. Therefore, very few selected elements and contributions to the NISPAcee 2016 conference have been chosen to be further developed as part of a specific monograph. Several selection criteria, from EAS direct or indirect incorporation, to methodological grounds and scientific quality have been followed. Finally, we have gathered the papers, mostly revised and rewritten compared to the original manuscripts as presented at the 2016 conference according to a few circles of review and editing. Our aim was not only to publish the best papers, as such, but also to combine them into a story of the EAS as presented in different countries, administrative areas and levels of application. The purpose is to further exchange experiences and anticipations across individual countries and administrative traditions, as well as in different administrative areas and mechanisms.

## 1.2 Key Issues Addressed

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Consequently, two parts of this monograph have emerged, consisting of several chapters to emphasise the various dimensions of EAS as designed, implemented and evaluated. First, there are cross-sectional implications, such as EAS impacts of and to administrative law or financial investments. Second, we address the understanding of EAS as a framework in selected countries, especially those that struggle to acquire full EU membership. Third, in most cases we elaborate some specific administrative principles (e.g. coordination in multi-layered governance, transparency, alternative dispute resolution) and/or subsystems (such as the civil service) as understood in the lenses of EAS. Contributing authors come from various European countries, namely West and East Europe and even international organisations (World Bank). Some are mainly researching aspects of national administration, others comparative insights on public governance and some others, the global concepts of EAS and its implications for administrative theory and practices. Nevertheless, they all have in common the desire to strive for a better European public administration and governance and trust the EAS to be an important factor thereof.

Altogether, 21 authors from Western (Luxembourg, The Netherlands, Sweden, Belgium) and Eastern Europe (Croatia, Slovenia, Serbia, Poland, Belarus, Georgia) contributed to the EAS research through this book by co-authoring 14 chapters, several with authors from different regions and countries.

First, there are three holistic and theoretical chapters, written by acknowledged field scholars. **Prof. Hofmann** provides an initial overview of EAS and its development in the past decades as well as likely future challenges to public law. He

emphasises that the term EAS should be used metaphorically. Therefore, the EAS relates to policy making and the term “space” in the context of a policy field or area, as opposed to a territorial notion. He puts forward that the EAS stands for a more or less integrated legal field in which national and European administrations closely cooperate to achieve jointly defined objectives through close procedural cooperation. Prof. Hofmann concludes that the development of EAS is ongoing and consequently, its comprehension is greatly facilitated by an understanding of the forces that have led to the EAS’s evolution until now and of the driving forces which will shape the development of EAS in the near and medium-term future.

**Prof. Koprić** further addresses these issues by elaborating RAS as the core theoretical concept for explaining administrative convergence, in conjunction with other interconnected theoretical and doctrinal concepts. He critically evaluates key guidelines, successes and failures in this respect, with special focus on Eastern and Southern Europe (particularly the Western Balkans) reforms. However, perspectives of EAS are also tackled to enable grounds for future progress in public policies and research.

**Prof. Sobis and Prof. de Vries** thoroughly tackle the notion of standards and their benefits and side effects. This chapter is the most valuable added value as general theoretical input to the debate on EAS. The authors present arguments to attenuate the high expectations regarding EAS, particularly by drawing attention to the side effects of using standards. After the conceptual introduction they also illustrate the issue by a case study on the hosting of asylum seekers and the standards for granting them refugee-status, which is an additional argument to show that the use of standards discloses some of the side effects. Interestingly, these result from the nature of standardisation in general. The findings have therefore repercussions for the *a priori* evaluation of emerging EAS as any future standardisation of public sector reforms.

The first part of the monograph includes two further chapters. **Prof. Naert** dedicates his discussion to multilevel governance, based on the analysis of the Juncker plan, developed by the Commission in order to step up investment in the European Union and the role of the European Fund for Strategic Investment (under the European Investment Bank umbrella). However, the Fund’s main challenge is to function at various governance levels. Prof. Naert opens the issue of coordination within EAS, institutionally as well as based on (investment) projects and policies, in cooperation with promotional banks and private investors. He points to the Fund as an aspect of EAS in terms of its inevitable intensive cooperation between administrative actors at different levels.

Serbia, as a case study transitional country, is in the centre of the next chapter, written by representatives of the World Bank, **Verheijen, Svircev, and Muhula**. Legacy, traditions and constraints are analysed in the light of Serbia, having “a record of start and stop reforms” since 2001. With the approval of the new PAR

strategy and Action Plan in 2014 and 2015 respectively, the start of EU accession negotiations and new efforts to restructure the administration and amend critical legal frameworks, the country has entered a new phase. The question remains, emphasise the authors, whether this time around, political and economic factors will facilitate this process, and how this trajectory aligns with the principles underlying the European Administrative Space. Unless reforms become less weary and social resistance decreases by sound political, legal and international support, EAS will turn into a myth.

The second part of respective monograph addresses developing components of EAS. These dimensions are various, yet all are an important part or a tool of and to EAS if understood systematically, strategically and consistently. First, Polish researchers, **Widla-Domaradzki and Trochymiak**, address the issue of politicisation and organisational learning in the administrative decision-making process. They point out that politicisation is a black box since not much has been done in the scope of empirical research, but we act on the assumption of negative impact of political influence. Authors try to overcome this gap by analysing the project “Ministries as learning organizations” (MUS) in relation to changes in internal structures of administration and management, based on structural modelling techniques to better understand the relationship between organisational learning and political adaptation. The findings show that there is an optimal level of “politicisation”, meaning adaptation, specific for different types of sectors or departments.

Croatia is, however, compared to The Netherlands, also in the centre of the next chapter, dedicated to tax transparency. Authors, **van der Maas, Lalić Novak and Džinić**, ground their research on exploring administrative capacities in Croatia that need to be developed in order to implement EU regulations and the OECD field recommendations, particularly regarding advance rulings. Transparent conduct is seen in the light of EAS, as well as proactive and partner oriented tax administration. The research approach is mainly descriptive, yet it already indicates basic insights into the problem within this case study. Harmonising legislation will be insufficient unless administrative capacity is systematically developed.

Georgia, on the other hand is presented as a case study regarding civil service training and development models. **Prof. Dolidze** addresses this topic in the framework of managerial and Neo-Weberian approaches to reforms on a national scale by the analysis of the Georgian Civil Service Act, in force since 2017, as a replacement of the one adopted in 1997. The new law establishes a career or professional PA system, which will, according to the study, bring dramatic changes to many areas of public organisations’ management in terms of EAS principles, above all PA effectiveness. In particular, the study elaborates on the most effective approach to the training and development system in public organisations, among the three basic schemes of training delivery: centralised, semi-centralised and decentralised schemes – and discusses the relationship between public and private actors on the

example of the training providers, based on the qualitative and quantitative data that the hybrid one is the optimal.

HRM in the public sector is of research interest in the following chapter too, prepared by **Ramasheuskaya and Rabava**, regarding the professionalism and motivation of Belarus civil servants, from the aspect of PA as an enabler of the competitiveness of national economy as pursued by the Strategic programme for the sustainable development of Belarus till 2030. The research has been conducted based on 182 questionnaires collected from public officials in Belarus, which included questions about intrinsic and extrinsic motivation factors, as well as questions on an organisational environment. The findings reveal a very high value of empathy as a factor of public service motivation, even though (too low) pay is not as important in absolute terms as its perception of fairness. If the latter is fulfilled, as well as an open atmosphere, the readiness for a higher level of loyalty and changes towards European standards is present.

Transparency is further tackled through an insight into administrative-judicial practices regarding the rights to information in Slovenia, as studied comprehensively by **Kovač**. Based on an analysis of the development of the Freedom of Information Act, adopted in 2003, the situation in Slovenia is evaluated in the light of European principles. The implementation gap is observed, yet the progress is evident, since a sound legal framework is supported by consistent judicial review. As anticipated, the results of analyses reveal Slovenian regulation to comply with European principles and rules; however, there is a reluctance of certain liable bodies to openness. Therefore, the Slovenian case illustrates the importance of national procedural regulation and institutional landscape in order to realise open and good administration.

Next, the topic of alternative dispute resolution (ADR) in administrative affairs in general and regarding consumer fields is addressed, in the chapters written by **Pečarič** on Slovenia and **Tuškan and Jeretina** on Croatia. Pečarič discusses the possibilities and obstacles of using alternative dispute resolution tools in administrative law, taking into account the necessary protection of the public interest and hence limited options and, furthermore, discrepancies between theory and practice. Comparative insights are provided from the US and New South Wales administrative law, and finally, criteria are given by which it could be more easily decided pro et contra to (not) use these tools in administrative law and indirectly develop the EAS. The focus of the last chapter is the development of cooperation and mediation between public authorities and private parties, and their impact on governance efficiency in Croatia. Special emphasis is given to distinguish in which administrative area mediation may be conducted, which legal regulation encourages the use of mediation, and on which specific fields it is being used since the legality and public interest limit this tool in respective areas. However, as pointed out by the authors, according to an analysis of available tools and their application in Croatia, not only

the prevention of conflicts in the field of public administration can be achieved by mediation, but it can also help citizens, through consultations, understand their rights more clearly, as well as the obligations imposed on them. In addition to this, this paper also deals with the possibilities of a constructive dialogue between public authorities and private parties in the field of public-private partnerships, concessions and public procurement, all with the intention of achieving good governance, which meets the legitimate needs of citizens and makes them partners. These issues are compared to European principles to establish a constructive dialogue between public authorities and private parties.

Last but not least, the administrative organization environment and administrative coordination are analysed by **Giljević**. In his words, the environment means the area, the actors, and the intertwining of mutual relations and connections, while its definition as a term in literature varies, even though in the contemporary world, all areas of administrative organization environment are characterized by a great heterogeneity requiring a high degree of interaction and transparency due to the need for harmonization. Therefore, he investigates coordination, defined as the process of harmonization and adjustment of the decisions and actions of a number of actors with a view to attaining a specific goal that cannot be reached by the actions of one actor alone, to address two cases of Croatian ministries and reveal how they coordinate with other stakeholders in their public tasks. The results of the study indicate that the environment and its dynamics impact administrative coordination by either improving it or hindering it.

To conclude, all contributions lead us to the inevitable conclusion. Namely, public administration is an important societal subsystem, directly influencing the welfare of the people and the economic environment. However, as with any complex system, PA is evolving over time. Contemporary society requires good administration in the sense of the implementation of EAS principles, but beyond the formal adoption of PAR strategies and new laws. This is the case, particularly in Eastern Europe, with gaps due to the ongoing post-socialist transition, the lack of administrative capacity, and gradual but inconsistent reforms. Hence, we hope to contribute to further European development with the respective monographs.

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## 2. The European Administrative Space – Some Considerations for the Consequences for Public Law in Europe

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*Herwig C. H. Hofmann*

This contribution to the NISPAcee conference presents, in very broad strokes, an overview of the ‘European Administrative Space’ (EAS) and its development in the past decades, as well as likely future challenges to public law.<sup>1</sup> The term EAS used here is metaphoric in that the notion of ‘space’ relates not only to the context of describing the territorial reach of administrative powers beyond national borders, but also the term “space” is used in the context of a policy field, or ‘area’ in much the same way as the Treaty on the Functioning of the European Union (TFEU), for example, refers to ‘areas’ such as the “area of freedom, security and justice”. The use of the word ‘space’ or ‘area’ is used here to indicate the existence of a more or less integrated legal field in which national and European administrations closely cooperate to achieve jointly defined objectives and close procedural cooperation. The following considerations aim to present an understanding of EAS as a space of integrated law and practice for the implementation of EU law. Since the development of EAS is ongoing, its comprehension is greatly facilitated by an understanding of the forces that have led to the EAS’s evolution until now and of the driving forces which will shape the development of EAS in the near and medium-term future. On this basis, it will be possible to prepare for future challenges, identify shortcomings and to develop possible remedies for its main flaws.

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1 HCH Hofmann, ‘Mapping the European Administrative Space’ (2008) 13 *West European Politics* 662; also published as HCH Hofmann, ‘Mapping the European Administrative Space’ in M Egeberg and D Curtin (eds), *Towards a New Executive Order in Europe* (Routledge 2009) pp. 24–38; HCH Hofmann, GC Rowe and A Türk *Administrative Law and Policy of the European Union* (OUP 2011) pp. 5–11; H Siedentopf and B Speer, ‘La Notion d’Espace Administratif Européen’ in J-B Auby and J Dutheil de la Rochère (eds) *Droit Administratif Européen* (Bruylant 2007) pp. 299–317; J Trondal and G Peters, ‘A Conceptual Account of the European Administrative Space’ in M Bauer and J Trondal (eds) *The Palgrave Handbook of the European Administrative System* (Palgrave MacMillan 2015) pp. 79–92.

## 2.1 Reconstructing the Emergence of the EAS and the rise of Integrated Administration

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The European administration as we know it today has not developed overnight.<sup>2</sup> Instead, it has been established in various phases of integration leading away from a purely territorially bound exercise of public policies in Europe towards today's more integrated law making and implementation thereof in many policy areas. Importantly, European integration has, over time, not only led to an opening-up of the political and legal systems of a Member State *vertically* towards accepting the influence of EU law within the Member States, but also *horizontally* in the sense of an opening towards accepting de-territorial application of legal acts of other Member States.

Historically, the vertical opening of states towards EU law came first in the context of the implementation of the principle of primacy of EU law, requiring the setting aside of conflicting national law as well as Member States accepting the potential direct effect of the EU within their territory, which allows for rights and obligations to be created directly under EU law without the need for transposition in Member State law. Finally, the obligation of the interpretation of national law, in conformity with EU law obligations and rights helped streamline Member State legal systems towards a single legal space.<sup>3</sup> Nonetheless, however powerful these influences have been in Member State legal systems, the vertical opening of the Member States towards EU law remains, in principle, limited to each individual Member State and the territorial reach of its sovereignty. This is the origin of the model, commonly cited until today, between, on the one hand, *direct administration* of EU law by Union institutions as opposed to and on the other, *indirect administration* of Union law by Member State administrations within their territory.

Horizontal opening-up of Member States began in the mid-1970s' case law of the European Court of Justice (now the CJEU) by means of introducing the obligation that Member States mutually recognise administrative and legislative decisions of other Member States. This process is sometimes described as 'negative' integration, as opposed to positive integration driven by EU legal acts harmonising divergent national provisions.<sup>4</sup> This development was spurred by the recognition of rights of individuals, mainly in the field of the fundamental freedoms of the EC

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2 This part of the chapter is based on previous publications such as: HCH Hofmann, 'Mapping the European Administrative Space' (2008) 13 *West European Politics* 662; also published as HCH Hofmann, 'Mapping the European Administrative Space' in M Egeberg and D Curtin (eds) *Towards a New Executive Order in Europe* (Routledge 2009) 24–38; HCH Hofmann, GC Rowe and A Türk *Administrative Law and Policy of the European Union* (OUP 2011) pp. 5–11.

3 Case 26/62 *Van Gend en Loos v Administratie der Belastingen* [1963] ECR 3, paras. 10, 12, 13; Case 6/64 *Costa v ENEL* [1964] ECR 585, para. 3. This was so established, irrespective of the nature of the law, whether primary (treaty) law, derived secondary law, or individual decisions of an administrative nature.

4 See especially JHH Weiler, 'The transformation of Europe' (1991) 100 *Yale LJ*, 2403.

Treaty *vis-à-vis* Member States,<sup>5</sup> leading, in reality, to administrative decisions of one Member State having *de-facto* trans-territorial reach in others. The admission of medicines or certain food products serves as examples for such a de-central application of EU law with trans-territorial decision-making in which a marketing authorisation by one administration in the EU has an effect on the entire internal market. Thereby, with increasing European integration, the distinction between the ‘inner sphere’ of a state governed by territorially restricted public law and its ‘outer sphere’ governed by foreign law and public international law has become much less pronounced within the EAS. The real nature of EU law as a unique legal system is, in part, to be found in the obligations of not only the vertical but also the horizontal opening of state structures.

These developments are the foundations of the current phase of fast-paced development of the EAS we are currently still witnessing. The ‘third phase’ of development marks an important shift in the legal and political environment by a move towards what can be described as an ‘integrated administration’ in Europe.<sup>6</sup> The horizontal opening of Member States towards the law of other Member States in the form of legislative acts, administrative acts, and to some degree private law, required information exchange – either sporadic and *ad hoc* mutual assistance obligations or by means of more permanent information exchange systems. With the ‘deepening’ i.e. further development of the internal market, many policy-specific sectoral regulatory areas, such as those for value added tax, the Schengen-zone, environmental law and others, required ever more sophisticated tools of permanent cooperation for the setting of rules for the implementation of EU law, as well as for continuous cooperation by administrations. Typical duties include regular reporting duties, participation in joint planning structures, and coordination of implementation through committees at the European level – within the framework of comitology or otherwise through expert committees. Key administrative functions are now undertaken in an increasing number of policy areas, involving input from several administrative actors both from Member States and the European level, tied together through procedural provisions emanating from EU law. The development of vertical and horizontal relations can therefore be understood as stepping stones towards the creation of an integrated network of administrations. Throughout the

5 In Case 104/75 *de Peijper* EU:C:1976:67, for example, the ECJ limited the possibility of a Member State to carry out an administrative procedure already undertaken in another Member State. That would be a disproportionate limitation of the fundamental freedom. Where there were similar requirements for administrative procedures in two Member States but no harmonisation, the ECJ went a step further and requested national administrations to make contact to establish the necessary information, Case 251/78 *Denkavit Futtermittel* EU:C:1979:252. Case 35/76 *Simmenthal v Ministero delle Finanze italiano* EU:C:1976:180 provided for the obligation of a Member State to accept the veterinary certificates of another Member State in the case of an investigation procedure harmonised by a directive. Case 120/78 *Rewe Central Ag v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* EU:C:1979:42, paras 8 and 14.

6 HCH Hofmann and A Türk, ‘Conclusions: Europe’s Integrated Administration’ in HCH Hofmann and A Türk (eds), *EU Administrative Governance* (Edward Elgar Publishing 2006) pp. 573–96.

developments in these three phases, Member States have opened up and deeply integrated into a European system in which they have gained in-depth access through their administrative actors into law-making at all levels – legislative, executive and judicial. The possibilities of this very effect, however, sets EU Member States apart from states which are in Europe but are not members of the EU, such as, for example, EFTA-members who, by opting to accept only parts of EU law, predominantly internal market law, pay for this choice by being, in many respects, excluded from participation in normative activity affecting their constituencies.

Some of the most striking developments of the ‘third phase’ of the development of integrated administrations are organizational innovations such as the ‘agencification’ of EU administration. More generally speaking, much of the administrative integration at EU level is the creation of regulatory acts with quasi-legislative effect, not the traditional single case decision-making associated with the concept of ‘administration’ in some Member States. This also explains why administration in the EAS, in some ways, appears as a highly political endeavour, setting regulatory goals and choosing the means to achieve them even in matters with a high degree of technical expertise yet with an immediate influence on value choices in society.

## 2.2 One important effect: The pluralisation of actors in EAS

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One of the effects of the development of EAS is that the ‘European administration’, a concept prominently referred to in Article 298 TFEU, contains both EU institutions, bodies and agencies as well as Member State bodies involved in the implementation of EU law and policies. The European administration has, in the past decades, become more multidimensional and diverse with a marked development towards the phenomenon of ‘pluralisation’ of actors. Two main phenomena contribute to such pluralisation. First, in the EU, executive powers for the implementation of EU policies are split between Member States and the EU and thus networks of regulatory actors have to be created to ensure joint implementation of law and policies. Second, this phenomenon is reinforced by an increase in regulatory matters, subject to a coordinated approach in the EU but in the reality of an increasingly multi-speed integration process.

Regarding the first issue, agencies exercising administrative functions in the various areas of EU policies, are created as bodies with a separate legal personality from Member States or from the EU.<sup>7</sup> Many European agencies have been created as decentralized forms of administration which integrate national administrative

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<sup>7</sup> Some agencies are also created as public-private partnerships. Examples are the European Institute of Innovation and Technology (EIT) [2008] OJ L97/1, the various joint undertakings in the area of research such as the fusion energy model ITER [2007] OJ L90/58, and the Fusion for Energy agency of the EU to support it; SESAR for air traffic management [2007] OJ L64/1 as amended and Galileo for satellite navigation [2008] OJ L196/1. These bodies are created as joint undertakings under Art 187 TFEU.

bodies into their operations. They generally provide structures for co-operation between the supranational and national levels and between the national authorities. At the same time, EU law requires Member States to create independent agencies linked to the EAS such as, for example, independent data protection authorities or independent regulatory authorities in the field of energy or telecommunications supervision.

The phenomenon of the use of independent agencies as a structural tool for the implementation of EU law or EU policy goals can, at least in part, be explained by the fact that the implementation of EU policies within the EAS requires networks of national authorities. Importantly, the use of agencies and networks allows national and sub-national actors to remain nominally in charge of final decision-making, whilst in the background, EU agencies structure procedural cooperation in the implementation of EU policies.<sup>8</sup>

Another way in which the EU polity has evolved in recent years is in the nature and breadth of the tasks it performs. This influences the growth and diversity of actors who perform them. This, second dimension of a pluralisation of actors and policies is thus linked to the broadening of policy objectives touched by EU law. But also, the growing membership of the Union to 28 Member States, mostly of small size, with increasingly diverse systems of administration and historic constitutional paths and developments has, in itself, further contributed to a pluralisation of actors, not least because the increasing diversity of EU membership has brought with it an increasing need for multi-speed integration. Official or unofficial opt-outs and partial participation in policies of the EU as well as cooperation in EU policies such as Schengen, by non-EU Member States causes its own problems of defining the territorial reach, the modes of application and the identity of the matter of ‘space’ in the EAS.

The result of these different aspects of pluralisation of conditions can conceptually be summarised as follows: Organizationally, the actors involved in European administrations, including the agencies created at EU or Member State level, remain separate, being organized either at the national or European level. In principle there are, legally speaking, no mixed types of institutions either under EU law or national (public) law. All legal acts of the European administration are formally either qualified as national or European. From an outsider’s perspective, therefore, despite all the moves towards an integrated European administration, not too much has changed from the *status quo ante* in the 1950s. When administrative functions are undertaken at European level, their exercise is organizationally fragmented insofar as executive authority at EU level is spread across several institutions, most notably the Commission and the Council, which are increasingly supported by EU agencies.

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8 S Griller and A Orator, ‘Everything under Control? The Way Forward for European Agencies in the Footsteps of the Meroni Doctrine’ (2010) 35 *EL Rev* 3.

From the ‘inside’ however, the system is held together by procedural law. In this, an administrative space is created in which the joint creation of a law and its implementation is a reality. Limitations on autonomy of Member States arise from the fact that, in the fields of Union policy, Member States’ substantive and procedural administrative law is to be applied within the framework of EU law.

### 2.3 The Development of European Administration as a Cooperative System

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European administration is thus now a highly integrated system striving to realise a system of values described by Harlow and Rawlings as basic principles of ‘cooperation, coordination and communication.’<sup>9</sup> These values remain valid as design characteristics of procedures, despite the ever more prevalent approaches of control and conditionality in the post-2008 crises response mechanisms. Procedural cooperation within the European administrative space is a key dimension for linking the various actors in the common goal of the implementation of policies.

The integration of administrative systems for implementing EU law has taken place irrespective of the diversity of the ‘tasks with which executive authorities are entrusted and the diversity of the institutions, bodies, and actors responsible for carrying out such tasks; and of the processes through which administrative measures are adopted.’<sup>10</sup> Also in the EU, no overarching approach exists which can be applied to interlocking legal and political systems and sub-systems when implementing EU law. The EU has not, so far, undertaken the important structural step of adopting, other than for comitology committees through the Comitology regulation and in the form of a Financial Regulation for the spending of its budget, an administrative procedure act applicable throughout policy areas.

Cooperation between diverse actors and across the different levels is an essential component of European administration. Administrative cooperation takes place in policy areas in which responsibility for implementation rests at the European level, and also in fields where, in the absence of EU administrative capabilities and competences, Member State authorities are responsible.<sup>11</sup> These procedural linkages can be highly developed, for example through composite procedures in which actors from various jurisdictions, both national and European, contribute

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9 C Harlow and R Rawlings, *Process and Procedure in EU Administration* (Hart Publishing 2014) p. 323.

10 K Lenaerts, foreword to HCH Hofmann, G Rowe and A. Türk, *Administrative Law and Policy of the European Union* (OUP 2011).

11 It should be noted that there is, in fact, a mismatch between the allocation of functions and administrative resources to the Commission when compared with those available to national bureaucracies, with the Commission equalling in size the administration of a major European city: H Kassim, ‘The European Administration: Between Europeanization and Domestication’, in J Hayward and A Menon (eds), *Governing Europe* (OUP 2003) pp. 139–161, p. 151.

to the final decision taken by one single actor or by simple forms of information exchange.

Diverse forms of procedural cooperation for the implementation of EU law through national and European bodies are often referred to as ‘shared administration’. The terminology was made widely accepted by the Committee of Independent Experts set up by the European Parliament and the Commission to investigate alleged misconduct of the Santer Commission in 1999. It referred to as ‘shared administration’, administrative procedures consisting of forms of administrative cooperation for the management of Union programmes where the Commission and Member States have distinct administrative tasks which are interdependent and set down in legislation and where both the Commission and the national administrations need to discharge their respective tasks for the Community policy to be implemented successfully.<sup>12</sup> Shared administration – i.e. networks maintained by procedure – pose specific problems for oversight and accountability by their characteristics as mixed or hybrid models of implementation. But hybrid and composite procedures are increasingly frequent in joining organizationally separate but procedurally linked networks of authorities.<sup>13</sup>

The procedural obligations underlying administrative networks for the implementation of EU law consist of obligations of different intensity. They range from obligations to exchange information either on an ad hoc or a permanent basis with network structures which have been developed to include forms of implementation such as individually binding decisions.<sup>14</sup> Therefore, a different and, in my view, currently promising approach to describing procedural cooperation consists of a focus on information management procedures.<sup>15</sup>

The starting point for a wider notion of procedural cooperation lies in conceptualizing the flow of information between the participant bodies in the network at European and national levels. This derives from the fundamental idea that most forms of procedural cooperation in implementing EU policies are based on the joint production, gathering and management of information and/or exchange of information. Information exchange mechanisms are established in numerous fields of

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12 P Craig, ‘Shared Administration, Disbursement of Community Funds and the Regulatory State’ in HCH Hofmann and A Türk (eds), *The Move to an Integrated Administration – Legal Challenges in EU Administrative Law* (Edward Elgar Publishing 2009) pp. 34–64.

13 This has been referred to as ‘regulatory concert’, see: S Cassese, ‘European Administrative Proceedings’ (2004) 68 *Law and Contemporary Problems* 15, 21.

14 A prominent example for the latter is enforcement networks in the area of competition law with the ‘European Network of Competition Agencies’. See: Council Regulation (EC) 1/2003 [2003] OJ L1/1 and the Commission Notice on cooperation within the Network of Competition Authorities [2004] OJ C101/43.

15 See D-U Galetta, HCH Hofmann and J-P Schneider, ‘Information Exchange in the European Administrative Union – An Introduction’ (2014) 20 *European Public Law* 65 with further references.

EU law and policies, generally on internal market matters,<sup>16</sup> as well as in the area of many policy fields such as in food, plant and medicine health and safety regulation.<sup>17</sup> Another important area of such common alert systems is the Schengen information system and related instruments for immigration and border control mechanisms.<sup>18</sup> Most prominently, information exchange and alert systems exist in the area of tax and recovery of public payments but also in the fields of customs.<sup>19</sup> The transfer of information and evidence within enforcement networks can also lead to the necessity of an allocation of enforcement responsibilities in cases where several Member State bodies might be responsible. Examples are the allocation of responsibilities distributed on this basis in fisheries and environmental law.<sup>20</sup> Enforcement in the fields of competition law and merger control is also a prominent example for such allocative rules.<sup>21</sup>

In a seminal article of 1996, Schmidt-Aßmann described various forms of such administrative cooperation ranging from *ad hoc* single-case information-exchange

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16 See in that respect e.g. the Internal Market Information System (IMI) with various functionalities for effective information exchange (Regulation (EU) 1024/2012 on administrative cooperation through the Internal Market Information System, etc [2012] OJ L316/1).

17 See e.g. RASFF (Commission Regulation (EU) 16/2011 laying down implementing measures for the Rapid alert system for food and feed [2011] OJ L6/7), RAPEX (Commission Decision 2010/15/EU laying down guidelines for the management of the Community Rapid Information System 'RAPEX' [2010] OJ L22/1), EUROPHYT (Council Directive 2000/29/EC on protective measures against the introduction into the Community of organisms harmful to plants, etc [2000] OJ L169/1, Arts 12(4), 13(8) and 16). See also Commission and European Medicines Agency, 'Compilation of Community Procedures on Inspections and Exchange of Information' (2014) EMA/572454/2014 Rev 17, pp. 14–29.

18 Schengen Information System (The Schengen acquis – Declaration of the Executive Committee of 28 April 1999 on the structure of SIS [2000] OJ L239/1, Art 92; Regulation (EC) 1987/2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II) [2006] OJ L381/4), Eurodac (Regulation (EU) 603/2013 on the establishment of 'Eurodac' for the comparison of fingerprints, etc [2013] OJ L180/1) and VIS (Regulation (EC) 767/2008 concerning the Visa Information System (VIS), etc [2008] OJ L218/60).

19 See e.g.: Council Directive 2011/16/EU on administrative cooperation in the field of taxation, etc. [2011] OJ L64/1 establishing the CIS; Council Directive 2003/48/EC on taxation of savings income in the form of interest payments [2003] OJ L157/38, Art 9; Council Directive 2010/24/EU concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures [2010] OJ L84/1; Council Regulation (EU) 904/2010 on administrative cooperation and combating fraud in the field of value added tax [2010] OJ L268/1.

20 See for example Art 50(5) and (7) of Regulation (EC) 1013/2006 on shipments of waste [2006] OJ L190/1, which provides that '5. Member States shall cooperate, bilaterally or multilaterally, with one another in order to facilitate the prevention and detection of illegal shipments.' '7. At the request of another Member State, a Member State may take enforcement action against persons suspected of being engaged in the illegal shipment of waste who are present in that Member State'.

21 e.g. Art 9 on the referral of merger control cases to the authorities of the Member States in Council Regulation (EC) 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation) [2004] OJ L24/1.

to settled procedures involving ongoing administrative cooperation.<sup>22</sup> More recently, the ReNEUAL Model Rules on EU Administrative Procedure have developed a model of EU administrative procedure law on this basis.<sup>23</sup> Conceiving information (including its generation, management and distribution) thus as a legal *topos*, the need for institutional routines in the form of legally defined structures of administrative cooperation — horizontally — between the Member States themselves and — vertically — between the Member States and the Union bodies is the fundamental approach of this concept. Cooperative procedures which have been developed in this context include certain forms of implementation such as individually binding decisions<sup>24</sup> and joint planning procedures.<sup>25</sup> Key to composite procedures, however, is the information cooperation discussed in ReNEUAL's 'Book VI' which provides for innovative approaches such as to how to address some of the central information-related shortcomings of composite procedures in the EU – most of which centre around the matters of accountability, judicial review and remedies.

Although scholars of European administrative law have recognized the increasing importance of information exchange, the discussion still appears to be at an early stage.<sup>26</sup> Although composite administrative procedures allow for using existing national administrative infrastructure, they can be highly problematic from the point of view of accountability. One problem is transparency, especially since inter-administrative information exchange makes a clear allocation of responsibilities that depends on a clear definition of functions and tasks difficult. Without such

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22 E Schmidt-Aßmann, 'Verwaltungskooperation und Verwaltungskooperationsrecht in der Europäischen Gemeinschaft' [1996] *Europarecht* 270.

23 [www.reneual.eu](http://www.reneual.eu). The results of the project have been published in the English language online on the ReNEUAL website and in Spanish as *Código ReNUAL de procedimiento administrativo de la Unión Europea* (INAP 2015), in German as *ReNEUAL – Musterentwurf für ein EU-Verwaltungsverfahren* (Beck 2015), in Polish as *ReNEUAL Model kodeksu postępowania administracyjnego Unii Europejskiej* (Beck 2015) and in Italian as *Codice ReNEUAL del procedimento amministrativo dell'Unione europea* (Editoriale Scientifica 2016) with French and Romanian language versions to follow in 2016.

24 A prominent example of the latter is enforcement networks in the area of competition law with the 'European Network of Competition Agencies'. See, Council Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty [2003] OJ L1/1 and the Commission Notice on Cooperation within the Network of Competition Authorities [2004] OJ C101/43.

25 Increasingly common are joint planning structures, in which EU law provides for the organization of the Commission (and sometimes European agencies) together with national agencies into 'planning networks'. An example of such a network is 'Eionet' (Council Regulation (EEC) 1210/90 [1990] OJ L120/1 and Council Regulation (EC) 933/99 amending Regulation 1210/90 on the establishment of the European Environment Agency and the European environment information and observation network [1999] OJ L117/1).

26 See e.g. A von Bogdandy, '§ 25 – Die Informationsbeziehungen im europäischen Verwaltungsverbund' in W Hoffmann-Riem, E Schmidt-Aßmann and A Voßkuhle (eds), *Grundlagen des Verwaltungsrechts Bd. 2* (Beck 2012); K Heußner, *Informationssysteme im Europäischen Verwaltungsverbund* (Mohr Siebeck 2007); HCH Hofmann, G Rowe and A Türk, *Administrative Law and Policy of the European Union* (OUP 2011) pp. 411–490.

clear allocation and definition, any form of anticipatory or subsequent accountability tools, such as design of procedural safeguards as well as effective judicial review is severely restrained.<sup>27</sup>

## 2.4 The Future of the Integrated European Administration

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In my view, the two main themes that have dominated the evolution of the European administrative space will probably continue to do so in the future. One is the question of the accountability of a system on which actors organized on different levels engage in composite decision-making procedures. Another is the question of values which govern the system of integrated administration.

In the EU, and the EAS more generally, the problem is that most structures of judicial and political accountability are organized at either the national or European level. Supervisory and accountability mechanisms are generally not procedurally linked in the same way as integrated administration is. Traditionally organized supervisory structures, with a two-level system with distinct national and European levels, have difficulty in allocating responsibility for procedural errors and finding adequate remedies for maladministration within a network. Therefore, exclusive reliance on an *ex post* review of a final act, for example, by Courts of the level – Member State or EU, which has issued the final act following a composite procedure – is problematic. A strong set of tools of accountability, capable of addressing the real-life problems arising from information exchange and composite procedures, would be necessary to secure individual rights and freedoms.

Holding actors to account, however, requires a set of values and criteria for assessing the action. Here, much clarification is necessary and development is ongoing. The vast array of actors, forms of acts and applicable procedures within European administration make it difficult to assess to what extent constitutional values infuse the integrated administrative activity, and, more precisely, how general principles are complied with across the legal system.<sup>28</sup> Requirements for accountability become particularly urgent in cases where administrative networks have been cre-

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27 For the relevant sector-specific analysis see: F Boehm, *Information Sharing and Data protection in the Area of Freedom, Security and Justice* (Springer 2012); O-C Günther and N Tüchler (eds), *Exchange of Information for Tax Purposes* (Linde 2013); A Gutiérrez Zarza (ed), *Exchange of Information and Cross-border Criminal Proceedings in Europe* (Springer 2015); J Sommer, 'Information cooperation procedures – with European environmental law serving as an illustration' in O Jansen and B Schöndorf-Haubold (eds), *The European Composite Administration* (Intersentia 2011) pp. 55–89.

28 See for further discussion regarding rule-making: D Curtin, HCH Hofmann and J Mendes, 'Constitutionalising EU Executive Rule-Making Procedures: A Research Agenda' (2013) 19 *ELJ* 1, 3.

ated within the European integrated administration, which act on matters particularly sensitive to fundamental rights.<sup>29</sup>

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<sup>29</sup> See e.g. A Benz, 'European Public Administration as a Multilevel Administration: A Conceptual Framework' in M Bauer and J Trondal (eds), *The Palgrave Handbook of the European Administrative System* (Palgrave Macmillan 2015) pp. 31–47 and M Egeberg, 'EU Administration: Center Formation and Multilevelness' in M Bauer and J Trondal (eds), *The Palgrave Handbook of the European Administrative System*, (Palgrave Macmillan 2015) pp. 66–78.



## 3. European Administrative Space – Myth, Reality, and Hopes

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*Ivan Koprčić*

### 3.1 Introduction

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The debate about European Administrative Space (EAS) has been characterized mostly by the shy questions about its existence, conceptual disagreements, conflicting answers about its importance, definition, driving forces and obstacles, and disenchanting speculations about its perspective. Some political and societal actors have given it certain mystical and mythical connotations. One of the popular myths presupposes that it would smash national sovereignty by plunging national public administrations into the black hole of the common European state. On the other side, although much more rarely, some actors believe that EAS is able to solve many unpleasant problems with lagging, cumbersome, bureaucratic, formalistic, inefficient, and apathetic public administrations.

The EAS is based on the idea of administrative harmonization and convergence of traditional models of public administration and traditional institutions of public administration and administrative law. It is a space with equal or similar level and quality of public services for all European citizens and other people and with their real possibilities to influence public policies at all governmental levels of the current multi-level architecture of the European Union (EU). A specific process of spreading various standards throughout Europe, be it East or West, has taken place. Such standards often shine as the result of efforts to increase public administration capacities to cope with the increasingly complex and wicked problems of the contemporary world.

EAS is grounded on and comprises a set of values and social and citizens' expectations, governance principles and standards of public administration organisation and functioning defined by law, whose application is supported by the appropriate procedures and accountability mechanisms. The EAS was created and is driven by the EU, the Council of Europe (CoE), OECD-SIGMA, and many other European players. It is facilitated by civil servants' desire to share best practices.

However, its real strength stems from society, since it is fuelled by the expectations of European citizens, civil society, economic and other non-governmental actors (cf. Ulusoy, 2009: 364–367). Those expectations propel the process of Europeanization and make the EAS a viable and live concept.

The purpose of this chapter is:

- To describe and elaborate EAS as the core theoretical concept for explaining the administrative convergence, in conjunction with other interconnected theoretical and doctrinal concepts;
- To present and critically assess the main standpoints of the EU bodies;
- To instigate thoughts about the perspectives; and
- To think about the research possibilities.

### 3.2 European Administrative Space – Lost in Thesaurus, Concepts and Approaches

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There are several competing terms, notions, and concepts in the field of European administrative science today. They range from Europeanisation of public administration to European Integrated Administration and European Administrative Space to European governance. The European Administrative Space has recently become the dominant concept in administrative theory and doctrine for the analysis of the phenomenon of administrative convergence in Europe, thus subsuming several narrower concepts with somewhat different focus.

Europeanisation of public administration is based on a more traditional approach of researching administrative similarities among the countries with a rather neutral attitude towards the actors, institutions, and legal instruments as the drivers of convergence. This approach is focused on the outcomes, not on the driving forces and mechanisms of convergence. It has developed some useful analytical dichotomies, such as top-down and bottom-up Europeanization or a Western and Eastern type of Europeanization.

European Integrated Administration is predominantly engaged with the institutional architecture of the EU with special emphasis on the nodes and links of the EU administrative networks. EU “integrated administration” is competent for the implementation of common and harmonized EU policies and the EU *acquis communautaire*, but it has a role in policy design, too. It is structured as a network, with the European Commission and the EU agencies (“EU bureaucracy”) as the network nodes and with national public administrations as the main field force. Apart from the vertical line (EC-EU agencies-national administrations), there are multiple horizontal networks of cooperation among national bodies and other actors in charge of information sharing, planning, coordination, regulation (independent regulators) and implementation (cf. (Hoffmann, Türk, 2009).

Good administration has predominantly normative connotations, referring mainly to the rights, their elements, and the way of further legal development. The main breakthrough in that regard was achieved by inclusion of the right to good administration in the EU Charter of Fundamental Rights as of 2009. That will certainly give additional impetus to the specification and further development of its elements. One of them may be the enactment of the European law on general administrative procedure, which is under way.

Good governance has gradually gained a pivotal role in doctrinal discussions about the new types of relationships between government, citizens and society as a whole, and is more oriented to policy making than to policy implementation. After some preparatory steps, the main document announcing the new doctrinal direction and systematising its constructing principles and other components in Europe was A White Paper on European Governance adopted by the European Commission in 2001.

In this vein, good administration has been attracting legal meanings, good governance has had doctrinal connotations, and the European Administrative Space has acquired theoretical significance. European Administrative Space can be used to denote several meanings. Geographic, political, normative, cultural, socio-logical, comparative administrative and some other approaches can be identified.

The geographic approach searches for the bases of administrative and managerial similarities among the European countries or a group of countries in their common history, shared doctrinal influences, similar geographic, geostrategic, economic, demographic and other conditions, and – generally – in geographic closeness which enables information sharing, mutual learning, common innovation, and institutional borrowing and transfer. Common territory, spatial closeness, exchange and communication are the real enablers of such administrative melting pots on European territory. The traditional models of public administration (Westminster, Weberian, Napoleonic, Scandinavian, and East European) are the result of previous convergence waves in the geographically limited parts of Europe (Kuhlmann & Wollmann, 2014: 14–21; Koprić et al., 2014: 40–45). However, contemporary administrative convergence is much broader and spreads over the whole of Europe, affecting even the broader space of European neighbourhoods. European standards and best practices have spread and now influence capacity building processes at all governance levels throughout Europe and in neighbouring areas. Occasionally the term “Europeanisation of public administrations” refers to this metaphor of convergence based on the EU influence on national public administrations in various countries.

The political approach towards EAS begins from the idea of the predominant position and significance of politics in the public sphere. Since the EU does have, without a doubt, a strong political dimension, the proponents of such rhetoric and approach consider EAS a sort of appendage to the European political institutions.

They see its main role as an instrument and a phenomenon connected with the implementation of common European policies. The derivative nature of EAS can be easily confirmed, since public administration really is an instrument of policy implementation, regardless of the governance level, from local, to regional and national, to European. That leads, in the next step, towards researching the nature, the quality, the dimensions, the instruments, and other issues of European governance.

The normative approach relies on the legal instruments and their role in fostering institutional isomorphism. There is a firm core of the common European governance principles, followed by the massive body of the European *acquis communautaire*, a set of other soft law public administration standards which continually develop (codified standards, best practices, etc.), and – last but not least – a system of European judge-made law (case law), i.e. the interpretation standards established in the constantly evolving practice in European courts. Legal instruments are especially important because after some time they produce changes even in countries which show the strongest resistance to formal Europeanisation and the dominance of European political and other bodies over the national legal systems and administrative models. That does not mean some irritation should not be taken into account, because it has already caused significant political and other consequences, such as those the EU is currently experiencing with Brexit.

Apart from top-down Europeanization, there is a bottom-up convergence pressure which stems from the shared expectations of European citizens. The EAS is of special importance for European citizens and all those who come to European territory, because they can count on the predictable, lawful, and reliable functioning of public authorities at all governmental levels. Those expectations, stabilized during a long period, are the normative skeleton of societal institutions and lead towards stabilisation of administrative behaviour. Over time, they have been petrified as the new values and civilization standards, recurrently influencing administrative institutions. Repetitive administrative patterns, stabilized throughout Europe on the basis of persistent citizen expectations, are at the heart of the cultural approach to European administrative convergence. Such development tempts European citizens to demand and expect more, and in a much faster manner, thus giving great strength and resilience to the EAS concept (cf. Checkel, Katzenstein, 2009: 10). A sub-variation of this approach deals with organisational and administrative culture, based on values, expectations, and behavioural patterns, and research – among other issues – the level of internalisation of common values and principles of EAS among European civil servants.

In contrast to several approaches, preoccupied with the normative dimension of EAS, the sociological approach asks about empirical evidence regarding EAS and the real level of European administrative convergence. If citizens are in the same or similar position with regard to public administration in different European countries, be that a factual position achieved on the basis of the same or similar legally

grounded rights and duties or on the basis of some other factors, we may conclude that EAS exists. This is a factual issue and it should be researched by standard sociological, empirical research methods.

The sociological approach, based mainly on the real, empirically established position of citizens throughout Europe or at least on their empirically collected perceptions, needs to be upgraded by the comparative approach. Comparative analysis of administrative systems is not a new method in administrative science, but it needs to be refined in order to be able to measure not only the substantial differences amongst the traditional models of public administration, but also the fine differences between countries. Methodological refinement can be achieved if the existing common political, administrative, economic, and even societal frames in contemporary Europe are taken as the basis of the methodological exercise. Significant commonalities enable substantial improvement of comparative administrative analyses in today's Europe, because they allow for the construction of common, understandable, and truly comparable administrative dimensions and much better "metres", i.e. more appropriate and precise measurement and comparison devices.

Each of the mentioned approaches adds a layer to the complex meaning of European Administrative Space and reveals some of its components. The EAS is developing towards a situation characterized by at least similar administrative and public services for all European citizens and other people on its territories and with real possibilities of all relevant stakeholders to influence public policies at all governmental levels within the EU multi-level architecture. EU harmonization policy, mutual adjustments of national public administrations in many administrative and policy fields, and mutual learning significantly contribute to these ends.

Some of the fields with prominent changes caused by administrative and governance convergence are: services of general interest, local self-government, protection of human rights, system of protecting citizens' rights (mainly within administrative procedures and administrative justice), professional services and self-organization of regulated and other professions and many policies, such as regional, agricultural, monetary, youth, environmental, ICT and information society, asylum, and others (cf. Koprić et al., 2012). The extent to which these administrative and policy fields are adjusted or even homogenized is another matter, but all of them, along with many others, are affected by continuous Europeanization.<sup>1</sup>

### 3.3 Wonderland of (European) Governance

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Governance has been used as a theoretical and as a doctrinal concept. This shows, amongst other implications, that despite many criticisms about excessive usage, notional circumventions, and possible vagueness, it may function well at the inter-

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<sup>1</sup> Page claimed some time ago that administrative convergence is "a restructuring and adjustment rather than a homogenizing Europeanization" (Page, 2003: 175).

related nexus of instrumental and value rationalities (Dong, 2015), which is very important for understanding public administration in general (Koprić, 2017).

In theory, governance has become an extremely popular concept since the beginning of the 1990s, denoting various possible meanings. However, it was used for the first time a few decades earlier by Harlan Cleveland in his book *The Future Executive: A Guide for Tomorrow's Managers* published in 1972. He argues that the new bigness and complexity of contemporary society and, consequently, of societal problems requires solutions which rely on multi-organizational arrangements, encompassing both public and private organizations. That will cause huge changes in the way organizations are structured and led (cf. Frederickson, 2005: 283–284).<sup>2</sup>

Since then, the usage of the term “governance” in theory has exploded, with a tendency to overlay the entire disciplines of public administration, public management, administrative science, and some others. It has frequently been used without any precise definition, as if its meaning were self-explanatory. In parallel, the word has been given several different meanings: when defining it, authors apply different standpoints and stress different concepts and ideas. Finally, it has become a fashionable term in scientific literature: “governance is now everywhere and appears to mean anything and everything” said Frederickson (2005: 285). He then concluded that “the concept is imprecise, woolly, and, when applied, so broad that virtually any meaning can be attached to it” (Frederickson, 2005: 289).

Frederickson urges that the concept of governance should be narrowed and tries to construct “a viable concept of governance for public administration” based on a return to the original Cleveland concept. He identifies three types of governance, which is a kind of public administration: inter-jurisdictional governance, third-party governance, and public non-governmental governance (2005: 294–295).<sup>3</sup> At the end, he states that public administration “is the basis of policy implementation in government, and government is an essential precondition of governance”, meaning that there is no governance without government (2005: 298–299).<sup>4</sup>

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2 “The organizations that get things done will no longer be hierarchical pyramids with most of the real control at the top. They will be systems – interlaced webs of tension in which control is loose, power diffused, and centers of decision plural. (...) Because organizations will be horizontal, the way they are governed is likely to be more collegial, consensual, and consultative.” (Cleveland, 1972: 13, quoted in Frederickson, 2005: 283).

3 Inter-jurisdictional governance means inter-jurisdictional and inter-organizational cooperation that is vertical and horizontal and relies on voluntary participation in a certain specific policy area (the examples are environmental inter-jurisdictional governance or national defence inter-jurisdictional governance). Third-party governance extends “the state or jurisdiction by contracts or grants to third parties, including sub-governments” (the first party is the elected democratic legislative authority; the second is the executive administration or public administration). Public non-governmental governance is characterised by the substantive autonomy of actors outside government engaged in policy making representing the interests or well-being of citizens. (Frederickson, 2005: 294–295).

4 In that vein, he opposes the influential arguments of Rhodes and other authors that new governance means governing without government (cf. Rhodes, 2007).

Governance can be seen as a continuum with the classic, hierarchical government at one end, and horizontal governance based on “self-organizing inter-organizational networks” (Rhodes, 2007: 13) at the other. Such a continuum can show the degree of governance development towards the horizontal pole, or, at best, a stage in the departure from the vertical government type of managing public affairs (cf. Koprić, 2012: 40).

Good governance is only one of the many administrative doctrines,<sup>5</sup> but one of the most influential in recent decades. An administrative doctrine is a system of ideas about desirable ways of operating and a set of prescriptions about good practices grounded on dominant values and systematized experiences, comprising standards with regard to organization, functioning, regulation, management, and reform of public administration. Administrative doctrines are themselves influenced by social, economic, political, demographic, and other societal circumstances.

“[D]octrines are accepted for reasons best explained, not by hard data, but by the analytical techniques associated with rhetoric” (Frederickson et al., 2016: 110; cf. also Hood & Jackson, 1991). Although doctrines do not belong to “hard” science, at least at first sight, because they are “contaminated” by values and principles, they have to be taken into account as an important parcel of social reality. They may be even analyzed and researched, as shown in the increasingly popular interpretative approach in public policy research (Wagenaar, 2007; Bevir, 2007; Sullivan, 2016).

Contemporary administrative development is characterized by two main, broad, and very influential administrative doctrines – the new public management (NPM) and good governance. In the beginning, “good governance” was used as a criterion for assessing the quality of institutions and governing processes in the countries applying for economic and financial aid and loans from the International Monetary Fund, the World Bank and other financial institutions and donors. It was counterpoised to poor or bad governance. A functioning market economy in the country concerned has been added as a criterion (Bever, 2007a: xi). Strengthening of the institutional and administrative capacity as a pillar of good governance has been paralleled with strengthening of the policy capacity in public administration, i.e., the strengthening of its ability to analyse and create public policies.

Other institutions, such as the UN and its agencies and programmes (UNDP, for example) or the EU further developed the concept of good governance by building democratic political values into it. This new doctrinal orientation emphasises the role of citizens and civil society, transparency, legitimacy, responsibility, efficiency, human and citizens’ rights, the rule of law, better quality of public services, the implementation of modern information-communication technologies, and bet-

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5 Hood & Jackson listed almost a hundred of them, but their “unit” of counting was a bit narrower. Compare also the systematisation of their doctrinal notions in Frederickson et al., 2016: 110–111.

ter human resources management. Citizens are seen as partners who significantly contribute to the final results of public administration's activities. Citizens need to be informed and consulted; they have to participate in the creation of public policies and in administrative and other public processes (cf. OECD, 2001).

The newest interpretations of good governance doctrine state that it is necessary to renew the democratic political legitimacy of modern countries. Renewal of democratic political legitimacy might be achieved by the involvement and empowering of citizens, local governments, and other actors in public governance. It is claimed that good results can be achieved through cooperation, consultation, and synchronisation between citizens, local and central governments. Only well-balanced and widely accepted public policies have a chance to result in efficient economic and social development. For that, "good governance is (...) a combination of democratic and effective governance" (UNDP, 2002: 1), i.e. good is the governance which is "transparent, effective, participative, accountable, responsive and responsible" (Fraser-Moleketi, 2009: 7).

At the beginning of the 2000s, the EU put forward the founding principles of good European governance. Among those principles are openness, participation, responsibility, effectiveness, and coherence (EC, 2001). Other principles of European governance have been codified in several documents of varying legal significance: they range from legally binding to less strict, policy, institutional, and professional documents. Because of its normative nature, good governance serves, in practical terms, as the benchmark for evaluation of administrative functioning in the EU Member States and acceding countries, as well as in the EU bureaucracy.

The principles of EU governance describe values whose importance has been confirmed in numerous EU documents. When talking about doctrines, one should not forget that values are an important component of the cultural legacy of our civilization. Petrified as the civilization standards, they become similar to axioms. Values are condensed political interests and the wishes of people that have gained legitimacy during continuously repeating circles of social and political interaction in a society over a long period. At least five groups of values are regularly combined into a specific doctrinal layer of public administration: democratic (political), legal, social, economic, and ecological. Contemporary Europe and the whole world are characterized by a previously unwitnessed value complexity which produces great and not always conclusive value pressure on public administrations, requesting their changes and adjustments (cf. Koprić, 2017).

The EU has exerted far more profound influence on transition countries than on consolidated Western democracies, because the accession process is carefully monitored by SIGMA, which is a joint initiative of the OECD and the EU, established in 1992. SIGMA works with acceding countries on strengthening their public governance systems and public administration capacities. To be able to provide such

support and to have an effective monitoring instrument, SIGMA has developed and codified numerous European administrative standards.

For the countries of the Western Balkans, the accession process has been influenced by the EU conditionality (Koprić, 2012: 28–29). Conditionality policy gave additional impetus to strengthening SIGMA's monitoring capacities. It has invested efforts into the codification of EU administrative standards and the development of baselines which serve as indicators of administrative reforms success. SIGMA has published more than fifty papers and many other documents, including certain checklists for monitoring purposes. Among the standards developed and used by SIGMA are those concerning the content of constitutions, civil service legislation, administrative procedures, public internal financial control, external audit, budget and public expenditure management, policy making and coordination, public procurement, and public integrity etc. (Koprić, 2011: 18–20; Koprić et al., 2011: 1538–1546).

In 2014, the EU defined the basic areas of administrative reforms covering the strategic framework for reform, policy development and coordination, public service and human resource management, accountability, service delivery, and public financial management. In addition, SIGMA prepared the Principles of Public Administration for EU Enlargement countries, and the Principles of Public Administration for European Neighbourhood Policy countries. As many as 49 principles refer to acceding countries.

There are at least equally important EU efforts concerning the codification and advocating of good European governance principles, legal and administrative standards and best administrative practices. Many of them have to be assigned, in particular, to the European Ombudsman. The European Ombudsman's considerable endeavour has been concentrated on the development and ensuring firm legal guarantees of specific rights to European citizens and others on EU territory. The next step in the development of EAS, after the tightening of doctrinal interpretation, backed by the proclamation of principles and codification of various standards, was the adoption of human rights which are to be seen as the new pillars of EAS.

### **3.4 Two groups of human rights as pillars of European Administrative Space**

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Two groups of human rights have been developed as the new pillars of EAS. One of them focuses on the democratic political participation of citizens, whilst the other concentrates on the right to good administration. They answer, to a degree and in a way, the two main claims about the insufficient level of EU legitimacy.

It is presupposed that the EU, as any other governance institution, has to gain input and output legitimacy. According to Scharpf, input legitimacy refers to the “government by the people”, which is able to realise “governing processes [that]

are generally responsive to the manifest preferences of the governed”. Output legitimacy stands for “government for the people”, which ensures that “the policies adopted will generally represent effective solutions to common problems of the governed” (Scharpf, 2006: 9).

Those who reproach democratic legitimacy deficit mainly use the arguments of distance and seclusion, claiming that the EU bodies are too far away, unattainable, and irresponsible to citizens. They argue that the lack of input legitimacy prevents the EU from adjusting to the societal needs and expectations of European citizens. Moreover, they say that deficient democratic legitimacy reduces the ability of EU bodies to find appropriate solutions for the nasty problems of contemporary European society.

Bringing in the notion of multi-level governance is necessary at this point to fully understand current legitimacy concerns. The EU level may be separately analysed in that regard, but the problems with input and output legitimacy can be grasped fully only by taking into consideration other governance levels. Only by taking into account the complex architecture of current EU multi-level governance is it possible to correctly assess the problems that have been addressed by the establishment of the right to good administration.

These problems are much more visible at the local, regional, and national levels, because administrative bodies at those levels are competent for issuing the vast majority of administrative acts and for performing various administrative actions and activities towards the citizens. Once we have put these administrative problems in the forefront of the analysis, we will be able to see the work of public administration as one of the highly relevant and rather complex problems of contemporary Europe.

The majority of European countries have more than one level (tier) of sub-national governments. Traditionally, local governments (municipalities) have attracted a lot of attention, along with local democracy and local service delivery. An important role belongs to regional governments as well, because of EU regional policy and other reasons, as well as to sub-municipal units, especially in consolidated systems and big cities (neighbourhoods, city districts, rural districts, territorial committees, wards, boroughs, etc.). It means that levels in the complex multi-level structure are European, national, regional, municipal (local), and sub-municipal.

We can observe a constantly evolving tendency towards multi-level governance. Multi-level governance blurs the traditional central-local dichotomy in institutional arrangements and places greater stress on a more complex game of European multi-level governance (Koprić, 2016). The types of actions and relationships among the institutional actors from various levels encompass mutual dependence, cooperation, competition, conflict, influence, impact, control and resistance, etc.

Subsidiarity, as the main functioning principle of the EU, confirmed by the provision of Article 5(3) of the Treaty on European Union (TEU) and Protocol No 2 on the application of the principles of subsidiarity and proportionality, additionally shows the importance of all other governance levels within the EU, for both political participation of citizens in designing European policies and their implementation through administrative bodies at all levels. The position of European citizens is extremely sensitive and precarious within the complex and dynamic network(s) of governments, simply called EU multi-level governance. For that, two groups of fundamental rights of European citizens and other subjects on the EU territories with regard to the governments have to apply to all governmental levels. They cover citizens' political and administrative situations.

Although the developmental paths of these rights may be traced back to certain key starting points, it is important to see that both groups of rights are guaranteed by the Charter of Fundamental Rights of the EU (CFR, 2009). There are other important documents, together with soft law and case law standards, developed over time. Certain rights and their elements are based on, developed in connection with, or rely on the documents adopted by the Council of Europe, such as the European Convention of Human Rights and Fundamental Freedoms (ECHR, 1950),<sup>6</sup> or the European Charter of Local Self-Government (ECLSG, 1985).<sup>7</sup>

The Charter of Fundamental Rights entered into force along with the Lisbon Treaty, on 1<sup>st</sup> December 2009. It clarifies citizen-government relationships and includes all updates in that regard based on changes in society, technological and scientific developments, social, economic and other changes. It addresses, amongst others, good administration for improving output legitimacy (administrative part of European integration) and political rights, for improving input legitimacy (political part of European integration).

With regard to the political participation of citizens, the CFR recognizes the freedom of expression and information (Article 11), freedom of assembly and of association (Article 12), political rights (right to vote and right to stand as a candidate) in the elections to the European Parliament and in municipal elections in the country of residence (country in which the individual resides, if he/she is a citizen of the Union) (Articles 39 and 40), right of access to documents (Article 42), and the right to petition (Article 44, cf. Article 227 of the TFEU).

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6 The provision of Article 6(2) of the TEU requires the EU to accede to the ECHR, while Protocol No 8 to the Treaties regulates aspects of accession. Although the Court of Justice of the EU in 2014 gave a negative opinion on the specific accession treaty with the CoE which the EU prepared in 2013, there is a clear will of the EU to accept the standards from the ECHR and to ensure the protection of human rights. This has previously been shown on many occasions, through the decisions, acts, and other documents of various EU bodies, including the Court.

7 The EU uses standards from the ECLSG especially within the accession process: "in large measure, it is the Charter and Congress monitoring that have been used as the basis for the assessment of compliance with democratic standards of local self-government" (Himsworth, 2015: 150).

The participation of citizens can be strengthened at all governmental levels, but local democracy is a natural *milieu* for it. Local and – to a degree – regional governance are the most suitable areas for boosting political participation, since decentralization can add to the importance of autonomous local decision-making at these levels. Several new channels of political participation have been developed for strengthening local democracy, such as youth councils, direct election of mayors in combination with the recall procedure, minority participation, local consultations, participative budgeting, various transparency and open government tools and institutions, etc. Some previously used, such as referenda, citizens' initiative, deliberative local assemblies, independent local political actors, and similar have also retained their roles in local democracy (cf. Koprić & Klarić, 2015).

The subsidiarity principle strongly promotes multi-level governance within the EU. It is connected to the idea of decentralisation, regionalism, and federalism, and stresses the importance of each lower level and its dominant importance over the higher governmental levels. Local communities of citizens are pre-existent with regard to wider communities and their institutions. It protects not only lower governmental levels, but also the private sphere of individuals and various societal actors (businesses, civil sector organisations, etc.) in their relations with the state (connections with liberal ideology). It also protects national authorities against the possible extensive interpretation of EU competences: the EU may only act when the action of individual countries is insufficient.

The CoE work still has a prominent role in promoting the standards of local democracy, which significantly adds to the democratic legitimacy of the whole European multi-level institutional mechanism. The basic document about local democracy is the European Charter of Local Self-Government (1985). In 2009, the CoE adopted the Additional Protocol on the Right to Participate in the Affairs of a Local Authority which took effect on 1 June 2012. Other relevant documents of the CoE include the draft Charter of Regional Self-Government (1997), European Urban Charter II (2008), the Convention on the Participation of Foreigners in Public Life at Local Level (1992), Revised European Charter on the Participation of Young People in Local and Regional Life (2003), Reference Framework for Regional Democracy (2009), and The Twelve Principles of Good Democratic Governance at Local Level (2008), etc.

Today, the right to good administration is stipulated by the provision of Article 41 of the CFR. Every person, not only European citizens, has the right to have her or his affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices, and agencies of the Union. The right to good administration includes the following rights of citizens and obligations of authorities:

- the right to be heard, before any individual measure which would affect him or her adversely is taken;

- the right to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
- the obligation of the administration to give reasons for its decisions;
- the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States; and
- the right to use one of the languages of the Treaties and to receive an answer in the same language.

There are other rights guaranteed by the CFR, such as the right of access to documents (Article 42), the right to refer to the European Ombudsman the cases of maladministration (Article 43), and the right to an effective remedy and to a fair trial (Article 47). Moreover, there are more fundamental principles, such as equality before the law (Article 20) and non-discrimination (Article 21).

This is the first enactment of the *right* to good administration. This right also applies to national administrations when applying EU law. The development of the good administration concept has been gradual and connected with the work of the European Ombudsman dealing with maladministration. The establishment of a broad concept of maladministration, encompassing legality, fundamental rights, and principles of good administration, is considered one of the main achievements of the European Ombudsman. The Ombudsman concentrates on its positive side, i.e. on defining good administration. Maladministration is the opposite to good administration: it is the failure of a public body to act in accordance with the binding rules and principles. The basic principle is that of legality, accompanied by other principles and rules developed predominantly in the Code of Good Administrative Behaviour. In general, the Ombudsman attempts to raise the quality of EU administration and the quality of governance within the EU.

All the principles from the Code can be systematised into three large groups:

- a) general principles of administrative law and public administration: lawfulness (Article 4), non-discrimination (Article 5), proportionality (Article 6), absence of abuse of power (Article 7), impartiality and independence (Article 8), data protection (Article 21), access to information and documents (Articles 22 and 23), and the right to complain to the Ombudsman (Article 26);
- b) principles of administrative procedure and administrative functioning in general: objectivity (Article 9), legitimate expectations and consistency (Article 10), fairness of treatment (Article 11), right to use the language of the citizen (Article 13), acknowledgement of receipt and indication of the competent official (Article 14), obligation to transfer to the competent service of an institution (Article 15), right to be heard and to make statements (Article 16), reasonable time-limit for decision-making (Article 17), duty to state grounds of decision (Article 18),

indication of the possibility of appeal (Article 19), and notification of the decision (Article 20);<sup>8</sup>

- c) service ethics standards: courtesy (Article 12), keeping records on activities and correspondence (Article 24), the need for publicity of the Code (Article 25), and duty to review its operation (Article 27) (more in Koprić, 2014: 42–46).

The Code, connected with the right to good administration from the CFR, forms a system of basic principles establishing pillars of good administration and good governance. It covers various situations in the functioning of EU institutions, bodies, and agencies. Moreover, it covers situations when national authorities serve as parts of the European integrated administration. It is primarily a benchmark and an ethical code. However, since it elaborates the right to good administration from the Charter, it has binding effects too (cf. Mendes, 2009).

The persistent work of the European Ombudsman and of Parliament in cooperation with academia (project ReNEUAL) has resulted in an effort to prepare the first European Law of Administrative Procedure (EU, 2016). On 15<sup>th</sup> January 2013, the European Parliament adopted the Resolution 2012/2024(INL) with recommendations to the Commission on a Law of Administrative Procedures of the European Union. Integrative and harmonizing effects of such a legal document are clearly stated in the Resolution: it stresses that the Law could strengthen a spontaneous convergence of national administrative law and thus strengthen the process of integration, and could foster cooperation and exchange of best practices between national administrations and the Union's administration.

Before the new Resolution of 9 June 2016 for an open, efficient and independent European Union administration (2016/2610(RSP) the European Parliament had repeatedly proposed to the EC to adopt a new European Law of Administrative Procedure. The following principles are mentioned in the introductory part of the Resolution: lawfulness, non-discrimination and equal treatment, proportionality, impartiality, consistency and legitimate expectations, respect for privacy, fairness, transparency, and efficiency and service. It proposed “a set of procedural rules which the Union's administration should comply with when carrying out its administrative activities”.<sup>9</sup>

Good administration has been mentioned in the EU treaties (TEU and TFEU) as well, when they mention open, efficient, and independent EU administration; administrative cooperation and improving national administrative capacities; right of access to documents, protection of personal data, maladministration, etc. (cf. Koprić et al., 2011: 1521–1534). Many other legal documents prepared by the EU and the CoE give strong impetus to the European administrative convergence, try-

8 Some of them are now included in the EU Charter of Fundamental Rights.

9 <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2016-279&format=XML&language=EN#top>

ing to improve input and output legitimacy of the complex and dynamic EU multi-level institutional setting.

### 3.5 Harmonization with European Administrative Principles and Standards in South Eastern Europe – problems, prospects, and lessons learnt

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The EAS<sup>10</sup> is an especially vivid and intriguing concept for South Eastern Europe. SEE is on the move towards EU membership, with Croatia as the newest Member State; Albania, FYR Macedonia, Montenegro, Serbia and Turkey as the candidates; and Bosnia and Herzegovina and Kosovo<sup>11</sup> as the potential candidates. The public administrations of these countries are deeply influenced by the process of Europeanization, i.e. harmonization with the *acquis communautaire* and acquiring European administrative principles and standards. Such harmonization is one of the main grounds for subsequent administrative reforms. The most influenced sectors are the constitutional position and organization of public administration, civil service, administrative procedures, financial and budget management, citizens' relations with public administrative bodies and their influence on public decisions, transparency and ethics, etc. The EU and other international donors foster technical assistance in various administrative fields in the countries of the region (more in Koprić, 2012).

Although we can imagine other reform triggers, apart from joining the EU within the regime of conditionality policy, such as mutual learning, informal harmonization of administrative standards, business and civil sector pressures, and initiatives from academia, these triggers would probably have less impact and the reform processes would probably last longer. Certain countries in the region are faster and better in accepting the ideas of modern public administration, with a certain level of innovation, whilst others do not have sufficient strength and willingness to modernize. Instead, they rely on formal, perhaps even superficial Europeanization, in the sense of accepting a formalistic approach based on pure legal harmonization with the *acquis communautaire* without deeper institutional and cultural changes (cf. Koprić et al., 2016).

Certain examples from the region clearly confirm that reluctance towards governance innovations is possible even within the framework of the EU accession process. However, without the prospect of EU accession, the reform processes would be much slower. There is the issue of administrative tradition as the other side of the Europeanization coin. A conclusion that institutions generally develop

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10 This part is based on the author's discussion within the closing roundtable *Harmonization with European Administrative Principles and Standards in South-Eastern Europe* at the 24<sup>th</sup> NISPAcee Annual Conference in Zagreb, Croatia, May, 19–21 2016. The panel was chaired by Jadranka Đurković and Anamarija Musa with the participation of Fatos Mustafa, Ivan Koprić, Tony Verheijen, and Zorana Gajić.

11 UNSCR 1244/99 and the ICJ Opinion on the Kosovo declaration of independence.

with significant inertia is based on the evidence collected worldwide under the umbrella of historical institutionalism. In many public administrations innovation is not a favourite word. Moreover, it seems that SEE countries are in desperate search of national identities and genuine traditions after several major changes of state organisation, as well as of the constitutional and social systems during their modern history (Koprić, 2012: 30–32). This makes the situation in the region even more complicated than elsewhere.

In particular, there are such elements of SEE governance tradition as the regulation of general administrative procedures which may impede modernization, but only to a degree and in a different manner in different countries (cf. Koprić et al., 2016). The same goes for other reform components. The majority of countries in the region tend to neglect administrative tradition from the socialist period. The impression is that some of them wish to forget even those administrative institutions which were technically well-designed, with good results in practice, and completely irrelevant from an ideological standpoint. For example, they had a physical one-stop shop for the delivery of administrative and public services, designed within the large self-managing communes. Notwithstanding good results, they were dismantled in the majority of new countries with the argument that that particular organisational principle was one of the elements of the socialist system. Now, reinstalling a similar organizational solution is being considered (Koprić, 2017a). The situation is similar to the principle of integrated local governance and some others.

At the beginning of the 1990s, the new independent states in SEE had a particularly difficult task to establish new parts of state administrations and to raise administrative capacity in almost chaotic circumstances. Defence, internal affairs, diplomacy, and many other parts of state administration had to be organized. The systems of local governance were transformed. Numerous reforms were implemented in public service sectors, from telecommunications to health care. It is almost self-evident that the recruitment of many newcomers was not the best way to build administrative capacities. However, a comparison of the current situation with the situation in the early 1990s shows that there have been many major changes in the national public administrations in the region, and these changes have to be assessed positively (cf. Koprić, 2017).

One of the frequently asked questions within the EU accession process is whether it is easier to build new institutions or to change traditional ones. It is important to see that this is not a question of easiness but rather a type of problem. If one accepts the new institutions, one has to learn about them, about their purpose, and about their adaptation to the particular national settings and circumstances. If one tries to change traditional institutions, one should count on resistance within the national public administrations. However, as administrative tradition in the region is prominent only in some administrative fields and institutions, such as general administrative procedures, while there were many changes in other areas during

modern times, it is hard to find real rebuffs towards specific new institutions and active counterworks. There is a kind of discomfort with regard to the new institutions which might be overpowered by education and training.

There is a tradition of administrative education in some university centres in SEE based on their own research and scientific work. For example, the Politico-cameral study was established in 1669 in the Croatian capital Zagreb. Moreover, several groups of scholars taught and dealt with administrative science in Ljubljana, Zagreb, Belgrade, and other centres in the 19<sup>th</sup> and 20<sup>th</sup> centuries. Several administrative studies were established during the 1950s and later.

However, despite these islands of excellence, public administration studies in the region have not been appreciated, as have been, for example, law studies at the traditional universities. Moreover, only a few study programmes from Slovenia are on the list of accredited public administration studies of the European Association for Public Administration Accreditation. None of the study programmes in public administration from the other countries of SEE are on the same list. That indicates an urgent need for the development of modern university education for the core personnel in public administrations in the region.

The public administrative studies are still predominantly legally oriented. The lists encompass various legal courses, from administrative and labour to business or criminal law, while public administration, administrative science and all other relevant subjects are somewhat neglected. In addition, there is much less content related to the economic analysis of public administration, political science, or sociology than in the most developed public administration and governance studies in Europe. Further, they are characterised by several interdisciplinary and comparative approaches, much less research, and rather weak connections with administrative practice. Lectures are mainly delivered *ex cathedra* and exams are the main form of students' evaluation. Knowledge, not skills and competencies, is the focus (Koprić, 2013; Marčetić et al., 2013; Lalić & Džinić, 2016).

Thinking in terms of recommendations, the governments have to define and codify educational expectations from their future civil servants, and have to ensure unbiased recruitment procedures. Universities have to develop vertically integrated systems of interdisciplinary (or at least multidisciplinary) studies of public administration. Greater emphasis has to be placed on empirical and comparative research, theory building, networking, development of new subjects and learning outcomes.

There are many problems with EU accession in SEE outside of public administration. First, joining the EU is a fashion and, to a degree, a superficial calculation. It is, to a significantly lesser degree, a genuine sense of affiliation, since the countries in the region perceive, more or less, that they are – *volens-nolens* – only parts of the European periphery, not its very centre. They are not the true impellers of European integration.

Second, many transition countries in the SEE region have weak pro-European elites, while internal resistance towards European integration is rather strong. This is probably the reason why EU issues are not very well represented in domestic public debate, in the media, and even in the study programmes and school curricula.

Third, their political and national elites wanted independent states, not a new integration after dissolution of the previous Yugoslav Federation. Lastly, connected with the previous argument, from time to time one can find examples of cheating Europeanization or Europeanization of political discourse and legal documents. Such Europeanization takes place only through political speeches, declarations, legal and other public documents. Ordinary people can hardly espouse the fact that they are genuine Europeans and perceive EU citizenship in its fullest meaning. It is not an easy task to think about themselves as European citizens, whilst, at the same time, they perceive themselves first and foremost as Montenegrins, Croatians, or Albanians.

In a situation with conflicting intentions, in which the national elites or a significant portion of them wish to join the EU, despite many hesitations and much impedance, conditionality is a prerequisite for achieving the administrative changes necessary for entering the EAS. If a proper, genuine domestic orientation towards public administration reform is non-existent, a sort of when-then policy seems to be a rational solution. Conditionality policy is a mechanism for imposing the necessary reforms. However, the EU, in addition to other donors, also makes things possible by financing reform projects, and ensuring technical expertise, etc. There is firm evidence of many flaws in the mechanisms of conditionality, financial aid, and technical assistance, but these problems cannot justify viewing the EU and, especially the European Commission, as the European police officer. Rather, the EU acts as a facilitating body supporting those domestic actors who have succeeded in setting Europeanisation as an issue of the utmost importance on the domestic political agenda.

Transparency and openness have to be used for building up public trust in national public administrations in the region. Trust in governments has to be complemented with civil servants who take a pride in their passionate and ethical service to the public. However, many people still treat transparency and openness as another set of empty, imposed words. This applies not only to politicians, but also to civil servants and citizens. Transparency and openness cannot be reduced to technical ideas, such as user-friendly web pages of public bodies, or the possibility to learn about the content of future legal regulations in advance. This is the new philosophy or doctrine of “public-ness”. There are at least two important aspects of public-ness. One is hard work on consolidated, detailed, reliable, and meaningful data about public administrations. Citizens often experience an inability to obtain the basic information about public administration since it is still in the grey zone of secrecy.

Investing significant efforts into improving transparency and openness may well be returned as a significantly improved public trust in governments.

There is no easy answer to the question about possible advice for other countries on how to achieve a smooth entrance and functioning within the EAS, on the basis of limited SEE experience. Reluctance, resistance, lack of experience and knowledge, weak or changing political support, and many other obstacles are also found elsewhere. They are a normal part of political and administrative life throughout Europe. Because of that, the three basic measures are worth mentioning.

First, a group of experts, consisting of practitioners and academicians, who would explore the current situation, from a perspective relevant to Europeanization reforms, could be a precious asset. Then, a sound reform strategy, adapted to specific circumstances, focusing on the main goals, changes, and achievements could serve as the backbone of the Europeanization of national public administration. If possible, the same group should be responsible for the implementation and overall management of the reform. Finally, to start with an empirical evaluation, apply, as frequently as possible, an ongoing evaluation methodology from the very beginning of the strategy implementation.

### **3.6 Conclusion**

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The European Administrative Space has recently become the dominant concept in administrative theory for the analysis of the phenomenon of administrative convergence in Europe, thus subsuming both good administration and good governance as narrower concepts with a somewhat different focus. Good administration has been attracting legal meanings, good (European) governance has had doctrinal connotations, and the European Administrative Space has acquired theoretical significance.

The EAS is based on the idea of administrative harmonization and the approximation of traditional models of public administration and traditional institutions of public administration and administrative law. It is a space with an equal or similar level and quality of public services for all European citizens and others with the real possibility to influence public policies at all governmental levels of the current multi-level architecture of the European Union (EU). If so, the EAS gives hope to citizens of the EU Member States and to all other people on its territory that they will be treated in a decent, non-discriminative, and equal manner.

Various administrative and governance standards have spread throughout Europe. These standards often shine as a result of efforts to increase public administration capacities for coping with the increasingly complex and nasty problems of the contemporary world. Administrative capacity has been imposed as one of the basic criteria for EU accession. Public administration capacity can be boosted in various

directions: we can speak about legal, organizational, financial, functional, personnel, and other aspects of capacity building (Koprić, 2009).

The EU has set a vast number of standards directed towards the enhancement of administrative capacity in the new Member States, candidate countries and potential candidates for EU accession. Those standards, albeit of varying legal significance, serve as benchmarks for administrative capacity assessments. Some of them are especially important, since they are guaranteed as fundamental rights.

There are two main groups of such rights, one whose intention is strengthening political participation and another whose purpose is strengthening the legal position of citizens in their contacts with administrative bodies in a multi-level European governance setting. The EU has also established institutions and procedures for assessing standards and building administrative capacities.

The EAS concept and its analysis have not only been important for the new Member States that have recently joined the EU and countries which are acceding under the conditionality policy. They are important for all Member States. European integrated administration is constantly evolving throughout the EU.

Administrative science is trying to analyse, research and evaluate the mentioned concepts and standards. However, it still lags behind in terms of both theory building and legal assessments. It is especially weak in regard to empirical research of administrative capacity building, citizens' perceptions, and evaluation of administrative convergence which may be an effect of the EU accession policy and other influences.

Despite these deficiencies, the paper tries to cope with the negative myths about the EAS by analysing the most important documents, collected experience in the SEE region, and some other data which show the current state of affairs in the field of administrative approximation in contemporary Europe.

Practitioners may benefit from the paper in several ways. First, the paper clarifies the concepts connected with the changes and development of public administration in the context of EU integration, enabling practitioners to better understand when they are used in various documents of their interest. Second, standards, benchmarks, institutions, and procedures in the field of preparation of public administration for EU accession are identified, systematised and analysed, especially from the perspective of newcomers to the EU accession process – there are many novelties which have been almost constantly developing. Third, the situation in Croatia and other SEE countries is analysed and some lessons are derived.

This can substantially improve the understanding and competencies of practitioners dealing with public administration reform in the EU accession context. Also, the paper may improve practitioners' competencies for functioning within the integrated European administration competent for the implementation of common and harmonized EU public policies and the EU *acquis communautaire*.

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## 4. Side Effects of Standards

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*Iwona Sobis, Michiel de Vries*

### 4.1 Introduction

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The European Administrative Space (EAS) is about the spread of European standards and best practices to influence capacity-building processes at all governance levels within their own administrative sectors as well as those of its Member States and the neighbouring countries. The underlying idea is to contribute to administrative convergence. Much attention has been given to the emergence of EAS (e.g., Olsen, 2003; Hoffmann, 2008; Heidbreder, 2011; Trondal & Peters, 2013) as well as to the processes of setting standards in general (e.g., Czarniawska & Sevón (eds.) 1996; Brunsson & Jacobsson et al., 2002). Such research is about the spread of standards and their impact on public reforms, reorganizations, and all kinds of organizational changes in which standards serve as measures of adequate performance.

Less attention has been given to the unintended side effects of using standards, therefore most scholars and standard-setting organizations see the emergence of the EAS as a development, which also has to be acclaimed. In this chapter, arguments can be found attenuating the high expectations of standardization. We present a case study on the hosting of asylum seekers and the standard for granting them refugee-status about which there is currently much debate. The presentation shows that the usage of standards in this policy area discloses many side effects resulting from the nature of standardization, the process through which standards are formulated, the way in which indicators for their achievement are selected, and the way these indicators are measured through a process of operationalization. The findings also have repercussions for the *a priori* evaluation of the emerging EAS with all its standards involved. The focus is on asylum seekers from countries outside the EU, known as *third countries*, looking for protection and on the complexities of obtaining a refugee status within EU Member States. The issue is relevant given the massive wave of migrants into Europe during the last decade and the growing number of illegal immigrants in Europe. It is also relevant, because many advocate that the

standard of refugee status has eroded in comparison to its original understanding which dates back to the Refugee Convention of 1951.

The purpose of this chapter is to provide an insight into the way in which the dynamics of actual migration patterns increasingly conflict with the standard definition of refugee status. This part of the chapter is based on desk-research, mainly on analyzing relevant documents and providing a critical assessment on earlier and recent migration trends. The empirical questions which we try to answer are: how the standards of granting refugee status conform to the current dynamics in migration trends, and how this affects the Member States in their capacity to manage the subsequent streams of asylum seekers to their countries. The underlying theoretical question is: what we can learn from that process about standards setting in general and about the emergence of standards within the EAS in particular.

In order to answer these questions, we structure this chapter as follows: Section 2 addresses the definition, emergence and merits of standards in a theoretical way and presents an overview of previous research on the concept of standards and compliance to standards. Section 3 gives a brief illustration on what section 2 has addressed theoretically, by focusing on the process towards creating a European Administrative Space. In Section 4, we present the empirical outcomes dealing with the role of standards regarding asylum seekers. It focuses on the side effects of standardization seen in that area, and reflects on the lessons learned from these experiences with regard to the EAS process of standardization. In the conclusions, we respond to the research questions.

## **4.2 Standards**

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In this section, we present a theoretical overview about the nature of standards, their emergence and their merits. It starts with a definition of standards, together with the main characteristics thereof and a distinction in three types of standards. This part sees standards as rules, guidelines or characteristics for activities or their results, aimed at the achievement of an optimum degree or order in a given context, distinguishing between standards for being, doing and having something. Subsequently, this section continues with an overview of the most important theories explaining the emergence of standards.

It is important to note that theories explaining processes through which standards come about emphasise process-internal features and hardly refer to the characteristics of the context in which this process takes place. The third dimension concerns the merits of standards. It is about the reasons why organizations comply with standards. Despite the mostly positive view on standards appearing from previous research, one can find some opposite statements. We conclude that there are as many potential benefits as drawbacks in setting standards and adapting to them. Although one may easily adhere to being something, obtaining agreement on

standards about doing something or having something is more difficult because of their costs and undesirable side effects.

#### 4.2.1 Defining standards

Encyclopaedias on the etymology of the word ‘standard’ tell us that the word is derived from the medieval French word for a banner – “*éstandart*” – around which the army of the king rallied, based on the authority of the sovereign. The later English version of this, conceived standards as norms determined by the authorities, and used them in the normative sense as, for instance, standards for length and weight. Around about 1900 there were standards of life, i.e. the basic requirements an average family would need. Hence, standards have a very long tradition and in the history of the world we find the basic characteristics of standards still used today, namely a norm suggested by some authority around which individuals and/or organizations voluntarily (to distinguish standards from laws) reach agreement.

These characteristics are seen in the recent definition of the ISO, defining a standard as a “document, established by consensus and approved by a recognized body that provides, for common and repeated use, rules, guidelines or characteristics for activities or their results, aimed at the achievement of the optimum degree or order in a given context” (ISO, 2004, section 3.1).

In the private sector, the same description is seen, namely that, “standard-setting organizations seek voluntary consensus on aspects of product design so that different products can work together” (Farrell & Simcoe, 2009, p. 1). Standards are based on consensus between the stakeholders, characterized by the absence of sustained opposition to substantial issues by any important part of the concerned interests and by a process that involves seeking to take into account the views of all parties concerned and to reconcile any conflicting arguments (cf. ISO/IEC Directives 2004).

Brunsson and Jacobsson (2002) define standards as voluntarily shared “rules about what those who adopt them should do, even if this only involves saying something or designating something in a particular way”. They argue that standardization generates a strong element of global order because standardization occurs almost everywhere in a field of human activity:

*(...) from the management of companies to the management of our own health that does not have its experts and its pressure groups. The pundits of the Worldwide Fund for Nature (WWF), the International Women’s Rights Watch, the International Standards Organisation (ISO), the International Football Association (FIFA), the International Labour Organisation (ILO), OECD and many more cannot perhaps force us to follow their rules, but they still often manage to get us to do so. Even powerful organisations like states and large corporations go by rules*

*that others have provided about how to organise, what policies to pursue, what kind of service to offer, or how to design their products (2002, p. 1).*

Important in their analysis is that they distinguish three types of standards: (a) standards about being something, (b) standards about doing something, and (c) standards about having something (2002, p. 4–8). Røvik (1996) introduced the concept of “institutionalized standards” which in his conception refers to socially constructed “building blocks” and widely accepted prescriptions for how parts of an organization or an organizational field should be organized. His definition can apply to large international organizations, national states or smaller organizations in the public, as well as the private sector (Røvik, 1996, p. 142).

#### **4.2.2 The process towards setting standards**

The main literature on standards argues that in order to reach agreement about standards, a legitimized standard-setting organization needs to exist. It is preferably an open organization in terms of membership, having organizations as members instead of individuals, being cooperative and consensus-oriented, impartial and politically independent, whose work is based on technological knowledge following the principle of parsimony of standard options, aimed at standards as non-mandatory and public goods (Werle, 2001, p. 16). Many organizations, such as the ISO and the UN, perceive themselves as standard-setters and the European Union (EU) is also one of them. Standard-setters differ from a nation-state in the sense that state legislators possess hierarchical authority to regulate certain matters within national borders through legislation, while standard-setters cannot claim hierarchical authority, and are unable to impose sanctions if individuals, organizations or states do not comply or adhere to their standards.

The process of standardizing is formally similar to policy development. The need for a standard has to be expressed. The standardizing organization needs to put this on the agenda. Subsequently, technical experts in the field elaborate on a definition of the standard, seeking as much agreement as possible. Afterwards, a technical committee is charged to work out the detailed specifications. The last phase concerns the production of a draft standard, to be circulated among the members, who can utter objections and requests for changes, after which a final draft is put up for adoption (cf. Matti & Buthe, 2003, p. 8).

In the practice of arriving at standards, especially in the public sector with opposing political interests, this process is more complicated. In game-theoretical terms, one might argue that processes towards standardization in this sector might not be so easily captured by a simple coordination game, in which the process towards standardization is a simple form of regulation and control inducing cooperation, similarity and homogeneity among organizations (cf. Matti & Buthe, 2003). It is rather a ‘battle of the sexes’ game, in which the players do prefer cooperation, but

differ on the optimal kind of cooperation. Seeing it within such a game-theoretical model points to the advantages in being a first-mover, and to the impact of the flexibility of the players as well as the quality of the discourse between them (cf. Mastenbroek, 2007).

From an institutional angle, Knill (2001) suggests that in real life, compliance to emerging standards is in need of institutional pressure. This is especially effective in combination with (at least) the image that the standard will create an opportunity structure for the member-organizations to have an institutional change in the direction they already intended to take, and when proposals are in accordance with the preferences and expectations of agencies. This conforms to the earlier theory by DiMaggio and Powell (1983), who emphasized the important role of coercive, normative, and mimetic isomorphic pressures in the adoption and diffusion of standards. Brunsson and Jacobsson (2002) also address the controversies involved, if standards limit individual the actors' freedom and right to be different (p. 15–16). In such cases, much of the success in setting standards depends on the support of the most powerful individuals, organizations or states. Brunsson (2002) asserts that only certain people, successful organizations and powerful states are successful in issuing orders and directives in such cases (p. 23). He points out that an international organization such as the EU spreads institutional standards amongst Member States, because “their leaders are selected in a manner that entitles them to tell others what to do” (p. 23). According to Brunsson, the EU Member States follow highly legitimised standards imposed for co-ordination and control, because, “they claim that the standards have been issued by a body that has been established through a fair and representative procedure” (p. 29–30).

What is striking is that the theories and descriptions on the creation of standards overwhelmingly depart from a process-internal perspective. In theory, processes of setting standards and obtaining compliance to those standards is mainly explained by institutional settings, actors and agencies inside policy arenas, by legitimacy of standardizing institutes, and the conformity of standards with preferences and beliefs of members. Such theories are corroborated by empirical research into EU directives and seem to provide a strong explanation for the nature of those processes. This is striking because one would expect that the policy-context, the socio-cultural, and the politico-economic differences between the EU Member States, but also dynamics and uncertainties outside the policy arena, have a strong explanatory power. Attention to this context in explaining the creation of standards is sparse.

#### 4.2.3 The merits of standards

Standards are pieces of general advice offered to a number of potential adopters, but the acceptance of standards remains voluntary. Thus, standard-setting efforts aim to convince other people or other organizations that it is in their own interest to accept the proposed standards.

The literature on standards emphasizes the positive effect of standards, as a way to improve things, being beneficial for those adhering to them as well as to outsider stakeholders. The main argument is that standards create an optimum degree of order in an otherwise chaotic world, based upon the premise that they provide an optimal solution for whatever problem they encounter and increase predictability and reliability (Brunsson & Jacobsson, 2002, p. 170). Standards are said to facilitate interaction and exchange between members, since they follow the same rules and procedures and pursue the same goals. Such knowledge gives *a priori* information about reducing transaction-costs. Moreover, standards are said to improve the efficiency of coordination and cooperation. Since they result in some kind of uniformity and reduce the number of options needed to be considered, they make for more efficiency in production and cooperation as Brunsson and Jacobsson noted that “a plug will fit into a socket” (p. 169). Standards also give people or organizations that adhere to them a certain status, legitimacy and identity, because the standards are highly valued by experts and/or in society (p. 55).

Røvik (1996) conceives standards to be flexible. “Institutionalized standards” are prescriptions of organizational change that travel “in” organizations because of their “fashion”, and travel “out of” organizations when they become passé. They are just temporary prescriptions and do not nail down the functioning of a whole organization, but rather apply to small parts of the organization and should be seen as institutionalized “building blocks”. An organization is often a multi-standard organization, because it usually has adapted many institutionalized standards from various institutionalized environments (Røvik 1996, p. 142).

Not everyone agrees. Standards can also have a long-lasting impact and can outlive problems for which they were originally the solution. This is the case because whereas they decrease transaction costs, they are likely to increase transition costs. A Qwerty-keyboard format is the well-known and notorious example. As we will argue, a once established standard in social reality is also difficult to change, even when circumstances changed completely. Given the dynamics in the political and social world, changing circumstances may disrupt the conformity about the optimality of previously established standards, but altering standards to make them fit for a changing context is difficult.

It has also, but less frequently, been argued that standards have side effects, especially standards involving doing something, come at a cost (cf. den Butter & Hudson, 2009; Jones & Hudson, 1996). Adapting to standards involves a trade-off between customer benefits in having the quality ensured, the guarantee that products can be used and bought with confidence, and that the health and safety of the workforce is ensured, against the administrative burdens of compliance, implementation and control of standards (den Butter & Hudson, 2009, p. 154). In order to meet the standards and, if one does not only wish to pay lip service to them, investments involving financial and human resources are often necessary and the

question arises whether the benefits outweigh the costs. If the costs are high, this can imply two things; first, a distance or even contrast between standards for being, doing, and having something can be observed e.g., standards for doing something do not perforce match standards of being or having something, or high costs of doing something can result in minimizing what needs to be done. Second, a distinction can emerge between in-groups and out-groups, in which those who can afford burdens become members of an in-group, whilst those without sufficient resources of necessity will belong to an out-group, even though the latter might share standards of having and/or being something. Furthermore, standards can be an impediment for innovation, as they determine the manner in which things are optimally arranged, regardless of time and place. Proponents of standards argue that having standards about something enables organizations to focus on innovations where such standards are not yet in existence, but this does not weaken the counter-argument. As soon as something is standardized, innovations in that area or part of that area and an increase of quality are likely to come to an end.

Standards are only a short step away from what is called one-size-fits-all solutions, disregarding contextual variation indicated by, for instance, political-economic and socio-cultural variance, or differences between the public and private sector. It is indicative for standards that they are mostly a-historical and a-contextual. They are therefore criticized for reducing individual and organizational autonomy, of reducing individual and organizational distinctiveness, and for fixating, that is creating an obsessive attachment or focus on meeting the standards without reflecting on the consequences thereof for the mission of the organization.

## **4.3 The theory applied to the European Administrative Space**

### **4.3.1 Defining the standards**

In the ongoing process towards a European Administrative Space, all the positive expectations of standardization as addressed above are visible. This is visible in the standards of what Europe wants to be, to have, and to do. The EU wants to be a supranational organization, in which all of its members respect the values for human dignity, freedom, democracy, equality, the rule of law, and human rights (Treaty on EU Constitution, 2005 art. 1.2). It wants to have supranational, national and sub-national administrations that are capable of transposing, implementing and enforcing the *acquis communautaire* – the laws, regulations, directives, and court decisions that constitute the body of European Union law – according to the principle of obligatory results (SIGMA, 1999, p. 6).

In order to achieve these standards to have something, there are standards for doing something, namely to create administrations that respect the rule of law, administrations that are open and transparent, and that are accountable and ef-

ficient. These indicators for professional, neutral, integer and competent administrations imply a separation of politics and administration, and the need to create a merit system in public administrations. In order to create an open and transparent system, public registers should be accessible to the public and decisions need to be motivated i.e., accompanied by a statement of reasons. As to accountability, formal procedures have to be established as well as checks and balances, with a separation of powers. Thus, the EU Member States need to establish “independent authorities” such as independent courts, ombudsman, audit-offices, prosecutors and media (cf. SIGMA, 1999; Matei, 2011, p. 11).

These are standards because of their voluntary nature. The treaty on the EU constitution stipulates that the Union has only supporting competence in this regard and thus may support the efforts of Member States to improve their administrative capacity to implement the Union law, but that no Member State shall be obliged to avail itself of such support (Article III-285).

#### 4.3.2 The process towards the standards

The actual idea of an EAS was launched when the Central European countries applied for EU-membership in the 1990s. One of the criteria for the potential Member State became that they should have sufficient national administrative capacities to comply with the *acquis*. However, the idea of executive ordering or administrative convergence existed long before that. Some even search for its origins in the Peace of Westphalia (1648), the Vienna Congress (1815), the Treaty of Rome, and the European Court decision in 1963 that the European Community directives are expected to work directly in national legislation and can thus effectively be used by citizens in their national courts (Curtin & Egeberg, 2009).

Trondal and Peters (2013) identified two types of pressures towards the EAS that play a pivotal role. Studies about the EAS I explain that some degree of integration among the EU independent Member States is necessary, because it contributes to creating European administrative capacity and promotes a growing convergence of administrative systems and policies in a common European model. The second type of research – EAS II focuses on a common administrative order at the EU level itself. It points at new patterns of integration of public administration evolving due to the economic situation and occurring crisis in Europe, and having influence on the practising of EU legislation at national level (Trondal & Peters, 2013, p. 303, see also: Egeberg & Trondal, 2009 and 2011; Heidbreder 2011; Ellinas & Suleiman, 2012). Egeberg and Trondal (2009) emphasize that national regulatory agencies operate in a double-hat manner. On the one hand, they serve their national state’s ministerial departments. On the other hand, they serve the European Commission. Thus, the EAS has become the body trying to standardize all administrative areas. It would be beneficial because, if certain rights of citizens are well protected in one EU

Member State, the expectation is that they will also be respected in other Member States.

However, it was only in the 1980s and 1990s that institutional standards to promote this idea emerged. Scholars point to the advisory role of EIPA and SIGMA. Others see the catalytic effect of the actual emergence of local twinning projects, cross border regions, and the emergence of the Schengen area – the area without borders within the European Union – on the need for the effective enforcement of the Union law through the EAS (Beck, 2015). Still others point to the decisive impact of the Copenhagen criteria of 1993, defining whether a country is eligible to join the European Union; the Madrid treaty, introducing the need for adjustment of administrative and judicial structures so as to be able to transpose the EU Law and effectively implement it; the Luxembourg treaty of 1997, pointing to the need for strengthening institutions; and the Helsinki treaty of 1999 with the explicit obligation of candidate countries to share the values and objectives of the European Union as set out in the Treaties (Torma, 2011). The standard-setting organization of that moment, SIGMA, rightly pointed out in 1998; “it is clear that an EAS is now beginning to emerge” (SIGMA 1998:a p. 15).

At the time, the “future” accession provided the incentive for a huge number of reforms in the CEE countries. The expanding *acquis*, with its requirements limiting institutional discretion and thus having a profound impact on national administrative styles and structures made sure that not only CEE countries, but also the existing Member States, were affected (Knill, 2001, p. 214). This influence varied over different policies, dependent on the basic pattern by which European policies exerted influence on national administrative styles and structures, and the extent to which such needed compliance was in line with national administrations’ beliefs and preferences (Knill, 2001, p. 227). However, all in all, Europeanization of national administrations took place and continues, making Matei and Matei (2008) conclude: it “[A]ppears as the closure for a large process that implies convergence, Europeanization and administrative dynamics” (2008 p. 46).

### 4.3.3 Merits of the European Administrative Space

The EAS conforms to the characteristics of standards as discussed above. It intends to create order in the mixture of administrative styles and traditions within the EU. The aim is to increase the reliability, predictability, and uniformity of administrative processes and decisions, which are beneficial for customers, who can trust those decisions of administrations at whatever level. Just as, for example, the EU water directive was beneficial because citizens can have confidence in the quality of tap water. It suggests that citizens and companies can rely on the uniformity of laws in all countries of the EU. Thus, the standards created by the EAS simplify trade and assure the free movement of goods, services, capital and people. They make the communication between the Member States easier, and give equal rights to citizens

wherever they live in the EU. There is certainty that the administrations in the EU Member States do have the capacity to transpose, implement, and control the *acquis communautaire* in line with Nizzo's opinion:

*(...) a deficient public administration could create conditions detrimental to a country's socio-economic development and thus drive it away from the process of integration (...) and Member States' administrative capabilities are positively related to their compliance with EU rules (1999, p. 8).*

The idea is that in order to promote the EU's overall harmonious development, this international organization needs to coordinate its members' policies and activities so as to provide sustainable development, and to improve and increase the level of convergence (Torma, 2011).

According to Cardona and Freibert (2007), everyone would benefit from the maintenance and operation of a reliable, transparent and democratic administration, enforcing *European* and *good governance* principles all over the EU, as the major requirement for the development of a *good market economy* is a well-functioning public administration, which in turn relies, to a large extent, on the professionalism of its staff (p. 58). Everyone also profits from independent and fair procedures in the judicial system, the maintenance and operation of such a public sector, which performs its tasks legally, effectively and with the citizens' satisfaction and that enforces the principles of decentralization, subsidiarity and solidarity.

The standards, the process of standardization, and the presumed merits of the EAS conform to the theories on standardization. However, the process of standardization regarding administrative convergence is still ongoing and still topical, as for example, the Balkan countries that would like to assess the EU. They are required to take care of due process inside administrations (rule of law, accountability, openness, transparency and efficiency). Recently the standards have become even more specific. A recent SIGMA report (2012) gives a list of 10 minimum standards for the reform of the civil service in the Balkan states. These include: the need to reform, to establish a civil service law, to establish central institutions to ensure civil service management, to standardize examination mechanisms for civil service recruitment, to standardize civil service tenure rules, merit selection and promotion, and the development of performance management, the establishment of performance evaluation systems, a salary system, ensuring principles of predictability, fairness and transparency, establishing training systems and to establish integrity management systems.

Not all scholars in Public Administration appreciate this kind of standardization. The literature is full of critical analyses regarding performance management, fixed salary systems, formal examinations for recruitment etc. The current standards aim to improve the Balkan public administrations but they are embed-

ded within the NPM ideology of the 1990s that is already passé. Thus, the question arises: whether the changing discourse on the requirements of properly working public administrations also affects attitudes towards standards. It does not seem to be the case that the standards are flexible enough to adapt to the new discourses, in which *good governance* and *value-based governance* are central. The next section will illustrate that standards in general tend to be overly resilient. It describes the standardization of processes regarding asylum-seekers.

## 4.4 Standards applied to asylum-seekers

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### 4.4.1 Standards

In some countries people are in danger and many judge it to be desirable to grant refugee status to such people, if they apply for it in a third country. Governments of those third countries should also take the necessary measures for the protection of the refugee's family especially with a view to ensuring the unity of that person's family and the protection of refugees who are minors. Furthermore, it is judged to be desirable that people with refugee status in a third country, shall be accorded the same protection as is accorded to nationals of that country. Those countries which agreed with these principles, signed the Refugee Convention of 1951 (known also as the Geneva Convention). This section gives a critical assessment of the standardization involved in this area.

### 4.4.2 Setting the standards

The Geneva Convention was the first official document after the Second World War that regulated refugee status. This document reflects the different types of standards in refugee status. Its preamble states that human beings shall enjoy fundamental rights and freedoms without discrimination, that there is a profound concern for refugees and endeavour to assure refugees the widest possible exercise of these fundamental rights and freedoms. These principles are standards about which we should have, namely compassion with those individuals lacking basic human rights, based on having a civilized society, highly valuing humanitarian principles, and highly valued ethical standards.

The Geneva Convention also contains standards about taking action. It explicitly states that the states that adopt the Convention should provide certain facilities to refugees, including administrative assistance (article 25); identity papers (article 27), and travel documents (article 28); the granting of permission to transfer assets (article 30); and the facilitation of naturalization (article 34). Furthermore, the adopters agree to accord to a refugee a treatment as favourable as possible, with regard to religion, the acquisition of movable and immovable property, education,

wage-earning employment, housing, self-employment, public relief, freedom of movement, and should facilitate the assimilation and naturalization of refugees.

The Convention also defines standards about those who can be classed as a “refugee”. In the convention, he/she is defined as someone who is unable or unwilling to return to his or her country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion. Hence, the Geneva Convention only applies to those in these categories and does not apply to people fleeing from a war-torn environment because of their fear of being killed in the violence. It does not apply to persons fleeing from catastrophes such as drought, floods, earthquakes or hunger. It also does not apply to those who are receiving protection or assistance from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees (UNHCR). The convention does not apply to those having committed a crime against peace, a war crime, or a crime against humanity, having committed a serious non-political crime, or having been guilty of acts contrary to the purposes and principles of the United Nations.

#### **4.4.3 The process to further standardization**

A peculiarity in the standard of being a refugee in the Geneva Convention was that it applied only to threatening events for refugees that had occurred prior to 1951 and for most countries signing the convention. It referred only to refugees from within Europe. The New York Protocol of 1967 partly adjusted the Geneva Convention by removing the geographical and temporal restrictions from the previous regulation but the definition of a refugee remained the same. Since then, the Member States of the European Communities (EC) signed in Dublin on 15 June 1990 a Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the EC. The current definition of a refugee is in line with the Dublin convention and based on the previous Geneva Convention but the definition of “family” is stricter. It refers only to the spouse of the applicant for asylum, the children, but only if they are unmarried and minors under eighteen years of age, or his/her father or mother where the applicant for asylum is himself or herself an unmarried child who is a minor under eighteen years of age.

Since 1999, the EU began to create a common European asylum regime in accordance with the Geneva Convention and other applicable international instruments. According to Eurostat (10 December 2015), a number of directives in this area emerged. On 2 September 2003, the Commission Regulation (EC) No. 1560/2003 laid down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national. The regulations concerned, amongst others, the processing of personal data and the free movement of such data. It was about the

common control system towards asylum-seekers, for example, comparison of the applicant's fingerprints with fingerprint data previously taken and sent to the Central Unit and failing this, even by comparison of DNA or a blood test.

On July 11, 2007, regulation (EC) No 862/2007 of the European Parliament and of the Council came about. It referred to Community statistics on migration and international protection and repealed Council Regulation (EEC) No 311/76 on the compilation of statistics on foreign workers. EU enlargement also influenced a geographical and political dimension concerning migration. There was a need to reinforce the exchange of statistical information on asylum and migration to improve EU statistical collections to monitor and develop implementation of EU legislation and policy. The understanding of refugee status was still the same as defined in Article 2(c and d) of Directive 2004/83/EC in line with the formulation in the Geneva Convention of 1951.

On December 2011, Directive 2011/95/EU of the European Parliament and the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, entered into force. This document regulated a Common European Asylum System that included the approximation of rules on the recognition of refugees and the content of refugee status.

One and half years later, in July 2013, the Dublin Regulation came into force. Its aim was to increase efficiency and to ensure higher standards of the protection system for asylum seekers falling under this procedure. This regulation is already applicable after a refugee arrives at the border, in territorial waters or in transitional zones. The European Council on Refugees and Exiles (ECRE) emphasized that two other legal instruments constitute the "Dublin System" namely: (1) Regulation (EU) No. 603/2013 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the recast Dublin Regulation, (2) **Regulation (EU) No. 118/2014** which amends Regulation (EC) No. 1560/2003 laying down detailed rules for the application of the recast Dublin Regulation (see: ECRE: Dublin Regulation). The recast Dublin Regulation became applicable on 1 January 2014.

In 2015, a new refugee crisis occurred with thousands of asylum seekers from Syria. The pressure this new influx caused in Greece and Italy has been enormous, resulting in September 2015 – after long negotiations – in the decision of the EU Justice Ministers that over a period of two years the EU Member States would share the responsibility for a total of 160,000 asylum seekers, who would arrive in Europe through Italy and Greece. The introduction of mandatory quotas became a new standard perceived as the best solution to manage the almost endless stream of immigrants, but protests from the Visegrad group (Czech Republic, Hungary, Poland

and Slovakia) opposed the decision. It should be pointed out that asylum seekers do not wish to stay in those countries.

#### 4.4.4 The resilience of the standards

In the process of setting standards for asylum seekers obtaining refugee-status, the original standard has proved to be very resilient, even though the circumstances have changed in such a way that the original standards are no longer sufficient to accommodate the new circumstances. This applies to the standards about having something – compassion; being something – a refugee or illegal immigrant; and has severe repercussions for the standards about doing something.

According to Hollifield (2004), migration patterns are dynamic. He notes that supply-push factors and demand-pull factors drove migration in the 19<sup>th</sup> century:

*Strong supply-push factors were at work, compelling Germans to go abroad. At the same time there were powerful demand-pull forces, leading German farmers and workers to emigrate to neighbouring countries – like France, Switzerland, and the low countries – in search of employment, while many went to Russia or the United States, lured by the promise of cheap land and a new start (Hollifield, 2004, p. 194).*

It was only at the end of that century and the beginning of the 20<sup>th</sup> century that: “[t]he need to regulate national populations, for purposes of taxation and conscription, led to passport and visa systems, and the concomitant development of immigration and naturalization policies” (p. 195). Afterwards, international migration was driven primarily by the dynamics of colonization and the push and pull of economic and demographic forces. As Hollifield notes, “Illegal or unauthorized immigration was not recognized as a major policy issue, and there were virtually no provisions for political migration” (ibid). It was only in the inter-war years that international migration took on a more political character, with diaspora and exile politics coming to the fore, resulting in protectionism and parochialism with subsequent lawmaking to protect their population and markets.

At the time of the Geneva Convention, just after WW II “migration was intensely political, especially in Europe, where large populations were displaced as a result of the redrawing of national boundaries, irredentism, and ethnic cleansing” (Hollifield, 2004, p. 893). The convention made no reference at all to the later issue of refugees fleeing from (civil) war or poverty through which their lives were threatened.

In the second half of the 20<sup>th</sup> century and at the beginning of the 21<sup>st</sup> century, a new wave of migration emerged, on the one hand worker migration, and on the other hand, asylum seekers because of international and civil wars. It resulted in a number of migrants estimated to involve 170 million people around the world.

The latest wave of migration is the massive influx of migrants from Central Asia, the Middle East and the horn of Africa into the EU. According to data from EUROSTAT, OECD and reports from the United Nations High Commissioner for Refugees (UNHCR), an increase of illegal migrants within Europe is visible since 2010. In 2014, there were about 626 000 illegal immigrants from non-EU citizens in the EU 28, which represented an increase of about 46% compared with 2013, and about 8% compared with 2008. In June 2015, about 137,000 people crossed the Mediterranean Sea into Europe, which was twice as many as during the same period in 2014. One-third was from Syria, whilst the second and third most common countries of origin were Afghanistan and Eritrea. The number of first-time asylum seekers increased by more than 150% in the third quarter of 2015 compared with the same quarter of 2014 and doubled compared with the second quarter of 2015. The number of asylum seekers in the EU 28 reached 413 800 during the third quarter of 2015. It proved that citizens of 149 countries sought asylum for the first time in the EU. Petra Gümplövá asserts:

*It is no longer state persecution and absence of civil rights and liberties which make people leave their homes. It is intrastate conflict, civil war, risk of genocide, internal violence perpetrated on massive scale either by organized crime or religious fundamentalists, and a total lack of state resources to create minimal conditions of security and social and economic development. People entering the EU from Syria, Afghanistan, Eritrea, Nigeria, Iraq, Pakistan, Somalia, Central African Republic, and Ukraine are escaping exactly these kinds of humanitarian catastrophes and gross internal violations of the most basic human rights. (...)*

She argues:

*People fleeing from these countries unambiguously qualify for refugee status. Their most fundamental human rights to security have been violated and they have an undeniable moral right to seek international protection from such hazardous conditions. They have a legal right not to be pushed back from borders and denied access to asylum procedure. Any country committed to upholding human rights and other fundamental norms of international law has a duty to provide material help and access to asylum procedure or provide other forms of protection (Gümplövá, 20 August 2015).*

The second assertion is disputable. From the standards, as formulated in the Geneva Convention about what its adopters want to have, namely compassion, the assertion might be morally justified. However, according to the standards of being something (a refugee) and doing something (giving them the rights belonging to refugee status), the assertion is questionable because those people are not perceived

as asylum seekers having to fear for their human rights because of their religion, race, political opinions et cetera.

It is indicative of the nasty consequences of the resilience of the standard defining someone as a refugee, and for the increasing distance between the standards for having, being and doing something.

The adaptation in the standard resulting in the Dublin Regulation focused mainly on coordination-issues between countries, preventing asylum seekers who are refused a status in one country, to move to other countries, and ask repeatedly for asylum, until they receive a positive response. It did not result in a modification of the definition of a refugee in line with the changed circumstances. Rather, the Dublin Regulation often acts to the detriment of refugees e.g., application can cause serious delays in the examination of asylum claims, and can even result in claims never being heard. Areas of concern include the excessive use of detention to enforce transfers of asylum seekers, the separation of families, the denial of an effective opportunity to appeal against transfers and the limited use of the discretionary provisions within the Regulation to alleviate these and other problems. It also impedes **integration** of refugees by forcing them to have their claims determined in the EU Member States with which they may have no particular connection. The operation of the Dublin system may also increase pressures on those Member States at the external borders of Europe, where States are often least able to offer asylum seekers support and protection (ECRE: Dublin Regulation; ECRE: Dublin II Regulation; Lives on Hold; see also Eurostat, 10 December 2015). A report created by the Dublin Transnational Project under the title *The Dublin II Regulation: Lives on Hold* is an example. It gives the following illustration of the consequences of the Dublin regulation:

*One example of the suffering to families caused by the Dublin system is the case of a Chechen father separated from his newborn child by the Austrian authorities. While the baby had refugee status in Austria, his father was sent to Poland under the Dublin system. The father's request to apply for family reunification once he was in Poland, was refused by the Austrian authorities and so the father remained separated from his wife and child by the mechanical application of this system. The majority of people sent back to another country under Dublin are actually returned to the first State of irregular entry into the EU (Dublin Transnational Project, 18 February 2013).*

Another example is Turkey, where millions of asylum-seekers fled from the wars in Syria, Iraq and Afghanistan. However, none of them receives refugee status because, as Turkey asserts, they are only obliged to give such a status to asylum seekers from Europe as they signed the Geneva Convention of 1951 with this clause.

## 4.5 Discussion and conclusion

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This chapter focuses on the unintentional side effects of using standards and contains a serious warning for the unbridled use and creation of standards. It began with formulating the research questions, namely: How do the standards of granting refugee status conform to the current dynamics in migration trends? How does this affect the EU Member States in their capacity to manage the subsequent streams of asylum seekers to their countries? What can we learn from that process about standard setting in general and about the emergence of standards within the EAS in particular?

Regarding the first question, we have the impression that the standards of granting refugee status no longer conform to the current dynamics in migration trends. The argument behind is that one has to understand standard setting by incorporating the characteristics of the period in which the standards are set. Then one sees that standards provide an answer to the specific problems dominant at that period, but simultaneously create something that seems to be overly resilient against dynamics in the context. The result is that standards, after a certain period, fail to be appropriate for the changed circumstances and become unable to provide an adequate answer to new issues and may even become an impediment to solving those newly arising issues and problems.

With reference to Brunsson and Jacobsson (2002), standards are analyzed from a very general and abstract level. According to them, standards constitute rules for those who adapt them, and are helpful in finding answers about being something, finding information about what should be done or what organization or state should have. However, the authors look neither for the internal connections between these concepts nor for occurring conditional dynamics between them. Regarding the issue of asylum seekers, we see the interdependence between being something, doing something and having something. Thus, one of our main conclusions is also that the resilience of standards contributes to an increasing distance between standards about being something, doing something, and having something, that is about the morals underlying the standards, the determination about what and who is included and excluded, and about commitments.

The article began with the assertion that much of the literature on standards ascribes mostly positive effects to them, such as an effective way to provide information, the best solution to solve a problem, the way to create variation or on the contrary, to create similarity etc. Nonetheless, one can also find some arguments against standards and standardization and then researchers are using almost similar, but opposing arguments. Hardly anyone disputes the values incorporated in the idea of a European Administrative Space producing standards for public administration. Many advocate that the way the EAS is spreading administrative standards

for the public sector is working in a similar way to the ISO and will produce the same benefits for its members.

The article continued with an overview of setting standards, their definition (being something), the process towards standardization and the supposed merits thereof and applied this to the emergence of the European Administrative Space. It resulted in a review of the benefits of the EAS as perceived by the EU and by scholars publishing thereon. The standard setting by the EAS is a recent and still ongoing process and the potential resilience of the standards does not cause major problems yet, although one can already see that standards are embedded in a NPM discourse over which there is increasing debate.

When analyzing another standard-setting process, namely the standard for granting refugee status, as already defined in the Geneva Convention of 1951, the problems arising from a resilient standard, despite the completely altered circumstances, are better understood. That case shows that standards remain resilient through time, even if the circumstances change dramatically. The standards outlive the problems they originally addressed. The analysis also shows that standards for being something (a refugee, according to the convention, with all rights involved), standards for having something (having a civilized and humane society and politics), and standards for doing something (treating refugees as favourable as natives and other aliens) can become contradictory.

Now, we approach the answer to our second question dealing with how EU Member States manage the subsequent streams of asylum seekers to their countries. Our main finding is that the Member States only *pay lip service* to the standards. The EU Member States have no capacity to provide certain facilities to all refugees, including administrative assistance and guaranteeing human rights for them, as the Geneva Convention and even the later regulations ascribed. The lesson learned is that the first definition of being recognized as a refugee from 1951 became the major criterion for ascribing refugee status and dividing all asylum seekers into two groups: in-group – the refugee, and out-group – economic migrants. Thus, the concept of refugee proved to not at all be resilience. In the end this can imply that the process results in the deterioration of standards for having something that a civilized society and a humane political system should have.

This problem of standards' resilience also backfires on the basic standards of the European Administrative Space i.e. its adherence to the rule of law, openness and transparency, accountability and efficiency. These four criteria reflect the dominant discourse of recent times and are embedded within the theory of New Public Management. The criteria at present impose on Balkan countries applying for EU membership. The standards refer, amongst others, to the need for reform, civil service management, standardized examination mechanisms for civil service recruitment, the development of performance management and the establishment of performance evaluation systems and establishing training systems.

At present, a huge discussion is taking place within the study of Public Administration as to the direction public administration should take after 25 years of imposed New Public Management practices (cf. Nemeč & De Vries, 2013). Scholars nowadays severely criticize the nature of performance measurement systems. The effectiveness of continuous and repeated reforms is also disputed, and standard examination systems for recruitment and promotion are criticized for their one-sided focus on factual knowledge, whilst a learning organization would be in need of personnel with analytic skills and able to make critical reflections. The same applies, *inter alia*, to the other conditions mentioned within the EAS as they focus one-sidedly on administrative processes – efficiency, openness and transparency – and not on, for instance, administrative efficacy, meticulousness and diligence.

Concluding, this analysis calls for the acknowledgement of this problem, and to rethink how far we want to proceed in setting standards for the adequate functioning of public administrative arrangements in the future, based on the problems faced in the past.

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## 5. EU Governance and the European Fund for Strategic Investment

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*Frank Naert*

### 5.1 Introduction

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A priority for the new European Commission that entered into power in November 2014 is to promote investment. For that reason, the Commission launched the so-called Juncker investment plan. Through a combination of financial injections and guarantees, the Commission tries to initiate investments worth € 315 billion over the period 2015–2017. Key elements of this plan are the creation of a European Fund for Strategic Investments (EFSI), the crucial role of the European Investment Bank (EIB) and cooperation with other government levels and private partners.

The Juncker investment plan is welcomed as a game changer in some corners, because it is supposed to allow the EIB to support financially more risky projects with the EU budget as a risk buffer.

The success of the plan is determined by the expected multiplier effect (leverage effect) of the initial € 21 billion that the EU is planning to make disposable. This effect is estimated at 15:1 meaning that each € spent by the EU should entail € 15 euro spending by other partners from other government partners and the private sector.

Such collaboration is, of course not novel. Multi-level governance is a theoretical concept, which was developed in the analysis of the operation of the European structural funds (Stephenson 2013). Over the period 2007–2013 the concept was broadened to include, besides several layers of government, financial intermediaries and private investors as they now also played a role in the EU cohesion policy (Dabrowski 2014). The operation of the structural funds can be placed in the framework of the European Administrative Space, defined as an informal entity based on a legal and administrative framework (Cioclea 2012).

The Juncker investment plan features some innovative governance aspects that merit a closer look:

- *The new role of the European Investment Bank*: Robinson (2009) states that the role of the European Investment Bank has been insufficiently analysed from a governance viewpoint: ‘consideration of the EIB should prompt a re-invigoration of multi-level governance theory’ (Robinson 2009, 652) and ‘it is clear that our understanding of multi-level governance can only be enhanced by an appreciation of the role of the EIB’ (Robinson 2009, 665). It is exactly this same EIB, which has to act as the motor of the Juncker investment plan.
- *The introduction of ‘national promotional banks’ and ‘investment platforms’*: Member States can make direct contributions to EFSI or indirectly through ‘national promotional banks’ or ‘investment platforms’. Although these need not be new institutions, their involvement adds a possible additional layer to the governance system.

The issue that emerges is whether these features signify a new step in the evolution of the multi-level type of governance and, as such, marks an improvement in the operation of the European Administrative Space. The analysis of these elements should allow assessing whether the EFSI governance structure constitutes an improvement in the way public investment is financed within the EU. First of all, however, it is to be assessed what case the EU and governments at other levels have to intervene in investment. The research questions can therefore be formulated as

- Is there a need for governments to intervene in investments?
- Does EFSI constitute an improvement regarding this government intervention?

This chapter is organized as follows. In the next section the case for government intervention in investment is analysed. The following sections expand on the two allegedly innovative elements in the Juncker investment plan.

## 5.2 The need for government to intervene in investment

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We will analyze the role of the Juncker Plan for EU governance in the classical framework for government intervention in the economy as set out by Musgrave & Musgrave (1989). Government has three functions in the economy: allocation, stabilization and redistribution. In the case of allocation, government intervention is needed when markets show failures as is the case when they offer insufficient amounts of collective goods, entail external effects in production and/or consumption, suffer from asymmetrical information or exhibit distortional forms of behaviour. In its stabilization function government has to counter the business cycle. Redistribution is warranted when the market leads to an income and wealth distribution that is not socially acceptable. In a multi-level governance setting this intervention is, by definition, not restricted to one level of government. In the context of this chapter the relevant governing levels are the EU level, the level of Member States and their sub-regional government levels. The next question is then whether

any of the reasons for intervention, as suggested by Musgrave & Musgrave on any of these governing levels, is warranted in the case of investment.

The starting point is investment in the private sector and its role in economic growth. It is a well-established fact that investment, as a way of postponing consumption, actually increases future consumption and in this sense motivates private economic actors into investing part of their income instead of consuming it. As a result, there will be economic growth that raises the standard of living of the actors. The economic decisions made by these actors will be coordinated by the markets, e.g. the capital markets will connect actors with excess savings with actors needing financial means in order to invest. Experience teaches, however, that markets can fail in generating the right investment, that market investments can be insufficient and that they can be unevenly spread in geographical terms. These problems with private investment necessitate the intervention of governments at different levels. In Table 1 these two dimensions are brought together in a matrix. We will now briefly discuss each of the entries in the matrix.

**Table 1**  
Investment policy at different policy levels

	<b>Sub-national levels</b>	<b>National level</b>	<b>EU</b>
<b>Allocation</b>	Regional & local budgets Development banks	National budgets Guarantees Development banks	Structural funds EIB
<b>Stabilization</b>	SGP	SGP	EIB EFSM, EFSF, ESM
<b>Distribution</b>	Structural funds EIB	National taxes National social security	Structural funds EIB

Regarding the allocation line in the matrix, the Commission (2014) points at market failures being:

*the result of (i) asymmetric information, (ii) externalities and (iii) market power (weak competition). They affect both the demand and supply of investment. Typical examples include (i) credit rationing and high return requirements due to banks' high transaction costs for identifying viable investment projects (e.g. in the SME sector), (ii) underinvestment in areas such as research & development, infrastructure, education and environmental projects, where the benefits of investments can accrue also to competitors and (iii) under-supply of financial services resulting from market concentration due to mergers, exits of competitors or other impediments to effective competition. A specific exter-*

*nality in the EU context lies in the enhanced market integration fostered by cross-border projects.'*

It will be clear that the characteristics of non-rivalry and non-excludability existing in many provisions, warrant government intervention in the allocation domain. Investment in areas ranging from railways, roads, waterways, energy networks, telecommunication, airports to research and development has to be undertaken by governments because private investors decide insufficiently or not to enter into these ventures because they cannot recoup the considerable upfront fixed costs or are unable to internalize the external benefits, although the benefits for society exceed the costs. Regarding the government level that should take care of these market failures, the decentralization theorem developed by Oates (1975) states that societal preferences regarding these provisions should prevail. Since preferences are more homogenous in smaller communities, lower levels of government should be the first to intervene. The more there are spillover effects, tax competition effects and scale effects in provision and financing of public provisions, the higher the optimal level of intervention will be. In the first entry, we find public investment at sub-national levels. Through the budgets of regional and local governments an important part of public investment is financed: local streets, the public domain, investment in garbage collection, etc. are typical for these lower levels. Because of the scale effects leading to natural monopolies, investment in railways, highways, energy and telecommunications are typically organized at a higher level of government. The question as to whether the EU has a task in correcting market failures in investment can be answered positively. As Griffith-Jones & Tyson (2012) state, at the EU-level "one of the most critical market failures was in financing large scale infrastructure projects." Early on, the EU took up this task, both through the creation of the European Investment Bank and through structural funds: 'as well as the EIB as an institution providing loans, the European mechanisms created to support the integration process included both grants through the Structural Funds and guarantees to catalyse lending by the private sector' (Griffith-Jones & Tyson 2012).

Also, the first line features another kind of market failure, i.e. asymmetric information in the case of lending to SME's. Banks are very reluctant to lend to SME's because it is very costly to do the necessary research in order to define the real creditworthiness of SME's and the viability of their investment projects. It is not clear at which government level the correction of this market failure is best organized. Reality shows that governments at all three levels are active in this area, usually through dedicated public-owned financial institutions.

Concerning the second line in Table 1, stabilization is, according to conventional wisdom, best taken up at a level as high as possible, because of macro-economical import leakages. Sub-national levels are not well equipped to stabilize their economies by using their investment budgets. National governments would be better at this task but are refrained by the provisions of the Stability and Growth Pact

(SGP). At the EU level, the EU budget would look like an obvious instrument to stimulate the economy, but its small size (approximately 1% of EU GDP) and the requirement of equilibrium prohibit it playing a significant role. The EIB stepped in when the euro crisis hit by engaging in a clearly and crucial countercyclical role. Also, by firstly establishing temporary and, later on, permanent rescue mechanisms such as the European Financial Stabilisation Mechanism (EFSM), the European Financial Stability Facility (EFSF) and the European Stability Mechanism (ESM), the EU took up in an alternative way the task of stabilizing the European economy.

Regarding redistribution, the lower levels of government are not usually seen as a good platform. The usual instruments of taxation and social security do not lend themselves to being organized on a small scale. Unwanted migration would duly punish jurisdictions, which would try to differentiate on those aspects. However, when investment is involved, the picture is different because it is mainly about regional redistribution and less about vertical or horizontal income redistribution. The latter are mainly taken care of by national governments through their progressive taxation and social security systems. The former seems to be, in the EU, the ultimate playground for the use of EU instruments such as the structural funds and the EIB in close cooperation with sub-national governments, hence the emergence of the concepts of multi-level governance (Stephenson 2013) and European Administrative Space (Trondal & Peters 2013).

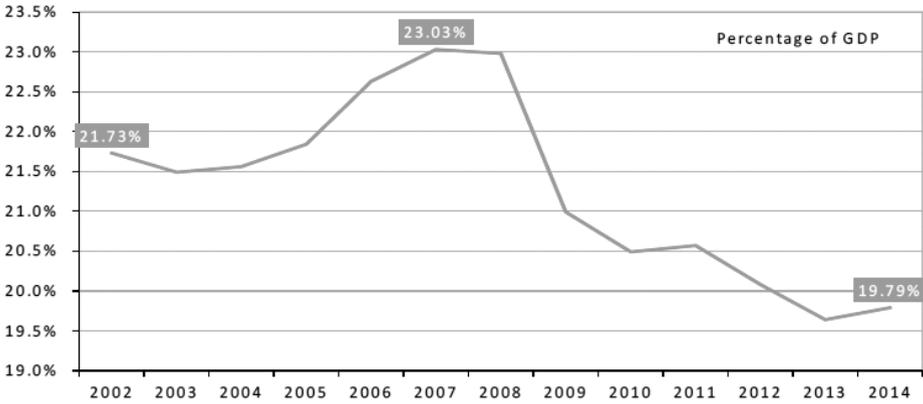
So, it is without question that governments, the EU level included, have a role to play in investment. At the EU level this role has been taken up for several decades by the creation of the EIB and by the structural funds. The next question then is whether, in the presence of this EU investment policy, an extra effort is required as signalled by the creation of the EFSI.

### **5.3 Insufficient investment and the need for EFSI**

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The establishment of EFSI has an impact on most of the entries in Table 1. Is there a need for EFSI, on top of the already functioning policies? According to some observers, there is no doubt, because, since the euro crisis, investment levels in the EU have failed to reach the pre-crisis levels. Barbiero (2014) argues that ‘it is clear that the EU fiscal framework was unable to foster public investment as a countercyclical fiscal stabilisation tool during the deepest crisis since the Second World War in those countries with fiscal space, in contrast to other advanced economies’. Griffith-Jones & Tyson (2012) state that “the EIBs’ level of additional financing was dwarfed by the scale of retraction in private market capital flows”. Buti (2014) finds that the drop of investment in the euro zone countries since 2007 is unmistakably clear. In Figure 1, the ratio of total investment to GDP in the EU 28 also shows the same trends.

**Figure 1**  
Total investment to GDP ratio in the EU28



Source: EPRS (2015)

The IMF (2014) finds that ‘the stock of public capital (a proxy for infrastructure capital) as a share of output has declined significantly over the past three decades’.

The idea that investment is lacking in the EU is not supported universally, however. Gros (2014) takes a dissonant view in stating that “superficially, higher investment seems always desirable. But the argument that Europe needs more investment now because its investment rate is currently lower than before the crisis is wrong on two accounts.” In the first place Gros (2014) argues that it is natural that during an economic boom, such as the EU was experiencing before the crisis, investment is higher than is needed, putting the investment that takes place in the ensuing recession in the wrong light. Moreover, the argument can be made that much of the high investment was in the wrong places, creating bubbles (e.g. in the housing sector) and was not much help in growth in the long run. The second reason involves the demographic phenomenon of a falling working-age population growth in Europe. This means that less investment in terms of GDP is needed to maintain the capital output ratio constant.

The IMF (2014) adds another critical note to the debate by observing that public investment is beneficial only in certain situations. “Increased public investment raises output, both in the short-term because of demand effects and in the long-term as a result of supply effects. These effects vary with a number of mediating factors, including (1) the degree of economic slack and monetary accommodation, (2) the efficiency of public investment, and (3) how public investment is financed.’ Increased public investment only helps in countries with a high efficiency of in-

vestment. The IMF classifies only France, Germany and Spain as ‘high efficiency’, whilst ‘Italy, Greece and Slovakia are low efficiency and should thus not be asked to increase spending”.

That leads Myant (2015) to observe that the Juncker plan will increase the level of investment but that “this is likely to be greatest in those countries that need EU help the least and smallest in those that need it the most.” This observation also puts in doubt the role of the EU level as there is no obvious argument for such a programme to be run from that level. The effect envisaged by EFSI could also be achieved by projects run separately in individual countries as only a limited part of the projects are of a cross-border nature. The Juncker plan does not have a mission to allocate investments in the countries that need it most, as there will be no country- or sector-specific quotas (European Commission 2015).

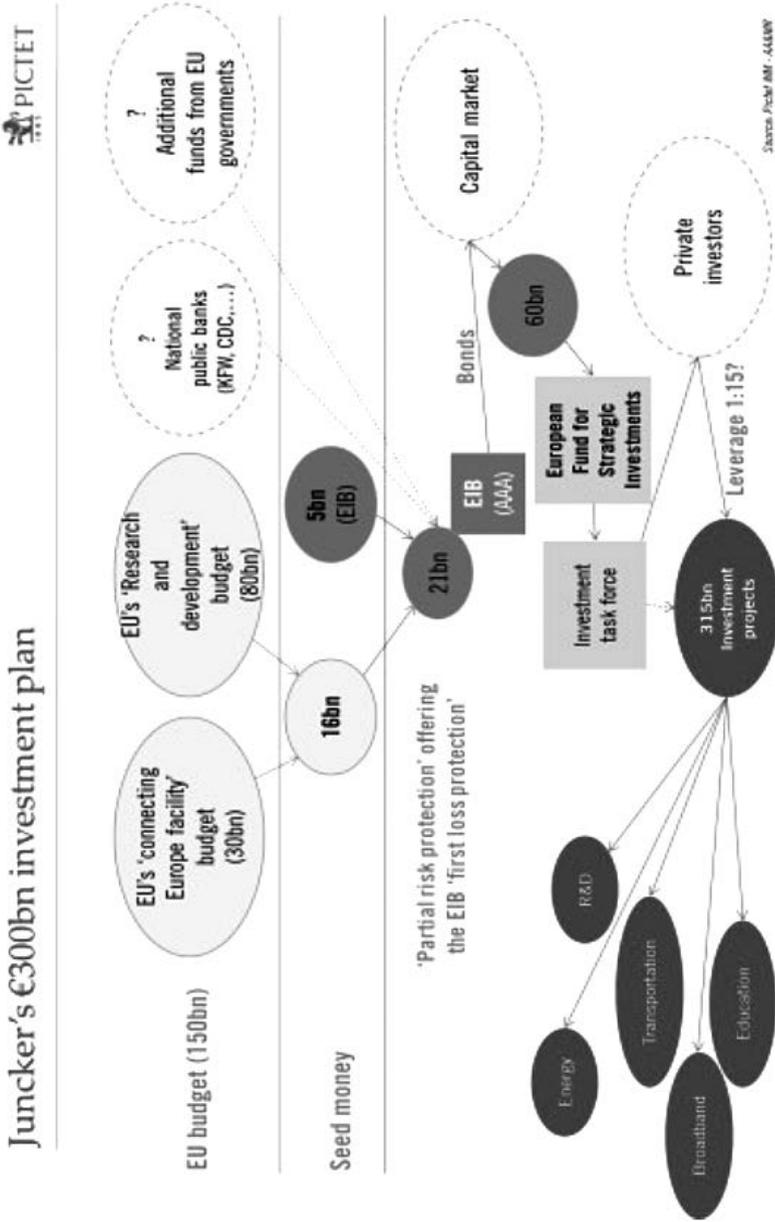
Thus, in this context, it is not at all clear whether the EFSI can have a value added in relation to the existing EU investment policies. In the next section we will focus on the characteristics of EFSI that can help decide this question.

## 5.4 The features of the Juncker Plan

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EFSI was launched jointly by the EIB Group and the European Commission to help overcome the alleged investment gap in the European Union. It is supposed to mobilise private financing for strategic investments, i.e. investment in ‘transport, energy and digital infrastructure; education and training, health, research and development, information and communications technology and innovation; expansion of renewable energy and resource efficiency; environmental, urban and social projects; as well as support for smaller businesses and midcap companies.’ (EIB 2015, 1) The EFSI constitutes the most important pillar of the three-pillar approach in the Juncker plan. Besides EFSI, in the second pillar, the Juncker plan wants to create an improved investment environment, which mainly consists of further removing barriers to trade within the EU single market. The third pillar targets at improving how finance reaches the real economy by installing an Investment Project Portal and a European Investment Advisory Hub (EIAH). According to Marty (2015) “the technical assistance organized by the EIB (and in part financed by the European Union’s budget) (...) will appreciably be developed to help promoters to structure and finance their projects better. The platform notably aims to support the introduction and increased use of complex financial packages.”

Figure 2  
The structure of the Juncker plan



Source: Durante (2014)

The EFSI wants to unlock EUR 315 billion of investment over the period 2015–2017. Figure 2 sketches how this has to be done. The multiplier effect of 15 is crucial, transforming an initial amount of 21bn € into an investment amount of 315bn €. The starting sum of 21bn partially comes from the EU budget. From the sum of 16bn €, 8bn has to be reshuffled from the existing 2015 to 2020 budgets (2.7bn from redirecting H2020 funds, 3.3bn from Connecting Europe funds and 2bn from existing margins in the EU budget). The origin of the remaining 8bn € is not clear. The 16bn € should work as a guarantee fund from the EU to the EIB offering specific cover to the investments financed by the EIB Group in case there are any losses. The EIB itself should also invest 5bn € from its own resources. Backed by this 21bn € the EIB should be able to generate three times this amount (60.8bn €) in investment through AAA-rated bonds on the capital markets. This amount is then expected to further generate the 315bn € in investment, divided over an infrastructure and innovation window and a Small and Medium Sized Enterprises (SME) window. The first window runs over the EIB, while the second one runs over the European Investment Fund (EIF), which is a part of the EIB Group targeted on the financing of SME's. It is expected that the EIB will provide EFSI financing of approximately 49bn € and the EIF around 12bn €, hopefully leading to long-term investments of approximately 240bn € in the first window and of approximately 75bn € in the second one. Projects financed by EFSI must go through the standard EIB due diligence as well as through an assessment by the EFSI Investment Committee to decide whether they are eligible for backing under the EU guarantee.

A crucial factor is the multiplier of 15. According to the Commission, this is a prudent average, “based on historical experience from EU programmes and the EIB” (Commission, fact sheet). The EU guarantee is portfolio-based (covering hundreds of projects), which means that the multiplier can only be exactly measured at the end of the investment period and only on a portfolio basis, not project by project. Standards & Poor (2015) expects “this 15x multiplier to be achieved by a combination of leverage and an element of crowding-in (incentivizing co-investment) from other funding sources. The EIB could deliver new loans, supported by a first-loss piece guarantee from the EU. These loans would then crowd in other investors to achieve the overall investment target. EIB projects typically attract about 3 times as much private investment as it finances through its loans for projects. However, the EIB believes it could significantly increase this multiplier by financing higher-risk (and higher-yielding) projects or being more junior in the structure of the project financing, as these projects will benefit from the first-loss piece guarantee from the EU.” Claeys (2014) agrees and finds that “the EIB often leverages itself by a factor of 6 before attracting enough private investors to co-fund its projects to increase investment by a factor of 3 leading to an overall multiplier of 18”. This optimism is not shared by all observers, however. Medarov (2015) finds that “the projected multiplier effect was called ‘overly optimistic’ by some financial experts.” Société Générale finds a leverage ratio of 15 to 1 ‘overly optimistic’. (<https://www.>

societegenerale.com/en/content/look-headlines-0)". Veugelers (2014) adds 'there is much scepticism if this 1:15 multiplier is realistic, particularly as private funding needs to be 'additional' – it should not crowd out already planned investments'.

The issue of possible crowding out brings up another crucial factor in EFSI, namely the additionality. Regulation (EU) 2015/1017 defines this concept in Article 5 as "support by the EFSI of operations which address market failures or sub-optimal investment situations and which could not have been carried out in the period during which the EU guarantee can be used, or not to the same extent, by the EIB, the EIF or under existing Union financial instruments without EFSI support". This means that the supported projects will typically have a higher risk profile than the normal EIB projects.

After approximately one year of operation (end of September 2016) the EIB reports that 40 % of the total 315bn € has been allocated, spread over the 324 transactions that were approved (<http://www.eib.org/efsi/>).

## **5.5 The new role of the EIB**

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It should be clear that the EFSI is not a proper fund or legal entity and that it does not trade independently. It is enshrined in the EIB and its dedicated governance should ensure that it remains focused on its objective of increasing the volume of higher risk projects supported. As such, it is only a label for new EIB assets. "This label will be awarded by the newly created 'EFSI investment committee' to some projects that the EIB previously did not want to fund because it considered them too risky, and that will now benefit from the EU guarantee" (Claeys 2015). The idea is that the EFSI would lead to a major change in the way the EIB functions. The EIB would take on more risk by funding high-risk/high-return projects that, without the EFSI, would not be able to secure finance. In doing so, the EIB would take a less dominant position by agreeing to finance a smaller share of each project to avoid crowding out private investors. In addition, the EIB would be junior to its co-financiers in order to reduce the risks taken by private investors.

The EFSI thus puts the EIB into the driver's seat by attributing to it a crucial position in raising and allocating the capital for the extra investment in the Juncker plan. The EIB is the obvious candidate because it has the most experience. Since this experience is mostly in supporting relatively small numbers of projects, 'it would need to take on a larger role' (Myant 2015). Also according to Darvas (2012), the EIB "seems to be the best institution to carry out such an investment programme".

In taking on this new task the EIB does not enjoy complete autonomy, however. EFSI activities cannot be entirely mixed with the normal EIB-activities since that would not lead to the wanted additionality. The governance of the EFSI is covered by Article 7 of Regulation (EU) 2015/1017. This article states that the EFSI will be governed by the Steering Board, the Investment Committee and the Managing

Director. The Steering Board comprises four members, appointed for three years, three by the Commission and one by the EIB. The Managing Director is responsible for the day-to-day management of the EFSI and is assisted by a Deputy Managing Director. The Investment Committee has, as its responsibility, to examine potential projects and to approve the support of the EU guarantee for EIB operations. The Committee is composed of eight independent experts selected through an open and transparent procedure. The experts are appointed for three years.

What do these innovations mean for multi-level governance theory? According to Robinson (2009), in many cases, the EIB remains absent in multi-level governance analyses, although ‘the EIB places a considerable premium on expertise and knowledge, requiring certain institutional structures of partnership between government and non-government actors to be in place before the loan bidding process’. It seems logical to assume that the introduction of the Juncker plan will enforce these institutional structures. Crucial here is the interplay between the EIB, the Commission and actors from sub-national government levels and from the private sector. Already in the period 2007–2013 the EIB and the Commission cooperated in several programmes (JASPERS, JESSICA, JEREMI, etc.), looking for a leverage effect of jointly financing projects through structural funds spending and EIB loans (Robinson 2009). These programmes are explicitly mentioned in Regulation (EU) 2015/1017 as expecting to feed the EIAH with good practices. Through the Juncker plan, according to Marty (2015), the “dialogue between the Commission and the EIB, the promoters, investors and other institutional players is provided for on European, national and regional levels to facilitate developments and to raise awareness on the new financing methods”. This will promote synergies between national programmes and those undertaken on the EU level. Marty (2015) even looks beyond the Juncker plan and foresees the possibility of converting the Structural Funds into these new EFSI instruments. This fits into the view of Valla (2014) that “over time, Structural Funds have become sadly famous for lacking a strategic vision. Their allocation is perceived as opaque and sub-optimal”.

## 5.6 The introduction of ‘national promotional banks’ and ‘investment platforms’

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From a multi-level governance and European Administrative Space perspective an even more important development is the prominent role attributed to national promotional banks and investment platforms in the operation of the EFSI. They are expected to play a role “in identifying viable projects, developing and, where appropriate, bundling projects, and attracting potential investors” (Regulation (EU) 2015/1017, recital 34).

The same regulation defines ‘national promotional banks or institutions’ as ‘legal entities carrying out financial activities on a professional basis which are given

a mandate by a Member State or a Member State's entity at central, regional or local level, to carry out development or promotional activities'.

Main examples of national promotional banks are Germany's KfW, France's Caisse des Dépôts and Bpifrance, Spain's Instituto de Crédito Oficial and Italy's Cassa dei Depositi e Prestiti. According to Valla (2014) they can be game changers "if they choose to put the unavoidable upfront cash that the Fund needs to effectively work".

Promotional banks are better known as development banks or as development financial institutions (DFIs) and have been around for a long time. Most of them have been established in the period 1946–1989 at national, sub-national and supra-national level and were seen as less useful in the next period. Since the financial and euro crisis, however, development banks have become more active and new ones have been set up (Wruuck, 2015). At the European level the EIB, also a development bank, has stepped up activity. The establishment of the EFSI also involves an important role for national development banks.

Wruuck (2015) points at the new elements in the present EFSI context: "what is different this time is i) the creation of a joint facility to promote investment in which national DFIs can take part and ii) that the discussion about DFIs role and their potential for European economies is not only regionally focused. Rather, DFIs are considered as part of the economic policy toolkit to address problems on a national as well as on a European scale". In that sense, promotional banks are becoming more and more integrated in the EU multi-level governance system and becoming a part of the European Administrative Space. This does not come without its problems, however. The European system of promotional banks is very heterogeneous as are the types of cooperation and coordination between them. For that matter, proposals have been raised (Valla a.o. 2014) to create a "Eurosystème of Investment Banks" (ESIB).

By 'investment platforms' Regulation (EU) 2015/1017 means 'special purpose vehicles, managed accounts, contract-based co-financing or risk-sharing arrangements or arrangements established by any other means by which entities channel a financial contribution in order to finance a number of investment projects'. They include:

- (a) "national or sub-national platforms that group together several investment projects on the territory of a given Member State;
- (b) multi-country or regional platforms that group together partners from several Member States or third countries interested in projects in a given geographic area;
- (c) thematic platforms that group together investment projects in a given sector".

Further guidance concerning investment platforms is given by the European Commission (2015): ‘Investment platforms are, in essence, co-investment arrangements structured with a view to catalysing investments in a set of projects (as opposed to individual projects). Investment platforms are a means to aggregate investment projects, reduce transaction and information costs and provide for more efficient risk allocation between various investors.’

Contrary to the promotional banks, investment platforms do not have a long pedigree. The Commission (2015) itself offers examples of a few recent multilateral investment platforms. “Marguerite”, the 2020 European Fund for Energy, Climate Change and Infrastructure was launched in December 2009 by a number of leading public financial institutions such as the EIB, KfW, the Caisse des Dépôts and the Cassa Deposito e Prestiti. It invests mainly in European infrastructural brownfield and greenfield projects in the transport, energy and mature renewable sectors. A similar initiative is the European Energy Efficiency Fund (EEEF) involving the European Commission, the EIB, the Cassa Deposito e Prestiti and the Deutsche Bank. With the presence of a private bank the EEEF takes on the form of a supranational public-private partnership (PPP). A third initiative, the European Fund for South East Asia, is also a PPP. They are not regular PPP however. The distinguishing factor between a regular PPP and an investment platform is that the latter invests in a portfolio of projects while the former engages in individual projects. There is a similarity with what the OECD calls ‘co-investment platforms’, whereby pension funds and sovereign wealth funds pool their resources to invest jointly in infrastructure projects. They do so in order to benefit from a number of advantages: “better alignment of interest with other pension funds, like-minded investment horizon, lower fees, better control of the characteristics of the investment, larger commitments, local knowledge, and a spreading of risk” (OECD 2014).

## 5.7 Conclusions

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In this chapter, the Juncker plan developed by the Commission in order to step up investment in the European Union is analysed from the viewpoints of effectiveness, its impact on multilevel governance and its contribution to the European administrative Space.

Although a good economic case can be made for intervention in investment at the EU level, it is clear that the extra instruments created by the Juncker plan can only have added value if it does not act as a substitute for existing financing sources but leads to extra investment. Although it is still early to have a clear view on that issue, the suspicion is that there is not much additionality present.

The central institution in the Juncker plan, the EFSI, is placed under the umbrella of the EIB, but is managed by a separate and independent governance structure. As the spider at the centre of the web, the EFSI has to count on actors at various

governance levels. At the EU level there is a close similarity between the objectives of the Juncker plan and the European structural funds that are managed by the Commission under the EU budget. The EFSI can contribute to a better coordination between both instruments. At the national and sub-national levels the EFSI has a role to play in coordinating investment projects and policies with promotional banks and private investors. As such, it adds to the elaboration of the European administrative Space.

Summing up, while it is still early to draw definite conclusions, the Juncker plan seems to have triggered a renewed kind of multi-level governance with a larger role for the EIB.

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## **6. Serbia's Difficult Administrative Transition to Join the European Administrative Space: Legacy, Traditions and Constraints**

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### **6.1 Introduction**

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With the adoption of a new administrative reform strategy and action plan, calibrated to pave Serbia's path to EU accession, the country has entered a new phase in its protracted administrative transition.

Serbia has a record of start and stop reforms in adjusting its public administration system. Earlier ambitious reform efforts, including the establishment of the Capacity Building Fund and agencification efforts in 2001/2002, the approval of the previous Public Administration Reform (PAR) action plan in 2005 and the (partial) overhaul of legislation on civil and public service in 2005/2006, were followed by reversals, leaving much of the legacy issues facing Serbia unaddressed.

With the approval of the new PAR strategy and Action Plan in 2014 and 2015 respectively, the start of EU accession negotiations and new efforts to restructure the administration and amend critical legal frameworks, the country has entered a new phase. The question remains whether this time around, political and economic factors will facilitate this process, and allow for Serbia to align with the values and principles that constitute the basis for the European Administrative Space.

### **6.2 Context And Implications for EU Accession Processes**

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While institutional capacity in public administration has been part of the EU membership criteria for almost two decades, recent experience with new entrants and the difficulties they have faced, both in assuming the responsibilities of membership and deriving the benefits thereof, have given a new impetus to discussions on the importance of these elements of the EU's membership criteria. The shift in the EU's own enlargement policy, centred increasingly on economic governance, represents both an element of realism (no support for further enlargement in existing Mem-

ber States unless the economic value added of new members can be argued) and a reflection that amongst the current candidate states, unlike the previous candidates, few have a fully functioning market economy. The predominance of the state in the economies of Serbia, FYR Macedonia and Montenegro (to a lesser extent in Albania and Kosovo) adds a further argument as to why the size and quality of the state administration is an issue of great importance in the current accession process.

Regardless of these factors, the EU's own thinking about public administration has not significantly evolved from the work carried out around the first Eastern enlargement, embodied in the definition of the 'European Administrative Space' (OECD/SIGMA 1998) and 'European Public Administration Principles' (OECD/SIGMA 2000). This, even although various evaluations of the public administration systems of the states of the first Eastern enlargement point to scant respect for these same principles after membership (Verheijen 2007; OECD/SIGMA 2009 and Meyer-Sahling 2011 and Mayer-Sahling and Van Stolk 2015). Some analysts have posed the question whether in many of the countries that entered the EU in 2004 and later there was ever real ownership of the European Principles in the way they were defined (Meyer-Sahling 2011). This poses the question of whether a modification of the paradigm itself might be needed to create more space for alternative approaches (at least in case these prove to work). This includes more reflection on the acceptance of politicization as a management tool and moving away from the lifelong career principle as a defining element of the civil service (indeed a number of "old" Member States have moved in that direction as well).

However, when it comes to the current candidate states the measuring stick consists mainly of the same review mechanisms applied between 1999 and 2004 for the first Eastern enlargement. Arguably this might, in a way, be a better fit for the candidate states that are successor states of Yugoslavia, which, even under Socialist rule, applied a modified form of civil service, based on continental European principles, a system that fell apart in the tumultuous 1990s. Unlike in Central Europe and the Baltic States, where especially young people took the opportunity of working for the private sector rather than working for the state when this arose, the preferences of labour market entrants in countries such as Serbia, Montenegro, Bosnia and Herzegovina and FYR Macedonia are still to find a job in the broader state sector, which is considered more secure and, in many instances, provides a better income (IPSOS survey 2015). On this basis, one might therefore expect a greater "take up" of European Principles, based on traditional public sector values (merit, impartiality, life long career etc.).

At the same time, building modern public administration systems based on European principles has posed an enormous challenge in all current candidate states and to Serbia in particular. The gap between what is seen as good in theory and the way this has been applied in practice is wide. Even if several efforts were made to bridge this, Serbia found itself in 2013 with a public administration sys-

tem that was poorly managed, underperforming, fragmented and costly: Politicized and high cost agencies, established in the first wave of market economic reforms in 2001–2003, coexist with an expanded network of formal administrative bodies, of which many date back to the old Yugoslav system. A relatively modestly sized core civil service oversees a large network of service delivery institutions, with virtually all major functions in health, education and social protection still largely in state hands. Finally, an even smaller group of politically appointed and frequently changing staff in ministerial cabinets is responsible for most policy design work. “Frequently changing” also applies to the highest level of career civil servants (assistant ministers), though many of these officials are rehired by other ministries when they are released from office or resign on political grounds.

In terms of policy management and implementation capacity, Serbia has a fragmented system with multiple institutions involved in the management of the policy process including the General Secretariat, the Legislative Secretariat, the Public Policy Secretariat and the Serbian European Integration Office. In addition, it has a Delivery Unit that tracks the implementation of priority reforms for the Prime Minister. Regardless of the presence of this plethora of institutions, the filtering function does not operate as it should leading to Government sessions being overburdened with numerous issues of detail that should have been resolved further down the line (World Bank 2016). At the same time, there is no functioning tracking mechanism to follow up on implementation measures, a gap that the Delivery Unit is now filling for a few high priority issues. Effective participation in the EU’s decision-making process will require a thorough reorganization of this system.

In this chapter, we will first explore some of the underlying contextual reasons why Serbia ended up where it was in 2013, even if from the point of view of theory it was one of the countries more likely to associate with ‘European Principles’. In doing this, we will look at the historical context, including the hollowing out of institutions in the 1990s, the absorption (twice) of the remnants of Federal institutions in the Serbian republican administration and the impact of efforts to ‘fix’ this problem in 2001–2003 through the injection of capacity from outside and the introduction of New Public Management-based reforms.

We will then move on to review the latest efforts in taking a holistic approach to public administration modernization, driven both by the EU accession process, the government’s fiscal consolidation programme and set in the context of government efforts to significantly reduce the role of the state in the economy. The questions from there will be whether this mix of conditions and context will help or hinder implementation of the reform programme and action plan and what can be done to mitigate any risks to progress. Finally, we will come back to discuss whether the assumption that Serbia could, in the end, well be closer to European public administration principles and values when compared to some of the earlier

entrants to the EU holds and what that implies in terms of the likelihood of good post-membership performance.

### 6.3 Current Contextual Issues: Legacy, Political Economy, Fiscal Consolidation and Economic Reform Trajectory

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Serbia shares some similarities, in terms of its economic trajectory, with successful new EU Member States, such as Slovakia, Latvia and Lithuania. Each of these three countries also faced, at similar stages in their EU accession process, a serious fiscal crisis (1998–1999). In each of these three cases, the crisis was turned into an opportunity to address engrained issues in economic and public sector management, turning these three countries from laggards on administrative reform to some of the leading countries on this agenda (see Evans and Evans 2001 and Verheijen 2007).

Serbia is currently emerging from its third recession in a time span of six years, with its public finances still under strain and debt levels high, while having finally levelled out. This, in principle, creates the right fiscal pressures to design and enact the kind of radical reforms that are much more difficult to introduce when the economy is strong. However, unlike the above three countries, Serbia has not used previous crises to address core structural issues in the public sector (including sector financing tools). Rather, it has consistently cut at the margins. Famously, the country failed to abolish any major institutions for decades (unlike the previously three mentioned countries), has kept hiring teachers while the number of school age children has been dropping rapidly for more than a decade and retains numerous expensive vocational education streams for professions that no longer exist. Legacy (administrative traditions), psychological and political economy factors combine to explain why Serbia has been unable, so far, to put crises to good use.

In terms of legacy issues, one fundamental difference with the three other states is that while they emerged as independent states from federal systems (and did not carry the burden and overhang of these systems), Serbia has had to absorb the remnants of two previous federal systems, one in the 1990s and one in 2006, after Montenegrin independence. This has complicated efforts to keep administrative expansion under control.

Legacy combines with psychology, i.e. Serbia is the core remnant of former Yugoslavia, and therefore did not have the same sense of purpose and energy that comes with newly gained independence (which applied to the other three cases mentioned above). Another legacy issue is an economic and administrative culture that puts primacy on the role of the state as an economic operator and a provider of employment, a reminiscence from the socialist era and a notion that remains pervasive throughout the territory of former Yugoslavia.

A further important fact is that fiscal pressures have existed at various points over the last 15 years, but have at no point been ‘translated’ into fundamental re-

forms. At the same time, resistance to change amongst a population that is growing weary after 25 years of perceived decline following the collapse of Yugoslavia (IPSOS survey 2015), remains a growing concern, and could undermine efforts to reform the state.

Given this context, what are the odds for Serbia to break with its traditional path, and to make a break with its largely frozen public administration system? In our view, there are three factors that significantly improve the odds for a positive outcome in the current reform debate. We will look in particular at the political economy context; social factors (including an analysis of public opinion surveys on reforms); and geopolitical pressures as ways that could help us in predicting the reform trajectory going forward.

In political terms the consolidation of the political scene works in favour of reforms. Politically, Serbia has moved from extreme party fragmentation in the 2000s to the current model which has two dominant parties: the Serbia Progressive Party (also known by its Serbian acronym, SNS), polling between 45 and 50 per cent of voter preferences, and the Socialist Party of Serbia (around 12–13 per cent). There are still a number of smaller parties represented in Parliament— some spin-offs from the previously unified Democratic Party, some on the far right, and one new movement (Dosta je Bilo or 'Enough is Enough' that challenges the vested political forces). These parties together made up around 35 per cent of the votes at the April 24 (2016) elections. Yet, there is a strong pro-European Integration block in parliament that is also largely supportive of economic and structural reforms.

The second is that Serbia has, with the opening of the first negotiation chapters in 2015, for the first time a real perspective of EU membership. While this is not a guarantee for successful institutional reforms, EU accession negotiations in themselves require discipline, coherence and continuity in government. This will act as a counter pressure to the revolving door management that has characterized the Serbian public administration for the last decade. Even if a number of central and eastern European states changed course on public administration reform after joining the EU, they did strengthen and tighten systems during the negotiation process. In the case of Serbia, this negotiation process is likely to be relatively long. One could expect the pressure for more continuity and coherence to play, along with a relatively well-established administrative tradition to be a positive factor for change. In summary, we would agree with Meyer-Sahling (2011) on the limitation, so far, of the 'pulling power' of EU accession to *sustain* civil service reforms *after* accession. However, we also believe that pressures during the accession process, both arising from the process itself and from administrative capacity membership criteria, will be sufficient to retain the momentum of reform processes during this period.

The third and final point is that even if previous governments were able to address economic downturns by cutting at the margins, this is no longer an option today. The margins to cut are limited at this point and years of tinkering at the edges

have aggravated the economic situation to a degree where structural reforms can no longer be postponed (World Bank 2015a). The political leaders that make up today's coalition have shown a clear understanding of this, and while vested interests remain strong, important steps in implementing broad structural reforms have been made since 2014. This includes the resolution of the legacy of loss-making commercial State Owned Enterprises, reducing the scope of state involvement in the financial sector and, most importantly, the reorganization and financial consolidation of public utilities and transport companies. The latter posed a particularly grave fiscal risk. Public administration reforms are therefore implemented as part of a much broader structural reform package rather than in isolation, which in general terms makes them more likely to succeed.

## 6.4 Main Elements of Current Reform Processes

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The government's immediate priority has been on fiscal consolidation with an understanding that root causes of underperformance have to be addressed in a systemic and coherent way. In the meantime, some short-term saving measures have been taken: a hiring freeze was imposed in 2013 and the law on maximum wages in the public sector was adopted. However, these measures on their own cannot address the deep inefficiencies in the public sector, unless embedded in a broader modernization strategy.

This broader strategy is set out in a Public Administration Reform Strategy (PAR) adopted in 2014. Together with the Action Plan for the Implementation of the Public Sector Reform Strategy (2015–2017), adopted in 2015, the strategy defines the immediate priorities of the Government of Serbia. The PAR programme has several objectives<sup>1</sup>: to increase the quality and efficiency of public services delivery; to motivate and reward high performing public sector employees and to strengthen capacities to be capable of managing the EU accession process. This reform agenda is clustered around the four main elements:

*An overhaul of legal frameworks.* While reform by legislation has its drawbacks, this is, in the Serbia case, a critical condition for moving forward. As a recent analysis (World Bank 2014) has shown, the legal framework for the broader public service (including the core civil service) is so fragmented that any reasonable staffing and wage control has become impossible, leading, amongst other things, to unreasonably high employment cost and serious distortions to the equal pay for equal work principle. While some parts of the public sector are better regulated than others (e.g. the core civil service has a legal framework for employment and wage management that has greater transparency and predictability than other components

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1 The PAR strategy has a broader remit than public administration reform and also includes other aspects of public management, such as improved Public Financial Management, strengthening Accountability and Procurement reform.

of the public sector), the incomplete reform efforts of the mid-2000s, together with the abolition of centralized payroll management and the lack of a human resource management information system, have seriously undermined system coherence and transparency. In addition, broader HRM reforms were also abandoned after 2007, leaving previous efforts to harmonize HRM principles and enshrine merit and performance principles in these, incomplete.

A broad legislative fix is therefore inevitable. To respond to this need, the government has recently made advances in reforming the legal and institutional framework for human resource management across the public sector. This includes the enactment of a new law strengthening the use of a registry of employees that would ensure accountability for staff on the payroll, in addition to streamlining the hitherto uncoordinated system for establishment control. In 2015, the government introduced a new law capping the number of public employees (until 2018) not only to reign in high wage expenditure, but also to support an orderly process of human resource planning. Finally, in early 2016, the government passed a new public sector wage law that revised job grades and pay coefficients, with the intention of addressing persistent inequity in grading and pay. Together, these laws and their associated by-laws will strengthen the legal and policy framework for managing the wage bill and employment practices across the public sector.

*Right-sizing and optimization.* In order to improve organization of the public sector and to better organize work processes within the institutions, the government of Serbia embarked on an ambitious right-sizing and optimization programme. Under this programme ministries are expected to simplify administrative procedures, eliminate redundant tasks and eliminate or restructure departments with duplicated functions, thereby reducing the need for staff. The right-sizing and optimization programme will also address the high costs of the public sector and its wage bill. The Wage bill cost had risen to 11 per cent of GDP by 2013, and is projected to be reduced to approximately 7 per cent of GDP by 2018. Rather than using the cheese cutter method of earlier efforts, the government has, in this case, initiated a targeted set of staffing reviews focusing on the core administration, the health, education and social protection sectors, finance and agriculture. Reviews do not only cover duplications and overstaffing, but also identify areas where the government needs to staff up. Targets for rightsizing in 2015-16-17 have been set between the government and the IMF. The World Bank then supports government efforts to meet targets set out in the Stand-By-Arrangement with the IMF. Subsequent reviews are also expected to address the quality of performance of core horizontal functions across the public administration with a view to identifying opportunities for improving service delivery, efficiency and effectiveness.

*Strategic sector financing reforms.* These concern parts of the public sector where expenditures are significantly out of line with comparator countries and service quality is not commensurate with this level of investment (World Bank 2015a).

It also concerns other areas where institutions could be sustained with a greater effort to attract external funding, such as research and science. Particular areas of concern are the health, justice, higher education and research sectors, as well as internal security and police. Previous efforts to reform financing of the health sector and to move from input based financing to financing based on results have not been successful. Discussions on this aspect are at the initial stages in some aspects, though more advanced in others (e.g. research and science).

*Strengthening policy coordination and implementation tracking.* Serbia's current policy management system is fragmented and rather ineffective. While it has some strengths, such as a fairly complete legal system and the foundations of a system for policy planning, it also has major weaknesses. The policy planning system is still fragmented and the two most important policy planning documents, the Annual Government Work Plan and the Action Plan for the Implementation of the Government Programme are not linked sufficiently. Policy formulation is mainly focused on legal drafting process, as no prior written analysis or preparation of proposals are carried out before the actual work on drafting legislation. Policy papers are not present as a tool for designing, communicating and consulting policy options but as proposals for obtaining their approval by the Government. Government efforts to strengthen policy system coordination resulted in consolidating an institutional setup of the Centre of the Government and strengthening its main institutions, the General Secretariat and Public Policy Secretariat. However, the process of reform and consolidation of the policy coordination system is a step-by-step process which can often last more than four years.

A World Bank assessment rated Serbia at level '2' on the Metcalfe scale (World Bank, 2016), which is well below what is considered to be an effective policy management system. Efforts so far have mainly resulted in the addition of new institutions in both the upstream and downstream policy processes, and have done little to 'unclog' what has become a cumbersome and top heavy process (World Bank 2016). It is expected that the EU negotiation process will force a consolidation of current structures and processes. An effective policy management system is one of the key requirements for successful administration of the EU accession process. The experience of the new Member States provides evidence that those countries that have invested in strategic and streamlined coordination systems have done better in the EU once they joined, both in participation in the EU system and in drawing the benefits of membership. A reformed policy management system in Serbia will create space for more informed government discussions on issues that really matter, which will contribute to broader ownership and better implementation of government policies.

## 6.5 Designing For Context: Adapting New instruments to Support Reform Delivery

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Trusting the reform context to generate (or reveal) and guide the emergence of feasible components of reforms is not only necessary, but also indispensable for progress in reforms. In many countries undergoing radical institutional reforms, including transition economies, professionalization of the public service and introduction of meritocratic principles in appointments and promotions encounters resistance. Such reforms entail disrupting the existing order and ideologies.

Fortunately, there is emerging research, however modest, showing how contextual factors can be operationalized in the practical implementation of reforms (e.g. Bunse and Fritz 2012). These new approaches are moving the discipline closer to answering the question: what types of reforms are most likely to “work in the average country or the education sector” (World Bank 2012), and thus incrementally bringing in the role of context into discussions around its practical application in public sector reforms. To this question, even a more fundamental one is: what is the best instrument for a particular stage in the reform process: the context determining the choice of instrument.

In recent years, there has been a movement towards results-based financing as an important element in donor engagement, though these approaches are not without critics (e.g. Perakis and Savedoff, 2015). Two of these instruments are increasingly being used by development partners both around the world and in Serbia. The first is the World Bank's *Program for Results* (PforR), introduced in 2012, which has increasingly occupied an important space as an innovative approach, not only in putting the country undergoing reform in the driver's seat, but also strengthening the institutional capacity of those countries to use their own systems to implement their own programme (World Bank 2015b; Gelb 2014). Here the World Bank acts less as a financier of inputs, and more as a catalyst for results and outcomes. The popularity of this instrument is visible from the amount of financing delivered through it in only three years. By the end of 2015, there were 35 approved PforR operations totalling \$8.2 billion (World Bank 2015b).

The second instrument is Budget Support. The Budget Support instrument gained prominence following the discrediting of the Structural Adjustment Programmes (SAPs). It was seen as an antidote to the conditionality and its perceived neo-liberal orthodoxy of the 1990s. The key rationale for the instrument was to integrate country stakeholders and their programmes into the discussions on development financing. Rather than prescribing things to counterparts, the instrument was intended to support programmes identified by government to tackle deep rooted institutional failures that undermined development. Emerging norms of development financing, e.g. Paris, Accra and Busan declarations, have served to reinforce the rationale of an instrument that promotes direct support to recipients' budgets.

Variations of results-based approaches (e.g. Output Based Aid, Results Based Financing and Programs for Results), operate in largely the same way: the government prepares an action plan with clearly defined actions and measures of success. These activities are demonstrably prioritized through the budgetary process as line items in the budget. On the basis of this, the development partner designs a programme whose disbursement is based on the successful implementation of the agreed activities. In this sense, the client is responsible for producing results, whilst the development partner is responsible for rewarding the achievement of results with financing.

There are three features of results-based financing that make it an important instrument for supporting reforms in Serbia. First, outcomes, rather than inputs are the focus of the arrangement. Funds are disbursed to the government treasury only upon verification that the agreed outcome has been achieved. Second, such payments are made in proportion to the level of achievement of the results. These can either be staggered until the end of the programme or be one-off payments, especially in the cases where certain outcomes are deemed so critical as to require their immediate achievement. Third, before payments are made for the identified results, an independent verification of results is conducted to confirm that the results were actually achieved at the agreed level. The payments are made based on prior agreed targets.

In Serbia, both the EU and the World Bank have used their respective variants of the results-based instruments (PforR in the case of the Bank and Sector Budget Support (SBS) in the case of the EU) to support the emerging public sector reform agenda. In both cases, this has been an important element in aligning the incentive structure to make agencies as the entry point for reform. Rather than central coordination, the achievement of specific sector outcomes is driven by key sector players, e.g. the Public Procurement Office or the State Treasury.

### **Programme for Results as an instrument for strengthening institutional capacity for reform**

The World Bank's Program for Results (PforR) is a multi-million programme designed to support elements of the Serbian government's reform programme, outlined in the Action Plan for Public Administration Reform.

Both the choice of the instrument and design of the support programme drew inspiration from a series of analytical work conducted by the World Bank. But, it was also clear that such analyses had been carried out before and attempts to address emerging recommendations made. It was therefore necessary to introduce an approach that reflected the political economy dynamics and the structure of the Serbian public administration, in which accountability and incentive structures are diffuse. While strong political leadership and support are critical, an exclusively "top down" approach would be insufficient to yield stronger "ownership". Hence, the

need for an instrument that delegated accountability for results, while also maintaining oversight of central level actors through monetary incentives directed to the budget.

Rather than directing ministries and agencies to act on a list of reforms, this approach has encouraged the entities to be part and parcel of identifying the problem, and proposing possible ways of dealing with it. Rewards are based on agreed criteria – known as Disbursement Linked Indicators (DLI) – whilst the entity is responsible for implementing a reform agenda that addresses the organizational deficiencies they collectively identified. This incentive-based participation is expected to incentivize participating entities to drive the reform agenda, and take credit for success, recognizing both the technical and political realities of reforms. An annual review is conducted by an independent entity to safeguard the integrity of the results.

As discussed above, reforming the Serbian public sector has produced mixed results. This has not been due to the lack of trying: in nearly all occasions, there has been an array of policies, laws and by-laws designed to support the emergence of a strong, merit-based, and service oriented public service. Nevertheless, as a result of limited implementation, the move from intentions to actions has been less promising. At the centre of this conundrum is the lack of a focus on incentives across a wide array of institutions critical to the success of reforms.

A results-based approach has rearranged the incentive structure by putting implementation at the centre, and generally attacking a collective action problem amongst key agencies. At the central level, the prospects of large tranches of financing that supports the government's own reform programme without the usual strict oversight of development partners is particularly enticing. This is more so when such financing is on the condition of delivering specific outcomes that the government is planning to deliver anyway, and not directly linked to the cost of delivering such reforms.

The introduction of DLIs has helped generate consensus around the path to be taken in implementing the reform agenda. What had hitherto been produced mechanistically in policy documents could now be debated, and the practical implications of implementation understood by important actors, including frontline implementers. The process of constructing DLIs brought together important stakeholders to discuss reforms for the first time in a long time. Rather than leaving the process to the Ministry of Finance or Ministry of Public Administration, the process of reforming the public sector has been defined as everyone's business, allowing consultations to be held with several actors to test the feasibility of the DLIs and the reform path generally.

The DLIs also demystified the complexity of the reform agenda. Both previous and current strategic documents that outline the government's programme for reform have been ambitious and may look rather daunting. By selecting only

a portion of the proposed action plan for support, the government's reform effort now has the appearance of realism, embedding key sections of the government as active participants in the reform process. They have also clarified the accountability framework for the reform program – laying out the specific entity responsible for driving the reform agenda.

### **European Union's Sector Budget Support**

Like the World Bank, the EU has also used a variety of instruments to support targeted interventions in the public sector in Serbia. Budget Support is an important instrument for the delivery of EU assistance to countries, accounting for nearly a quarter of all EU development aid.<sup>2</sup> The EU has increasingly relied on Budget Support as an instrument to advance targeted policy reforms in recent years. Its attractiveness is both in its result orientation as well as its dominant characteristics, mainly promoting ownership, ensuring predictability and efficiency (Wolff 2015). The principle is simple: agree on specific policy measures to be implemented within a specific period; implement them as agreed and large transfers (tranches) are made directly to the treasury of the participating country. Since its introduction in development financing, Budget Support has gained a central place as a response to the emerging architecture of development finance with the country at the centre, with up to a quarter of development aid delivered through this instrument. Yet, the reviews have been mixed – many suggesting that budget support has not lived up to its expectations as an important tool for financing development. The EU Budget Support, as an instrument for delivering development financing, has equally received mixed reviews; on the one hand, lauded as a “more credible” means of promoting ownership (European Commission, 2008) and on the other as “co-optive and coercive” (Langan 2015).

The Sector Budget Support (SBS) differs only slightly from General Budget Support (GBS) in the sense that policy actions are linked to a specific sector rather than a range of policy areas across sectors (Williamson and Dom 2010). Development partners use this modality to promote the achievement of specific goals in a specific sector of interest, e.g. health care or governance. Like the PforR, sector budget support is tied to, and is thus traceable to specific expenditure items related to that sector in the national budget. Yet, in addition to financial support, the instrument also creates an environment for dialogue around key reform issues associated with the sector, as well as an assessment of performance on selected policy actions and capacity building as required.

The SBS for Serbia is designed to support the single government programme and complement Serbia's PAR. With a budget of €80 million the support reflects a major source of financing to support the ambitious reform agenda outlined in the

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2 See: “Budget support and dialogue with partner countries”. <https://ec.europa.eu/europeaid/node/13967>.

PAR strategy, including related technical assistance programmes. The design of the sector budget support is based on the assumption that the government has defined key areas of focus in its quest to transform its public sector. The sector budget support thus mirrors the specific areas in the PAR strategy and its action plan. Like the World Bank's PforR, the sector budget support also identifies important reform milestones that have to be met to trigger disbursement of funds to the government.

In addition to supporting broad based reforms, aimed at transforming the sector, e.g. focusing on human resource management and financial management, the SBS is also designed to provide technical assistance to core institutions involved in managing the reform agenda. For instance, the programme foresees support to the ministry of public administration and local self-government to lead the implementation of the public sector reform agenda and support to the Ministry of Finance to lead the reform agenda in public financial management. Both would be implemented through a technical assistance programme.

The EU support for Serbia is framed within the broader rubric of the Instrument for Pre-Accession Assistance (IPA). The IPA is the main instrument through which financial and technical assistance is provided to countries in the process of preparing for EC accession. In addition to reforms in the public sector, the IPA window provides financial support to cover other strategic areas of the economy such as agriculture, and rule of law, among others. The design of the IPAAII was made both with the EU's enlargement strategy and the difficult reforms that countries preparing for EU accession have to undertake.

The EU identifies three innovative ways to engage the country through the IPA. The first is a deliberate strategic focus on the country through the development of country strategy papers covering a longer time period of seven years; second, a focus on pre-determined sectors, allowing for greater alignment between the enlargement needs as well as the specific sectoral requirements of individual countries; and finally the use of sector budget support as a critical entry point for supporting reforms in a specific sector (European Commission 2015a). It is in this context that the EU Sector Budget Support for the Serbian public administration has been developed.

An important element of the SBS is the understanding that the government has committed to a strategy for undertaking reforms in the public sector, and that this commitment is credible, as demonstrated by the inclusion of specific budgetary lines in the national budget, reflecting the particular areas of focus covered by the Sector Budget Support. As such, the SBS is implemented under two conditions, namely that the government prepared a Public Financial Reform Programme covering the duration of the SBS and that the annual budget provides sufficient funds to finance activities as well as to support the key institutions involved in the implementation of the reforms (European Commission 2015b).

It is still too early to determine whether the use of these two instruments will produce the hoped for results. However, it is clear that the process of designing engagement with authorities through these instruments has created the space for more strategic thinking about what can be achieved in the short to medium-term. For the participating development partners, the process has created a sense of realism about what is possible within a rather fluid reform context. This has led to a more calibrated approach in designing elements of the financing. For instance, rather than cover the entire gamut of the Government's Action Plan for the implementation of the PAR strategy, the World Bank's PforR operation selected only two out of the five areas of the PAR Strategy. For the government, the process has raised the stakes, helped coalesce disparate stakeholders, and created a sense of urgency about achievement of specific disbursement linked indicators. More importantly, there is a sense of a shared purpose – the government knows what it wants to do and the development partners are supporting a Government programme, rather than something manufactured in Washington DC or Brussels.

## 6.6 Trajectories and Alignment with the Principles Underlying the European Administrative Space

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At the outset of this chapter we posed the question whether current reform efforts on public administration reform in Serbia will be 'more of the same' or 'different this time', and also connected this to the ongoing debate on Europeanization of administrations through accession. The experience of recent enlargements has thrown significant doubt on the convergence theory of the late 1990s (and administrative reform, unfortunately, is not the only area where this is being questioned), with some wondering whether new EU Member States have established their own direction, very different from the 'European Administrative Space' principles that were coined by Fournier and others in 1998–1999.

Former Yugoslav states have an administrative tradition that, at least for the post World War II period, was significantly different from that prevailing in central Europe and the Baltic States, only to be seriously undermined in the conflicts that dominated the 1990s. However, a fundamental element of this tradition, the notion of centrality of the state and the public sector in the economy and society, has remained. This has created a different dynamic to reform processes compared to the one prevailing in central Europe: less interest in new, private sector-driven, models and more in continental European notions of a law-driven state, distinct from the private sector. This continues to make states such as Serbia more likely to take a continental European path when it comes to developing its public administration.

Our review of current reform directions and debates largely confirms this assumption; law driven models of public sector management based on long-term ca-

reer principles remain an attractive option and drive much of the debate around core legislation.

A critical distinction, however, remains on the issue of politicization and permanency; the trend of growing and deep politicization that came with the political regime of the 1990s has not yet been reversed, and merit principles for senior administrative appointments remain to be reinstated.

We have argued in the chapter that the EU accession process, combined with fiscal pressures and political consolidation, will create favourable conditions to both enhance coherence and continuity in government, and that without improvement in effectiveness and capacity in the civil service it will be very difficult for Serbia to complete the negotiation process. This is especially given the stronger emphasis that the EU is putting on both economic governance and institutional readiness for accession.

The direction of ongoing reform efforts is promising, though reform fatigue and social resistance to right sizing will remain considerable obstacles to progress. Hence, coherent long-term support and accompaniment by international actors will remain critical. The combined use of new support instruments by both the EU and the World Bank could play a critical role, and this innovative support model is one that, if successful, may set an example for other countries, both in the Western Balkans and further East.

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# Part B

## Developing Components of Common Administrative Space in Eastern Europe





## **7. Organizational Learning in Public Administration in Poland. The Issue of the Politicization and the Administrative Decision-making Process**

*Lukasz Widla-Domaradzki, Mateusz Trochymiak*

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### **7.1 Introduction: towards the professionalization of the public administration**

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The concept of organizational learning is irrevocably tied to the principles upon which public administration should be founded. Although the professionalization of public administration can be traced back to the origins of the institution in its modern form, the very idea of that which we call 'professionalism' has evolved, as have the standards and the bodies that make up public administration. One of the trends that has transformed the concept of 'professional public organization' takes its origin in the administrative reforms commonly known as the New Public Management which, in short, redefined the efficiency of public servants, embedded in Weber's bureaucracy paradigm, from 'loyally following procedures' to 'skilfully using resources' (see DuGay 2010, Osborne and Geabler, 1990). The reforms resulted in higher expectations being placed on public servants, i.e. extensive knowledge of regulations whose purpose is no longer enough; that they should also have managerial skills; be able to create and use strategies, and devise cost-effective solutions. Subsequent waves of reforms consumed the managerial approach, however, the emphasis was on non-economical values that public administration should adhere to. The term 'public servant' or 'manager' in the public sector was replaced with the term of governance process 'coordinator', who collaborates with non-governmental institutions, takes into consideration the values and opinions of citizens, and strives to achieve compromise and high efficiency. This requires not only managerial skills, but also familiarity with the needs of citizens, foreseeing the possible outcomes of decisions, being open to dialogue, and having negotiation skills. Therefore, public administration received new tools that created a new framework of decision-making processes. Public consultations, outcome assessment in the form of evaluation, and Impact Assessment could all be considered examples of the above. The latter of the above mentioned tools is the embodiment of the knowledge-based approach

to public administration, which makes gathering information on each intervention and monitoring its outcomes an integral part of the decision-making process.

At this point we feel it necessary to outline the process of implementing the new solutions. Although the first New Public Management reforms had a global reach, individual countries had a free hand to create their own solutions, sometimes based on experiences observed elsewhere. Later, reforms were combined with an attempt to build a common framework for the functioning of public administrations of different countries. This is especially apparent in the case of EU Member States which have common guidelines concerning administrative processes, common goals and common execution standards. An example of the above would be imposing guidelines concerning the execution of programmes financed, in part or in whole, with EU funds, which should adhere to the principles of horizontal policies, the standards of programme monitoring and assessment, and public procurement legal procedures.

The development and impact of the so-called European Administrative Space (EAS) is important in this respect. The EAS is understood not only as the institutionalization of national public administration solutions (SIGMA), but more importantly as 'emerging with its own traditions, which build on but also surpass the distinctive administrative traditions of the Union' with a key characteristic of 'administrative reliability, which is necessary for the rule of law, effective implementation of policy and economic development' (Fournier 1998, 121).

The EAS is, therefore, an attempt to create a common European tradition of professional public administration that is transparent, competent, responsive, and accountable before the citizens for the outcomes of its activity. However, European countries have their own 'traditions' that translate into different approaches to administration (Painter, Peters 2010). These differences do not stem solely from formal regulations, but also have their roots in certain customs, ways of undertaking interventions and values. The differences between the solutions suggested by the EAS and those used by individual states may obstruct the public administration modernization process and hinder its effectiveness. Therefore, the following question begs the question: to what extent is the EAS responsible for the improvement of administrative capacities in different administrative milieux? We believe that one of the areas that the EAS aims to change is the ability of public administration to learn, i.e. adapt to changes in accordance with a knowledge-based approach. We are certain that one of the factors that contradicts the values currently promoted by the EAS is the high level of politicization of public administration. We wish to analyze the organizational learning process to find out whether politicization affects this aspect of public administration activities and if it may indeed hinder modernization.

## 7.2 The issue of politicization

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The issue of politicization of public administration is viewed as something problematic, which has negative consequences on public policies. Public opinion sees this problem as the appropriation of administrative structures by the ruling party members who are focused more on party goals and control of organization than ways in which to manage policies efficiently. The founder of the conception of separation administration from politics, Woodrow Wilson, believed that administration should be the only tool of law execution and bureaucrats should be ideology-free and impartial in their decisions. The professional administration model assumes that well-qualified civil servants will be making decisions on the faith of law, using their knowledge to deliver services in the most rational and efficient way. This idea requires a professional civil service in administration working in an environment free from the influence of politicians. Violation of this rule can have a negative effect on the process of management in public administration institutions.

Indeed, research has confirmed that administrative organizations run by party loyalists are likely to have a negative impact on the process of policy execution and the legitimacy of public decisions (Peters and Pierre 2004a; Lewis 2008). This is mainly because the appointees are often ill suited for the job and often because of the frequent fluctuations, they also *“have a hard time committing to long-term plans or policy reform and career professionals are slow to respond and grow cynical after multiple experiences with these ‘birds of passage’”* (Lewis 2008:4).

But, despite the evidence that breaking the rule of separation has often lowered the administration's ability to operate efficiently, the research on politicization also showed us that the line between politics and administration in the process of policy making is blurred (Svara 2002). The officials quite often participate in the process of formulation of public policy and have a huge influence on its objectives (Peters 2001). It is partly because they control information from the “bottom” of public policies, which often make them initiators of state intervention. On the other side, politicians responsible for the results of public policies in front of the voters are looking for ways to change unpopular decisions interfering in the process of implementation. The influence of the politician is higher when he/she can control the manager of public organization by having the power to replace him. But he/she cannot control the whole process of policy implementation simply because they lack of knowledge and the competences to carry this out. Also, it would be risky for politicians' popularity to change procedures or strategies that were created in the process of consultations with citizens and social partners. However, a more important reason for resistance is that the administration *has its ways of doing things* that cannot simply be changed by single, political decisions. Public organizations have their rules, norms and strategies shaped in time by formal procedures and informal practices (Denhardt, Catlaw 2015). It is hard to eliminate them even if we replace most of the officials in the organization.

Knowing this, we rejected the simple dichotomy between ‘politicized’ and ‘politics-free’ administration. We assumed the thinking would be more accurate regarding the influence (direct and indirect) of politicians on the administration process. Politicians can influence administrative procedures and organizations (staff, goals strategies etc.) in a formal way (by the power given to them by law) or informal (corruption, patronage). The question is to what extent politicians have influence on the administration and what that means for the process of governance. That is why we reject a simple connection between politicization and the effects of public policies. In our view, politicization is not simply a matter of the man in charge but depends on the power to influence the decision-making process in an organization. Administration also has a way of resisting this influence. We think that the main question about the politicization phenomenon should be how public administration is reacting to political influence, what parts of it is more sensitive to politicians and why.

In Poland, public administration politicians have a high influence on the decision of officials. The reforms of the Civil Service allow politicians to control the recruitment process and staff of public organizations (Gadowska 2015). However, the process of decision-making is becoming more complicated, which leads to using regulation assessment, evaluation, expertise and other kinds of knowledge-based tools. In this paper we focused only on the narrowed aspect of politicization. The subject of our interest is the capacity of public organizations to learn and how political factors influenced and shaped the *organizational learning* process. We asked two questions: Do staff changes in ministries influence the methods of *processing things* in an organization (department in ministry)? And second: How do these changes affect the learning process in an organization? Our findings are based on the conclusions from the MUS project in Poland.<sup>1 2</sup>

### 7.3 Organizational learning and political adaptation concept

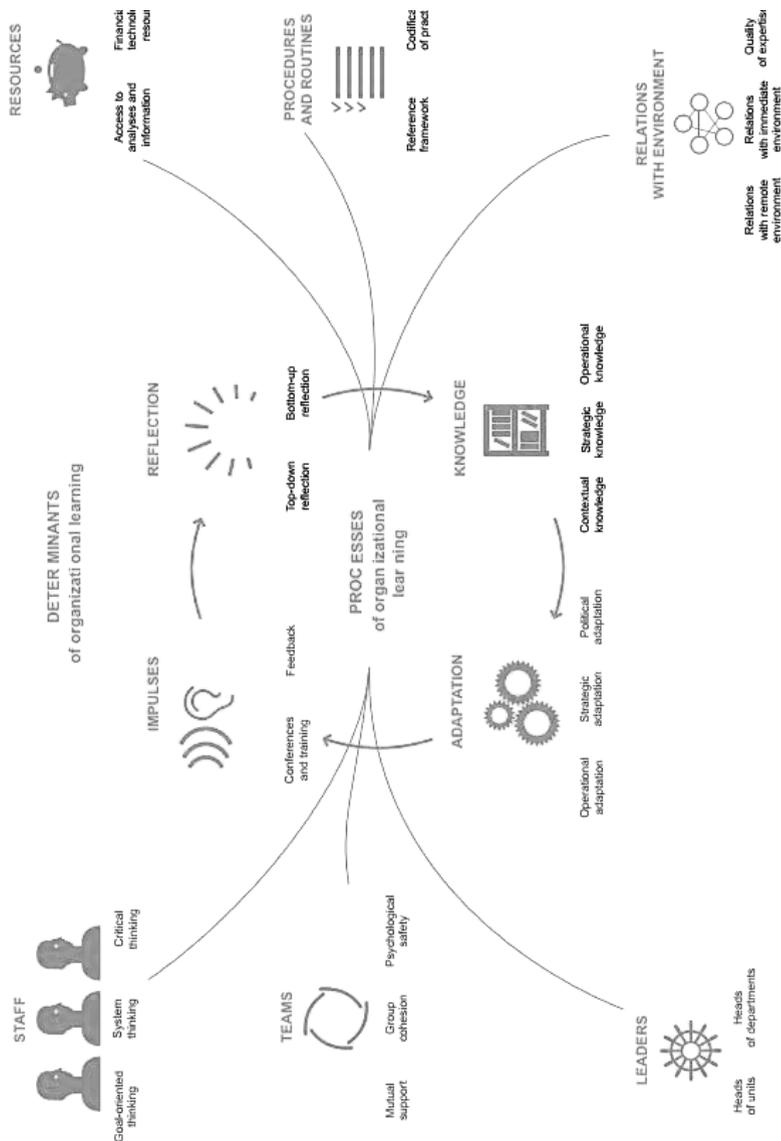
For the purpose of our analysis we define organizational learning as “*adaptation that is based on the social process of reflection that produces new insights, knowledge and association between past actions, the effectiveness of those actions and future actions*” (Fiol, Lyles, 1985, p. 811; Lipshitz et al., 2007, p. 16). Our model of organizational learning contains two types of factors: determinants and elements side fac-

1 Learning Ministries (MUS) project. The project was co-financed by the European Union from resources of the European Social Fund – the Operational Human Capital Programme, while the intermediary institution is the office of the Chancellery of the Prime Minister. The co-financing is awarded within the framework of the V Priority of the Human Capital Operational Programme – Good Governance, Sub action 5.1.1. Modernising management systems and increase in workers’ qualifications. All of the project’s initiatives, including the support for departments participating in the implementation of innovative solutions, are financed from the project’s resources. Timeframe: September 2010 – September 2013.

2 Methodology in Annex 1.

tors (Figure 1). Determinants side factors (outer model) contain 15 factors which support organizational learning process. Elements side (inner model) contains 10 factors which are essentially parts of the organizational learning process.

**Figure 1**  
Full model with Determinants (green) and elements (blue)



Source: Olejniczak, Mazur, 2014.

When defining organizational learning it's important to bear in mind certain qualities of the adaptation processes (Argyris, Schön 1995; Fiol, Lyles 1985; March 1991; Lipshitz i in. 2007). First of all, adaptation can be reactive – responding to changes in the environment or proactive, taking initiative, based on the analysis of observed trends. Second, adaptation can cover both incremental improvement (single-loop learning) as well as substantial changes in assumptions underlying policy intervention, current organizational strategies and exploration of new approaches (double-loop learning, sometimes called “unlearning”). Third, adaptation is based on evidence, mainly feedback, about an organization's performance (activities and their effects) and ability to reflect on that information.

In this paper we focus only on *the adaptation* element and its factor *political adaptation*.<sup>3</sup> We mark out three types of adaptation (Olejniczak, Mazur, 2014, p. 40). The first type is **operational adaptation**, which means a change in operational issues – the current working methods, procedures, and methods of performing daily activities. The second type is **strategic adaptation** and it means a change in the future directions of a department, and the tasks or the perception of the area in which a department operates. The last one – **political adaptation** – means a change in the course of action and a revision of the purpose of a department, under the influence of a political or personnel change at the highest levels of the ministry.

It is important to note that *adaptations* can be related to each other – and, in fact, to some level they are – but not necessary. For example, operational adaptation is when an organization is introduced to new procedures for budgeting. The organization needs to comply to these procedures but this does not mean that the head of the organization or department must change. The same thing applies to strategic adaptation – a department can change its goals as a reaction to the failures of programmes, but this does not necessarily mean changing the head. The political adaptation is different because it means a change of procedures or goals of the department **only because the new head has new ideas about a course of action**. When a new head changes procedures or goals because of a new law or because a programme does not work, we cannot separate operational and strategic adaptation from political adaptation. The latter situation is more likely when a government has changed and new heads are trying to arrange ministries according to the programme of his/her fraction.<sup>4</sup>

## Analysis

Our first step was to verify if political adaptation is a significant variable in our model of organizational learning. Analysis showed that in comparison to other

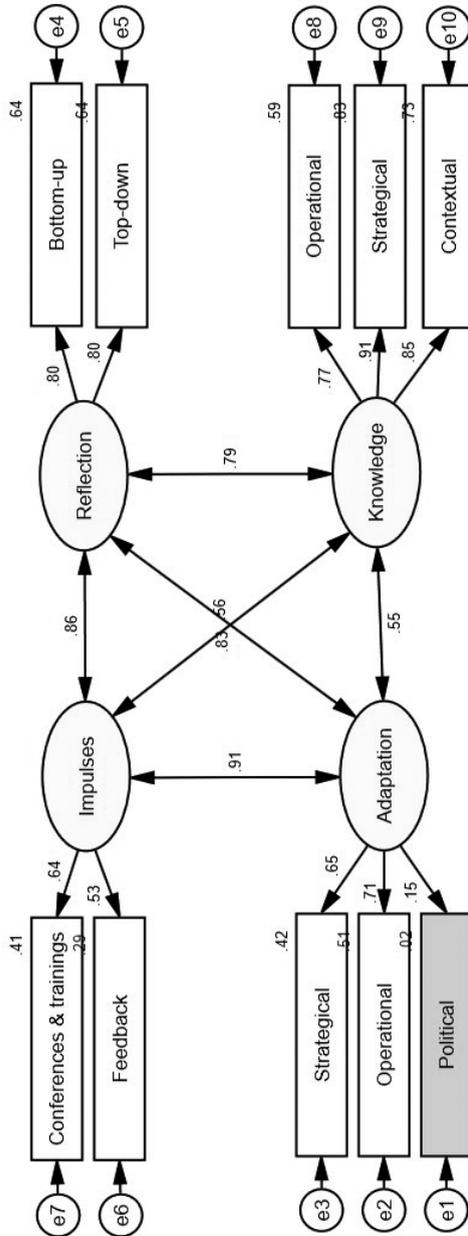
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3 Full analyses of other elements and factors can be found in: [http://mus.edu.pl/uploads/MUS\\_eng\\_internet.pdf](http://mus.edu.pl/uploads/MUS_eng_internet.pdf).

4 It has to be mentioned that our research was conducted in a stable political situation: there was no change of ruling party between 2011–2013.

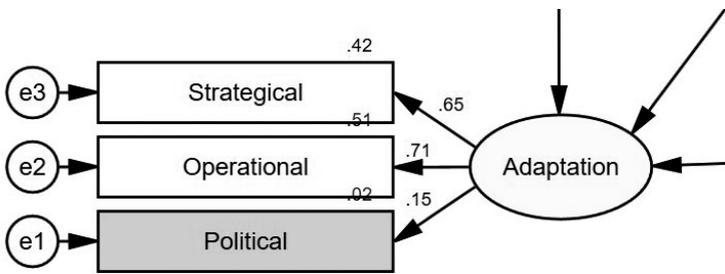
**Figure 2a**  
Processes side – Inner Model

**MUS - Processes Side**



factors, **political adaptation has a very limited impact on the potential to learn amongst Polish ministries** (see Figure 2a). Other Adaptation factor elements such as operational adaptation and strategic adaptation build this capacity to a much greater extent (Figure 2b).

**Figure 2b**  
Political Adaptation Zoom (Processes side – Inner Model)



We also checked how political adaptation is related to other types of adaptation and we found that the connection is very weak (Table 1). **This means that a change in management is not directly related to a change in strategy or procedures in an organization.** Using those results as a starting point we try to answer the question if political adaptation is a really insignificant element of organizational learning, or if it has to be treated differently from other factors.

**Table 1**  
Political adaptation correlation

Pearson Correlation	Operational adaptation	Strategic adaptation
Political adaptation	.041	.162

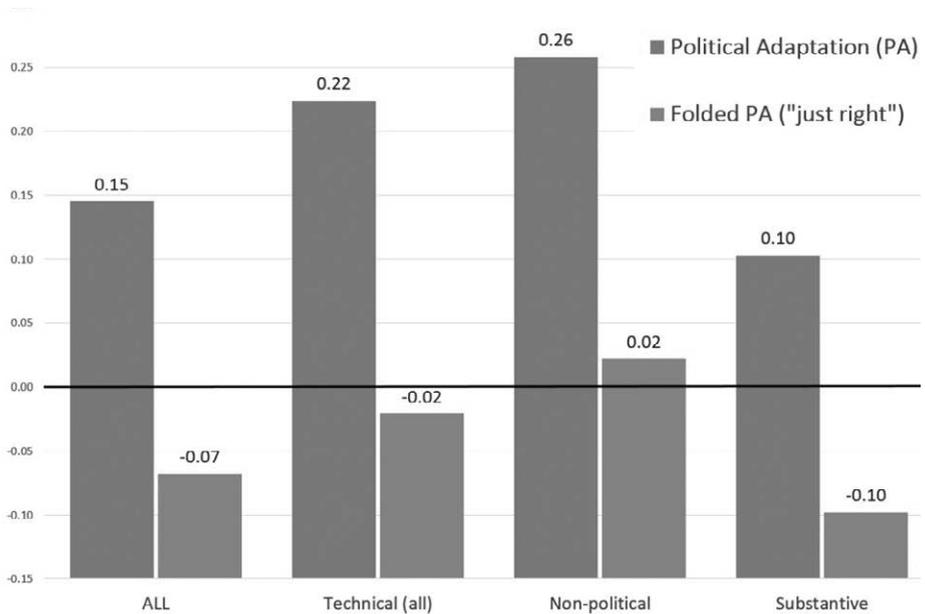
Our first hypothesis about the low impact of Political Adaptation on organizational learning in Polish ministries was:

*H1. Political adaptation is not like other types of adaptation. It should be treated differently: low impact on the overall learning process suggests that political adaptation may be in the “just right” scale.*

If this hypothesis is true, it means that too low or too high political adaptation is counter-effective and average political adaptation is “just right”. “Just right” means that if an organization adapts to changes of staff, but not completely to change itself, the organizational learning process is also changing. Otherwise, if an organization changed completely or it did not change at all – there is no impact on the process of learning.

To check this hypothesis we decided to fold the original variable around its average: too low and too high values were treated as an undesired level of political adaptation, whilst average values were the “just right level” of adaptation. Below (Figure 3) presented the original political adaptation and folded political adaptation, broken down by different types of departments.

**Figure 3**  
Political Adaptation breakdown by department type



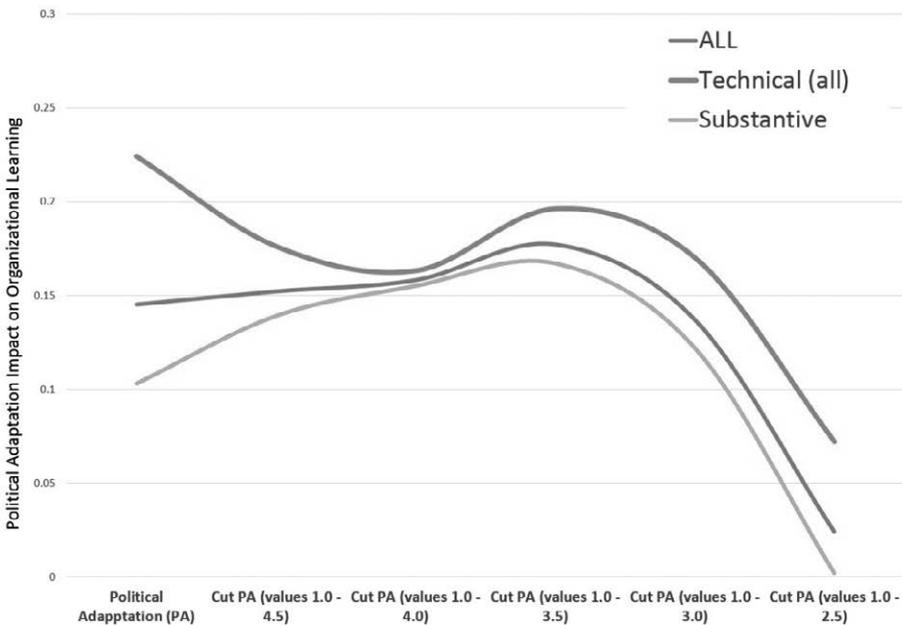
In fact, as you can see, the folded version of political adaptation performs worse than the simple political adaptation factor. That means that *H1* has to be rejected. We also found no strong evidence regarding the different points of folding (not only around average value, but also the around average value +/- 1 standard deviation).

Despite rejecting *H1*, we can observe different levels of impact of political adaptation on the learning process in different types of departments. That led us to an alternative hypothesis:

*H2: There is an optimal level of political adaptation, different from maximum, specific for every type of Department.*<sup>5</sup>

To check if H2 is true, we decided to prepare several structural models with cut-off at highest or lowest values of Political Adaptation. To check if H2 is valid, we have to look for the maximum value on the *Impact on Organizational Learning* axis (which is the Y axis). Figure 5 shows different levels of political adaptation impact, depending on cutting off the highest values of this factor. For example *Cut PA (values 1.0–4.5)* means that in the sample, only those respondents who gave no more than 4.5 points on political adaptation, remained<sup>6</sup>.

**Figure 4**  
Cut political adaptation breakdown by department type (1)



As we can see, H2 is true, but only for Substantive Departments. For Technical Departments, the maximum impact for political adaptation is gathered on the entire sample. In practice, it means that political adaptation has indeed limited impact on organizational learning, but it is a good strategy for technical departments to adapt as strong as possible, to improve performance. However, this is not

<sup>5</sup> Definition of the types of departments can be found in Annex 1.

<sup>6</sup> Political adaptation can take values from 1 (very poor political adaptation) to 5 (absolute political adaptation).

true for Substantive departments, which should adapt in a more moderate way. For Substantive Departments, the maximum is around 3.5, which means that political adaptation, if higher than moderate, begins to deteriorate the positive impact on organizational learning. The impact observed on all departments is the result of Technical and Substantive findings.

We also checked curves for Technical Departments and Non-political departments<sup>7</sup>. Figure 5 shows the differences between all Technical Departments and Technical Departments without political departments.

**Figure 5**  
Cut Political Adaptation breakdown by department type (2)

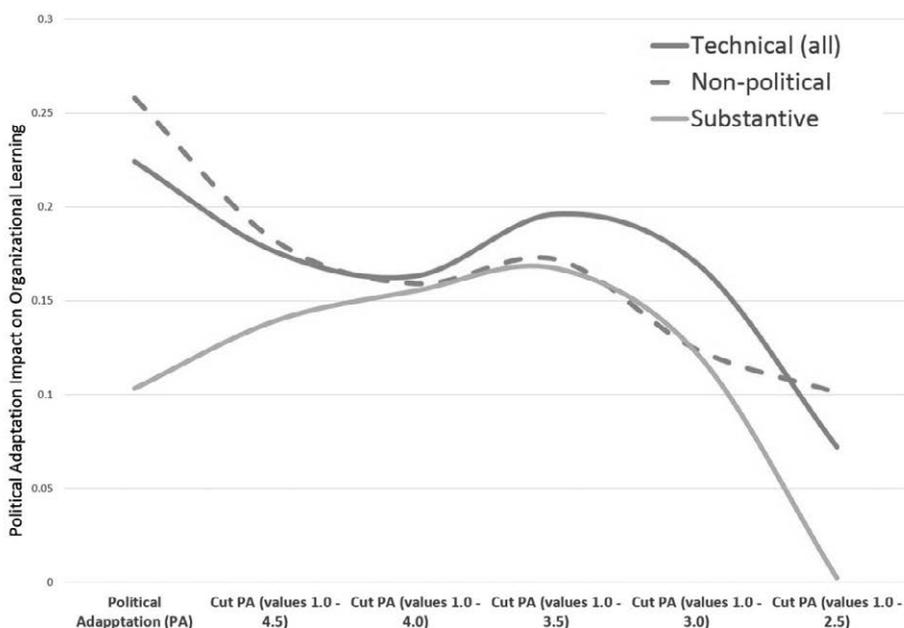


Figure 6 shows that there is not much difference between all Technical departments and Non-political departments. Both curves show that the maximum positive effect on the organizational learning process is achieved when non-political departments and technical departments adapt as much as possible.

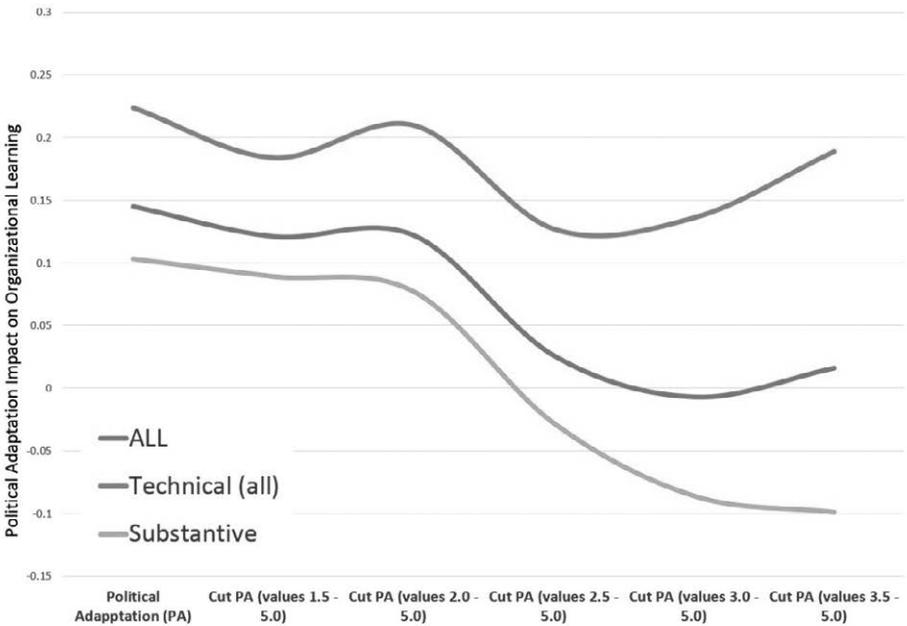
It has to be highlighted that **policy making is performed by Substantive departments**, while Technical departments have only a supporting role. On the other hand, all policies have to be at least approved (if not designed by) by the Minister's

<sup>7</sup> Unfortunately, we could not check Political Departments (Minister's Office and General Director Office), because of small sample size.

Office and General Director’s Office. As a rule, in Poland, both the Minister and General Director of each ministry is appointed by the ruling party or coalition, which also has a major impact on choosing its subordinates. Therefore, the importance of high level political adaptation is not a surprise here. However, as our findings show, the maximum possible political adaptation is also the best strategy for the other Technical Departments. On the other hand, the Substantive departments should apply a different strategy: our findings show that **too high a political adaptation has a lower impact on the ability of organizational learning than a moderate one**. On the other hand, too low political adaptation also becomes counter-effective for Substantive Departments’ organizational learning abilities.

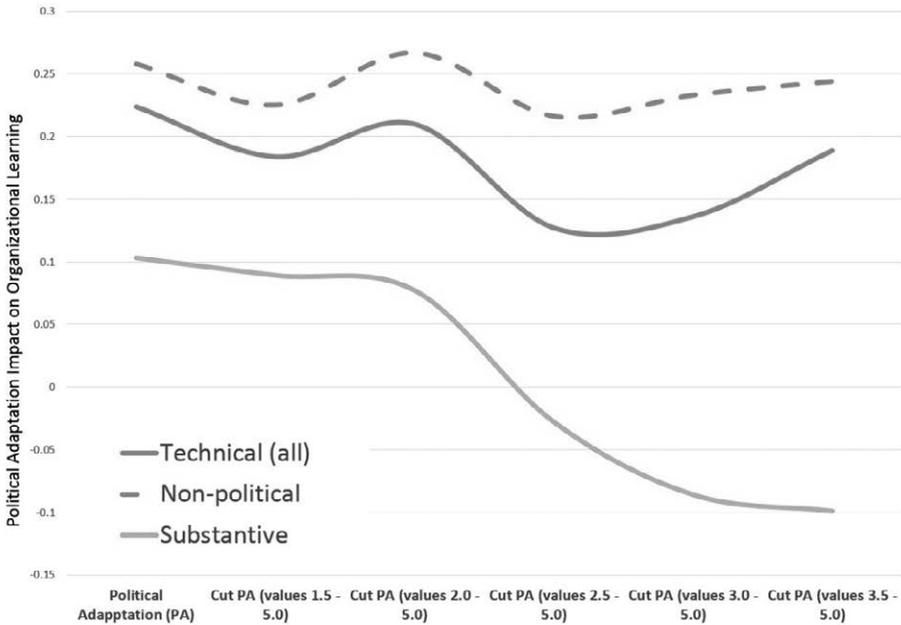
Second, we checked what happens if political adaptation is cut from the other end. Until now, we have tried to understand what happens if political adaptation is rather low, but what happens if it is high? First of all, it’s not surprising that a higher level of political adaptation is counter-effective in the case of Substantial Departments, and it has no major impact on Technical Departments. Results are shown in Figure 6.

**Figure 6**  
Cut political adaptation breakdown by department type (3)



What is interesting is that those cut levels of Political Adaptation seem to have no effect on Non-Political Departments. Those departments have the highest level of organizational learning potential if Political Adaptation is not exceptionally small and stays within the range 2.0–5.0. Results are shown in Figure 7.

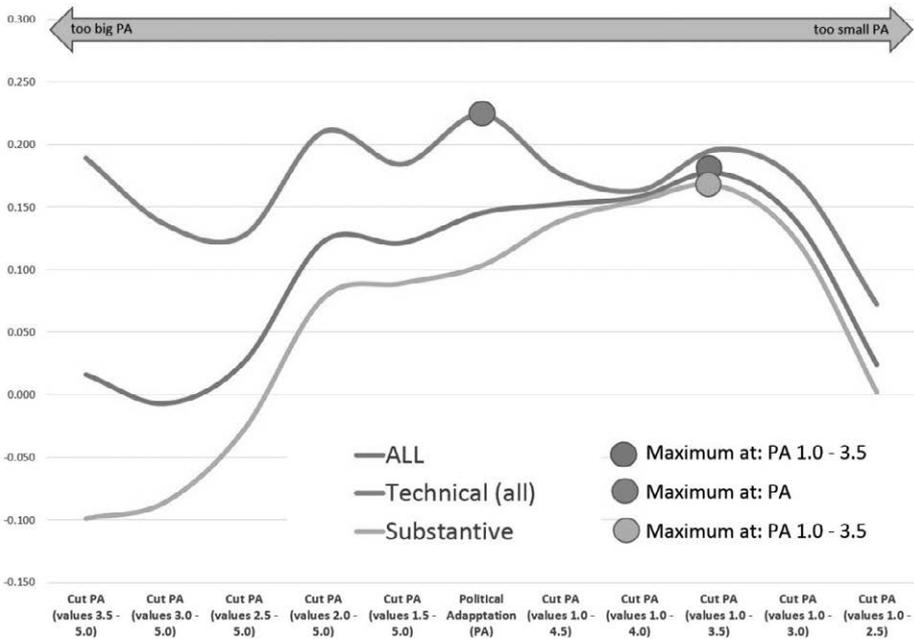
**Figure 7**  
Cut Political Adaptation breakdown by department type (4)



To summarize our findings, we present overall optimum levels for different types of Departments. The optimum for Substantive Departments is located between 1.0–3.5 on a 5-point scale, which means a too high (3.5–5.0) Political Adaptation is not a good solution from an organizational learning perspective.

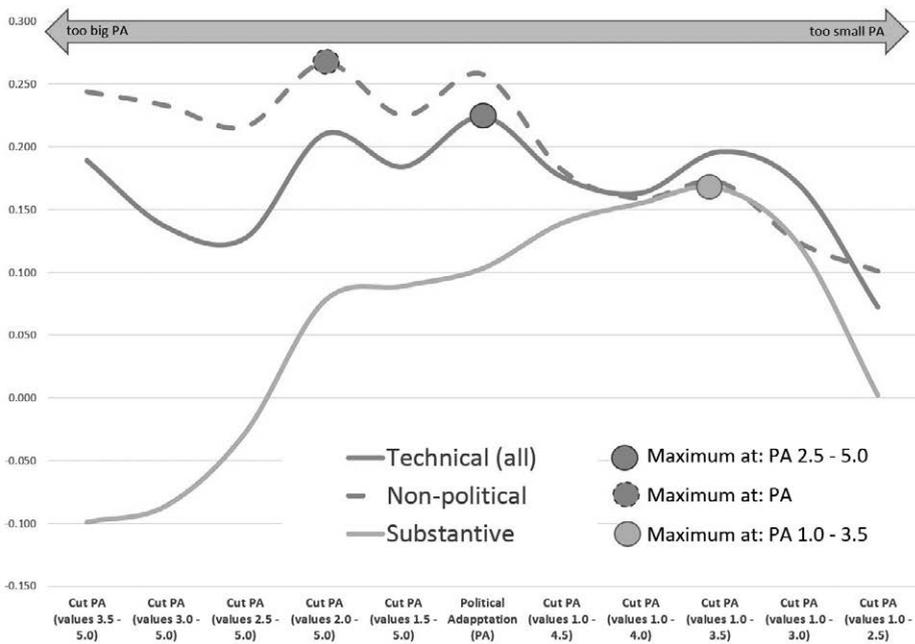
It has to be highlighted, however, that too small a political adaptation (1.0–3.0 or even lower) also causes lower learning potential. It seems that too big a political adaptation is not a problem for Technical Departments – the difference between whole scale and low cut of PA has no such impact, as it takes place in case of Substantive Departments. A bigger threat for Technical Departments is no sufficient political adaptation – values with a high cut of PA are much worse than the optimum. Results are shown in Figure 8.

**Figure 8**  
Cut political adaptation breakdown by department type (5)



Most interesting is probably the case of Non-political Departments (all Technical Departments without Minister’s and General Director’s Offices). Our working hypothesis was that Political Departments should adapt at a high level, but for the remainder of the Technical Departments this is not necessarily the case. Our evidence shows a different trend: Non-political Departments obtain their maximum at 2.0–5.0 values, which means that those departments’ learning potential can benefit from high political adaptation. Results are shown in Figure 9.

**Figure 9**  
Cut political adaptation breakdown by department type (6)



## 7.4 Conclusions

It should be noted that the results of our research are limited and it can be interpreted solely for the organization learning process. Also, our research is based on opinions regarding the changes, not facts. However, the view of civil servants is very important in the reform management process.

The conclusions of the research show us that the dilemma of an independent administration is not always a matter of who is in charge. Politicization of public administration is a more complex process than it appears to be. First, changing management staff in a public organization does not always mean a change in the course of action. We do not know, however, if it is because the lower-level staff has the power to resist changes or because the changes are not introduced (or they are only superficial). The answer requires more research on this topic.

Second, political changes in the organization do not have to influence the whole organization – it is more probable that those changes will affect some of the departments more than others and some of them will be unchanged. Political ad-

aptation should be considered a factor of moderate or low impact on the entire organizational learning process in several Polish ministries, but it has to be adapted very carefully. In some cases (Technical and Political Departments) it performs better if developed as much as possible. But, in the case of policy making departments (Substantive) Political Adaptation should be applied more carefully, because the optimum level of Political Adaptation is not reached at maximum level.

Third, the above solutions may not serve as a basis for drawing out unambiguous recommendations concerning further public administration reforms. It cannot be unambiguously determined whether politicization, defined as the ability of politicians to appoint their loyalists to administrative positions, makes it more difficult for administration bodies to adapt to change. However, the following conclusions regarding the institutions tasked with professionalizing public administration, such as the EAS initiative, may be drawn: if lasting changes are to be made to the way in which public administration functions, they must be tailored in a manner that would ensure their survival when the political environment changes. In other words, each change in the organization should take into consideration whether it will remain in force once another political party takes over. Our analysis proves that far-reaching politicization does not have to be an obstacle, at least in this type of activity. It also transpires that the probability of it becoming a problem varies, not only between specific tiers of administration, but also between the departments of a single organization. Moreover, answering the above question brings us closer to addressing the problem of how to reform, which seems to be considered secondary to the problem of determining what needs reforming.

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## 7.5 Annex 1: MUS methodology

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We used two datasets from two waves of computer-assisted Web interviews (CAWI), conducted amongst all employees of Polish ministries (with the exception of heads of departments). The first wave was conducted in 2011 and included the employees of four Polish ministries involved in the MUS project: the Ministry of Infrastructure, the Ministry of the Interior and Administration, the Ministry of the Environment and the Ministry for Regional Development. The second wave took place in 2013 and included employees of three<sup>8</sup> Polish ministries: Ministry of Infrastructure and Development, Ministry of Administration and Ministry of the Environment. Total sample size from two waves was N=2439.

The principal objective of the project Learning Ministries is to strengthen the processes of modern knowledge management in departments of Polish ministries. We intend to support ministries and their employees in the process of the use of knowledge in their everyday work – both those of an operational nature and strategic activities. By doing this we would like to contribute to improving the level of effectiveness of the national administration.

The project deals with knowledge management in institutions, which is the key question for the effectiveness and rationality of public policies. It is a pioneering empirical applied research method used in the Polish central administration. The assumed methodology of research and achieved return of the sample guarantees the credibility of diagnosis and outcomes. The scale of the project, interdisciplinary research team and foreign partners' involvement provide an exceptional opportunity to carry out innovative actions, as well as to identify the newest international solutions in the field of knowledge management. The scientific and pragmatic approach – encompassing testing and verifying instruments – provides assurance that the final set of instruments will optimally suit the needs and reality of the Polish central administration.

The quantitative tool – the CAWI questionnaire – was structured so that individual questions were clustered into groups that constitute the broader dimensions, that is, our analytical categories. Some of these were based on questions taken from earlier studies on knowledge management in organizations and thus, as such, they were verified within other research projects. Other questions were created in consultation with practitioners and theoreticians of the Polish governmental administration system. At the development stage of the questionnaire, we made sure that most (about 90 %) of the questions would have a coherent, five-point Likert scale.

The overall coherence of the questionnaire was verified in several ways. First of all, we checked their face validity through discussions with project stakehold-

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8 Between 2011 and 2013 there was a change in the structure of Polish ministries. The Ministry of Infrastructure was merged with the Ministry of Regional Development to create the Ministry of Infrastructure and Development.

ers. Then we conducted pilot research that allowed us to collect feedback from the interviewees. Ministries were selected as representations of different organizational and functional solutions present in the Polish administrative system. Items are clustered into the categories according to the final version of the organizational learning framework. Pilot data was analyzed to ensure that the questionnaire was coherent, using Cronbach's alpha test. The test results were very high – on average, the components reached a scale of 0.96.

In our research, we took advantage of both types of factor analysis: first, we attempted to recreate the theoretically assumed constructs (confirmation analysis), then, if the first approach failed, to approach the matter from an exploratory point of view and attempt to identify new factors. When we had constructed new factors, we reverted back to confirmation analyses to see how these 'new' factors impacted one another.

For this purpose, we used factor analysis of the principal components with orthogonal Equamax rotation. This preliminary analysis was aimed at checking whether the data would group into other elements than those pre-determined within the constructed theoretical framework. In this manner, we obtained ten factors – components of the organizational learning process, which only partially matched the elements from the theoretical framework (for instance, the knowledge-building factors); others were entirely new constructs. The analysis consisted of two stages: the first stage was the factor analysis that pertained to all components of the organizational learning process, and this resulted in the determination of the ten factors. The second stage consisted of the identification of explanatory factors. In the case of the latter, the analysis was performed for each focus area individually: separately for groups of variables pertaining to different categories such as personnel, resources etc. As a result, a total of 26 explanatory factors regarding the learning process were obtained.

To summarize, the quantitative analysis was conducted in several stages:

1. Analysis of missing data
2. Factor analysis (exploratory) for learning processes
3. Factor analyses (exploratory) for determinants of the learning process
4. Creation of factors in the database on the basis of SEM analysis
5. Analysis of average values of factors for individual departments in the context of results obtained for individual ministries.

The structural models created aptly described the common reality in the examined fragment of the Polish public administration system. However, our objective was not only to diagnose the processes responsible for learning, but also – and most importantly – to verify the existence of individual processes in the specific ministries and departments. Using the CAWI method enabled us to maximize the number of respondents who participated in the survey. The sample obtained was

large enough to allow for a complex quantitative analysis leading to the building of an organizational learning framework.

The questionnaire was structured so that individual questions clustered into groups constituted the broader dimensions, that is, our analytical categories. Some of these were based on questions taken from earlier studies on knowledge management in organizations and thus, as such, they were verified within other research projects. Other questions were created in consultation with practitioners and theoreticians of the Polish governmental administration system. Indicators were measured with several questions. The **Political Adaptation factor contains two questions:**

1. As a result of political changes (replacement of the political leadership of the ministry after the election), within the framework of the department, we adjust our objectives on our own to adapt quickly to the programme of the new political leaders of the ministry.
2. In my unit, the direction of our activity usually changes as a result of changes that take place at the ministerial level (HR, political, organizational).

It has to be mentioned that in the questionnaire we included a variable **type of the department**. We extracted **technical departments** – types of departments existing in every Ministry and serving the needs of other departments (HR, Financial and Bookkeeping, Audit and Control, Minister's Office, General Director's Office, PR and Law departments); **non-political departments** – departments existing in every Ministry without typical political departments (includes all **technical departments** without Minister's Office and General Director Office); **substantive departments** – departments specific for a given Ministry. Substantive Departments taking care of specific issues, for which a given Ministry was established and responsible for policy making (for example Department of Innovation).

## 8. Implementation of Rules on Tax Transparency by Tax Administrations: Administrative Capacities on the Test

*Ivana van der Maas, Goranka Lalić Novak, Jasmina Džinić*

### 8.1 Introduction

Tax transparency is a much debated term in the context of international taxation. At the level of tax administrations, transparency is seen as the amount of information tax administrations are willing to exchange between themselves and also as a level of their openness in communication with taxpayers. From the perspective of taxpayers, it represents the taxpayers' approach on how they share the information on the amount of tax they pay and how they assure tax administration that a "fair share of tax" has been paid. Transparency is important for tackling tax avoidance and tax evasion and ensuring that taxation occurs where economic activity takes place.

In recent years, the global debate on tax base erosion and corporate profit shifting resulted in two projects. The first was carried out by the OECD, aiming to structurally change tax policies in order to minimize corporate tax avoidance. Similarly, the EU reached a political agreement on a piece of legislation aimed at improving transparency on the assurances given by Member States (hereinafter: MS) to companies about how their taxes are calculated (i.e. tax rulings). According to the Directive,<sup>1</sup> MS are obliged to automatically exchange information on advance cross-border tax rulings. In other words, in order to facilitate the development and implementation of EU policies (i.e. EU tax policy), cooperation between national administrative organizations is of the utmost importance.

However, in order to cooperate with others and thus contribute to the effective implementation of EU policies, national public administrations have to attain a sufficient level of administrative capacities. So as to assure comparable levels of service efficiency and quality throughout the EU, common administrative stand-

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1 Council Directive 2015/2376/EU of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, OJ L 332, 18.12.2015.

ards, including the rule of law, transparency and openness, accountability, efficiency and effectiveness, are shared amongst public administrations. Those standards are central to the notion of the European Administrative Space (hereinafter: EAS), and useful in evaluating administrative capacities at European, as well as national level.

Whilst the European Commission is scrutinizing any effort of MS tax administration to give a tax certainty to taxpayers, at the same time characterizing it as an illegal state aid, some MS, such as Croatia are confronted with the introduction of a tax ruling regime and to follow European regulations on tax transparency. In that sense, the strengthening of those administrative capacities required for successful cooperation with other states in the exchange on tax rulings information becomes critical. The recommendations for the development of administrative capacities necessary to support an efficient system of tax rulings and tax transparency could be of interest and importance for other countries as well, especially those that are confronted with the same request by the EU, such as candidate countries, as well as potential candidates for accession to the EU.

Therefore, the main research question of the paper is: what capacities should less experienced tax administrations develop in order to deal with the policies on tax rulings and tax transparency and thus contribute to the effective implementation thereof through the shared principles of the EAS?

To answer this research question, the paper will provide an overview of the Croatian Tax Administration (hereinafter: CTA). In order to envisage what kind of challenges new developments will impose to the CTA, a comparative overview of The Netherlands tax ruling practice<sup>2</sup>, being one of the MS with the longest tradition of tax rulings practice, will be given.

The research approach is a case study, with the desk research of strategic documents, legal regulations and soft law documents.

The first part of the paper summarizes the contemporary understanding of administrative capacities and transparency. The second part briefly sketches the EU rules on tax transparency and exchange of tax rulings. The third part gives a comparative overview of the tax rulings regime and procedures in The Netherlands' Tax Administration. The fourth part gives an overview of the Croatian Tax Administration and its tax rulings regime. The final part offers the conclusions on the administrative capacities of tax administrations required for performing new functions imposed by EU developments with respect to tax transparency.

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2 Although The Netherlands' system encompasses both advance transfer pricing agreements (ATAs) and advanced tax ruling/agreements (ATRs), the paper will focus only on ATRs, since the Croatian system does not recognize APAs.

## 8.2 Contemporary understanding of administrative capacities and transparency

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No single definition or understanding of administrative capacities exists in literature, which makes this concept rather difficult to measure and comparative analyses to be conducted (Bryan 2011: 1; Christensen and Gazley 2008: 266; Giljević 2009: 207).

Administrative capacities can be understood as a set of skills and competencies expected of public administrations so that they can facilitate and contribute to problem-solving, either at the level of the whole administrative system or simply an individual administrative organization. However, whilst some scholars focus on the results an organization should be achieving, others stress the ways in which it fulfils its tasks and considers capacities just as administrative potential, which may or may not be activated (Honadle 1981: 577). Nevertheless, the capacities of problem-solving depend on the resources available to the system (public administration or individual administrative organization) as well as on the capability to use available resources effectively (Mayntz and Scharpf 1975: 8). Therefore, three specific perspectives used to define capacity could be identified: resources, capabilities and outcomes (Bryan 2011: 8). In addition, Honadle (1981) distinguishes capacity from capacity building, considering the former as the means to performance and the latter as the efforts to improve organizational means, i.e. capacities.

At the EU level, the issue of administrative capacity becomes critical during the 1990s, in the process of the preparation of accession of ten Eastern European countries to the EU. The administrative capacity has been established as the main accession criteria at the Madrid EU Council meeting of 1995 (Koprić et al. 2011: 1551). Common minimum benchmarks were developed by the European Commission (hereinafter: EC) and SIGMA, expecting candidate countries “to have administrative systems capable of transposing, implementing and enforcing the EU *acquis* in a way that they achieve the set results/outcomes, to meet the criteria required for EU membership, as adopted by the EU Council, and to have their progress towards EU accession measured in terms of their administrative and judicial capacity to apply the *acquis*” (Cardona and Freibert 2007: 52). Going beyond a mere technical role of administration, the EC points out that administrative capacity has good governance as its basis and ultimate objective (EC 2014: 8). Koprić (2008: 148) indicates this approach as a European pragmatic understanding of administrative capacities which stresses the importance of legal regulation and specific elements of the civil service system. On the other hand, there is a scientific understanding which is more complex and systemized in five categories by the author: public policies, strategic planning and legal regulation, organizational issues, functional issues, personnel issues and support to the development of administrative capacities (Koprić 2008: 149–150). Farazmand (2009: 1016–1017) considers administration as “the most

*essential component of the capacity to govern a nation, its economy, and its institutions...*” and thus indicates even 11 key administrative capacities.

Lodge and Wegrich (2014) tried to reduce the complexity of the issue by indicating four sub-types of administrative capacities, namely delivery, regulatory, coordination and analytical capacities. Focusing on tax administration, it can be stated that delivery capacity is the ability to effectively collect taxes and other state revenues. Accordingly, there are numerous organizational and procedural instruments aimed at building that type of capacity, i.e. to complete the general task of tax administration. In order to implement those instruments (e.g. regulation drafting and enforcement, proposals on tax policy changes and analysis of data in the taxation area), general regulatory, coordination and analytical capacities must be in place.

One of the instruments or requirements for the effective collection of state revenues in the era of globalization is transparency, considered principally as an instrument “enhancing the functioning of the government” (Dragoş et al. 2012: 136).<sup>3</sup> In general, transparency means “*the opening up of the internal organizational processes and decisions to third parties, whether or not these third parties are involved in the organization*” (Pasquier and Villeneuve 2007: 148). It means that in the broader sense it includes not only general public, but also other public sector organizations. This concept of transparency especially comes into effect in the EU and international agreements requiring cooperation among national governments in various fields. In order to implement supranational policies effectively, they have to be transparent to each other, i.e. to exchange necessary information.

However, transparency could not be effectively implemented just on the basis of regulations passed and obligations imposed to administrative organizations. As some analyses and national information commissioners’ reports show (Pasquier and Villeneuve 2007: 157; Croatian Information Commissioner 2016: 164), one of the crucial obstacles for public sector organizations to be transparent is a lack of capacities in the form of underdeveloped values of transparency and openness in everyday work, weak understanding of regulation, lack of knowledge and skills for the handling of the requests submitted and reluctance to proactively publishing information. In that respect, transparency in public administration represents a key requirement for the effective achievement of organizational goals, but in order to be reached itself, it requires a certain level of administrative capacities.

Three broad elements of institutional and administrative capacity building indicated by Heichlinger et al. (2014: 33) could be taken into consideration in this

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3 On the one hand, transparency could be considered as a norm, value or even a right (‘to know’) and on the other as an instrument consisting of various methods and processes in order to foster accountability, legitimization of public authorities, reduction of corruption, the participation of citizens in the development and implementation of public policies, etc. (Dror 1999: 63; Pasquier and Villeneuve 2007: 148).

respect: structure (as a part of a broader policy aspect), people and systems. They comprise 16 key building blocks for strengthening administrative capacity, most of which are intended to improve a specific type of administrative capacity. For example, stakeholders' involvement in all components of the policy cycle and simplification of administrative procedures are mostly related to regulatory capacity building, while appropriate administrative structures and management of partnerships with different crucial actors in the field are relevant for coordination capacities. However, they are all interconnected and led by the common goal of strengthening administrative capacity and completing organizational tasks. On the other hand, some of the indicated "building blocks" are more important than others in order to achieve specific tasks of administrative organizations. Therefore, the rules on tax transparency implemented by the EU as specific instruments intended to improve tax administrations' performance as well as key capacity requirements for the implementation thereof, will be analysed in the following chapters.

### 8.3 The EU rules on tax transparency and mandatory exchange of tax rulings

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In recent years, the international public urged the development of a corporate tax system where all, but especially large multinational companies, would pay their "fair share of taxes". These initiatives followed a public disclosure of the examples of tax evasion and tax avoidance<sup>4</sup> performed by some multinational companies. It has been noted that multinational companies with cross-border business operations avoid paying their "fair share of tax" by engaging their activities in tax planning structures using international tax law mismatches. In particular, the legislation allows companies to shift their profits to a jurisdiction with a lower corporate income tax rate, thus avoiding paying all or part of the taxes in a jurisdiction where the income is actually acquired but where the corporate income tax rate is higher. These practices are happening so consistently that governments are confronted with a constant tax revenue loss.

The priority of the EU is to promote sustainable economic growth and investment within the European Single Market. Therefore, the EU needs a harmonized tax legislative framework to ensure fair and efficient taxation. At the EU level, a direct tax legal framework is not harmonized and sometimes that may result in a double taxation or double non-taxation of companies operating cross-border. This imposes great challenges to the improvement of tax transparency policies.

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4 Tax evasion, in contrast to tax avoidance, may be characterized as intentional illegal behaviour, or as behaviour involving a direct violation of tax law, in order to escape payment of tax. Tax evasion is generally accompanied by penalties that may be, but are not always, criminal in nature. Deliberate under-reporting of taxable income would generally be considered an example of tax evasion. The term "evasion" tends to be used in French-speaking countries to refer to the concept of tax avoidance, while "tax fraud" is used to refer to the concept of tax evasion (IBFD 2016).

With regard to tax rulings, the EC, in its documents announcing the launch of the EU Tax Transparency Package, took the position that “greater transparency for tax rulings is urgently needed in order to tackle aggressive tax planning and ensure fair tax competition between Member States.”<sup>5</sup>

The concept of tax rulings and the legal obligation to exchange them between Member States was in place for many years. The Directive on administrative cooperation in the field of taxation that entered into force in February 2011,<sup>6</sup> aimed to “provide for the exchange of information in tax matters to the widest possible extent”. This exchange of tax information mostly concerned the exchange of tax rulings. However, the conditions imposed by that Directive for the exchange of tax rulings were flexible. The obligation to exchange tax rulings imposed on national tax administrations was too weak, allowing MS to choose what kind of information to send, when to send it and to whom. In particular, MS that issued a tax ruling had discretion to assess if the exchange of the content of that ruling would be relevant for other MS.

In 2015, the focus on tax transparency and effective exchange of tax information was increasing. The EC issued the EU Tax Transparency Package in which is defined a tax ruling as: “a confirmation or assurance that tax administration gives taxpayers information on how their tax will be calculated. In general, tax rulings are issued to confirm the tax treatment of a large or complex commercial transaction or activity.”

One of the successes of the EU Tax Transparency Package is the recently amended Directive on administrative cooperation, regarding the mandatory exchange of tax information<sup>7</sup> (hereinafter: Directive) that deals with the exchange of tax rulings issued to taxpayers in advance and in relation to their business activities with a cross-border element.

The definition of a tax ruling is inconsistent across the EU. MS have different concepts of what constitutes a tax ruling, which makes it difficult to have a global view of national practices. It is defined as “any communication or other instrument or action of similar effect, given by or on behalf of a MS, regarding the interpretation of the application of its tax laws”.

The automatic exchange of cross-border tax rulings will come into effect on 1 January 2017. From that moment on, tax administrations of MS will be obliged to report, every three months, to all MS on the rulings they have issued. The informa-

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5 The European Commission – Fact Sheet Combating corporate tax avoidance: Commission presents Tax Transparency, published on 18 March 2015.

6 Council Directive 2011/16/EU on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, OJ L 64/1, 11.3.2011.

7 Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, OJ L 359, 16.12.2014.

tion that needs to be sent via a secure e-mail system will consist of a pre-defined set of information. The format of the information on tax rulings that will be exchanged among MS will be standardized. The Central Directory of cross-border tax rulings will be created and accessible by all MS.

The Directive will become effective on 1 January 2017 allowing some time to improve the administrative capacities.

#### **8.4 The Netherlands' Tax Administration – tax rulings in practice**

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In The Netherlands, an efficient and reliable tax ruling practice is in place, providing certainty in advance about the taxpayer's position in The Netherlands.

The Netherlands' tax ruling practice was developed in the 1950s and the procedure was centralized in the Ministry of Finance. Later, as the amount of tax rulings grew, local tax inspectors were responsible for the issue of the rulings. Finally, in 1991, the tax ruling procedure was placed in the specially authorized tax administration group in Rotterdam that is still today in charge of the negotiation and conclusion of tax rulings.

The most recent reform on tax ruling practice in The Netherlands took place in 2014. According to the new system, advance taxpayer's certainty was granted in the form of a "determination agreement" which is binding for both the tax administration and the taxpayers. Since the tax specific requirements that were imposed by the reform of 2014, taxpayers continue to have the right to freely approach their tax administration and request an advance tax certainty agreement.

The Netherlands tax ruling practice has no legislative basis as it has been developed gradually through practice. The result is that The Netherlands has a so-called "open system" for tax rulings. This means that there are no limitations to the issues that rulings can address. Also, the tax administration does not have a strict procedural framework for tax rulings and it is free to act according to good practice. Tax administration is committed to fully cooperate with a taxpayer unless the proposed business structure, which is the subject of the ruling, obviously conflicts with The Netherlands' tax law or if the main objective is tax evasion in that country (Romano 2001).

The tax inspector presents the request to the Tax Ruling Department of the Local Tax Office in Rijnmond, Rotterdam Office (hereinafter: TRD). After considering the request, the TRD provides the local tax inspector with binding advice on the issues in the request. The binding advice of the TRD is mandatory for concluding the agreement between the taxpayer and the tax administration.<sup>8</sup> Once positive binding advice has been obtained, a binding agreement will be concluded. In

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<sup>8</sup> Netherlands – Corporate Taxation sec. 1. 2016. Country Analyses. Amsterdam: IBFD.

practice, taxpayers are free to indicate the time they expect the ruling to be valid but they need to substantiate their request, otherwise the common period of 4–5 years is applicable.

In 2014, the TRD consisted of 25 full time employees with an additional 8 people who joined in 2015. In total, around 12,500 companies fall under the competence of the TRD out of which 30 % use the possibility to obtain a tax ruling. Yearly, the TRD receives around 10,000 tax returns from companies that have obtained tax rulings. In 2013, the TRD dealt with 552 requests for rulings where some 441 tax rulings were approved, whilst for 111, the request has been withdrawn by the taxpayers.<sup>9</sup>

## **8.5 The Croatian Tax Administration**

### **8.5.1 Tax rulings in practice**

The institute for the issuance of binding tax rulings by the CTA was introduced in the Croatian legal system in 2015 by Amendments to the General Tax Law,<sup>10</sup> while details of the procedure on tax rulings are defined by the bylaws. Next to tax rulings, the CTA may, at the request of a taxpayer, issue an official tax opinion. Official tax opinions are non-binding and that differentiates them from binding tax rulings. They are issued by the Central office of the CTA for tax activities that took place in the past. Their content, which does not contain the taxpayers' identities, is publicly available on the CTA website.

In contrast, recently introduced binding tax rulings can be issued for concrete questions relevant to the tax treatment of future and intended transactions and business activities in the areas of: VAT taxable supplies for the purposes of input VAT deduction, the application of tax laws regarding investment projects with a value of more than HRK 20,000,000 (approximately, EUR 2,630,000), the taxable base in status changes, the implementation of the treaties on avoidance of double taxation and in the case of business activities, not comparable to common business activities in the territory of the Republic of Croatia.

Based on the taxpayer's request for a preliminary conversation with the CTA, the latter will invite the taxpayer (i.e. his attorney or tax advisor) to a meeting within 15 days from the submission of the request.

In general, a tax ruling will be issued within 60 days of submission of the taxpayer's written and complete request. The deadline may be extended for 30 days or

9 Algemene Rekenkamer (2014) Belastingontwijking. Een verdiepend onderzoek naar belastingontwijking in relatie tot de fiscale regels en het verdragen-netwerk, available at [www.rekenkamer.nl/Publicaties/Onderzoeksrapporten/Introducties/2014/11/Belastingontwijking](http://www.rekenkamer.nl/Publicaties/Onderzoeksrapporten/Introducties/2014/11/Belastingontwijking), date accessed February 5, 2016.

10 Official Gazette 26/15.

more, based on the complexity of the tax issue at hand. However, the costs of issuing tax rulings range from HRK 5,000 to 30,000 (depending on the taxpayer's revenue) and this must be paid before the submission of the request. This raises the issue of the legal certainty and accessibility of the CTA that has been guaranteed only to taxpayers able to pay the stipulated fees for issuance of tax rulings (Huzanić 2015: 108). Furthermore, the request must comprise all obligatory elements for the tax ruling – questions, proposal of an answer, facts and legal analysis of the case, transaction, and business event or activity. The issued tax ruling has a binding effect for the CTA in relation to concrete taxpayers only.

The ruling is valid from the date of delivery to the applicant. Its validity expires if: it is based on regulations which have been amended or are no longer valid, important circumstances have been changed or it has been determined that the binding ruling is based on false or incomplete information.

In order to facilitate the tax rulings procedure, the Advisory body for tax rulings is formed within the CTA. It comprises 30 members – civil servants employed in the CTA, experts in the various tax fields that are engaged in preliminary conversations with the taxpayers and in the issuing of tax rulings. It is foreseen that 4 members of this team are present during the preliminary conversations with taxpayers. It can be concluded that the functions, structure and position of the Advisory body for tax rulings within the CTA are still imprecise.

The recent provisions implementing tax rulings into the Croatian taxation system are intended to ensure legal certainty for taxpayers. Nevertheless, the main purpose of this introduction is the alignment of the Croatian tax system with EU law in light of the measures adopted under the EU Tax Transparency Package. In order to implement the Directive for the exchange of tax rulings, Croatia had to introduce a tax ruling regime. Yet, it is evident that the business sector did not influence this process but regardless of the reasons behind this, it is a very welcome novelty, essential for the building of a modern tax system.

### **8.5.2 Structure and administrative capacities**

Tax administration functions are the responsibility of the CTA, embedded in the structure of the Ministry of Finance. This organizational model of a traditional department of government within a ministry is considered to be a standard model, although many countries have established new institutions with a broad range of autonomous powers, often referred to as semi-autonomous agencies or bodies (Crandall 2010).

The CTA proceeds according to the laws and regulations on the rights and obligations of taxpayers regarding different types of taxes and other fees within the

tax system. Its main duties are stipulated by the Tax Administration Act (hereinafter: TAA).<sup>11</sup>

### *Structure and processes*

The CTA structure was reformed at the beginning of 2015, as part of Croatia's ongoing modernization programme that is being supported by the World Bank. The main organizational features, amongst others, include new territorial organization and further optimization of its duties. Following recent reforms, the organizational structure of the CTA predominately follows the function-based model.

The CTA consists of a Central Office, six regional offices and the national Large Taxpayers Office (hereinafter: LTO). There are 57 local offices, organizationally subordinated to the regional offices. The *Central Office* of the CTA acts as an interface between political decision-making (the government, including the Minister of Finance and Parliament) and the operational level. It has a function-based structure. However, on the level of departments, apart from the functional-based structure, the model of internal organization is partially based on a type of tax criteria. The *LTO* is organized as a separate office in charge of large taxpayers on the entire Croatian territory, supported by 3 local offices in main regional centres and has a function-based internal structure. *Regional offices* are established to perform the duties of the CTA in a particular geographical area for a number of counties (decentralized operational level). Regional offices are structured according to the main functions. *Local offices* are in charge of the broad spectrum of functions in respect of all taxpayers who are residents in a particular geographic district. The internal organizational structure of the local offices is client-based, providing a full range of tax administration functions to its assigned group of taxpayers.

The analysis has shown that although the function criterion prevails, the CTA structure is designed based on a mix of criteria and therefore can be described as a "hybrid" structure. All three common models for organizing a tax administration have advantages and disadvantages (see more Vehorn and Brondolo 1999; Brčić 2000; Alink and Kommer 2015). However, a function-based organization for tax administration is recognized as the most effective organization to collect revenues, minimize the tax gap and service taxpayers (Kidd 2010). In most cases, a functional approach, together with the unit for large taxpayers, should improve the efficiency and effectiveness of tax administration (Vehorn and Brondolo 1999; OECD 2015).

### *People and management*

Competent, professional, and productive staff is an essential enabler for tax administration to carry out its mandate. This has been recognized in the Strategy of the

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<sup>11</sup> Official Gazette No. 148/2013, 141/2014.

Tax Administration for the period 2011–2015.<sup>12</sup> It is also recognized that the quality of human resource management is crucial for quality performance. In that regard, two important policy documents were adopted – the Human Resources Management Strategy for the period 2010–2015 and the Training Strategy of the Tax Administration for the period 2012–2015. Despite this, the assessments of current and future skills and capability needs of the staff have not been developed, neither were the plans to fill any gaps which may be required (OECD 2015).

The approximate number of civil servants and employees necessary for carrying out the activities of the CTA is 4,850 and is envisaged by the Regulation on the internal organization of the Ministry of Finance.<sup>13</sup> Civil servants and employees are hired on a full-time basis. The CTA has the autonomy and flexibility for recruitment decisions concerning the skills and qualifications, duration of the contract, geographical location and appointments on merit (OECD 2015).

At the beginning of 2013, the CTA employed 4.298 civil servants and employees.<sup>14</sup> Based on the decision of the government to ban the recruitment of new civil servants and employees of government agencies, professional services and offices of the Croatian Government,<sup>15</sup> the number of staff who can be hired on an annual basis is limited. According to the Plan of admission to the civil service, the CTA can recruit one new member of staff only if two members leave, subject to the approval of the Ministry of Public Administration.

As regards the age profile, the majority of CTA staff is between 30–49 (52 %) and 50–59 (34 %), but only 2 % of staff is younger than 30. The proportion of staff with a university or degree-level qualifications is 46 % (OECD 2015).

The performance evaluation system of the CTA staff is regulated by the Civil Servants Act<sup>16</sup> and the Regulation on the procedures and criteria of evaluation of civil servants.<sup>17</sup> According to the Civil Servants Act, civil servants are evaluated on the basis of the demonstrated effectiveness of work, comparing the scope, quality and deadlines for the execution of tasks with the job description of the civil servant and the work plans of the state body.

With regard to the management, the Croatian state administration is, in large, built as a traditional bureaucratic and hierarchical organization. The Head of the CTA is the Director General who legally represents the CTA and is also the State Secretary in the Ministry of Finance. The Director General steers the work of the

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12 All strategic papers are available at the TA website ([www.porezna-uprava.hr](http://www.porezna-uprava.hr), date accessed 15 March 2016).

13 Official Gazette No. 32/12, 67/12, 124/12, 78/13, 102/13, 24/14, 134/14, 154/14.

14 See [www.mfin.hr/hr/novosti/informacija-za-medije-2013-02-20-18-05-04](http://www.mfin.hr/hr/novosti/informacija-za-medije-2013-02-20-18-05-04).

15 Official Gazette No. 114/14.

16 Official Gazette No. 92/05, 142/06, 77/07, 107/07, 27/08, 34/11, 49/11, 150/11, 34/12, 49/12, 37/13, 38/13, 01/15, 138/15.

17 Official Gazette No. 133/11.

Central Office and is assisted by assistant directors, who are, at the same time, heads of departments within the Central Office. The Director has a political mandate – he/she is appointed and dismissed by the government on the recommendation of the Minister of Finance.

### *Systems and tools*

The ICT has an important role in increasing transparency and accountability, as well as in enhancing the efficient delivery of public services. The importance of the ICT has been recognized by the CTA and reflected in the External and Internal Communication Strategy for the period 2012–2015.

There are several instruments of communication and online services provided by the CTA: Website of the CTA; the Contact Centre as a channel for CTA communication with taxpayers; e-Porezna which offers several electronic services; and the project e-Citizens, launched to simplify and advance citizens' communication with public administration and to increase the transparency of the public sector – within this project, the CTA provides different information to citizens, such as information about the annual tax return for income and information about the tax obligation for motor vehicles.

With regard to the exchange of information for tax purposes, the CTA is designated as the Croatian competent authority for this purpose. The rules applicable to the exchange of information for tax purposes are mainly contained in the General Tax Act<sup>18</sup> providing general tax procedures, which also apply in respect of the exchange of tax rulings and other information based on international agreements and EU legislation. The CTA has wide powers to obtain the information requested for exchange of information purposes, supported by the possible application of coercive measures and enforcement provisions (OECD 2016).

## **8.6 Conclusion**

The practice of tax rulings has many positive aspects, both for taxpayers and tax administration. Tax rulings are a powerful tax administration tool ensuring consistency in the application of tax laws and providing certainty as to the tax consequences of a taxpayer's business activity. Complex tax legislation cannot ensure the uniform understanding of the provisions. Tax rulings can contribute to that understanding. Moreover, they play an important role in improving the quality of communication between taxpayers and tax administration. Consequently, within the tax rulings procedure, taxpayers are treated as clients and that can result in better compliance with tax obligations and tax administration can better understand the taxpayer's business activities.

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18 Official Gazette 147/08, 18/11, 78/12, 136/12, 73/13, 26/15.

On the other hand, the negative side of tax rulings practices is a lack of transparency on rules governing the procedure and actions of tax administration. The emphasis on this problem has been highlighted by the OECD and the EC in their recent anti-tax avoidance projects. Also, doing a favour for one taxpayer on the basis of a tax ruling that determines his position towards tax administration in advance can result in a distortion of the European Single Market. Therefore, effective cooperation amongst European tax administrations in exchanging information on tax rulings is required. In order to cooperate and thus effectively implement national and supranational policies on tax transparency and tax avoidance, national tax administrations have to strengthen their administrative capacities in a way which ensures the achievement of the shared EAS principles. When taking into consideration differences between Western democracies and countries in transition regarding the success in meeting the requirements of transparency legislation (Dragoş et al. 2012: 237), this requirement is particularly directed to those countries without long experience in tax rulings practices which entered the EU recently (as Croatia did) as well as for those lacking the strong administrative capacities required for implementation of EU policies as is the case for EU candidate countries. However, all other MS should continuously work on the strengthening of their administrative capacities since changes of supranational regulation are new for all of them.

The Netherlands' extensive experience in tax rulings may be used to support the development of a newly established tax ruling regime in Croatia and other countries, in at least the several following ways:

1. The legal nature of the agreement between a taxpayer requesting a tax ruling and the tax administration. Since it is binding for both parties and therefore providing stronger obligations, it develops mutual confidence, as well as accountability and efficiency;
2. The period of validity of tax rulings. Although taxpayers are free to indicate the time they expect the ruling to be valid, they need to substantiate their request. Otherwise the common period of 4–5 years is applicable. A fixed period of validity ensures predictability and provides guarantees to the taxpayer that the tax will be calculated as stated in the tax ruling, for a certain period of time; and
3. The gradual development of an organizational structure in charge of tax rulings. As the number of tax rulings was not substantial in the starting phase of tax rulings practice in The Netherlands, the procedure was centralized in the Ministry of Finance. As the amount of tax rulings grew, the responsibility was shifted to local tax inspectors, and finally a tax ruling procedure has been placed in the specially authorized tax administration group. It is an example of the development of an organizational structure that follows practical needs.

Administrative capacities of the CTA necessary to support an efficient system of tax rulings and tax transparency required for the implementation of national

and supranational policies are yet to be developed. Based on the analyses presented in this paper, several conclusions and recommendations for the development of administrative capacities necessary to support an efficient system of tax rulings and tax transparency can be drawn:

1. The effective system of tax rulings should be recognized by strategic documents;
2. The appropriate administrative structure is a prerequisite for the system of tax rulings and information exchanges with EU bodies and tax administrations of other Member States. The organization and the procedures of the body in charge of facilitating tax rulings procedure should be clearly defined;
3. In practice, the procedure of obtaining tax rulings should be simplified and more user-friendly in terms of the relationship with the taxpayer and effective in the relationship with other tax administrations and EU institutions;
4. Vertical communication channels between the local offices that will receive requests for tax rulings and the body in charge of facilitating a tax rulings procedure that will issue a tax ruling should be transparent and approachable. The chief officials and civil servants of the local offices should be aware of the procedure on the designated body for tax rulings and especially on fixed deadlines;
5. The tax officials dealing with tax rulings need to have a thorough knowledge of the national tax system as well as of the EU rules on tax transparency and tax rulings, and an in-depth understanding of the business structure of the taxpayer. They need to understand the effects of tax rulings in the EU perspective. Equally important, they need to master the English language;
6. The members of the body in charge of facilitating the tax rulings procedure should be appointed for a longer period of time in order to assure continuity and stability in tax rulings, i.e. uniform practice;
7. There is a need for permanent training of tax officials to empower them to efficiently and capably facilitate demands for tax transparency of the tax administration;
8. Broad usage of existing ICT tools and a development of new ones. The tax administration should increase the amount of information in English available to taxpayers via the website. The online applications for taxpayers' requests for tax rulings should be available and easily accessible; and
9. Capacities to actively participate and cooperate with the European network of tax administrations as well as in the development of the European and international policies on tax transparency.

In order to implement policies in tax transparency and to impede tax avoidance, countries are dependent on each other. Therefore, they have to continuously strengthen their administrative capacities in accordance to the already existing

European principles and practices. This is especially important for those countries without previous experience in tax rulings practices which will now have to cope, both with the implementation of regulation on tax rulings and tax transparency.

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## 9. Training and Development Models for Public Sector Servants Envisaged by the New Law on the Civil Service in Georgia

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*Nino Dolidze*

### 9.1 Introduction

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Since the 1990's the development of national legislation in CEE countries has been oriented towards harmonization with the requirements of the European Union. After regaining independence in 1991, Georgia began with the fundamental reforms in many areas, including the public administration and civil service. The first version of the Law on Civil Service, adopted in 1997, did not clearly define the model of public administration or the main principles of the civil service. Since 2004, the choice has been made between two different approaches – between the NPM or competitive and Weberian, career or professional systems. The reforms that Saakashvili's government was conducting can be characterized as so-called Neoliberalism, or NPM approach. But notably, they have not been reflected in legislation. In 2013, as a result of the work initiated by the Civil Service Bureau and implemented by the network of academic and non-governmental organizations, a Civil Service Reform Concept and consequent draft law were developed. In 2015, the draft was adopted by parliament and will come into force from January 1, 2017 as the new Law on Civil Service<sup>1</sup>. It establishes a career civil service, the introduction of which will bring dramatic changes in many areas of public organizations' management. The legislator claims to address those internationally accepted principles of Good Governance, which, according to the OSCE/SIGMA are considered as bases for Public Administration Reforms, including the organization and management of the civil service and human resources management system, in particular.

Chapter 1 of the OECD/SIGMA document on the Principles of Public Administration: "A Framework for ENP Countries", defines the strategic framework of the Public Administration Reform and underlines the importance of the "overall

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<sup>1</sup> See Legislative Herald of Georgia;

[https://matsne.gov.ge/index.php?option=com\\_idmssearch&view=docView&id=2582658&lang=ge](https://matsne.gov.ge/index.php?option=com_idmssearch&view=docView&id=2582658&lang=ge)

vision and prioritized objectives” in the reform process, as compared to the less effective ad hoc approach (Ch. 1, p. 10). Most recent studies of the Georgian civil service have revealed non-systematized and fragmented development of the sector, as the major disadvantage of the reform, although it should be noted that too much centralization might lead to the increased political influence over administration (Ghonghadze & Dolidze, 2014, Ghongadze, Dolidze & Edner, 2016). EU principles of civil service and human resources management state that due to the requirements of the merit system, recruitment, promotion or professional development of civil servants should be conducted in a politically neutral environment (Ch. 3, p 21–24). The very first article of the new Georgian Law on Civil Service sets out the definition, which makes clear the goal of the legislator – to create a professional civil service, based on four general principles: the rule of law, transparency and compliance with the procedural norms and the provisions of the administrative processes, accountability and efficiency. The new law also highlights the importance of establishing a uniform and impartial civil service, politically neutral, which is achieved as a result of the separation between politics and administration; the authors determine the public service as “a long-term career, which is based on clearly defined rights and duties towards the state and requires dedication and professionalism, impartiality and unity of principles” (Art. 1, para. 1).

Until now, the established practice in the public sector implied that the main activities of particular agencies were regulated by the agency itself, including the norms of the everyday working routine, organizational structure, holidays, vacation, overtime, compensation procedures, working conditions and safety norms, performance assessment system and more. Regulations were approved within the organization by the Minister and any changes were to be first of all communicated to the employees.

The EAS principles define the professional development of public servants, as “regular training, fair performance appraisal and mobility and promotion, based on objectives and transparent criteria and merit” (Ch. 3, p. 25). The new law on public service sees the development of the civil service as a holistic process, which applies equally to all public institutions, defines the basic framework, and development trends, while the specificities of a particular public agency should be regulated by the by-laws. The unity of the civil service is reflected in the common policy of employment and recruitment as well, both at central and local government levels and the creation of hierarchical structures consistent in terms of management, coordination and control of the entire sector. Such an approach will contribute to the stability of the sector, a unified and transparent pay system and facilitate attracting and retaining qualified staff.

### 9.1.1 Application of the EAS Principles of Predictability and Reliability

Enforcement of the new Law on Civil Service is an attempt by the Georgian government to establish a merit-based professional civil service and incorporate principles of EAS in the Georgian administrative system. The mechanisms, used by the legislator to ensure the stability of public organizations, derive from the principles of reliability and predictability as defined within the EAS. The reliability is directly related to the qualification and competence of public servants, which, within the legal frames, have certain discretion to timely and adequately make appropriate decisions: “A civil service whose recruitment and promotion system is chiefly based on political patronage or cronyism is more likely to hamper professional integrity than a system based on merit” (OECD, 1999). In this regard, merit-based recruitment and promotion, as well as regular training and professional growth gain special importance.

Notions of impartiality and neutrality implied by the OECD definition are vital for the stability and effectiveness of a professional civil service, opposing political influence, nepotism, cronyism and other discriminative approaches. A similar interpretation is suggested by Matei, saying that the principle of reliability and predictability, besides the supremacy of law, protects civil servants from political patronage and cronyism, “with a certain degree of decisional freedom” (Matei, 2007). The notion of professional competency is underlined by Torma, as reliability and predictability apply mainly to the decision-making processes. The author mentions that competency and authorization are necessary composites of the above principle, stressing the aspects of proportionality, fair procedure and timeliness, identified in the OECD definition. In particular, it implies that “the civil servants have to be qualified, well-trained, neutral and professionally independent” (Torma, 2011).

Thus, the establishment of strong, hierarchical state institutions with strictly defined duties, authority and responsibility of each position is impossible without competent and qualified staff. Considering the above, we pay special attention to the system of Training and Development (T&D) introduced for civil servants by the new law.

In the presented study we are discussing three basic models of training delivery for the state sector: centralized, semi-centralized and decentralized schemes. Considering the political and administrative context of a particular country, the choice of the T&D model is greatly determined by the established system of public administration. The centralized model is mostly used in the states with strong bureaucratic institutions and implies that the development of civil servants, including training and qualifications, as well as career promotion, is controlled by the government, and, in some cases, by a concrete state agency, which has the authority to provide the whole cycle of trainings – including needs assessment, development and planning of training modules, as well as monitoring and quality control.

The decentralized scheme is advocated by the NPM model and is based on the contractual delivery of training by non-governmental providers. Training and capacity building needs are determined by particular agencies or employees, and training providers selected on the basis of a free market – the best quality at the best price. The semi-centralized scheme is based on the cooperation between the government and private actors. Both sides have clear roles in the T&D process, the government carries out planning, monitoring and quality control, sets the standards and develops the overall policy, and selects training providers among non-governmental actors, such as educational institutions and private training organizations. Because Georgia has experienced two out of these three models in its recent past and its present, we have the opportunity to examine the impact of each of the approaches in one state context. Thus, the overall research question is as follows: which of the above described training and development models is the most effective for increasing the stability of the public sector and establishing a professional civil service.

## **9.2 Literature review**

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### **9.2.1 Training and Development in the Public Sector**

The importance of regular training in the public sector is widely observed in scientific literature. Van Wart and the authors discuss the results of the research conducted in 2013 in 19 countries with the highest-ranking public officials on training, and reveal those factors, which determine the necessity of the well-established, systematic T&D approach. Although the study is specifically focused on senior officials, nevertheless, the results can be generalized over the whole public sector, including mid- and low-level servants. The researchers note that the training of civil servants can be regarded as a condition, which ensures the viability of public organizations, thus, in order to maintain the ability to respond effectively to the challenges of the environment, the establishment of a continuous T&D system is necessary (Van Wart, Hondeghem, Schwella & Suino, 2015). One of the factors contributing to the effectiveness of the process is the involvement of private and non-governmental actors (Van Wart et al., 2015). Kroll and Moynihan emphasize three aspects of training programmes, especially in the context of the reform: 1) distribution of information on the reform and consecutive changes; 2) strengthening the sense of stability, particularly for officials involved in the process of change management; and 3) development of reform-specific skills (Kroll & Moynihan, 2015, p. 147).

### **9.2.2 Correlation of the T&D Model with the Stability of the Public Sector**

In developing countries, the civil service is not sufficiently stable to compensate for low wages and people are constantly seeking better jobs in other sectors. Frequent

changes of political power, reorganization and structural reforms also contribute to the high turnover; consequently, establishing a unified public personnel management approach including the T&D system is the only way to keep professional standards high. The main disadvantage of the centralized scheme is the inability to involve a maximum amount of servants in the process. Lucking brings examples of several CEE states, where combining centralized coordination and policy formulation, reaching out to independent providers and creating a network of training organizations, contribute to the growing effectiveness of public organizations. On the other hand, the lack of a unified strategic vision and fragmented approach results in low effectiveness, low quality and an inefficient use of resources (Lucking, 2003). Lucking argues that the semi-centralized scheme is the most effective when a relevant public agency is responsible for needs identification, curriculum development, outsourcing and contracting with providers, quality and impact assessment and, at the same time, there is a well-developed network of training providers covering the entire country, capable of providing the relevant knowledge and expertise in all the fields required by the public sector, both at central and local levels. Such cooperation develops a domestic market and effectively uses regional and local resources and promotes the establishment of high national standards in the civil service. Besides, it is the only way to maintain political neutrality and avoid the problem of partisanship. Moreover, the head of the above mentioned agency should not be a political appointee and must be selected very carefully, based on his/her competency and experience. In turn, the establishment of unified national standards promotes the development of professional cadres and their mobility within the public sector, which is one of the main principles of career civil service (p. 23).

### 9.2.3 Legislative Discourse

The new law highlights the crucial importance of the unified professional development and career growth system and the state's obligations in this regard, which, in turn, will depend on the performance evaluation (Chapter 1, Article 16). In this sense, the law emphasizes several important factors: 1) a certification process prior to recruitment (Article 29), managed by the Civil Service Bureau, which will set standards for the tests, the testing time and place will be published on the website on a monthly basis (Article 30); 2) the civil service is becoming life-long employment (Article 33); this provision, according to the legislator, ensures stability and guarantees the protection from unfair dismissal of the servants, including for political reasons; 3) appointment to the position, which is defined in Article 34 and implies that open competition, except in special circumstances, is held only at the lowest, the fourth-ranking position, while for the upper (third, second or first) ranks only internal promotion, or in other words, internal competition, will be available. Candidates will only be selected from the current servants, contracted employees and those enlisted in the reserve (Article 34, para.3). The legislator opens a competition for an external candidate, only if the existing servants cannot meet the qualification

requirements for the position announced (Article 34, para. 4 a) and b)). It is clear that in these circumstances, access to the public sector, apart from the initial stage, is extremely detrimental to the qualified staff who seek employment outside. The provision is contradictory of the principle of equal opportunities both for internal and external candidates, maintaining on the one hand, institutional memory and on the other, providing the public sector with “new blood” by those experienced in private and non-governmental sectors. Considering the above factors, the initiative once declared by the Georgian government to establish a centralized state training centre, requires a special attention. No doubt it creates a safe working environment for existing public servants by protecting them from arbitrary firing and the recruitment of unqualified personnel, but at the same time, it increases the “isolation” of the public sector and monopolizes the certification training, as well as the whole process of professional development. This, in turn, will significantly decrease the quality of the training process and overall qualification of the staff and reduce the activities of private and non-governmental providers.

### 9.3 Research Questions and Hypotheses

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From a review of the literature on training in public organizations, as well as national legislature, the following research question was formulated: considering the context of the Georgian public sector, does the semi-centralized model of training delivery contribute to the stability of public organizations and the establishment of an effective professional civil service more than centralized or decentralized schemes?

We developed the following hypothesis: *In the context of the developing country, the semi-centralized model of training delivery contributes to the stability of the public sector and the establishment of a professional civil service more than centralized and decentralized models.*

The independent variables are three models of training delivery, the dependent variables – stability of the public sector and professionalism of the civil service.

The centralized model of T&D will be established after enforcing the new law on civil service; consequently, for the moment, we do not have any evidence to judge the effectiveness or flaws of this scheme. Thus, this part of the hypothesis is tested, based on the results of in-depth interviews with providers. As for the development of the training component of the Georgian public sector, we can trace evidence of the decentralized scheme before 2013, when training and development was not considered to be a part of administrative policy. In this period, training was organized sporadically by different donors and individual agencies were defining their own training needs. As an example of the semi-centralized model, we consider large-scale training for the employees of executive agencies from central government – 1866 civil servants, mostly from mid- and low levels. The project was carried out with USAID support under the G3 project, in cooperation with Management

Systems International (MSI). The government of Georgia was actively involved in the development of the training modules, evaluation criteria and quality control mechanisms, as well as a selection process for the training of participants. The training process, however, was completely outsourced, and provided by a consortium of educational institutions and private and non-governmental actors.

Thus, we formulated the first research hypothesis as follows:

*H1 – The semi-centralized model of training delivery provides the establishment of an effective and politically neutral civil service compared to the centralized scheme. The data on civil servants’ satisfaction from the evaluations of the training project 2013 were used to develop second research hypothesis:*

*H2 – In the presence of the semi-centralized training delivery scheme, the satisfaction of civil servants employed in the public sector and their motivation increased.*

As for the comparison of semi-centralized and decentralized schemes, we developed a third research hypothesis:

*H3 – The semi-centralized scheme of training delivery increases the stability of public sectors, compared to the decentralized scheme.*

## 9.4 Research Methods and Data

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Three types of data sets were collected which concern the primary question of the stability and effectiveness of training under the three regimes:

- Qualitative research on the capacities of the Georgian educational institutions and training providers collected through in-depth interviews with representatives of the institutions;
- Quantitative data based on the questionnaires administered to Georgian public servants to evaluate their responses to the decentralized training programme;
- Impact analysis of the training models on the stability of the public sector based on the statistical data on employees’ turnover, obtained from the agencies participating in the training project.

Question 1: How do providers view the advantages and disadvantages of the decentralized model?

Question 2: How do the training participants see the value of the semi-centralized training model?

Question 3: What effect does each of the models, represented by different training eras in recent Georgian history, have on the turnover and stability in Georgian Ministries?

#### **9.4.1 Qualitative Research of the Georgian Educational Institutions and Training Providers' Capacities**

Three groups of training providers were identified: 1) educational institutions/universities that conduct academic and training programmes in public administration, public policy and related fields; 2) private and non-governmental training providers; 3) state training-centres under the ministries. The preliminary study of the providers identified several institutions which comprised the research sample. Representatives of five universities, 3 non-governmental and 2 state training centres (under the Ministry of Justice and the Ministry of Finance) were selected for the in-depth interviews. Besides, we conducted two interviews with a high level official at the Ministry of Finance and a representative of the Civil Service Bureau.

#### **9.4.2 Quantitative Research of the Evaluation Questionnaires of Central Government Employees after the 2013 Training Project**

The project was conducted during the period April–December 2013 and was aimed at the qualification and professional development of more than 3000 civil servants of the executive branch of the Georgian central government. Trainings were scheduled in ten different modules. The quantitative data were obtained to analyse trainees' attitudes and satisfaction from the evaluation forms submitted by the participants and pre-tests and post-tests results and attendance records for each training session.

The total duration of the training cycle was 5 months (July 1–December 20). 3914 servants registered for participation, the actual number of the participants was 1866. Trainings were provided by the consortium of higher educational and non-governmental institutions, namely, the Georgian Institute of Public Affairs, Robakidze University, IDFI, PMCG and CTC.

#### **9.4.3 Impact of the Training Models on the Stability of the Public Sector**

We identified two time-periods and conditionally assigned two different T&D schemes: 1) the year 2009, when trainings in the public sector were delivered in a non-systematized manner, based on the needs and requirements of particular agencies and specific projects implemented by different donor organizations. Moreover, the content of training modules, the length of the sessions, as well as quality control and evaluation mechanisms were identified separately for each project. This period is taken as a sample of decentralized delivery. 2) The year 2014, the period after completion of the large-scale training project for central government employees,

with the cooperation of government administration and external providers, when the content, schedule and evaluation criteria were defined centrally by the government administration, while the process was implemented by the training organizations and universities. We consider this project and the relevant time-period as a sample of semi-centralized delivery. The statistical analysis was conducted, based on data obtained from the following eight agencies: Ministry of Education and Science, Ministry of Culture and Monument Protection, Ministry of Economy and Sustainable Development, Ministry of Health and Social Affairs, Ministry of Finance, Ministry of Justice, Ministry of Environment and Natural Resources Protection, Ministry of Defence.

**Table 1**  
Collected data on employees turnover

Agency	Total number of servants		Dismissed based on personal request		Structural reforms /other causes		Employed in another agency of the public sector		Number of employed servants	
	2009	2014	2009	2014	2009	2014	2009	2014	2009	2014
Environment	153	130	10	38	10	10	16	13	117	69
Health	801	668	22	15	2	37	0	0	777	616
Culture	169	127	15	19	64	50	7	9	83	49
Education	519	286	58	14	11	20	0	0	450	252
Justice	1105	872	21	20	15	29	8	19	1061	804
Economy	230	205	80	37	118	1	0	4	32	163
Finance	325	263	31	18	76	14	17	10	201	221
Defence	687	450	56	43	330	10	18	13	283	384
Total number	3989	3001	293	204	626	171	66	68	3004	2558

The data under the “personal request” can be interpreted in different ways; they might really express a personal desire to leave the job or serve as a cover for politically motivated firing. While employment within the sector in another agency can be interpreted both as contributing to the instability of the public sector, and opening a career path for a particular servant. The data were processed in the STATA programme by Chi Square Test, which enabled us to identify any difference between the two given time periods in terms of stability.

## 9.5 Discussion and Findings

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### 9.5.1 Comparison of Semi-centralized and Centralized Training Delivery Models

The first research hypothesis proposes that the semi-centralized scheme is more effective for the Georgian public sector than the centralized model. Consequently, our intention is to compare these two. As noted above, the centralized model is just being introduced in the Georgian public sector and it is too early to evaluate the results. Therefore, our study mainly aimed at demonstrating the advantages of the semi-centralized model as compared to the decentralized scheme. However, the in-depth interviews, as well as the survey, also highlighted the qualitative factors, which enabled us to judge the disadvantages of the centralized model. Besides, the in-depth interviews at the first stage of the research contain some significant arguments supporting the semi-centralized model. It should also be noted that for the in-depth interviews, respondents are divided into three groups: representatives of higher education institutions, private/non-governmental providers and state training centres at the executive agencies. However, for the purposes of the research, all three groups are considered to be equal actors in the training market. Higher education institutions have a comparative advantage in terms of their own infrastructure and training facilities. Some NGOs, too, have a fairly well-developed infrastructure, for quite a large number of participants, short and medium-term trainings. This is an important issue for the government, because in contrast to the centralized model, which implies the existence of a permanent training centre, a well-developed infrastructure and administration, using the space and administrative capacity of external training providers allows a significant cost-saving. One additional factor that favours the semi-centralized model is that training of employees outside the agency, in a more specific educational environment, positively affects the process and adds to the participants' motivation.

#### *Negative Aspects of the Centralized Scheme:*

Network organizations are created as a result of cooperation between a variety of providers, allowing them to synergistically use experience, expertise, administrative resources, and infrastructure. Unlike individual providers, networking is an effective method to embrace different areas of competence, so that the public sector will receive the highest quality services with the best price. It is particularly effective to conduct trainings in general skills and knowledge, such as project management, human resource management, strategic planning, presentation skills, general management and management of public organizations, public finances, together with the capacity to work out the modules, tailored to the specific needs of particular public agencies. Besides, their rich academic resources can be used by the public sector for various types of research, including needs assessments or policy analysis.

The existence of several potential providers ensures administrative sustainability of the system and reduces the risks of failure for concrete projects. Moreover, the centralized scheme contains an essential political risk, in particular, establishment of a so-called “Soviet” institution, where a sort of “quasi-state” or state agency (be it the state academy of public administration or a public body or a particular university) centrally provides policy and programme development as well as implementation. The head of the institution, as a rule, is appointed by the head of the government, therefore, being totally accountable to him and under the complete political influence of the ruling party.

### *Analysis of the Training Project Participants’ Evaluation:*

The one-year *training* project serves as a sample of semi-centralized delivery, with the participation of 1866 public servants (22.3 % of the total number employed in central government). Some of the essential features of the project can be described as a semi-centralized scheme – a solid political will – the project was planned and implemented by the government administration, with the support of one of the major donors (USAID programme of Good Governance in Georgia – G3). The content of modules, duration and schedule of training sessions were processed centrally by the government administration, with the consent of the donor and with the participation of the provider’s network organization. The provider was accountable to the government and the donor for the training process, quality control and final assessment.

Naturally, the implementation of such a large-scale and multi-actor project was conducted with some problems, which basically reflect the situation existing at the time of the project implementation in the public sector:

- Low motivation of employees, expressed in relatively poor attendance, because of the intense daily regime and irregular working hours, especially for middle and low-level employees;
- Low understanding of the importance of trainings by high level officials;
- Poor centralized management, implying a lack of legislative regulation;
- Problem of administrative responsibility, when the project team members were made responsible for the number of trainees, without providing them with proper authority and discretion to demand attendance and urge public agencies to release their employees during the session hours;
- Lack of political will;
- Lack of centralized planning.

The preliminary documents drafted by donors and providers included a detailed description of each module and compliance with existing ranges and positions in the public sector. Despite this, registration of participants was mainly conducted

in a non-systematized way and in most cases, decided by department-level officials. As far as the needs of the public sector in terms of training and development have not yet been studied and also the fact that there are no common job descriptions according to the positions and ranges, the participants were often randomly registered for specific modules, without taking into account their interests and needs. Of course, this approach lowered employees' motivation and the efficiency of the training. There were cases where participants would come only because of a sense of duty and often had no idea about the module they were to attend. Some of them later mentioned in the evaluation forms that they had already attended similar training, thus for them it had been a waste of time.

*Perception of Training and Professional Development as a Necessary Component of the Stability in the Public Sector:*

Multiple evidence from other countries' case studies as well as the scientific literature shows that governmental instability leads to a decrease in professional standards and the motivation of civil servants. This has also been proved by the presented analysis. A frequent change of political power, reorganization and structural reforms prevents the establishment of solid and strong political institutions. One of the factors for the stability of the public sector is the development of common standards for personnel management, which, in turn, is quite a complicated issue and requires a comprehensive approach. But, it is also important to maintain the discretion of an individual agency in staff recruitment, promotion or development. T&D implies the need for professional growth for public servants and, most importantly, the government's responsibility regarding this component. The above project clearly showed that the participants had not linked the training to their career growth and development. Moreover, attendance was significantly higher at the so-called general skills training (human resource management, presentation and writing skills, project management and strategic planning), compared to the public sector specific modules (open governance, civic participation, ethics in the public sector, public administration, public policy development and legislative framework). This clearly indicates a tendency for public employees to make use of the opportunity and develop such skills, which will increase their competitiveness in the private and non-governmental sectors. This approach, of course, prevents the formation of a stable civil service, staffed with highly qualified and motivated personnel.

In summary, the implications of the evaluations made by civil servants identifying the arguments supporting the effectiveness of a semi-centralized scheme of training delivery, mean that the following can be underlined: the critical comments mostly referred to the poor organization and low motivation from the side of the governmental agencies, namely, the HR personnel who were responsible for sending out the schedules and setting participants groups. However, the participants positively evaluated the work of the consortium member organizations, i.e. training providers. A unified approach to the T&D policy and legislative regulation of the

issue will provide a mandatory nature of the trainings; the sessions will be scheduled on a regular basis to avoid undesirable intensity of the process, and will allow employees to select the modules according to their needs and work interests within the convenience time period; preliminary needs assessment and centralized development of the modules will increase the compliance of the trainings with the requirements of the public sector, as well as individual agencies. Particular emphasis is also placed on groups' homogeneity issue, which means, on the one hand, staffing groups by the ranks, length of service and experience, and, on the other hand, will make the trainings mandatory for high-level officials.

At the same time, project participants highly evaluated the practical experience of the trainers from the consortium member organizations, their knowledge, communication and teaching skills; use of modern teaching methods; learning environment and infrastructure, which contributed to the effective perception of educational materials; use of providers' expertise for consultation during and after the trainings to facilitate using the new skills and knowledge in the everyday working environment. The evaluation also highlighted another factor, which can be named as an additional advantage of the training process: participants were given the opportunity to meet their colleagues from various agencies and establish informal contacts, which enhances public sector stability, as well as increases its ability to respond to the new challenges in the environment. In general, various factors indicate the success of the project, such as: audience satisfaction, increase in the number of employees willing to participate during the project implementation, especially during the last phase, index of knowledge comparison before and after the training sessions through the pre- and post-tests, and participants' evaluation of the modules by the relevance to their everyday work. The quantitative data from the surveys confirm the conclusions made after the in-depth interviews and the project evaluation analysis. The respondents mainly emphasize the same factors, identified above as the flows of the decentralized scheme. Namely, ineffective communication between coordinating agency and providers, lack of unified policy of training and development, a centrally developed approach to the process as well as criteria for quality assessment. Thus, it is obvious that in order to maintain high quality, project planning and control must be the responsibility of the state and the implementation should be provided by independent actors who, in the competitive environment, meet the conditions set forth by the government. It is important that the participants gave a positive assessment to the relevance of the content of modules to their daily work and emphasized the overall success of the project, as the first attempt to provide systematized training in the public sector. They also admitted the importance of regular training and the involvement of employees at all levels in the process, especially considering the legislative changes and ongoing reforms in the public sector.

### 9.5.2 Comparison of Semi-centralized and Decentralized Models of Training Delivery based on Turn-over Data

The third research hypothesis was developed based on the following arguments: we selected the turn-over rate as a main characteristic of the public sector stability, as the low turn-over, on the one hand, indicates the attractiveness of the public sector as employment and, on the other hand, provides the establishment of strong state institutions. Consequently, we tried to identify which training model contributes more to the low turnover of public employees. We used the data on employees turn-over collected for the years 2009 and 2014 from the executive agencies of central government. The data were analyzed in STATA, by using the Chi square test, with the significance level 0.5. The test was conducted individually for every agency as well as for the total number of servants by categories within the sample. Below is provided a Table with the aggregated numbers from all eight ministries.

**Table 2**  
Aggregated Numbers by the Ministries

	2009	2014	<b>Total</b>
No of servants left in the office	3004 (3174.08) [9.11]	2558 (2387.92) [12.11]	5562
Personal request	293 (283.62) [0.31]	204 (213.38) [0.41]	497
Structural changes/other causes	626 (454.83) [64.42]	171 (342.17) [85.63]	797
Employment within the sector	66 (76.47) [1.43]	68 (57.53) [1.91]	134
<b>Total</b>	3989	3001	<b>6990</b>

The Chi square statistic is 175.3406.  $p < 0.00001$ . The p-value is .000173. The result is significant at  $p < .05$ . The difference between the data from 2009 and 2014 was revealed as statistically significant in all samples except the Ministry of Culture and Monuments Protection. The analysis of total numbers also revealed a statistically significant difference. Consequently, the research hypothesis has been confirmed, namely, that: The semi-centralized scheme of training delivery increases the stability of public sectors, as compared to the decentralized scheme. The obtained data once again underline the importance of the findings, which were identified in qualitative interviews and quantitative analyses of the employees' evaluations of the training project. Although we cannot consider one particular factor as determining the stability and effectiveness of the public sector, even the factor of the utmost importance, such as the model of training delivery, determines the professional development and career growth of civil servants. Considering the existing context of the country, the effectiveness of the trainings depends on various factors, including

administrative discretion and freedom from political influence at the mid- and low-level positions, effective communication within the public sector as well as with external actors, and development of the providers' market etc.

## 9.6 Conclusion

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The data collected in the results of the project evaluation can be used as supporting arguments for establishing a semi-centralized T&D model in the public sector, confirming the general hypothesis of the study. It considers the development of the modules, monitoring and evaluation criteria and quality control mechanisms, provision of accreditation procedures for the external actors and regular needs assessment to determine training areas by the relevant governmental body. The discussion on the proper T&D system in most of the post-Soviet countries is still ongoing. It gains the utmost importance in the light of introducing EAS standards in a local context. The new Law on Civil Service of Georgia aims at referring to the EAS principles of public administration for member and candidate states. Two components, reliability and predictability, should be particularly emphasized, as they greatly contribute to the effectiveness of the public sector, especially in the Georgian context, where stability is amongst the major problems in the civil service. High turnover of employees, as well as a low level of professionalism and qualification of the existing cadres, are the obvious indicators of the above. Consequently, the legislator addresses the T&D system to regulate these problems. Based on the new Civil Service Law, particularly in terms of establishing a professional civil service, the Civil Service Bureau must have a sufficient mandate to be assigned the role of leading in organizing a professional development and training system and making decisions in terms of policy. On the other hand, a variety of private and non-governmental organizations and training institutions should be involved in the delivery of high standard trainings, providing a wide range of qualified trainers, a high level of motivation, intensity and a proper infrastructure and logistics for the training courses.

However, it should also be mentioned that strict centralization may lead to a dramatic drop in quality. Accordingly, the presented research on the educational institutions and other training providers acquires a special meaning for decision-makers in the public sector. The results of this study can be used in the future to create a strong network of organizations. The paper places major emphasis on the structure of the T&D system and regulation of the process. Relying on the experience of other post-socialist states, it is clear that the selection of a proper model is largely dependent on the form of government, development and strength administrative institutions and their capacity; however, the study has proved that a semi-centralized scheme is the most justified in the existing context, giving enough flexibility to the government to control professional qualifications and the career growth of the employees and, at the same time, allow the development of a free market, creating a competitive environment among providers and their ability to

enhance the cooperation network. We believe that this is the only way to create a solid foundation for a strong, politically united, professional civil service establishment in Georgia.

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## 10. What Motivates Civil Servants in Belarus: Money Cannot Buy Happiness

*Ina Ramasheuskaya, Natallia Rabava*

### 10.1 Introduction

The building of an effective public administration system is one of the key ways of increasing the competitiveness of the Belarusian economy. As indicated in the Strategic programme for the sustainable development of Belarus till 2030, one of the challenges that need to be addressed in order to improve the effectiveness and quality of governance is an increase in the professionalism and prestige of the civil service.

These issues are closely linked with the motivation of civil servants and their assessment of the importance of different aspects of their work. Motivation of civil servants is increasingly being researched, not just by academics but also by different international organizations that are interested in creating effective mechanisms of support for international development programmes.

The issue of motivation in the civil service has special significance in the light of the dramatically new expectations of modern public administration: for example, the concept of “public sector agility”, promoted by OECD, focuses on both strategic aspects of public administration and on a high level of responsiveness to changing external demands. This concept is partially adapted from the private sector (‘strategic agility’) in response to the increasing demands and expectations of national governments by citizens. Thus, national governments are expected to effectively address international and regional challenges as well as increase the quality and quantity of public services without increasing budgetary spending. Moreover, citizens expect that their individual preferences will be incorporated in the service design and that services will be provided quickly and efficiently (OSCE, 2015).

Of course, addressing these ever-increasing expectations and often shrinking finances poses the question for all national governments: How can the best people be attracted to the civil service and what can motivate them to stay? At the same time, many national governments find it important to attract the right kind of peo-

ple who are not expecting the same level of remuneration as in the private sector. The issue is even more pressing in those countries that are undergoing economic transformation. In this case, the government is expected to direct and manage economic reform and its own transformation (see for example Koprivic, 2009).

As Belarus too is seeking to improve the efficiency and effectiveness of its public administration, various initiatives are being undertaken by the government towards this aim, with or without the cooperation of international organizations. However, these initiatives lack a systemic approach and, moreover, are directed at different parts of the government without merging into a comprehensive framework to address the problems that pervade the government apparatus in Belarus. We argue that the principles of European Administrative Space can become a foundation for carrying out public administration reform in Belarus.

Formally, Belarus can be viewed as “bouncing” on the edges of European Administrative Space, without fully committing itself to any particular direction of government reforms. However, there exist continual practical interactions between public officials in Belarus and their counterparts in Eastern and Central Europe in the hope of obtaining technical expertise which would help to carry out the much needed economic reform. Moreover, as relations between Belarus and the EU continue to gradually improve, Belarusian public bodies would be able to make use of a wider range of instruments offered by the EU for the exchange of expertise in public administration (for example, Twinning) (BelTA, 2016).

As an independent research centre, we see our role as bringing to the attention of policy makers in Belarus that borrowing from the experience of the EU and its member countries cannot be understood as “technical expertise”. Changing the way the government manages the economy would require not just changing the economic model, but changing the principles on which the government in Belarus functions.

In this regard, EAS principles provide a substantive framework that Belarus can use to employ a systemic approach to its public administration reform.

However, implementation of these principles should take into account both formal and informal practices in the institutions that will be undergoing transformation. For example, the National strategy for sustainable social and economic development till 2030 states (Economic bulletin of ERI, 2015) that regional governance bodies will become more independent in their decision-making and utilize target indicators in their work, and that line ministries will play a key role in the development of public policies in the corresponding policy spheres. However, these changes are not possible without qualitative changes in public administration bodies and other state organizations on different levels, and without changes in the motivational structure of the civil service.

Why do we believe that a study of civil service motivation is important in the light of EAS principles? Several arguments could be put forward (in reverse order of EAS principles as stated in F. Cardona, 2009):

- Efficiency in the use of public resources and effectiveness in accomplishing the policy goals established in legislation and in enforcing legislation.

Efficient and effective use of public resources for the achievement of established policy goals is not possible without selecting and recruiting professionals to work in governmental bodies responsible for the development and implementation of policies. In order to attract and retain highly qualified professionals in the civil service, it is necessary to have an adequate motivation structure in place in governmental organizations. The Belarusian government is keen to attract professionals educated abroad (especially with advanced degrees in economics) and have plans to send officials responsible for economic development to study abroad. However, without creating an organizational culture that solicits professional opinions and does not punish those opposed to established practices and rewards individual ambition and performance, governmental bodies would not be able to retain the most professional civil servants or make full use of their expertise.

- Accountability of public administration to other administrative, legislative or judicial authorities, aimed at ensuring compliance with the rule of law

Implementation of this principle would again require a re-orientation of the organizational culture in Belarusian governmental bodies from the one where loyalties lie predominantly with an organization or a high ranking person within the organization, to one where loyalty lies with the constitution and the rule of law. This change of organizational culture is not possible without a thorough understanding of the current organizational culture and the ways it propagates both formally and informally.

- Openness and transparency, aimed at ensuring the sound scrutiny of administrative processes and outcomes and its consistency with pre-established rules

Again, openness and transparency does not seem to currently be the inherent values of the Belarusian civil service where, on an individual basis, the problems of low efficiency and effectiveness are often recognized but the need to have an open and transparent discussion of these problems with society is denied. The change towards openness and transparency would, again, require a change in the way civil servants are recruited and socialized, with the emphasis on serving citizens as opposed to serving politicians or a politician.

- Rule of law, i.e. legal certainty and predictability of administrative actions and decisions, which refers to the principle of legality as opposed to arbitrariness in public decision-making and to the need for respect of legitimate expectations of individuals.

It can be expected that the implementation of the first three principles would result in the refinement of the commitment to the rule of law among Belarusian officials, especially when it comes to meeting the expectations of citizens in the delivery of public services. Here again we argue that it is necessary to study the motivation of civil servants in Belarus to find out how the existing motivational mechanisms can be enhanced to bring about this refinement.

In summary, we suggest that any systemic changes to the public administration system in Belarus, including moving towards the implementation of the EAS principle, should be based on thorough research of contemporary practices in the governmental apparatus in general and in civil service in particular, with emphasis on its motivation system, a formal and de-facto decision-making system, organizational culture and a system of socialization of civil servants.

It is especially important when one considers that current attempts to improve the civil service system in Belarus are based on the mere assumptions of decision-makers (the President in particular) about the motivation of civil servants. A quick analysis of the discourse of Belarusian political leaders shows that according to their assumptions, pay is the crucial motivation factor. They believe that the level of financial compensation determines the attraction of the civil service in general, and individual organizations in particular, and also indirectly determines the quality of civil servants' work. In accordance with this assumption, all efforts to increase the prestige and effectiveness of the civil service should first focus on maintaining an adequate level of pay, including a reduction in the number of civil servants and distributing the savings amongst those who remain in the service. Indeed, in 2013 the number of civil servants is reported to have been reduced by 25 % in accordance with the Presidential Decree (Decree of the President of the Republic of Belarus, 2013).

Although no analysis of the impact of this reduction was carried out, especially with regard to the effectiveness of governance or even the resulting increase in pay, there have been several announcements of planned further reduction of the civil service in order to increase the level of pay and therefore presumably make the civil service more effective (BelaPAN 2015).

In Belarus, academic and policy research on public service motivation is in its nascent phase. The first study of the motivation of civil servants was performed in the framework of comparative research of local civil servants from two neighbouring regions of Belarus and Poland (Prysmakova 2016). The study looked at the effects of state centralization on public service motivation in the two historically and culturally close regions. However, the findings did not suggest any uniform connection between centralization and the different aspects of public service motivation.

The current state of Belarus' civil service development is different from most countries in the European neighbourhood in one important aspect, specifically that there is no competing party influence on civil servants. Elections to the National

Assembly (Belarusian Parliament) are not based on the political party system, and although several parties (both pro-government and oppositionist) do exist in the country, they do not have any bearing on the political or policy processes in Belarus. Therefore, the link between politicization of appointment and the removal of civil servants and their motivation that appear to have had significance in Eastern European members of the EU (Meyer-Sahling, J. 2009) is difficult to observe in Belarus. This does not mean that there is no competing influence on policy decisions in Belarus, but this seems rather to come from different lobby groups (industry, agribusiness, “siloviki” etc.) (See for example the Belarusian Yearbook 2013) and therefore much more difficult to research and assert because of the fluidity and opaqueness.

Another important factor that seems to influence public service motivation in Eastern Europe (Meyer-Sahling, J. 2009) and the Western Balkans (Meyer-Sahling, J. 2012) appears to be the perceived fairness of the pay system in the civil service. At this stage, some elements of the “pay for performance” system exist in Belarus, but allocation of the evaluation of performance and allocation of bonuses remains highly discretionary and relies on the judgement of the organization’s head. Our hypothesis is that this discretionary “pay-for-performance” system has a negative effect on the motivation of civil servants in Belarus, the lower the perceived fairness, the more significant the effect on motivation (thus concurring with the connection identified in Eastern Europe and the Western Balkans). However, further studies on this are obviously required and incorporated in our research plans.

Overall, we believe it is very important to research the motivation of civil servants in Belarus in order to create an empirical base of evidence for planning future reforms. Based on international practices, we suggest involving independent experts and civil society organizations in this research in order to increase the validity and verifiability of results.

In our research, we were guided by the Principles of Public Administration formulated as a framework for European Neighbourhood Policy (ENP) countries (SIGMA 2016). Specifically, we found that the two principles outlined in Section 3 (Public Service and Human Resource Management) serve as good guidance for planning this and further SYMPA studies of public service motivation and formulating recommendations for the improvement of human resource management in the civil service in Belarus.

Although the Law on Civil Service of Belarus (as amended in 2015) contains some provisions for merit-based recruitment and the promotion of civil servants, it does not stipulate specific mechanisms for ensuring merit in these processes. Largely, recruitment, promotion and dismissal lie within the discretion of the organization’s head. The threat of dismissal, in particular, is very grave as civil servants in Belarus have virtually no legal job protection as most of them work on short-term contracts. Therefore, we believe that Principle 1 of Public Service and Human Resource Management (Principle 1: The policy and legal frameworks for a profession-

al and coherent public service are in place; the institutional set-up enables consistent and effective human resource management practices across the public service) outlines the potentially significant direction of future reform. Specifically, we think that point 3 of this Principle (Public service regulations, particularly with regard to recruitment, promotion and dismissals, prevent direct or indirect unfair discrimination) deserve attention as a step which is both critical and realistic.

While in principle Belarusian civil servants' appointments are based on professionalism, in practice many civil servants note that they are not ready to defend their professional opinion or come up with initiatives because of being afraid of losing the "favour" of their superiors.

This recommended step is also congruent with Point 6 of Principle 2 (The scope of public service is adequate and clearly defined: Public service legislation is applied in practice in all institutions and to all positions, as stipulated by the laws).

## **10.2 Recommendations for future reforms**

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When planning the improvement of the system of stimulation of civil servants, we recommend taking into account such factors as support for individual initiative and the opportunity to gain new skills and competencies. Other important factors worth paying attention to are the stability of the working environment and the importance of self-realization in general. Stability of employment conditions and the encouragement of professional development and initiative would contribute to further professionalization of the civil service. The frequent announcement of plans for the reduction and changes in the rules of employment in the civil service, on the other hand, is not recommended, as it leads to lower motivation amongst employees.

Furthermore, it is recommended to take into account the fact that most probably the strongest consolidating factor of motivation among civil servants currently is empathy, and the factor that is most closely linked with their life satisfaction is serving society. It is the responsibility of those in charge of human resource policy in the civil service to make sure that these aspects are factored into the development of further policy.

Those in charge of human resource policy development in the civil service (the Presidential Administration) are advised not to focus exclusively on the issues of financial compensation (as is currently the case) but to take into account other motivation factors. Policymakers are advised to regularly conduct surveys on motivation and satisfaction in the different aspects of work in governmental organizations, in cooperation with and commissioned to independent research organizations. This will provide evidence as well as benchmarks for planning future steps towards the implementation of the Principles of Public Administration on human resource management.

Lastly, it is recommendable to provide open access to the results of such surveys and hold discussions regarding their results on different levels of governance, engaging the public. This would serve as a vehicle for increasing the transparency of public administration, engaging citizens in decision-making and building trust between civil servants and citizens. Hence, it is worthwhile to utilize the results of this and subsequent research on motivation amongst civil servants in Belarus in order to increase the effectiveness, professionalism and the prestige of the civil service in Belarus and to achieve corresponding goals of national sustainable development strategies.

### **10.3 Methodology**

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The objective of this research is to start collecting evidence on the motivation of civil servants in Belarus to contribute to the body of data on this issue.

Since the research coincided with the run-up period to the presidential elections in Belarus we used the “snowball” method of distributing questionnaires (which we hope also helped to address the problem of respondents (civil servants) giving the answers expected of them). The initial sample included 14 people, and the total number of collected questionnaires amounted to 182.

The questionnaire included 21 questions, of which 7 explored 4 intrinsic components of public service motivation – the desire to participate in the workings of state, the desire to serve society, self-sacrifice and empathy based on Perry (1996), 3 dealt with external factors of civil service attractiveness (salary, stability and recognition by colleagues), 9 – explored satisfaction through the different aspects of working in the organization and 1 dealt with the general level of satisfaction in respondents.

The first question asked the participant to range 7 mixed factors of motivation in the order of importance. However, some respondents assigned weights to individual factors instead of ranging them. We analysed these two groups separately.

The questionnaire also collected information on the gender and age of respondents, number of years they worked in the civil service and the size of town or city they live in.

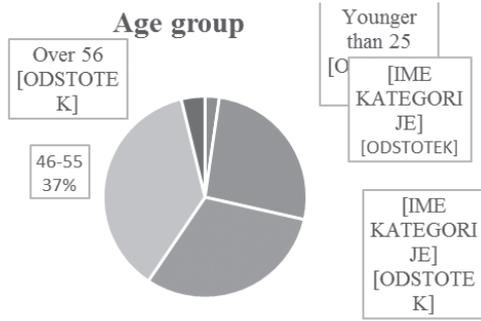
### **10.4 Analysis**

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#### **10.4.1 Social and demographic data**

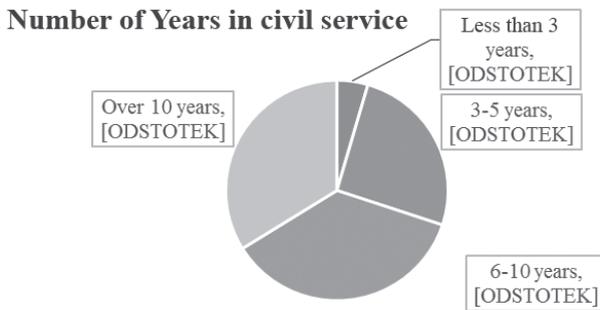
182 people took part in the survey. 129 questionnaires were completed in full, in 53 questionnaires 3 questions (5, 6 and 15) were missing because of a copying mistake. Gender: 49.6% female, 50.4% - male.

Distribution by age groups



In Belarus, people usually graduate from higher education institutions at the age of 23–24. Since entering the civil service usually requires a higher education, the low number of people younger than 25 is quite normal. There is also a so-called “distribution” system whereby those students who received their education free-of-charge on a competitive basis have to work for 2 years at a place that is selected for them (otherwise they would have to “pay back” the state the market cost of their tuition). It means that some people enter the civil service, not because it is their choice, but because they are “distributed” there. Often they move to a different place immediately after their required term of work is over. Therefore, some percentage of the age group 26–35 may be these people, but we do not have any data on what percentage of them are “distributed” to their work places.

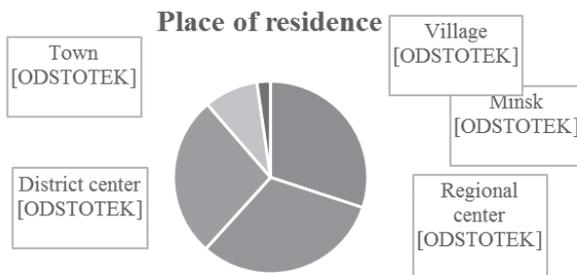
Distribution by number of years in civil service



As one can see from this distribution, the percentage of people who have spent less than 3 years in the civil service, is very low – just 4%. It can be explained by the methodological reason: snowball methods presume that people give questionnaires

to those they trust. This is certainly, with high probability, people of their own age and level, not the “newbies”. So here we can see that we have a sample of people who have more or less chosen the civil service as their work place for a certain time, especially 34 % of respondents who have worked there for more than 10 years.

Distribution by the size of city or town



30 % of respondents live in the capital (Minsk), 32 % - regional centres (there are 5 of them in Belarus), 27 % - district towns, and 9 % - small towns.

### 10.4.2 Motivation factors

As we have mentioned earlier, there were two groups of respondents who differed in their interpretation of the request to rate the motivation factors. The first group (49 people), in accordance with the original design rated 7 factors in order of importance (1 – most important, 7 – least important). The results in descending order of importance can be seen below ( $n=49$ ):

<b>Motivating factor</b>
Opportunity for self-realization
Social protection and stability
Recognition by colleagues and managers
Position, status
Financial compensation
Working for the common good
Good working environment, good colleagues

The second group (133 people) assigned weights to each of 7 factors in accordance with their importance (1 – most important, 7 – least important). In this group,

we rated the motivating factors in accordance with the average assigned weight. The result in decreasing order assigned average weight ( $n=133$ ):

<b>Motivating factor</b>
Opportunity for self-realization
Social protection and stability
Working for the common good
Recognition by colleagues and managers
Good working environment, good colleagues
Position, status
Financial compensation

In both groups, we see that the top two rows are occupied by “opportunity for self-realization” and “social protection and stability”. It is interesting to note however, that “financial compensation” is assigned the minimum weight in the second group. To some extent, it challenges the existing assumption amongst Belarusians that the civil service attracts mainly people who are “good subordinates” as we see that both lists are topped by “self-realization” rather than “social protection and stability”. However, it shows that people who chose the civil service as their place of employment also highly value stability. This goes against the current plans of the country’s leadership to continue with a reduction in the number of civil servants. In our recommendations, we argue that frequent changes of rules and plans regarding civil servants diminishes the predictability of the working environment and leads to lower motivation amongst workers.

### 10.4.3 Responses to the questionnaire

The results we have received reveal the following, as shown through 21 questions listed in the Table below. The responses show a very high value of empathy as a factor of public service motivation. Responses to the questions on empathy show a high average value and low variation. We can suppose that empathy is either an important factor of personal motivation to work in the civil service, or a dominating value in the organizational culture, thus prompting a normative selection of higher values.

The lowest values are present in the responses to the question about whether respondents think they are being paid fairly for their work. It means that respondents, on average, believe they are not paid fairly. At the same time, responses to the question on the financial factor being a dominating one when selecting a job show quite a low average value. However, the variation of this value is quite high. We can suppose that civil servants differ in their assessment of the importance of the financial factor, but agree that their pay is unfairly low. Alternatively, they may

feel that the system of pay is not fair (as we commented previously; organizational heads have a lot of discretion over the distribution of bonuses). Further exploration of the perceived fairness of the pay system is required, if the goal is to get close to the fulfilment of Principle 1.

Question	Average value (1-7)	Standard deviation
2. I am ready to sacrifice some of my interests if it benefits society as a whole	6.36	0.83
<b>3. I very much sympathize with people in difficult life situations</b>	<b>6.51</b>	<b>0.68</b>
4. I like to explain to people how the government helps them in different ways	6.37	0.77
<b>5. It is very difficult for me to see when people are not treated fairly</b>	<b>6.69</b>	<b>0.56</b>
6. I believe that only the people who put duty before personal interests should join the civil service	6.18	1.42
7. It is important for me that my colleagues and superiors listen to my ideas	6.20	1.06
8. I like it when my professional knowledge helps people to solve their life's problems	6.25	1.01
9. It is important for me to work in a good tight collective where people have known each other for quite a while	6.25	1.12
<b>10. When choosing a job, the most important factor for me is salary, everything else comes second</b>	<b>5.30</b>	<b>1.52</b>
11. It is important for me to be perceived as a person who is useful to society	5.88	1.22
12. I have a good understanding of the goals and objectives of my organization	6.02	1.18
13. I feel that my colleagues and managers listen to my opinion	5.57	1.46
14. I feel that I can give my direct opinion on work issues	5.43	<b>1.60</b>
15. My managers support my initiative even though it may fail	<b>5.53</b>	<b>1.58</b>
16. If asked, I am ready to recommend my organization as a place to work	5.81	1.36
17. I believe that I receive fair pay for my work	<b>4.70</b>	1.3
18. I understand my work duties very well	6.30	1.05
19. My managers support me in obtaining new skills and competencies	6.26	1.034
20. I like to tell people where I work	6.25	0.96
21. In general, I'm satisfied with my life	6.09	1.13

The policy and legal frameworks for a professional and coherent public service are in place; the institutional set-up enables consistent and effective human resource management practices across the public service with SIGMA-recommended policy, and legal and institutional frameworks for the public service (SIGMA 2016).

Two more questions that have a relatively low average value but high standard deviation are: “My managers support my initiative even though it may fail” and “I feel that I can give my direct opinion on work issues”. We can suppose that a high standard deviation of the value given as a response to these questions indicate that not all governmental organizations support initiative and directness.

Again, a more thorough implementation of Principle 1 would require efforts to make the support of initiative and direct expression of professional opinion consistent throughout the public service. This issue is closely linked with the movement towards a professional civil service.

At the same time, the respondents on average gave high marks with low variability to the statement “I like to tell people where I work” but were slightly less enthusiastic and more diverse in their readiness to recommend their organization as a place to work.

The level of deviation differs for respondents in towns of different size. We have calculated the standard deviation separately for all types of cities for the answers to those 3 questions where the variation was the highest and there was 1 question with the lowest variation. As a result, the high level of standard deviation is achieved due to the answers from the capital, Minsk. But, in some cases, Minsk answers are more consolidated, and in others they are more variable than the regional ones.

Here is the standard deviation for the answers to question “14: I feel that I can give my direct opinion on work issues”:

Town size	Standard deviation
Minsk (n=45)	<b>1.111010096</b>
Regional centre (n=55)	1.691133543
District centre (n=49)	1.598787806
Town (n=25)	1.624807681
Average	1.60

As we can see, all the regional answers (from regional centres, district centres or just towns) are distant from each other compared to Minsk. It can be explained by the fact that more freedom of opinion is tolerated in the capital, including the civil service, and people feel it easier to speak their minds compared to the regions. In addition, all the ministries and all the central decision-making bodies with a presumably higher level of professionalism are located in Minsk. At the local level, professional life is more rigid; it is also more difficult to find a job if you lose yours

because of speaking your mind. (There were also answers from village level but their number (9) is not sufficient to make any conclusions, so they are ignored here)

A similar situation also appears with the question “15. My managers support my initiative even though it may fail”: Minsk answers are closer to each other than the regional ones:

Town size	Standard deviation
Minsk (n=45)	<b>1.03579655</b>
Regional centre (n=55)	1.610974269
District centre (n=49)	1.911850521
Town (n=25)	1.750457816
Average	1.58

However, in the question which is third by variation, “10. When choosing a job, the most important factor for me is salary, everything else comes second”, it is the opposite: Minsk shows more polarized opinions than the regions:

Town size	Standard deviation
Minsk (n=45)	<b>1.611825</b>
Regional centre (n=55)	1.559591
District centre (n=49)	1.400923
Town (n=25)	1.354006
Average	1.52

Nevertheless, the difference is not as significant as in the previous cases.

The least dispersed answers (the answers to question “5. It is very difficult for me to see when people are not treated fairly”) also show some difference in Minsk compared to the remainder of the country. Minsk responses are closer to each other in the high value of this factor (6.69 average value):

Town size	Standard deviation
Minsk (n=45)	<b>0.365518</b>
Regional centre (n=55)	0.64347
District centre (n=49)	0.466092
Town (n=25)	0.650444
Average	0.56

#### 10.4.4 Correlations

We have not found statistically significant correlations of the responses with age, gender, number of years in the civil service or size of the town or city. Naturally, the number of years in the civil service positively correlates with the age of respondents.

The importance of the financial factor when selecting a place to work has low correlations with the perception of salary as fair. We can presume that if people do not join the public service because of money, then they can tolerate it if their salary is unfair (in their opinion). Instead, they find other motivation factors more important than money. Again, the perception of fairness of low pay correlates with their readiness to recommend their organization as a place to work. People decide to recommend their organizations (or not) not just because of the financial factor. Alternatively, we can suppose that they recommend their organizations to the people who are not motivated by money either.

Civil servants are more likely to recommend their organization as a place to work if they feel they can speak their minds and that their management supports their initiative. At the same time, these two factors have the highest variation of answers. We can suppose that the situation depends on their place of work. However, these are not the only factors connected to the willingness to recommend their organization: the standard deviation (1.36) for the answers to this question is less than those mentioned above (1.60 and 1.58). The perception of fairness of low pay correlates with their readiness to recommend their organization as a place to work. General life satisfaction correlates with many aspects of work, most strongly with the following (in descending order):

- My managers support my initiative even though it may fail;
- My managers support me in obtaining new skills and competencies;
- I'm pleased to tell people where I work;
- If asked, I am ready to recommend my organization as a place to work.

Among the motivation factors, the strongest correlation with life satisfaction was found with the component of "Serving society" and the weakest – with the domination of financial compensation when selecting a place to work.

### 10.5 Conclusion

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Building a quality public administration system is one of the key ways to increase the competitiveness of the Belarusian economy. As indicated in the Strategic programme for the sustainable development of Belarus until 2030, one of the challenges that need to be addressed in order to improve the effectiveness and quality of governance is an increase in the professionalism and prestige of the civil service. Without close attention to the issues of motivation amongst civil servants, it is not possible to focus the public administration system on the implementation of new

goals and tasks, including the interaction with civil society on a wide range of social and economic development issues. There is the possibility of the adoption of the principles of European Administrative Space to be the foundation of a systemic approach to the reform of public administration in Belarus. The importance of studying the motivation of civil servants in the implementation of EAS principles is discussed, together with the practical implication of such studies.

This study has shown the issue of civil servants' motivation in Belarus. It is built on the analysis of 182 questionnaires collected from public officials in Belarus, which included questions about intrinsic and extrinsic motivation factors, as well as questions on an organizational environment. Most importantly, the responses show a very high value of empathy as a factor of public service motivation. Responses to the questions on empathy show a high average value and low variation. The lowest values are present in the responses to the question if respondents think they are being paid fairly for their work. It means that respondents, on average, believe they are not paid fairly. At the same time, responses to the question of the financial factor being a dominating one when selecting a job, shows quite a low average value. The perception of the fairness of low pay correlates with their readiness to recommend their organization as a place to work. Moreover, civil servants are more likely to recommend their organization as a place to work if they feel they can speak their minds and that management support their initiative. It therefore seems that money cannot buy happiness in the civil service.

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# 11. European Principles as a Framework of Access to Public Information in the Slovene Public Administration and Judicial Review

*Polonca Kovač*

## 11.1 Introduction

Openness and transparency in general and, in particular, in public administration (hereinafter: PA), are key European Administrative Space (hereinafter: EAS) and good administration principles. In theory, the importance of these concepts is highly recognized, mainly as a means to enhance democracy and accountability.<sup>1</sup> Both are especially important in Eastern and Southern Europe to bridge the post-socialist legacy (cf. Vintar et al. 2013; Koprić 2014, 319–344). Consequently, supra- and national legislation and strategic documents pursue individual issues related to transparency, access to public information included.

Key documents that tackle access to public information or RTI (right to information) are globally the UN Universal Declaration of Human Rights (1948) and at the European level the European Convention on Human Rights (1953, Art. 10), Council of Europe resolutions (especially (81)19 on the Access to Information held by Public Authorities and Rec(2002) 2 on Access to Official Documents), and the EU law and case law. The most important sources regarding the EU are the Treaty on the Functioning of the European Union (TFEU, OJ C 326/47, 26.10.2012) with Art. 5 (publicity), 11 and 15 (transparency), and 1, 10, 15 and 298 (openness). Based thereon, the EU adopted Regulation (EC), namely No 1049/2001 of the European Parliament and of the Council of 30 May 2001, regarding public access to the European Parliament, Council, and Commission documents (OJ EC, L 145/43, 31.5.2001), and Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on

<sup>1</sup> See different authors on connections amongst these principles, e.g. Banisar 2006; Savino 2010; Rusch 2014; Pirc Musar 2015; Galetta et al. 2015. Likewise by OECD/SIGMA 2014 or 1999, 12: “Openness and transparency are also necessary instruments for the rule of law, equality before the law, and accountability.”

the free movement of such data. Moreover, there are the EU Ombudsman's Code of Good Administrative Behaviour (2005, 2012), and the EU Charter of Fundamental Rights (2010, Art. 41 and 42). In addition, we find the European Commission White Paper on European Governance (2001), and SIGMA's principles as developed since 1998 to 2014 versions, presenting a set of accession criteria for candidate countries.<sup>2</sup> All the documents include the RTI and transparency principle as key ones in pursuing good administration.

Slovenia joined the EU in 2004. In 2003, the Slovenian RTI Law was enacted.<sup>3</sup> The latter law was also grounds for the initiation of a State Information Commissioner (IP). Consequently, there have been many cases conducted in Slovenia between 2003 and 2015, with many ending up in front of the Administrative Court or Supreme Court. Several cases have even been discussed by the Constitutional Court of the Republic of Slovenia since Slovenian Constitution provides RTI respective protection.<sup>4</sup>

This chapter tackles the research question of whether and to what extent Slovenian administrative authorities provide access to public information as stipulated by law, based on an analysis of the relevant case law. The main issues addressed by competent courts are further compared to EAS and good administration principles. Through such a comparison we verify the anticipated implementation gap in the field and identify key elements that need to be addressed at the strategic level in future in Slovenia and beyond.

## 11.2 An assessment of the Slovene regulation and development regarding transparency

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As in Europe in general, but also in Slovenia, concepts of EAS and good administration with transparency included, have been one of the guiding principles for PA reforms for the last two decades. The EAS has served and still serves as a common European administrative infrastructure for the joint formulation and ex-

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2 This document is relevant for the EU MS as well since the transitional Eastern European region still faces lack of administrative capacity, accountability and citizen oriented systems.

3 Hereinafter: the (Slovene) RTI law, in Slovene: *Zakon o dostopu do informacij javnega značaja*, Official Gazette of the Republic of Slovenia, No 24/03 and amendments. Regarding the latter, there were five amendments of the law adopted in 2005, 2006, twice in 2014, in connection to added liability regarding RTI of state companies, and 2015. Moreover, the law was amended twice by Tax Procedure Act, trying to overcome the general principle of openness by tax secret. Despite several attempts, only once the Constitutional Court found the RTI law as partially unconstitutional, so it repealed it only once (cases U-I-201/14, U-I-202/14, 19.2.2015, on information regarding "bad bank" maps).

4 Art. 39 (Freedom of Expression) of the Slovene Constitution from 1991 stipulates: "*Freedom of expression of thought, freedom of speech and public appearance, freedom of the press, and other forms of public communication and expression shall be guaranteed. Everyone may freely collect, receive, and disseminate information and opinions.*"

ecution of public policy (Trondal and Peters 2013, 295), even though the concept of good governance/administration is more common in today's theory and practice.<sup>5</sup> In Slovenia, the development in this respect has been and still is conducted rather unsystematically and more regulatory as value change oriented. Nevertheless, the degree of awareness for the need for open and good administration governance is rather high in Slovenia, taking into account EU guidelines. Yet, regulation alone does not suffice and should be followed by effective implementation to overcome the ongoing processes of Europeanization and (post)transition (Kovač and Virant 2011, 230).

Slovenia adopted the RTI law in 2003, which is still a modern law, assessed, for instance, by the non-governmental organization Access Info Europe as the second best global wide.<sup>6</sup> The law is based on the general principle of overall and primary openness (Art. 5) but allowing a set of exceptions. In principle, public information under Art. 4 of the FOIA is (cf. Pličanič et al. 2005, 82, etc.): *“Public information shall be deemed to be information originating from the field of work of the body and occurring in the form of a document, a case, a dossier, a register, a record or other documentary material (hereinafter referred to as ‘the document’) drawn up by the body, by the body in cooperation with other body, or acquired from other persons.”* What is of the utmost importance, are the broadly defined liable bodies to reveal the public information, namely all state and municipal bodies, barriers of public authorities, public services and also (since a 2015 amendment) private companies, in which state or municipalities hold the majority or so-called “dominant influence”. It has been proven (cf. OECD/SIGMA 2014, 29, 60; Statskontoret 2005, 35–43) that especially selected procedural institutions contribute to “real” transparency. All these are also guaranteed under Slovene law, such as time limits (to reveal the information in 20 days) and an appeal to an independent body Information Com-

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5 On EAS, see also Cardona and Freibert 2007. On good administration and governance as prevailing doctrines of recent reforms, see Kovač and Gajduschek 2015; Rusch 2014; Venice Commission 2011; Staskontoret 2005. For Slovenia (in the context of PA reforms), see Kovač and Virant 2011, 208 and the following. Compare in particular, Art. 41 on the right to good administration of EU Charter of Fundamental Rights (2010). The purpose thereof is to guarantee every person or every legal entity the right to have their affairs handled impartially, fairly and within a reasonable time, whereby they must have the right to be heard and to have access to their files, while the administration must give reasons for its decision. Moreover, Art. 42 stipulates the right to access the information.

6 See <http://www.access-info.org>; [http://www.rti-rating.org/country\\_rating.php](http://www.rti-rating.org/country_rating.php). However, there are other global wide measurement scales, focusing on transparency, such as Transparency International, Global Right to Information Rating (GCI by Centre for Law and Democracy), or related to e-government (such as United Nations, <http://www.un.org/en/development/desa/publications/connecting-governments-to-citizens.html>) etc. There are even many more, comparing countries and time progress regarding overall democracy and effectiveness that also see transparency as an important part of measurement, e.g. Democracy Index, the Legatum Prosperity Index, the Bertelsmann Stiftung Transformation Index, World Bank Governance Indicators, World Economic Forum, etc.

missioner in Slovenia since 2003 as a special ombudsman) with judicial review in administrative dispute.

The Information Commissioner in Slovenia has a dual role, protecting freedom of expression and personal and other data as stipulated by Art. 38 and 39 of the Slovene Constitution and horizontal or sector-specific laws. IP hence acts: (1) as an appeal body by the RTI law and the Media Act, and (2) as an inspector or protector of different types of protected data (especially personal but also classified and other data, such as health documentation, access to passport or ID or bank and consumers' credit-related competences). He/she is a functionary, elected in Parliament for a period of five years, with an office of app. 30 employees.

Moreover, the Slovene RTI law stipulates the subsidiary use of the General Administrative Procedure Act (GAPA) and regarding judicial review the Administrative Dispute Act (ADA).<sup>7</sup> Based on the complementary use of the Slovene Constitution, RTI law, GAPA and ADA, an interested party can claim access to (public) information, orally or in written form, directly to the liable (anticipated) holder of the information or respective document. The liable body is obliged to conduct an administrative proceeding and in the case of a denial of the request and, if based on a written application, an individual administrative act (decision) must be issued, in 20 days (or exceptionally, based on special conclusions, an additional 30), or a refusal as a base for an appeal is deemed. The party may lodge an appeal to the Information Commissioner. Against its decisions, there is a possibility of a suit to the Administrative Court by a party or a liable body. Judgments of the Administrative Court can be challenged in front of the Supreme Court based on a constitutional complaint in front of the Constitutional Court. The latter also conducts proceedings to assess whether laws are unconstitutional or not but this is rarely the case relating to the RTI (decisions or law). The Constitutional Court in Slovenia has the role of assessing the compliance of general and abstract legal acts with the Constitution. Nevertheless, approximately 74% of all cases lodged in front of the Constitutional Court are constitutional complaints against concrete legal acts, e.g. 1003 cases out of 1348 in 2015.

(See Annual Report, <http://www.us-rs.si/media/rsus.letno.porocilo.2015.1.in.2.del.pdf>). There is also a possibility of combined proceedings, when a complainant lodges a constitutional complaint but simultaneously claims the law as the grounds for a concrete decision to be unconstitutional. This is the case in 2015 in 262 cases out of 1003.

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<sup>7</sup> GAPA, *Zakon o splošnem upravnem postopku*, Official Gazette of the Republic of Slovenia, No 80/99 and amendments, in force since April 2000. Administrative procedure codification has been characteristic of the current Slovene territory since 1923, with the Austrian (1925) and Yugoslav laws (1930, 1956). ADA, *Zakon o upravnem sporu*, Official Gazette of the Republic of Slovenia, No 105/06 and amendments.

As stipulated by the GAPA, in Slovenia, there is another right available to any party in all concrete administrative relations (procedures). This is the so-called “access to one’s file” which must be regarded as parallel to the RTI. Such “double” protection derives from the Constitution and fundamental administrative principles as set down by the State Administration Act, Civil Servants Act, etc. (Kovač 2015, 194). The purpose of the GAPA is to inform the party – i.e. the person whose right, legal interest or obligation towards the authority is being decided upon in the procedures – of the grounds for decision. The competent body must therefore assess the legal interest and related rights on a case-to-case basis, yet under the concept of subjective affectedness.

The right of access to public information is different. According to the Slovene RTI law, given the ultimate purpose, which is to ensure openness and thus prevent abuse of authority and responsibility, the party is not required to demonstrate a legal interest. The RTI law in Slovenia in this respect even provides a broader definition to freedom of information as pursued by the Constitution in Art. 39 (see similarly in comparative view, Savino 2010, 7 and the following). However, these rights are closely connected but do not replace one another. On the contrary, they serve as a double protection, as ruled by the Slovene Constitutional Court in 2011 (Decision U-I-16/10 and Up-103/10, 20. 10. 2011). Moreover, statistics show that there is an implementation gap regarding the latter, indicating a constant increase in appeals to the Information Commissioner, - approximately 45 % - due to the silence of liable administrative bodies (e.g. 258 out of 578 filed in 2014, with an additional 150 applications filed directly to the IP instead of firstly going through the first instance bodies). The IP issued annually in recent years since 2011 approximately 260 decisions (see Table 1), and answered and published in 2014 alone, 297 general questions regarding the RTI law implementation.

As revealed by the above data, there has been a rather constant share of appeals filed and decisions issued in the last five years, with approximately 260 cases decided upon, with an expected increase in 2014 of 25 new liable companies. Among these, in 2014 for example, the IP has denied appeal in 44 % of cases, granted it fully in 18 % of cases, partially in a further 29 % and by returning the case to the first instance body in 8 % of cases (altogether they granted 55 % appeals). Annually there are approximately 8–13 %, i.e. 20 to 30 cases, where the IP’s decisions are challenged in court (e.g. 29 out of 288 in 2014), and the success rate is usually around 50 %.

Moreover, one can see that the possible EU impact, taking into account the fact that Slovenia became a full member in May 2004, is not detected. Since the FOIA was adopted in 2003, we cannot speak of pre- and post-accession periods in the field.

**Table 1**

No. of decisions based on appeals to the Information Commissioner 2003–2014

<i>Year</i>	<i>No of decisions</i>	<i>Index (declines shaded, the <b>highest peaks</b> in bold)</i>
2003	6	
2004	19	317
<b>2005</b>	<b>96</b>	<b>505</b>
2006	110	115
2007	83	76
2008	129	155
2009	161	125
<b>2010</b>	<b>206</b>	<b>128</b>
2011	251	122
2012	256	102
2013	258	101
<b>2014</b>	<b>288</b>	<b>112</b>

Source: Annual Report of the IC 2015.

From a contextual aspect, the main issues addressed in practice by the IP and consequently the courts, are differentiated amongst (1) substantive law, (2) procedural dilemmas and (3) establishing facts. However, the majority of cases lie in the latter sphere with connection to FOIA interpretation. Regarding procedural, but also problems of a substantive character, there has been in approximately one-third of cases throughout each year since 2011, often a very questionable status of the parties. It is disputable who is the beneficiary or the obliged authority.<sup>8</sup>

The most frequent issue seems to address a dispute where there are exceptions in revealing the information, as is the case in approximately 70 % of cases. The most frequent exceptions are indeed personal data or business secrecy (see more in Kovač 2014, 196 and annual reports of the IP). Public expenditure is usually one of the key criteria of disclosure, thus RTI presents control over the accountability of functionaries and officials for their lawful and appropriate use in terms of public

8 See the decision by the IC (090-190/2012/14, 30.10.2012) concerning the purchase of speed radars in a municipality, or the case 07-00-02834/2011-03, 5.12.2011, when the tax administration had to deliver to the applicant, data on the 50 largest tax debtors in terms of employee social security contributions. For instance, one of the liable bodies is also the Slovene Motorway Company (021-83/2007, 1.2.2008), since such companies carry out public tasks or provide a public service and are financed from public funds. In addition, the Information Commissioner, the Administrative Court and the Supreme Court in Slovenia (090-54/2009, 15.7.2009, the Supreme Court X Ips 252/2009, 8.9.2009) developed a uniform practice to determine which personal data of public employees are protected and when priority is given to the public interest, namely to control budget expenditure. On the other hand, the courts recognized such status to companies involved in public procurement (021-18/2005/14, 5.10.2005, the Administrative Court U 2409/2005-20, 30.3.2007, etc.).

benefits. Moreover, in 2014, there were also 106 cases dealing with the question whether the requested information even exists and if it is in the possession of the liable body.

### 11.3 Analysis of European Administrative Space and its principles on transparency of PA

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The role of PA in contemporary society is changing, from once merely an authoritative guardian to being a promoter of societal development. Consequently, there are newly developed principles that guide PA in its conduct as pursued by the EAS in the late 90's and good administration nowadays. Among these "modern" principles, the concept of EAS is widely acknowledged.<sup>9</sup> EAS principles have been developed by SIGMA – a joint venture of the OECD and the EU, as a guide to candidate countries in their Europeanization processes and to present a solid ground for PA after accession since EAS bases convergence and integration of administrations in the various actions or so-called "shared sovereignty" (see Hofmann 2008).

In 1998 SIGMA defined four main principles of EAS (see OECD 1999): (1) rule of law, reliability, predictability and legal certainty; (2) openness and transparency; (3) accountability; and (4) efficiency and effectiveness. We can see that transparency is especially emphasized:

- As part of openness (usually transparency means an action by the government for society, while openness is the contrary, see Musa 2013, 10–13; Savino 2010, 21–30);
- Can be read as a bridge between lawfulness and accountability and one of the key pillars of good administration/governance (see more in Venice Commission 2011; Bevir et al. 2011).

However, EAS is especially important when there is a question of an informal and in-depth understanding of European standards, since EAS is, after all, about the implementation of the principles. There is a so-called "obligation of results" in order to achieve a homogeneous conduct of PA across the EU in relation to citizens and other users of public services (Cardona and Freibert 2007, 52).<sup>10</sup> Or as stated by the European Commission in the White Paper on European Governance (2001): "*Governance means rules, processes and behaviour that affect the way in which powers are exercised at European level, particularly as regards openness, participation, accountability, effectiveness and coherence.*"

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<sup>9</sup> More in SIGMA/OECD 1999, 2014. Cf. Cardona and Freibert 2007, 53; Koprić et al. 2014, 320–324.

<sup>10</sup> Generally, see Trondal and Peters 2013, who argue that the process of institutionalization within the EAS indicates, particularly in recent stages, three dimensions: independence, integration and co-optation of PAs.

Traditionally, or in continental Europe, the principle of transparency was initially implemented only by means of (G)APAs, thus known as “procedural” transparency. During the last two decades, procedural transparency has been complemented with the spread, all over Europe, of Freedom of Information Acts. RTI in this context, is an essential part of the transparency regime in all European legal orders, however, in practice differs in terms of prevailing administrative culture (Savino 2010, 13; for the region Kovač 2015, 193–201; Musa 2013, 3, 13). Even although not all countries explicitly place transparency as a fundamental principle, thorough RTI transparency is defined as one of the key European principles according to EU treaties and regulations and case law of the Court of Justice of the EU. In this sense, the search for a balance between transparency and privacy is the most often addressed issue (Galetta et al. 2015, 21). Thus, given the very limited possibility to perform balancing tests, personal data protection nearly always prevails when first level bodies decide on requests. EU institutions mostly deny access to information whenever personal data of individuals, public officials included, is in question. Public sector bodies have only two options – to either allow access to public information or deny it, applying one of the exemptions the law offers as *numerus clausus*. In accordance with the latest decision of the CJEU (Case T-115/13, 15.7.2015), for the condition of necessity to be fulfilled, it must be established that the transfer of personal data is the most appropriate of the possible measures for attaining the applicant’s objective, and that it is proportionate to that objective, which means that the applicant must submit express and legitimate reasons to that effect (more in Pirc Musar 2015). The same applies to European Parliament Resolution of 15.1.2013 with Recommendations to the Commission on a Law of Administrative Procedure of the EU (2012/2024(INL)), pursuing the principles of privacy and transparency.

The latter is defined as “*The Union’s administration shall be open. It shall document the administrative procedures and keep adequate records of incoming and outgoing mail, documents received and the decisions and measures taken. All contributions from advisory bodies and interested parties should be made available in the public domain.*”<sup>11</sup> The *principle of transparency* is also closely related to participatory democracy, especially when transparency is also applicable in adopting general (administrative) acts, with public consultation and a hearing to effectively take place. Furthermore, *the right of access to documents* under Art. 15 (3) TFEU and Art. 42 of the Charter is a fundamental right under EU law and also a basic condition for an open, efficient and independent (European) administration, therefore any limitation must be narrowly construed (must be based on law, respect the essence of right and follow the criteria of proportionality; more in Galetta et al. 2015). As seen,

11 See also articles from 33 to 37 under ReNEUAL draft the EU APA Regulation (2015). For instance: “(37) *The principle of transparency and the right of access to documents have particular importance under an administrative procedure without prejudice of the legislative acts adopted under Article 15(3) TFEU. Any limitation of those principles should be narrowly construed to comply with the criteria set out in Article 52(1) of the Charter and therefore should be provided for by law and should respect the essence of the rights and freedoms and be subject to the principle of proportionality.*”

transparency and RTI are, within EU institutions and by European scholars, regarded mainly as procedural issues since they are (Nykiel et al. 2009, in Kovač 2014, 34) “of paramount importance with a view to turning a theoretical entitlement to a measure into an actual right that may be effectively enforced.” (cf. Banisar 2006, 141).

Nevertheless, if we try to identify the main directly connected principles at European level to the topic of transparency and RTI, there is a clear convergence despite different sources (Table 2).<sup>12</sup>

**Table 2**

Main European transparency related principles of EAS and good administration

Principles	Connection to transparency
Lawfulness, legal certainty and quality	Transparency enables and upgrades them.
Openness, publicity and responsiveness	Transparency as an element of them.
Privacy	Transparency should be balanced with privacy through publicity based on the proportionality.
Participation and equity, involvement, consensus orientation	Participation etc. and transparency act in parallel to enhance lawfulness.
Accountability	Transparency is a key pillar of it.

Source: author.

On these grounds, we continue to address research questions on the level of compliance of Slovene regulation and practice with respective European principles.

## 11.4 Analysis of Slovene law and practice on RTI through the lenses of European principles

Slovene (and regional Eastern European) regulation on classical and contemporary principles and fundamental rights in administrative relations is traditionally oriented (more in Kovač and Virant 2011; Vintar et al. 2013; Koprić et al. 2014). Namely, Slovenia has a long tradition of such regulation, based historically mostly on Austrian and German legacy and since 2000 on European harmonization. Therefore, Slovenia can be claimed as a part of the so-called legislator-centred *Rechtsstaat* circle (cf. Statskontoret 2005, 74–76; Kovač 2015, 195) regarding social and legal environments, relevant also for transparency and a good administration context.

Regarding transparency and closely related principles and rights of participation and accountability there are several explicit legal sources to stipulate respective European principles. In terms of types of relevant document, one must name at least:

<sup>12</sup> Cf. OECD/SIGMA 1999, 2014; Statskontoret 2005; EU Charter 2010; Bevir et al. 2011; Rusch 2014; EP Resolution 2013; ReNEUAL 2014; Galetta et al. 2015.

- The Constitution, particularly Art. 1, 2, 3, 120 and 158, etc., on state governed by the rule of law, legal certainty, etc., 14 and 22 on equality, 23, 25, 156, and 157 on effective remedy and judicial review of PA, 35, 37, 38 and 39 on privacy protection and openness and freedom of information.
- Strategic documents of the Slovene Parliament and Government regarding the conduct and development of PA; such as the Strategy for the period of 2015–2020, explicitly addressing, amongst other topics, transparency and public consultation;
- Umbrella laws, i.e. FOIA and GAPA with ADA (with the right to be heard, access to information and one's file, reasoning, notification and delivery, right to appeal, etc.).
- Sector-specific laws, which must be in compliance with fundamental principles as above, but also may and do introduce additional or adopted entitlements or restrictions, such as in environmental or tax fields.

However, in order to tackle the research question on the implementation of transparency in Slovenia, we elected to obtain a deeper insight of RTI realization compared to the proclaimed goals and prescribed rules and an analysis of case law has been conducted. We have analysed all publicly accessible cases based on Slovene FOIA between 2003 and 2015 at the two highest levels of judicial review, namely in front of the Supreme Court and Constitutional Court.<sup>13</sup> The Supreme Court conducts administrative disputes at appeal and revision<sup>14</sup> level in concrete cases, whilst the Constitutional Court reviews concrete cases within constitutional appeal proceedings and primarily deals with assessing laws as general acts whether to comply with Constitution and EU law.

One expects that the quantity of judicial disputes would firstly increase<sup>15</sup> whilst, after some established case law, the number of disputes should fall. This is also obviously the case in Slovenia (Figures 1 and 2) – in recent years expressing some level of maturity. On the other hand, when FOIA broadens (as in 2014), new disputes arise, but new or amended law is often seen as a problem after one or more years, due to the length of proceedings (cf. Figure 1 with 2007 as the first year after the 2003 adoption of the FOIA).

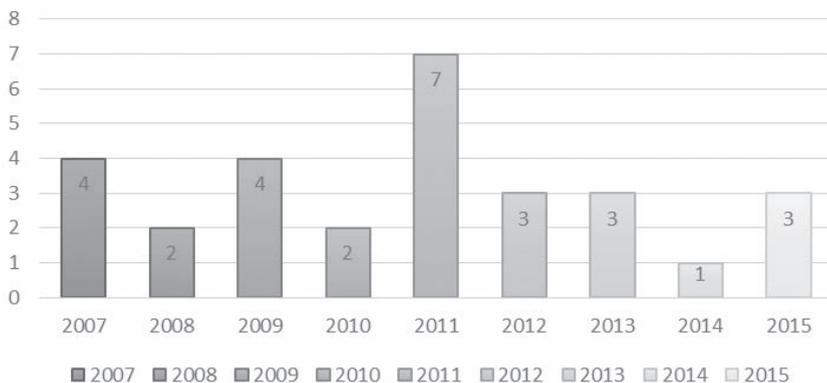
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13 For cooperation in conducting this research in March 2015, I would like to thank my post-graduate student Matic Pirc.

14 As pursued by the Slovene Administrative Dispute Act, all individual administrative acts (such as decisions on RTI) are subject to administrative dispute in front of the Administrative Court in the first instance. Later, there is the possibility of an appeal to the Supreme Court, which also conducts a revision, as an irregular legal remedy, in case of major legal breaches.

15 Particularly by adoption of FOIA in Slovenia in 2003 since the law changed the basic principles of secrecy to openness (Pličanič et al. 2005, 37).

**Figure 1**  
No of cases at the level of the Slovene Supreme Court



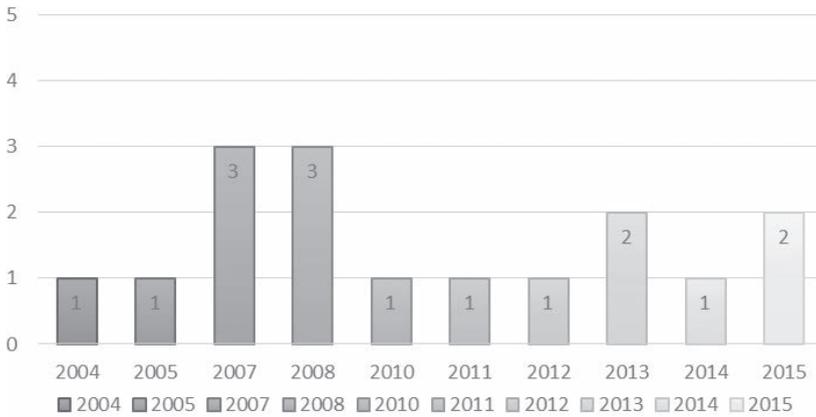
Source: author based on annual report of IP and court.

Contents-wise, these cases are very diverse. In approximately one-third of cases the plaintiff is the journalist that requested RTI in the first place, but his motion was denied. Amongst the bond bodies, there are: national TV, the Forest Institute, film agency, national airport, public pharmacy, student organization and university, etc. But, even in almost one-third of cases the authority from which RTI has been requested is a court or similar entity (notary, public prosecutor). Moreover, often state financial organizations are challenged (SOD, KAD). Most cases are disputed since the bond body insists that the required information should be a business secret or under other lawful exceptions. However, in summary, the Supreme Court confirmed the decision of the Administrative court in almost all cases.<sup>16</sup>

Further analyses reveal the most disputable issues to be discussed in front of the respective courts. These issues, as anticipated, reflect questions which appear as crucial in front of the Information Commissioner but there are others which are exposed.

<sup>16</sup> There is only one case where the verdict differed in this instance, regarding access to visitors of the public prosecution office through video control (case X Ips 1613/2011).

**Figure 2**  
No. of cases at the level of the Slovene Constitutional Court



Source: author based on annual report of IP and court.

On both levels alike we can detect, as the most recurring dilemma, cases related to exceptions to RTI, as in concrete disputes and also regarding laws under constitutional review (Art. 1, 4 and 6 of the Slovene FOIA, stipulating the definition of RTI, public information and exceptions). This is the case in 14 out of 30 cases in front of the Supreme Court. Four more cases address the relations between RTI and the access to one’s own file by GAPA. In this regard, it is not surprising that both sides look for justice in almost equal share (Table 3). This is not the case in front of the Constitutional Court, since there are 8 cases (50%) with beneficiaries to RTI as appellants, while liable bodies only act in this role in 3 cases (20%); with other appellants being IC, members of parliament and courts.

**Table 3**  
Status of liable bodies to RTI in front of the Slovene Supreme Court 2003–2015

<i>Liable body as a</i>	<b>No of cases</b>	<b>% (N=30)</b>
<i>Plaintiff</i>	14	47
<i>Defendant</i>	16	53

Source: author based on IP annual reports.

This data is important in a comparative perspective since often, legal regimes worldwide do not allow the authorities to seek legal protection, particularly with no access to court as the latter is guaranteed for affected private parties only (cf. Banisar 2006; Savino 2010). For Slovenia, we see that a broader *locus standi* is rather use-

ful in terms of developing a doctrine but on the contrary, it diminished the level of respect for FOIA implementation.

Further analysis was conducted amongst administrative dispute cases and constitutional reviews, in order to identify which laws were challenged (directly or as a base of concrete act disputable). We expected FOIA to be frequently challenged, together with umbrella procedural laws, i.e. GAPA and ADA or Civil or Criminal Procedure Act (when liable respective courts in these proceedings), with some others appearing when stipulating exceptions, such as the Personal Data Act or Classified Information. The statistics show the following list as indicated in Table 4.

**Table 4**

Laws challenged in relation to RTI in front of the Supreme and Constitutional Court 2003–2015

<b>Laws related to FOIA</b>	<b>In front of the Supreme Court</b>	<b>In front of the Constitutional Court</b>
<i>ADA</i>	19 (63%)	2 (13%)
<i>GAPA</i>	5 (17%)	/
<i>Civil Procedure Act</i>	5 (17%)	2 (13%)
<i>Info Commissioner Act</i>	4 (13%)	2 (13%)
<i>Notary Act</i>	2 (7%)	/
<i>Courts Act</i>	2 (7%)	/
<i>Personal Data Act</i>	2 (7%)	1 (6%)
<i>Public Funds Act</i>	1 (3%)	/
<i>Companies Act</i>	1 (3%)	/
<i>Classified Information Act...</i>	/	1 (6%)...

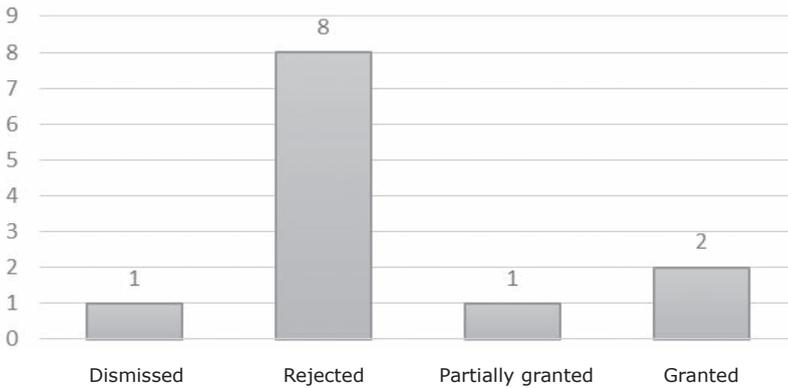
Source: author based on annual reports of courts.

The results therefore reveal that due to the horizontal nature of RTI, disputable legislation is indeed usually of an umbrella character, which shows us the systemic importance of RTI. Other laws that appear as relevant – but only in single cases – are also often umbrella cases, e.g. a Civil Service Act or courts-related acts. Among sector-specific laws, usually there is a disputable issue of a liable body, for instance the Ownership Transformation of Companies Act, Securities Market Act, Students' Association Act. Some other cases dealt with proportionality, typically regarding the Real-Estate Recording Act.<sup>17</sup> However, the number of cases in connection to these laws is so low to disable further contextual conclusions.

<sup>17</sup> Case U-I-464/06-13, 5.7.2007, initiated by the Information Commissioner since the law in question disproportionately revealed data on propriety rights of individual owners, which was misused as so-called public voyeurism (cf. Pirc Musar 2015).

Further analysis was conducted on the success rate of plaintiffs and appellants to verify the consistency of case law, anticipating a higher share of refused suits due to preliminary appropriate practice following previous courts' decisions. In other words, we expected only a few cases being granted, due to the prior developed and consistent administrative praxis and case law by the first instance Administrative Court. Results reveal that indeed this is the expected trend (see Figures 3 and 4) since there are only 24 % of appeals and 23 % of revisions granted with three-quarters rejected or even dismissed cases.

**Figure 3**  
 No of appeals (N=12) in front of the Supreme Court 2003–2015  
 according to success



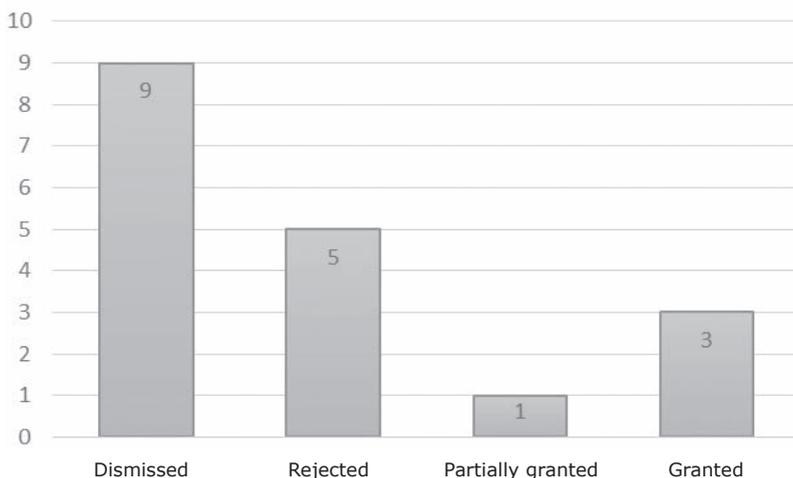
Source: author based on annual report of IP and court.

Likewise, we can establish figures for the Constitutional Court since there are eight cases out of 15 within the constitutional review where initiatives or requests were dismissed on formal grounds. In another seven cases, the Court ruled in three of them that the law in dispute was unconstitutional and in four cases, compliant with the Constitution. Among constitutional complaints, again only one case out of three has been successfully ruled for the appellant. In summary, in approximately 22 % of cases, the Court follows claims on an unconstitutional state.

Based on the analysis of quantity and qualitative evaluations of the cases in the previous chapter, let us assess the Slovene regulative regime and administrative and judicial practice in relation to the initial research questions. In this respect, we take into account theoretical views on PA conduct and development in general in (Eastern) European space, as well as its level of transparency and openness (Table 5, based on the 3-level scale).

**Figure 4**

No of revisions (N=18) in front of the Supreme Court 2003–2015 according to the success



Source: author based on annual report of IP and court.

Transparency represents a twin principle with participation, and simultaneously its prerequisite, both leading, based on lawfulness, to openness, responsiveness and accountability. However, transparency and participation in Slovenia in a full or proactive sense still seem to be, in practice, merely declaratory or even non-existent, although there is evidence that FOIA represents a good regulatory framework in a comparative aspect. We also ground our assessment upon the most relevant constitutional cases, favouring privacy over transparency. On the other hand, the number of cases is rather low to be able to make significant conclusions as revealed by the aforementioned statistical research. Hence, further analysis into the individual cases is required. Nevertheless, there are some overall characteristics as analyzed in Table 5.

Against expectations, courts rarely try to balance the respective principles within reason of the verdict, which seems to be a lost opportunity for the development of a doctrine. In fact, the main problem in Slovenia at both levels, in general PA and in transparency related conduct, seems to be the over-formalized approach of not only administrative authorities, but also often courts of lower instances. Such a gap between the prescribed and declaratory goals of openness and transparency, compared to the actual level of RTI realization in practice, can be explained, in our opinion by cultural rather than legal or formal elements. Hence, a radical shift could be achieved with an integral understanding of the rights concerning information and transparency if we combine the present rather formalistic (al) regimes into a

combined basic principle of the right to know (cf. Statskontoret 2005; Banisar 2006, 6; Savino 2010, 5; Kovač 2015, 196).

**Table 5**  
Qualitative assessment of compliance of Slovene regulation  
with European principles

European principles	Slovene regulation and its compliance
Lawfulness, legal certainty and quality	Highly respected in administrative and judicial praxis on formal aspects, but there is less evidence on legitimacy and quality issues.
Openness, publicity and responsiveness	More declarative, namely presented as overall goals but not consistently proven through individual cases. There are many objections especially regarding liability to enable the RTI.
Transparency	As above.
Privacy	Privacy seems contradictory to transparency and openness more coherently respected, based also on long respective tradition regarding personal data protection as a main exception to the RTI.
Participation and equity, involvement, consensus orientation etc.	These principles seem to be implemented rarely to full effect; they are often infringed or followed more formally as in-depth and based on argued reasoning.
Accountability	In summary, accountability issues need to be addressed further, in a more holistic way as purely (not) respecting the letter of the law.

Source: author.

In addition to the joint effect of all principles and rules, it is most important to emphasize the autonomous nature of individual procedural rights by (G)APA or/and FOIA, as only in such a manner can the latter be enforced. Transparency is a rather procedural principle, especially in practical implementation. In administrative relations, where the administrative authority is superior to the party, in order to maintain public interest through regulated public policies, these guarantees are particularly important. In fact, the extent to which authority is restricted indicates the actual degree of democracy of an authority at the national level. In this regard, over-detailed codification of administrative procedures and freedom of expression have a counter-productive effect, especially combined with a too formal culture in (Slovene) practice (Kovač and Virant 2011, 220). More focus should therefore be placed *de lege ferenda* on proactive openness (cf. Banisar 2006, 32; Pirc Musar 2015), broader participation of several participants in the procedure, individual accountability (cf. Kovač 2014), and service-mindedness in general.

## 11.5 Conclusions

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If we agree to understand transparency as an international and constitutional principle that is societally legitimate as long as it is in the service of accountability and administrative democracy, transparency of PA is thus a means to strive for its higher responsiveness and accountability as the empowerment of citizens nationally and worldwide. Good administration and European Administrative Space, as a convergent system of European principles, can thus be realized. That is the case when transparency is systematically balanced with other principles but is a key pillar of contemporary PA. Particular importance should be attributed to the culture of transparency in society as a whole, again at national and global levels.

For Slovenia and its filed case law we can see a rather high level of awareness and stability regarding transparency development. We believe that international examples and especially the constitutional basis with elaborated law are the main factors of such a state of the art situation. The courts, as revealed by this study on the highest levels of Supreme Court and Constitutional Court may and, indeed do, interpret the rights to information in a value based context. Consequently, further efforts in practice and respective research by scholars are to be systematically continued, particularly in a comparative sense.

However, taking into account European Administrative Space standards as set and implemented in different regions of Europe, we anticipate in Slovenia's case a rather formal implementation of the said principles and rights. Namely, for the openness and transparency related area we cannot establish an otherwise uncommon implementation gap, but there is room for improvement in terms of a proactive behaviour by the accountable entities. In the words of the European ombudsman, administrators should express service-mindedness to resolve collisions of public and legally acknowledged private interests instead of purely administrating the case and leave it to judicial review if needs must.

Moreover, other studies covering the theory and Slovene reality show less awareness of the importance of other related good administration principles, such as participation in public governance. Hence, even transparency cannot be fully developed if its twin principle has still to be elaborated. Additionally, there is an inevitable linkage between transparency and administrative efficiency. One might suspect that there is no sufficient awareness of the necessary interdependence of all elements of good administration. There are often even trade-offs of one principle being prioritized at the expense of another as seen through the cases analysed. It is therefore of the utmost importance to pursue, through theory and case law, the holistic understanding of these principles as a joint concept. Namely, legalism and neo-liberalism as the main sources of side effects and failures of public administration reform objectives in different reform stages have to be bridged. In view of this, it is also important to upgrade research in the field of administrative science since

the connection between the fundamental principles of the European Administrative Space is not satisfactorily studied. The present analyses therefore represent the cornerstone for a necessary upgrading.

Being full members of the EU means more than harmonisation of countries' legislation. Good administration with all its elements needs to be taken, not as some voluntary guideline, but as a basic standard for our citizens and business. In such a context, only a systematic and comprehensive approach on political, research and practical levels can bring about a sustainable progress that we are seeking, particularly regarding the transparency principle.

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## 12. Alternative Dispute Resolution in Administrative Law – The Slovenian Perspective

Mirko Pečarič

### 12.1 Introduction

In almost every kind of institutionalization, negotiators neither fully understand nor are able to fully predict future effects, or what will evolve from their endeavours. It could nevertheless be said that a process that is evolutionary and gradual leads to a convergence of differences with an increase in common practices, mutual opinions and interactions. The same applies to the administrative systems and administrative practices of Member States within the European Administrative Space (EAS). This chapter, in this framework, will look into the matters of administrative procedure, especially into the possibilities of alternative dispute resolution (ADR) where the (national) public interest does not have – at least at first sight – such a high priority as it has in a classic administrative procedure. From this point of view, the evolution of ADR tools in EAS could be even more probable/easier to evolve than the classic elements of administrative procedure. The latter concerns the regulation of processes through which administrative decisions are elaborated, and about providing a cheap, fast and efficient means by which the merits (*de novo*) review of government decision-making can be conducted. This goal refers to the establishment of an administrative appeal as the non-judicial adjudication tool that is fast, cheap, accessible, more expert, specialised and user-friendly (Wade and Forsyth 2004; Cane 2009; Harlow and Rawlings 2009).

If these goals stand firm, how come administrative procedures have so little possibilities for *consensual* problem solving? People, in the majority of cases, resolve their conflicts by peaceful and consensual dispute resolution, by using conciliation, negotiation and other possibilities that can lead to consent or a peaceful resolution of a problem before they use other legal (or more invasive) means. Public agencies are, with administrative matters, very often involved in solving people's problems without or outside the formal, one-way, inquisitorial decision-making. In these cases, the regulation and application of more adversarial-type activities in which

consensus is their main “actor” could be more effective. ‘Considering how common conflicts are in their daily routine, it is surprising how limited the range of methods is that professionals use to deal with conflict’ (Carpenter and Kennedy 2001, 18). This statement can also be made for administrative matters, due to the fact that statutes that regulate administrative procedures in the main do not include an alternative dispute resolution (ADR). Some authors still follow this approach (Auby 2013), although ADR is coming more to the fore (Cane 2011; Dragos and Neamtu 2014; Hofmann et al. 2014). The US Administrative Dispute Resolution Act of 1996 (Public Law 104–320) is a rare example of an Act that explicitly regulates this field, and states similar reasons for the use of ADR tools as have been applied for the use of a classic administrative appeal:<sup>1</sup> the latter is increasingly formal, costly, and lengthy, resulting in the unnecessary expenditures of time and with a decreased likelihood to achieve the consensual resolution of disputes. If we really want a speedy resolution of disputes, it is strange to note the above mentioned absence of ADR in administrative matters (that applies to millions of cases in each country<sup>2</sup>). Could it be that this absence is justified? In the Slovenian example it will be verified if the effectiveness of administrative appeals “blocks” the usage of ADR tools, because the first produce the intended result of a speedy resolution of conflicts. Answers will be given to the following questions:

- 1. Does a Slovenian arrangement of an administrative appeal decrease an application of ADR?**
- 2. What criteria can be established for (not) using ADR tools in administrative (iure imperii) matters?**

The answer to the first question will point out obstacles that other countries can use in an evaluation of their legal arrangements, whilst the answer to the second question will give predispositions that can be of help (not) to implant ADR tools in legal systems. Points for practitioners can be found in the Slovenian experiences with ADR legislation, *i.e.* where other countries should do the same or opposite to what Slovenia did and/or is still doing. Another point will be in giving the criteria to use ADR tools in administrative matters due to their specifics *vis-a-vis* civil matters, and in the determination of specifics that are – due to the small amount of ADR tools in administrative matters – obviously not clear enough, or even absent. Before answers can be given to the above mentioned questions, the ADR legal ar-

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1 In paragraphs 1 and 2 of Section 1 it states that ‘administrative procedure’, as embodied in chapter 5 of title 5, United States Code, and other statutes, is intended to offer a prompt, expert, and inexpensive means of resolving disputes as an alternative to litigation in the Federal courts; [but] administrative proceedings have become increasingly formal, costly, and lengthy resulting in unnecessary expenditures of time and with a decreased likelihood of achieving consensual resolution of disputes.

2 Already in such a small country as is Slovenia, with 2 million of inhabitants, more than ten million administrative acts are issued in one year on the basis of the rules provided by the General Administrative Procedure Act (Public Administration Development Strategy 2015–2020, 2015).

rangement in administrative matters in Slovenia and other legal systems will first be evaluated. From this evaluation and answers to the above mentioned questions, guidance will be given to other countries that intend to implement ADR tools into their administrative matters.

## 12.2 Alternative Dispute Resolution in Administrative Law – Contradictio in Adiecto or the Solution?

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ADR refers to any method of settling disputes outside of the courtroom and typically includes early neutral evaluation, negotiation, conciliation, mediation and arbitration. There are many works about ADR in the field of intellectual property (World Intellectual Property Organization 1994; Aplin et al. 2013), business (Ponte and Cavenagh 1999; Ingen-Housz 2011), construction (Sink and Harris 1994), workplace (Gramberg 2006), employment law (American Arbitration Association 2010), community associations (Avgerinos 2004), multinational companies (OECD 2006; Betancourt and Crook 2014), mass (Hodges and Stadler 2013), consumer (Hodges et al. 2012) and international disputes (Jones and Pexton 2015), but *very few* in the field of public, *i.e.* administrative law (Richardson 1996; Department for Constitutional Affairs 2005; DeLeo 2008; Allen and Thompson 2011; Dragos and Neamtu 2014). It seems that within ADR there could be some kind of indirect or tacit recognition that every type of dispute can be subjected to dispute resolution processes – except for public disputes and/or disputes where a public authority decides *iure imperii*. Although the origins of the ADR tools are older than classic legal tools for resolving conflicts, the first are rarely used in administrative law; this stands despite the fact that amongst the first conflicts were those where the public authority (*e.g.* with the wisdom of King Solomon) or some higher power was involved (*e.g.* Judgment of Paris in Greek mythology, Muslim Tahkim) or allowed these kinds of procedures (*e.g.* Jewish *Bitzua* and *P'Sharah*, India's system of arbitration or *Panchayat*, Irish *Brithem*, etc).<sup>3</sup> The above-mentioned tacit recognition of impossibility to use ADR tools in administrative processes could emerge due to the involvement of public power (*iure imperii*), that must give priority to the public interest, public welfare, public finances, community issues and other public elements, which cannot be on the same footing with some particularistic interests of individuals.

One element that prevents a wider ADR usage could be *the rule of law* itself by which legal rules must be known in advance and equally applied in equal/similar cases for all citizens. How predictability to use public power can be equally achieved in the flexible, changing and balancing of ADR processes – that are based more on the skills, flexibility and persuasion of operators rather than on the pre-defined rules that should apply to each side equally – is the question that at first sight, this negates the rule of law (this could hold especially true for the public side, due to the

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3 About the history of ADR see (Barrett et al. 2004).

principle of legal certainty that requires every authority to abide by its own rules – *patere legem quam ipse fecisti*). The rule of law reason could be “comforting” for the European style of legal thinking, but if it is compared to non-European practices it can be refuted (every country has the same possibility to use ADR in similar circumstances). Another element that prevents the usage of ADR tools could be *an absence of the administrative procedure statutes* that would explicitly regulate ADR. One exception is the already mentioned US Administrative Dispute Resolution Act of 1996 (Pub. Law 104–320) that states clear reasons when not to use ADR tools in §572 [b] (1).

Another statute that regulates ADR is the Administrative Decisions Tribunal Act 1997, No 76 of New South Wales. The purpose of part four of this Act is to enable the Tribunal to refer matters for mediation or neutral evaluation if parties to the proceedings concerned *agree* to that course of action. Under Article 102, the Tribunal could, by order, refer a matter arising in proceedings before it is sent for mediation or neutral evaluation if: ‘(a) the Tribunal considers the circumstances *appropriate*, and (b) the parties to the proceedings consent to the referral, and (c) the parties to the proceedings agree as to who is to be the mediator or neutral evaluator for the matter’. Article 105 allows the Tribunal to make orders to give effect to any agreement or arrangement arising out of a mediation session. The Tribunal cannot, however, make an order unless it is satisfied that an agreement or arrangement is in the best interests of a person whose interests are considered by the Tribunal to be paramount.<sup>4</sup> Under the Civil and Administrative Tribunal Act 2013 the Tribunal of New South Wales may ‘*where it considers it appropriate*, use (or require parties to proceedings to use) any one or more resolution processes (any process [including ADR] in which parties to proceedings are assisted to resolve or narrow the issues between them in the proceedings’ (Article 37). The Tribunal may, in any proceed-

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4 Section 108 deals with confidentiality and states that a mediator may disclose information obtained in connection with the administration or execution of the Act only in one or more of the following circumstances:

- (a) with the consent of the person to whom the information relates;
- (b) in connection with the administration or execution of this Part;
- (c) if there are reasonable grounds to believe that the disclosure is necessary to prevent or minimise the danger of injury to any person or damage to any property;
- (d) if the disclosure is reasonably required for the purpose of referring any party or parties to mediation, to any person, agency, organisation or other body, and the disclosure is made with the consent of the parties to the mediation for the purpose of aiding the resolution of a dispute between those parties or assisting the parties in any other manner; or
- (e) in accordance with a requirement imposed by or under a law of the State (other than a requirement imposed by a subpoena or other compulsory process) or the Commonwealth.

Section 109 addresses the immunity of mediators and states that no matter or thing done or omitted by a mediator subjects the mediator to any action, liability, claim or demand if the matter or thing was done in good faith for the purposes of a mediation under the Act, and when the subject matter of mediation was referred for mediation, the mediator’s name was included in a list compiled under the Act.

ings, make such orders (including an order dismissing the application or appeal that is the subject of the proceedings) as it thinks fit, to give effect to any agreed settlement reached by the parties in the proceedings if ‘(a) the terms of the agreed settlement are in writing, signed by or on behalf of the parties and lodged with the Tribunal, and (b) the Tribunal is satisfied that it would have the power to make a decision in the terms of the agreed settlement or in terms that are consistent with the terms of the agreed settlement. The Tribunal may dismiss the application or appeal that is the subject of the proceedings if it is not satisfied that it would have the power to make a decision in the terms of the agreed settlement or in terms consistent with the terms of the agreed settlement’ (Article 59). There should be more than one party (if there is only one party, ADR is not possible), circumstances must be from the Tribunal’s view appropriate, and parties must give their consent to the ADR process (when this Act was enacted in 1997 it was also stated that parties must agree who is to be the mediator or neutral evaluator for the matter, but this condition was abolished with amendments and the renaming of this Act that is now called the Administrative Decisions Review Act 1997).

Another element that can prevent the usage of ADR could be *characteristics of public disputes* that are different from private ones. Within the first there are many adversaries, who can be quickly changed due to (non)stated arguments or claims from other people. Interests in public disputes can be, at the same time, more wide and unclear than they are in private disputes, and can also culminate faster and uncontrollably (the mob rule). Carpenter and Kennedy (2001), amongst the common characteristics, include the complicated network of interests, emergence of new parties as the process unfolds, varying levels of expertise, different forms of power, lack of continuing relationships, differing decision-making procedures and unequal accountability. Unlike labour-management negotiation and international diplomacy, public disputes have few institutional mechanisms for resolving conflicts. There are presently no formal guidelines, whilst the broad range of interests and values can be the cause of the hard determination of the relevant parties in a procedure. If conflicts are not resolved, they can spiral into unmanaged conflicts. Positional bargaining is always a contest of wills and is a fertile ground for a conflict; it begins if one side becomes aggravated by the fact that the other side does not even recognise something as a conflict or the other side as a relevant partner. Then the position hardens, communication stops, the conflict goes outside of the boundaries, perceptions become distorted and a sense of crisis emerges.

From the clear shortage of special legal arrangements of ADR tools within the states’ administrative matters, the following questions about the reasons for absence emerge: Is there some kind of diametric opposite relation between the West and East and/or between the EU mediation directive<sup>5</sup> (in Article 1 it states that

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5 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, OJ L 136.

‘this Directive ... shall not extend, in particular, to revenue, customs or *administrative matters* or to the liability of the State for acts and omissions in the exercise of the State authority [*acta iure imperii*]’ and the administrative guidance (Japanese *Gyōsei shidō*) as ‘guidance, recommendations, advice, or other acts by which an administrative organ may seek, within the scope of its duties or affairs under its jurisdiction, certain actions or inactions on behalf of the specified persons in order to realize administrative aims, where such acts are not dispositions’ (Article 2 of the Administrative Procedure Act of 1993)? Is there a formal *vs.* informal regulatory/ADR system and/or could we talk about the diametrically opposite relation between Kelsen (the hierarchy of rules) *vs.* Confucius (consensual leadership)? The answers to this “opposite relation” will be given by criteria that will put this relation on the same denominator. The latter will serve as a check if ADR can(not) be used in administrative matters, and also as the answer to the second question from the introduction, but prior to that, an analysis of ADR in the Slovenian administrative matters will be carried out to give the answer to the first question and serve as input for the second one.

### 12.3 ADR Findings for Slovenia

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The Slovenian administrative legal order does not clearly determine ADR measures; this can cause different practices by different/same bodies. It is no wonder that ‘in Slovene administrative law ... regulation is over detailed and lacking the stimulating elements of modern participative and consensual definition of administrative relations in terms of good administration. There are no ADR techniques developed to solve the disputes, neither within the law principles nor at implementation level’ (Kovač 2014, 376). From the e-collection of administrative proceedings case law cannot be established any clear message about ADR. There is a correlation between a higher rate of appeals and court actions filed and granted in areas where regulations are more numerous and amended more frequently: ‘the appeal (filed in approx. 3 % of all cases) is a very effective filter of court accessibility in construction issues, since 88 % of disputes are resolved in appeal procedures; in 67 % of the cases the parties do not even file the court action although they have not been successful with the appeal—if they do, they only have a good 10 % of possibilities to be successful’ (Kovač 2014, 378). If we apply the data of the Slovenian Ministry of Justice and Public Administration (Kovač 2014) there are 300.000 appeals in 10 million administrative cases. Around 85 % of administrative appeals (255.000) are referred to the second instance where less than  $\bar{x} = 19\%$  of appeals are granted (48.450) and in 67 % of cases parties do not litigate although their appeals have been denied (138.388). Other 33 % (68.162) have only a 13 % possibility of being successful (8.861). In Slovenia, administrative appeals are therefore successful in 2.95 % of cases.

The first question from the introduction can therefore be *confirmed*: based on the small percentage of successful appeals, on the analysis of using ADR tools

and case-law, not only the Slovenian arrangement of administrative appeal, but also other normative arrangements concerning the ADR possibilities lead towards a decreased likelihood of achieving the consensual resolution of disputes. From this point it can be argued that administrative procedures in Slovenia do not need ADR, but in relation to the ECtHR's case law and its Overview 1959–2014 (2015) this argumentation cannot be valid; from the Overview it is seen that from 323 judgments, in 304 (94,11 %) the court found at least one violation. Most of the violations concerned the length of proceedings and the right to a fair trial and the right to an *effective remedy*. Could there be *de lege ferenda* possibility for parties to a) directly file the court action without going to the second instance (alternative – both ways could be possible) or even to b) directly file the court action without an appeal? These questions remain open.

In Slovenia, there is no Negotiated Rulemaking Act that would direct regulatory agencies to use consensus building and negotiation to create administrative rules, neither the Administrative Dispute Resolution Act that would direct the agencies to expand the usage of ADR. Administrative matters have certain specific features, so it is advisable to clearly regulate the ADR processes and to regulate them separately from other procedures that do not have the *iure imperii* elements. The strategy for public administration development (Public Administration Development Strategy 2015–2020 2015) gives *prima facie* encouraging news<sup>6</sup> about the ADR tools, but a deeper view finds an unclear message. One amongst other objects and purposes of the new GAPA would be apparently also along the formal framework of the classic administrative adjudication and at least in some areas – to enact a 'more flexible, faster and more rational establishment of administrative law relationships (the possibility of participative management relations and the introduction of administrative contracts)', but in administrative law there is a distinction present between regulation and adjudication. In Slovenia these administrative relations were always understood as the individual administrative processes, and when the strategy talks about the possibility of participative management in connection with the administrative contracts, what it talks about is unclear: while the first is used in participative, negotiated rulemaking (so called *RegNeg*) or regulation, the

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6 The existing detail (casuistic) addressing of administrative procedural institutions in the GAPA is not necessarily the only and the best process for the efficient protection of public and private interest. For participants outside the public authorities the extensive and complex regulation can lead to ignorance of their fundamental procedural rights and non-adequate protection of their positions. Too detailed a process on the authoritative side causes inefficiency if activities are carried out exclusively because of the form and are otherwise not needed to provide the basic purpose of the administrative procedure. The answer is, in general, (and consequently shorter) a transparent regulatory framework, which will not be detrimental to the public and private interest and will ensure an efficient and fair process. These reasons are not the only object and purpose of the new GAPA; at least equally important is to establish – along a formal framework of the classic administrative adjudication at least in some areas – a more flexible, faster and more rational establishment of administrative law relationships (the possibility of participative management relations and the introduction of administrative contracts).

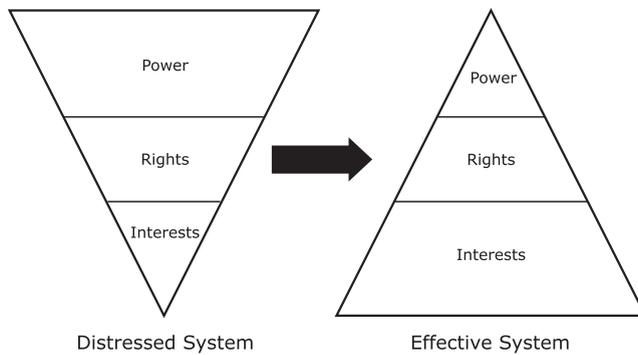
second is used in administrative procedures that are outside of adjudication. If and how this was meant remains to be seen when a draft law on GAPA will be prepared.

## 12.4 Criteria for ADR in Administrative Matters

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The case of Slovenia cannot therefore be of any sizeable help, although ADR terms are included in the legislation in different statutes. This diversification can be the obstacle, because diverse preferences can lead to diverse perspectives; the first have diverse values and the latter create different possible solutions. A clear distinction should be made in the law between the ends and means, between the fundamental and the instrumental, and between substance and procedure; we should be more focused on *interests*, not positions, because the lasting solutions are based on the first, not on the second (Ury et al. 1988; Carpenter and Kennedy 2001; Page 2008). Ury, Brett, and Goldberg (1988) argue that actors should focus on what they would like to do, based on their interests. Interest-based claims are more negotiable, and less likely to become intractable. If interest negotiation does not work, parties should then try a rights-based approach (a legal suit), while the power-based approaches such as strikes, should be reserved for those few conflicts that cannot be resolved either through an interest or rights-based approach. The diagram below from Brahm and Ouellet (2003) shows a distressed conflict management system, and a healthy dispute management system that resolves most disputes at the interest level, fewer at the rights level, and fewest through power options. This is a healthy approach for several reasons: 1) negotiating interests is less expensive than adjudicating rights or pursuing power options; 2) negotiating interests results in mutually satisfactory solutions, whilst the other two approaches result in a win-lose situation; 3) when power-based approaches are tried, the losing side is often angry and may try to “get back” at the other side whenever the opportunity arises; and 4) interest-based negotiation is usually less time-consuming than the other approaches.

**Figure 1**  
Moving from a Distressed to an Effective Dispute Resolution System



One of the obstacles for such small success of ADR in administrative processes can be the nature of the administrative processes due to their similarity with the distressed system: they also have the largest part of power being on the public, *i.e.* the administrative side and smaller sense for the interests of other parties (although an obligatory demand for their respect in a procedure might be proclaimed by law). Public officials who conduct procedures do not decide about their personal interests, so they may not be – as other parties in the procedures are – interested in reaching the best solution to the problem. In the absence of clearly stated guidance when and where to use ADR in administrative matters, the following *substantive* (as procedures are more or less known<sup>7</sup>) ADR criteria can be given:

- I. a) *Recommendation Rec(2001)9 of the Council of Europe's Committee of Ministers to Member States on alternatives to litigation between the administrative authorities and private parties* mentions “the appropriateness of alternative means” that “will vary according to the dispute in question”. b) Guidelines for a better implementation of this Recommendation explicitly state that ‘little academic research has been undertaken on alternatives to litigation in the administrative field’ (we could not agree more) and when required by private parties, administrative authorities should accept submitting the issue in dispute to an ADR means available “unless this procedure is against public interest or is abused by a private individual”.
- II. From the case of Slovenia, a summation of all *indeterminate legal notions* can give the following directions: the ADR tools can be used to an extent appropriate to the nature of a legal relationship giving rise to a dispute; harm must not

<sup>7</sup> ADR typically includes early neutral evaluation, negotiation, conciliation, mediation, and arbitration.

be done to the public interest, public morals or legal interest of third parties or contrary to the (substantial, not procedural) law.

- III. *The US Administrative Dispute Resolution Act* of 1996 Pub. Law 104–320 states (§572 (b)) that an agency shall consider not using a dispute resolution proceeding if: (1) a definitive or authoritative resolution of the matter is required for precedential value, and such a proceeding is not likely to be accepted generally as an authoritative precedent; (2) the matter involves or may bear upon significant questions of Government policy that require additional procedures before a final resolution may be made, and such a proceeding would not likely serve to develop a recommended policy for the agency; (3) maintaining established policies is of special importance, so that variations among individual decisions are not increased and such a proceeding would not likely reach consistent results among individual decisions; (4) the matter significantly affects persons or organizations who are not parties to the proceeding; (5) a full public record of the proceeding is important, and a dispute resolution proceeding cannot provide such a record; and (6) the agency must maintain continuing jurisdiction over the matter with authority to alter the disposition of the matter in the light of changed circumstances, and a dispute resolution proceeding would interfere with the agency's fulfilling that requirement.
- IV. *Administrative guidance* is the preferred informal means for Japanese bureaucrats to achieve policy goals or to persuade through public offices the implementation of government policies. '*Gyosei shido* is highly controversial since in practice it normally implies an informal – not legally authorized – sanction with discretionary bureaucratic power over related future deals' (Sato 2001, 106). It has been estimated that as much as 80% of administrative activity in Japan is through the use of this (Young 1984). The Act of 1993 was the first statute to specifically regulate the practice of administrative guidance, although this guidance existed long before there was a statute enacted that defined the term; probably under historic experiences, Japan put in the Act all necessary matters that had, in the past, a conflicting nature: under the Act a government agency therefore may not treat a person in an adverse manner solely because that person failed to follow administrative guidance (Article 32.2); administrative guidance may not be used to pressure a petitioner into withdrawing or modifying a petition once they have indicated an intent not to do so (Article 33); the content of administrative guidance and the identity of the official responsible must be made clear to the counterparty (Article 35.1), and verbal administrative guidance must be followed by a summary in writing if the counterparty demands it (Article 35.2). 'Although the public does not have to follow administrative guidance, it is frequently implemented and usually complied with, even when business enterprises do not agree with the content of a specific measure. This is because business enterprises are often concerned that their relationships with administrative organs may be impaired if they do not comply

with administrative guidance, particularly where they receive subsidies from the government' (El Kahal 2000, 241). For the purposes of clarifying the role to be played by justice in Japanese society in the 21<sup>st</sup> century, the Justice System Reform Council was established under the Cabinet in 1999.<sup>8</sup> The Administrative Reform Council supported the goal of replacing vague, ambiguous, and highly discretionary administrative guidance with a system of clear, enforceable rules. The Justice System Reform Council endorsed the same objective. Many business leaders and politicians welcomed that shift. Over the years, a number of business leaders have voiced frustration at instances of administrative guidance by bureaucrats. Those leaders would have welcomed the prospect of reducing the seemingly unreviewable discretion of bureaucrats (Foote 2007, xxviii). Although Japan is moving a little bit towards a more European positivistic style of legal thinking, administrative guidance is still a principal instrument of enforcement that is used extensively throughout the Japanese government to support a wide range of policies.<sup>9</sup>

- V. *Before the fact* – a division between administrative guidance and procedure can be explained by the distinction between the “before” and “after” the fact: “[g]uidance is permitted when the substance of that guidance is directed towards

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8 The Justice System Reform Council was established under the Cabinet in July 1999, for the purposes of “clarifying the role to be played by justice in Japanese society in the 21<sup>st</sup> century and examining and deliberating fundamental measures necessary for the realization of a justice system that is easy for the people to utilize, participation by the people in the justice system, achievement of a legal profession as it should be and strengthening the functions thereof, and other reforms of the justice system, as well as improvements in the infrastructure of that system” (Article 2, Paragraph 1 of the Law concerning Establishment of the Justice System Reform Council). Recommendations of the Justice System Reform Council. For a Justice System to Support Japan in the 21<sup>st</sup> Century. June 12, 2001. The Justice System Reform Council. <http://japan.kantei.go.jp/judiciary/2001/0612report.html>

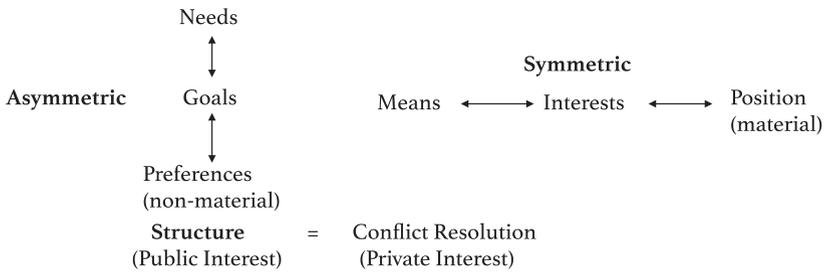
9 Japan’s administrative guidance is a clear example of a tight connection between the first and the ADR tools; can therefore on this basis criteria be established to be used for ADR? The basic condition for administrative guidance is that official conduct must not form any kind of rights or duties to citizens, because the latter could be affected in their rights or duties only by public power in legal procedures with given legal remedies. Administrative guidance is normally only about the guidance, instructions, recommendations and explications given to persons that implement public tasks. In France this guidance is called *circulaire* or *instruction de service* and denotes ‘communication by which a hierarchical superior ... communicates to his subordinates intentions about the execution of a service or the interpretation of a statute or regulation’ (Waline 2010, 390) or ‘constitutes a commentary on the interpretation of dispositions, a way to proceed, precautions to be taken or controls to be exercised’ (Chapus 1996, 471). In the US, administrative guidance includes the interpretative rules, general statements of policy and rules of agency’s organization, procedure or practice (APA§ 553 [b]); it ‘simply clarifies or explains a regulatory term, or confirms a regulatory requirement or maintains a consistent agency policy’ (Cass et al. 2011, 495) or is ‘merely an announcement to the public of the policy which the agency hopes to implement in future rulemaking or adjudications...[or] encourages public dissemination of the agency’s policies prior to their actual application in particular situations’ (Popper et al. 2010, 229). As administrative guidance cannot be the basis for an agency’s enforcement action, its authority, amendment of legislative rule or significant/substantial change/impact on a person’s rights or duties, then ADR must also conform to the same conditions.

a policy objective that meets the norms of society or the common sense objectives of the public as a whole and how the agency arrived at its guidance is not a matter of judicial concern' (Goodman 2008, 490). Administrative guidance is relevant before the *fait accompli*, i.e. when a suggestion does not become a demand that affects legal rights and obligations. The Japan Administrative Reform Council has turned this call for voluntary action more towards an after-the-fact legal review and towards a formal, remedy type society. In Japan, a recipe for raising the quantity and quality of the legal profession goes (very slowly) towards the opposite direction of the common and continental legal regimes. One of the elements for more extensive use of ADR tools could also be a degree of the courts' margin of appreciation of the bureaucratic (discretionary) decision-making.

- VI. *A crowd beats an individual* – Scott's the Crowds Beat Averages Law emphasises that 'we should recognize that the choice being made is, on average, better than the average choice we would make. The accuracy of the crowd's prediction cannot be worse than the average accuracy of its members; thus, the crowd necessarily predicts more accurately than its average member (Page 2008, 197, 350). The wisdom of crowds/collective wisdom/collective intelligence (Grove and Meehl 1996; Surowiecki 2005; Landemore and Elster 2012; Kahneman 2013) arises from the people's *diversity* (each individual prediction contains bits of truth mixed with various errors, so the bits of truth add up to a larger truth [a.k.a. standing on the shoulders of giants], whereas the errors cancel each other in negative correlation), and can be used especially in the so-called RegNeg procedures, which would give public participation in general decision-making and/or regulation not only more importance, but better results.
- VII. *The ADR tools equation* (a tool to facilitate a decision): a distinction between public and private conflicts can also be seen as a distinction between asymmetric and symmetric conflicts; the first are hierarchically arranged and involve needs, goals and (more non-material) preferences, which affect structure (public interest), while the second are horizontally arranged means, interests and (more material) positions that reflect private interests. The example of the equation given below can serve as a *subjective* preliminary check for (not) using ADR:

**Figure 2**

A distinction between public and private conflicts and the ADR equation



$$+ ADR = \frac{\text{Structure (Public Interest)}}{\text{Structure (Public Interest) + Conflict Resolution (Private Interest)}} = < 1 ADR > 0.5$$

$$+ ADR = \frac{\text{Constitutional Norm (10)}}{\text{Legal Norm (< 10) + Private Interest}} \text{ if } = < 1 ADR > 0.5$$

If a summation of a legal norm and a private interest (to each could be subjectively given max. 10 points) is between <1 and 0.5> when divided with a constitutional norm (which has 10 points in every case due to its constitutionality), then ADR can be appropriate. The public interest protection in the constitutional norm could not be satisfactory, if the legal norm and the private interest are equally important as the constitutional norm. A determination of points is still a result of subjective evaluation, but the indeterminate legal notions (appropriateness, public interest, legal interest, public morals) and the understanding of all words fall into subjective evaluations and/or understanding, which we normally do not problematize. They can be more and more objective with adding more and more people (see the above stated VI<sup>th</sup> criteria).

## 12.5 ADR in European Administrative Space?

In the introduction of this chapter it was said that the evolution of ADR tools in EAS could be even more probable to evolve than the classic elements of administrative procedure (a convergence could be easier if the public interest is not highly emphasised). It seems that this predisposition was not correct. The notion of public interest can be very flexible: it changes in time and space parallel with the development of countries' political, economic and other systems. Due to this flexibility there is rather a high probability that ADR tools cannot be fully determined on the

EU level (besides the flexibility of the public interest there could also be a fear that states would give up their public power in cases for which it would be the most needed). *Alternative Dispute Resolution in European Administrative Law* (Dragos and Neamtu 2014) was the first book that comparatively assessed the state of the art of the ADR in administrative law of several European jurisdictions and at the level of European Union law. The main conclusion of this work was ‘when organized, administrative appeals are fulfilling their role as ADR tools or pre-trial proceedings. They offer a good venue for seeking legal protection whilst also playing the role of pre-trial procedures’ (2014, 561). The working group of ReNEUAL Model Rules on EU Administrative Procedure has (also) refrained from drafting a law on settlements agreements: ‘[t]he question whether and under which circumstances settlement agreements and mechanisms of alternative settlements of disputes are licit is assessed very differently in Member States. This heterogeneity is based on the different views on the principle of legality of administration. In the end, this question is a topic of substantive law, not of administrative procedure law. Hence, Book IV does not provide for rules on the question if a settlement agreement or alternative dispute resolution can be closed at all’ (Hofmann et al. 2014, 154).

The notion of “space” (in European Administrative Space) as a common term to describe the integration phenomena, shared constitutional values and general legal principles in the present state of development cannot put the Member States’ differences and specifics on the same legal denominator (a general legal act) that could determine also when, which and how a specific ADR tool can be used. Criteria for ADR in Administrative Matters from section 4 of this chapter could be more applicable in this phase to determine when to use ADR tools in a specific country. Although these substantive criteria should also respect the European Administrative Space principles such as legal certainty, public participation, proportionality, giving reasons, right to a hearing, right of appeal, and so on, it must be acknowledged that ADR tools as tools cannot be synonyms with EAS as an integration concept. The first should nevertheless be based on a reliable, transparent and democratic public administration that respects the principles of integrated administration through the *acquis communautaire*, whilst EAS could give a general framework in which also ADR tools can, in time, converge between states. Constant interaction between Member States, cooperation and an exchange of information could also establish common practices in ADR approaches; Member States cannot base their actions mainly on the European Court of Justice’s rulings, but in their common agreements. As national governments meet, compare notes and join forces to draw up and enforce EU standards within EAS, it is quite possible that they could also increasingly push each other in the use of ADR tools.

## 12.6 Conclusions – the Future of ADR

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Although the informal ADR methods are *de facto* used in many administrative matters, there could be given answers for formal applications. The future of ADR in administrative matters could begin from two predispositions: a) nothing stops parties in a case before the administrative body to reconsider their positions and voluntarily eliminate their conflict with the help of clearly stated and negotiated *interests*; and b) if an act or (in) action is found to be formally the administrative decision that affects or changes rights or duties (the presence of authoritativeness, concreteness and legal effect is established), ADR would not be allowed. In the fourth chapter seven substantive criteria can be of help when deciding (not) to use the procedural ADR tools in the administrative matters (if they are of course previously allowed by the law). From these criteria it can also be concluded that ADR in administrative matters involve mainly before the fact – administrative guidance, *i.e.* before the public agency decides with the public power (*iure imperii/de puissance publique*). For these cases it could be more appropriate to talk about the *public debate* (where a competent public agency only talks with people, seeks solutions, listens to proposals), whilst it would be more appropriate to talk about ADR in administrative matters when the usage of public power is *sine qua non* for the solution of questions.

When using ADR, there are possibilities for structural corruption (in the absence of classic litigation tools) to emerge, when the iron triangle made up of politicians, bureaucrats, and businesses is present; administration could also exercise its influence informally and would not act in a way that could create legal rights for parties to challenge administrative decisions; the prevalence of administrative guidance and favourite judicial interpretation for ADR – without the clear legal principles, procedural measures and procedure – could deny the effective judicial review. Possibilities could be using ADR in pre-proceedings (the administrative body could give in a public debate a deadline for the voluntary fulfilment of an obligation or omission of a prohibited practice before a formal commencement of administrative procedure), the legal independence of special institutions (Ombudsman, Court of Audit, Universities...) can foster ADR in procedures in which these institutions use administrative rules (employment law disputes, habilitation procedures, disciplinary actions...), the establishment of an independent managing institution (ADR [Administrative] Centre) beyond the control of the courts, the administrative agencies and those under their jurisdiction to serve as honest brokers in developing and administrating the administrative procedures. If we teach children and practise ADR methods in schools, the possibilities for more effective and efficient administrative procedures would also rise.

In the future, scholars should develop clear distinctions between ADR and ADR in the administrative procedures/litigations, between employee discretion in the procedural law and official discretion within the substantial law, between the public debate and ADR in *iure imperii* cases. What could further be said about ADR

as a consensus building approach within the framework of deliberative democracy and/or public participation as mediation in general rule making? What conditions should be met to use ADR as ODR (on-line dispute resolution) in administrative matters? Is it possible to use ADR as a filler of legal gaps? What conditions should be present to establish a duty of confidentiality between the ADR user and clients/citizens? Answers to these and similar questions should be given in the future, if we want effective conflict resolution/prevention in administrative matters in the name of public interest and human rights. From this elaboration it can be concluded that ADR tools are not fully developed in the EU Member States. Although it is therefore highly improbable to expect that these tools will become part of EAS in the near future, they could evolve proportionately with the rising levels of cross-national exchange of ADR's good practices. The latter's messengers will be public officials and scholars. This entire work with its chapters is a clear example of this.

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## **13. The Importance of Cooperation and Mediation in Public Administration – Efficient Solutions for Good Governance in Croatia**

*Ana Tuškan, Urša Jeretina*

### **13.1 Introduction**

Mediation and cooperation have many common characteristics and they work hand in hand. Cooperation is one of the main principles used during the mediation process, and it is one of the guidelines for the parties after the mediation agreement has been signed. Using mediation, parties gain, not just trust and satisfaction, but they also develop strong mutual cooperation. Cooperation builds an added value in legal relationships, which are formed on the basis of the signed contracts, whether they are in a public or private domain. In fact, public and private legal fields are constantly intertwining and work together sometimes very discreetly, which is causing problems particularly in resolving disputes, when the division between the public and private cannot be defined clearly.

Utilizing mediation in the field of Public Administration could solve many problems; however, cooperation between private parties and public authorities is not something that can be achieved easily. Private parties will always think about their rights, without paying too much attention to how they can fulfil their obligations more efficiently by understanding them more clearly, or how to solve their disputes by participating in the decision-making process, and finally how to achieve efficient cooperation with the public authorities. The principles of good governance try to organize public functioning in the best possible way, and, therefore, they have a lot of tasks to fulfil. They include, amongst others, consultations with citizens, service quality, transparency, efficiency and effectiveness, responsiveness, and participation. By developing mediation in the public domain, these principles can be made more visible.

Mediation is not only a way to solve disputes, but it can also be used in an educative way to help private parties understand more clearly the functioning of the public sector, and also it can help the public sector be more efficient and open to

change. In this context, we analyze the legal status of mediation in the field of public administration in the EU, particularly in Croatia. Essentially, Mediation could serve as a communication bridge for private-public cooperation and also as a means of consultation in cases that may become disputes. Furthermore, the paper proposes questions regarding in what specific areas of public administration mediation can be used and how it can become an efficient model for coordination and communication between the public and private area. Proposed efficient solutions for good governance will try to answer these questions within the fluid term of the common European Administrative Space (hereinafter: EAS).

## 13.2 Public Administration Enriched by Mediation and Cooperation in Croatia

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Mediation, as a process with the third neutral party, tries to resolve disputes between two or more parties in conflict, and can be used in many fields of Public Administration. Since the public authority acts as a party in both private and public law, it is important to note that mediation can apply in numerous specific fields of Public Administration. The Croatian Mediation Act<sup>1</sup> defines mediation as *any process whereby parties attempt to settle their dispute with assistance of one or more mediators who help them in achieving the settlement, without authority to impose on them a binding solution*. Namely, parties can initiate mediation in civil, commercial, labour and other disputes regarding their rights of which they may freely dispose. The Mediation Act also states that its application must be followed by legal sources of the CE, EU and OECD. However, the main problems occur when it comes to the precise legal translation of transposed EU legal regulation to Member States' legal systems.

### 13.2.1 The importance of precise legal translation

At first glance, different versions of the Recommendation Rec (2001)9 of the Committee of Ministers to Member States on alternatives to litigation between administrative authorities and private parties (hereinafter: The Recommendation) can be seen in the French and English languages. In other words, the headline of the Recommendation in the French language is "*Recommandation Rec (2001) 9 du Comité des Ministres aux Etats membres sur les **modes alternatifs de règlement des litiges** entre les autorités administratives et les personnes privées*", while the English version of the same document is "*Recommendation Rec (2001) 9 of the Committee of Ministers to Member States on **alternatives to litigation** between administrative authorities and private parties*". The question that arises from these two translations is their field of its application. Namely, if we accept the translation of the English version,

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<sup>1</sup> The Croatian Mediation Act (entered into force on 24 October 2003), new Mediation Act (entered into force on 13 July 2013), Official Gazette, No. 18/11.

consequently the question arises, what does the term “*alternatives to litigation*” mean? Does this term indicate an alternative to the civil procedure, or alternative to any adjudication? On the other hand, if we analyze the French version of the Recommendation, we see that the objective is “*les modes alternatifs de règlement des litiges*” (ADR). Therefore, the French version is clearly the more precise version, because its aim is to encourage ADR between private parties and public authorities, as well as to bring together European legal systems with different public administration institutes, which are, in some Member States, regulated by administrative law, and in others by private law<sup>2</sup>.

In the Recommendation, it is initially emphasized that the role of the administrative courts is to resolve cases in a reasonable time; however, that is not always possible. After Recommendation, the alternative could also mean to bring administrative authorities closer to the public. It is stated: “*The principal advantages of alternative means of resolving administrative disputes may be, depending on the case, simpler and more flexible procedures, allowing for a speedier and less expensive resolution, friendly settlement.*”<sup>3</sup> Additionally, the purpose of the Recommendation is to prevent disputes before they arise, particularly with cases in respect to conciliation, mediation and negotiated settlement. Moreover, this could state directly that alternative means to litigation should be either generally permitted or permitted in certain types of cases deemed appropriate, such as individual administrative acts, contracts, civil liability, and, generally speaking, claims relating to a sum of money.<sup>4</sup>

The recommendation also supports the idea of organized education and information with transparency, emphasizing that parties must receive appropriate information about the possible use of alternative means<sup>5</sup>. Therefore, it is important to build cooperation and coordination between public authorities and private parties in order to achieve more efficient administrative capacities. Mediation as a voluntary, first choice tool can be used for both private and public interests, and, if it does not achieve a positive outcome, parties can resolve their dispute in court. By introducing the formal mediation process, Member States voluntarily respect the principles of good governance, since they are set up in accordance with their constitutional background. Each conflict is solved in a unique and innovative way, but in accordance with the common principles would lead us to the convergence and better understanding of the necessity of common principles. Building the communication bridge and filling the gap between different legal systems would lead us closer to the visibility of the European Administrative Space.

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2 Ee. concessions.

3 ADR is predicted in all appropriate cases (*considering that the use of alternative means could not serve administrative authorities or private parties as a means of avoiding their obligations or the rule of law*); See the Recommendation Rec (2001)9 point 5–10.

4 See Article 2.i, Recommendation Res (2001)9.

5 Appendix of the Recommendation Rec (2001)9, op. cit. supra, point 2.ii.a.

### 13.2.2 Contracting between public and private entities

In the Croatian legal system, mediation developed divergently within different fields of Public Administration. Fulfilment of the tasks important for society can be accomplished throughout the field of public as well as private law. Sometimes the border is not so clear, but mediation could set aside the differences. Contracting between public authorities and private entities must be made in accordance with the basic principles which vary amongst Member States. Public authorities must respect the rule of law, act in the public interest and they must try to reduce costs. Furthermore, private parties want efficiency, less costs, better results and the respect of their legitimate interest. These goals are more likely to be accomplished by coordination and cooperation. Public agencies are very active in dispute resolution, but the coordination between public authorities, public agencies and private parties is very complex and differently determined in Croatia. Mediation can be an effective solution for the process development in which both interests can find a place, especially if we analyze private or administrative legal contracts between different public and private entities.

Citizens' participation and cooperation with public authorities can encourage the creation of a solid foundation for the successful development of the economy and society as a whole. Coordination of the highest quality can be achieved through mediation and other ADR mechanisms. The question of how to encourage a uniform citizen participation and coherence does not have an unambiguous answer. By encouraging mediation in civil commercial law and also in some administrative matters (in permissible cases), legal systems under different constitutional traditions can be reconciled. The unification of various legal systems will likely encourage a culture of communication, mutual respect and cooperation, and a dissemination of good practice outside the formal borders of the EU. Namely, this legislative support touches not only the area of private contract law, but also indirectly appears in the field of administrative contract law. To define the "public contract", we have to answer the questions set by ReNUAL (2014)<sup>6</sup>. In ReNUAL, it is proposed that a public contract can be divided into three phases, which are usually common to all legal systems: **1. Administrative procedure leading to the conclusion of a public contract** (governed by administrative procedure and public procurement rules); **2. Conclusion of the contract** (governed by the rules establishing the prerequisites for the validity of a contract in the right to invoke invalidity); **3. Execution and end (expiration) of the contract** (above all governed by the law of obligations).

The public procurement contract is signed by one (or more) provider and one (or more) contracting public authorities for the acquisition of work, such as

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6 "Does a public contract only concern public procurement or does it also involve the conclusion and execution of all public contracts made by public authorities? Are contracts between public entities contracts which should be made subject to the same rules as public contracts between public administration and private bodies?" See more in ReNEUAL (2014), pp. 147–150.

the delivery of goods or provision of services. Therefore, if any legal entity has the status of the contracting authority, it shall act according to the rules of the Public Procurement Act. However, there can also be a case where one party to the public procurement contract may not be a public authority, such as public services in general interest (PSO) or so called universal services (USO)<sup>7</sup>. PSO and USO are more likely private bodies, which provide goods and services of general interest and are mostly treated under public administrative law. These public services often appear in telecommunication, energy, gas, postal and other sectors.

In the Croatian legal system, the difference between the existing and former *Public Procurement Act (hereinafter: PPA)*<sup>8</sup>, is, amongst others, the fact that the previous regulation stipulated mediation during the appeal procedure before the Public Procurement State Commission. It is impossible to know to what extent such a solution was indeed used, because neither one Report specifies the number of appeal proceedings which were terminated by mediation. In fact, the previous PPA<sup>9</sup> provided that the State Commission for Control of public procurement may terminate the proceedings due to the withdrawal of the appeal. Consequently, the termination of the proceedings may be the result of mediation between the parties, but also it can be the result of appeal withdrawal. Therefore, it was not possible to acknowledge the number of mediation processes, while there are no objective indicators. The possibility of mediation during the appeal procedure was removed entirely from the PPA<sup>10</sup>. With the absence of precise analysis on the utilization of mediation, we cannot conclude whether it has been successfully used or not. Nevertheless, the Ministry of Justice Mediators Register (2014)<sup>11</sup> has, on the Mediators' list, more than 500 independent mediators, which are more than enough to proceed with the disputes in the field of public procurement. It would be useful to try mediation, especially for those parties who are willing to settle their dispute quickly to reach a goal of better cooperation with public authorities. This can only be achieved with systematic monitoring, education, analysis, and will of both sides.

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7 The services of general interest indicate 'market' or 'non-market' activities, which are considered by the public authorities, and are subject, for this reason, to specific public service obligations (PSO). The concept of *universal services* (under universal services obligations – USO) refers to a set of general requirements, which should be satisfied by operators of such services to make sure that all citizens have access to certain essential services of high quality at prices they can afford. See *Europedia* (2011) on [http://www.europedia.moussis.eu/books/Book\\_2/3/6/06/4/?all=1](http://www.europedia.moussis.eu/books/Book_2/3/6/06/4/?all=1).

8 The Public Procurement Act, Official Gazette, No. 110/07, 125/08, 90/11, 83/13, 143/13, 13/14.

9 PPA, article 151.

10 The reason could also be "The Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts p.30.

11 See more on the website of the Ministry of Justice: <https://data.gov.hr/dataset/registar-izmiriteljja/resource/a848a273-d772-4261-9e3a-3593f379500e>.

*The Concessions Act*<sup>12</sup>, on the other hand, encourages the usage of ADR, but it only predicts the possibility of arbitration. But, could a concession contract be looked upon as an administrative contract? In the Croatian legal system, its stipulation must be directly prescribed by law and one of the parties is always the public authority. Its special position, as a safeguard of the public interest, is particularly visible by the unilateral termination of an administrative contract, which determines that if the private party does not fulfil its obligations, the contract must be terminated. In the reverse situation, if the public authority does not fulfil its obligation, the private party cannot terminate the contract before filing a complaint. Hence, if we compare the legal determination of administrative contracts<sup>13</sup> with the provisions that regulate concession agreements<sup>14</sup>, it is clear that the concession contracts cannot represent administrative contracts, because both sides to the concession contract have the same legal position. The appeal related to the concessions award is resolved by the State Commission for the Supervision of Public Procurement, against whose decision a lawsuit can be filed before the Administrative Tribunal, whilst the disputes arising or which may arise from the concession agreement may be submitted to arbitration or they can be solved before the Commercial Courts<sup>15</sup>.

It is also interesting that mediation is, as well as arbitration, determined by *the Public-Private Partnership Act (hereinafter: PPPA)*<sup>16</sup>, which defines a public-private partnership contract as a long-term contractual relationship between public and private partners, which is the subject of the construction and/or reconstruction and maintenance of public buildings, in order to provide public services. In addition, a contract on a public-private partnership is concluded after the prior approval of the Ministry of Finance, and a subsequent approval by the Agency for investments and competitiveness is needed. These characteristics are not sufficient for a public-private partnership contract to be considered as an administrative contract, because the PPPA requires that an administrative agreement is concluded with the party of the administrative procedure.<sup>17</sup>

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12 The Concessions Act, Official Gazette, No. No. 143/12.

13 Which are prescribed by the Administrative Procedure Act.

14 Prescribed by the Concessions Act.

15 Comparing the German legal system, where an administrative contract is a separate instrument to solve various public-private relationships, the goal is the efficient cooperation between private parties and public authorities, with the task to proceed in the public interest whilst the subjects of the contract are not of crucial importance. In the French legal system, public authorities solve their special tasks by concluding administrative agreements. Croatia has not yet decided what exactly the goal of administrative contracts is, but enabling a wider usage of administrative contracts means that many important questions concerning the efficiency and coordination of public authorities and private parties can be solved. Whatever the aim is the cooperation between the public and private sectors needs to be improved.

16 The Public-Private Partnership Act, Official Gazette, No. No. 78/2012, 152/14.

17 That means that the future private partner is not subject to the administrative procedure, despite the fact that new ReNUAL model rules concern these kinds of partnerships as the subjects of an administrative contract.

The small number of alternative proceedings suggests that alternative methods are not sufficiently promoted to private entities and citizens. Therefore, it is necessary to develop a culture of dispute resolution communication and cooperation. If the parties do not choose either mediation or arbitration, the Commercial Court is competent to resolve the dispute concerning private-public partnership. However, the Regulatory agencies are providing legal protection during the process of the selection of a private partner, in accordance to the regulations of the governing public procurement. Against its decision, a claim before the Administrative court is predicted. Therefore, one institute and the competence of both Administrative and Commercial courts creates dispersion. On the other hand, if the parties under the contract decide to use the ADR methods, all disputes can be communicated and solved in one place. This means creating better services, developed local community and satisfied citizens.

Until the new *General Tax Act (hereinafter: GTA)*<sup>18</sup>, no law expressly predicted the stipulation of an administrative contract. In Croatia, administrative contracts were introduced in 2009 by the APA, according to which the public authority and private entities can sign an administrative contract in order to execute the rights and obligations set out in the administrative act if the law predicts the conclusion of such contracts. One of the characteristics of the administrative contracts is the special position of public authorities as a safeguard of the public interest. Namely, the existence of the parties' unequal position is particularly noticeable when a public authority has the right to unilaterally terminate the administrative contract if the taxpayer does not meet the obligations set in the contract. In the opposite situation, the private party has no right to unilaterally terminate such a contract before filing a complaint.

The idea for the introduction of administrative contracts in the GTA is the creation of special relations between public administration and private entities, which should lead to a more individual approach. The administrative contract is predicted for taxpayers with overdue tax debt, and it can be concluded for monthly payments<sup>19</sup>. GTA also stipulates the conclusion of the tax settlement whose goal is to efficiently resolve the newly established tax obligations through stimulating measures<sup>20</sup>.

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18 The General Tax Act; Official Gazette, No. 147/08, 18/11, 78/12, 136/12, 73/13, 126/15.

19 Up to 24 monthly rate payments.

20 Although the idea is very good, the realization is not so efficient because interest rates could be reduced by up to 50 per cent if the payment is made within 90 days from signing the settlement and, in order to reach a settlement, the taxpayer has to accept the newly stated obligation and expressly give up the right to use legal remedies. Most taxpayers cannot fulfil their obligation in such a short period and this kind of approach does not care about the individual possibilities of payment, the liquidity of the taxpayer and it does not give an opportunity for private parties to settle in the most convenient way.

Taking into account that each taxpayer has a different financial background, it needs to be emphasized that individualization is very important in order to reach a settlement which is possible to comply with. If the state provides a solution that is in favour of an individual taxpayer, then, automatically, the taxpayer becomes more active in solving his/her own problems and the state can create a constructive dialogue. In any case, the ADR should be made possible, but only followed by a precise analysis which monitors the results and creates a new tax culture, with a vision of content citizens and an efficient public administration.

### 13.2.3 Research Questions, Data and Methods

1. **[RQ1]:** With the transposition process of a number of European legal regulations into Member States' legal systems, the **different language translations** cause **divergences in legal definitions**, especially in the area of administrative contracts and ADR, which touches both the private and public legal systems. **What are the main factors for divergences in (the transposition of) EU legal regulation in the area of ADR in Public Administration?**
2. **[RQ3]:** Mediation principles are incorporated within the principles of good governance, which lead to the administration convergence in terms of the **European Administrative Space. How can we reach a more coherent European Administrative Space?**

In this paper, we used different methodology with research techniques and analysis. First, we used theoretical research methods for identifying and differentiating between European and Croatian mediation regulation, by using inductive-deductive, classification and description methods on theoretical data analysis. With the theoretical data analysis we defined the main factors for divergences in EU legal regulation on ADR and Public Administration. Through a mediation case study, we used comparative and compilation methods to confirm similarities between Croatian mediation and EU good governance principles. In the empirical research analysis, the results of the statistical data analysis on the usage of mediation in Croatia are presented. The statistical results show the current role of Croatian mediation in public administration with its problems. Additionally, the proposed efficient solutions for good governance in Croatia can be seen as the main guidelines from mediation good practices in the new Member State. Hence, the future guidelines for stronger mutual cooperation between public administration, private parties and citizens are the answer to common European Administrative Space.

## 13.3 Mediation as an Added Value to European Good Governance

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Supporting mediation between public and private entities can be seen as an added value to European good governance. Among the many tasks and obligations, which

public authorities should respect, is the right to Good Administration settled within the Lisbon Treaty<sup>21</sup>. Good governance<sup>22</sup> can be reached through the accomplishment of a set of common principles, which are the first step in the creation of European Administrative Law. Despite this, the EU has no authoritative power regarding setting administrative standards, according to Heidebreder (2010)<sup>23</sup> this “...encourages voluntary national exchange and communication” and also “...precisely the non-binding quality of voluntary standardization makes it attractive for Member States.” In addition to the variety of public administration structures and regulations among Member States, the set of common principles can guide them throughout administration convergence. These common principles of public administration among EU Member States are part of the so-called “*acquis communautaire*”, which is presented as the **European Administration Space** (hereinafter: EAS)<sup>24</sup>. EAS is a term which is often used to describe the coordinated implementation of EU law and Europeanization of national administration law, which reflects a strong indirect link between European integration and public administration across Member States<sup>25</sup>. As Hofmann (2008)<sup>26</sup> noted: “*The European administrative space is a three-dimensional concept with complex vertical, horizontal and diagonal relations of the actors therein.*”

Mediation, together with its principles, is a useful method that could bring all these three dimensions together. Therefore, EAS common principles can be combined with the 12 principles for good governance, which could together be fulfilled through mediation principles. According to OECD-PUMA (1999) the **main administrative law principles** are common to Western Europe countries, which are driven into the four following groups as a shorter version of the 12 principles

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21 The Treaty on the Functioning of the European Union, article 41, OJ C 326, 26. 10. 2012.

22 A process of community, representation and amelioration by open and transparent decision-making, efficient and effective services management and the creation of a surrounding where the public authority and private parties cooperate and coordinate their actions for the purpose of institutional and economic development.

23 See Heidebreder, E. G. (2010). *Structuring the European Administrative Space*. EGPA Conference, p. 10.

24 EAS is the entire body of legislation of the European Community. EAS is derived from the rule of law and democracy, which must be adjusted to these new methods in administrative procedures at all levels of Public Administration. See OECD-PUMA (1999). **European Principles for Public Administration**. SIGMA papers, No. 27, OECD Publishing.

25 See OECD-PUMA (1998). *Preparing Public Administrations for the European Administration Space*. SIGMA Papers, No. 23, OECD publishing.

26 See Hofmann, H. C. (2008). *Mapping the European administrative space*. West European Politics, Vol. 31, No. 4, pp. 662–676.

for good governance after the Council of Europe<sup>27</sup>, which are together identified through the mediation principles after EU Mediation Directive 2008/52/EC<sup>28</sup>:

### 1. *Rule of law*<sup>29</sup>

The rule of law principle can be combined with more than one principle for good governance, such as ***rule of law principle*** (rules and regulations adopted in accordance with procedures provided for by law and are enforced impartially), ***principle of ethical conduct*** (public good is placed before individual interest; effective measures are made to prevent all forms of corruption), ***principle of competence and capacity*** (professional skills of those who deliver governance are continuously maintained and strengthened in order to improve their output and impact), ***principle of responsiveness*** (objectives, rules, structures, and procedures are adapted to the legitimate expectations and needs of citizens) and ***principle of sustainability and long-term orientation*** (the sustainability of the community is needed, to internalize all costs and not to transfer problems and tensions, long-term perspective on the future development). Namely, principles of EAS and good governance together can be achieved with the mediation ***principle of voluntariness*** (Article 3a), ***principle of access to ADR*** (Article 1) and ***principle of recourse to mediation*** (Article 5), under which parties have access to use mediation (ADR) on a voluntary basis, which can result in a balanced relationship between the parties involved. In the mediation process, importance is given to the ***principle of expertise, independence and impartiality*** (Article 3b), which means that the Mediator, as a third natural party, conducts a mediation proceeding in an effective, impartial and competent way. ***The confidentiality principle of mediation*** gives, in particular, insurance to the parties that all the information disclosed in this process cannot be used in any court or arbitration procedure. Confidentiality also means that the parties cannot disclose information to non-parties in mediation, but only when it does not oppose the safeguard of the public interest<sup>30</sup>.

27 More about the 12 principles for good governance at the local level with tools for implementation, see [http://www.coe.int/t/dgap/localdemocracy/Strategy\\_Innovation/12principles\\_en.asp](http://www.coe.int/t/dgap/localdemocracy/Strategy_Innovation/12principles_en.asp).

28 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters. This Mediation Directive is supported by the new Directive 11/2013/EU on consumer ADR. Although this Directive emphasizes mediation only in civil and commercial matters, we confirmed in previous sections these matters also touch Public Administration law.

29 Means legal certainty, reliability and predictability of administration actions and decisions, which refers to the principle of legality as opposed to arbitrariness in public decision-making and to the need for the respect of legitimate expectations of individuals (*neutrality and generality, legal competence, discretion, proportionality, fairness, timeless, integrity*).

30 Similarly, the principle of confidentiality is explained by the European Code of Conduct for Mediators in point 4.

## 2. Openness and transparency<sup>31</sup>

**Transparency and openness** can be identified with the same principle for good governance (public access to all information which is not classified; information on decisions, implementation of policies and results is made available to the public), and also with the **principle of fair conduct of elections, representation** (elections are conducted freely and fairly, citizens are at the centre of public activity and have a voice in the decision-making process), the **principle of innovation and openness to change** (advantage is taken of modern methods of service provision, to experiment new programmes and to learn from the experience of others for achieving better results). These principles can be achieved with the **mediation principle of information for the general public** (Article 9) and the **principle of information on competent courts and authorities** (Article 11), which means encourage mediation through its availability to the general public, in particular on the internet, competent courts and authorities.

## 3. Accountability<sup>32</sup>

The **Accountability** principle (identical to the principle for good governance) is displayed with the rule of law, which means that all decision-makers, collective and individual, take responsibility for their decisions, which are reported on, explained and can be sanctioned. This principle also touches **the principle of human rights, cultural diversity and social cohesion**, whereas it is important to treat cultural diversity as an asset to respect, protect and implement all human rights with no discrimination to reach social cohesion and mutual integration. Wahl, Kastlunger and Kirchler<sup>33</sup> conclude that: “Governments should emphasize citizen-friendly procedures to ensure citizens’ trust and in return, the trusting citizens will be voluntarily compliant.” Despite the fact that the mediation process is voluntary, enforceability of its agreements should not be a problem. Courts or other competent authorities shall, after **principle of enforceability of agreements resulting from mediation** (Article 6), ensure that it is possible for the parties to request that the content of the resulting written mediation agreement be made enforceable, unless it is contrary to the rule of law. That way the accountability principle could be accomplished. Moreover, with the **principle on effect of mediation on limitation and prescription periods** (Article 8), parties who choose mediation in an attempt to settle a dispute are not subsequently prevented from initiating judicial proceedings or arbitration in relation to the dispute by the expiry of limitation or prescription periods during the mediation process.

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31 Aimed at ensuring the sound scrutiny of administrative processes and outcomes and their consistency with pre-established rules (*responsibility, statement of reasons*).

32 Accountability of public administration to other administrative, legislative or judicial authorities, aimed at ensuring compliance with the rule of law (*supervision, to explain and justify its actions*).

33 See more in Jone M., Maples A. (2012), *Mediation as an alternative option in Australia’s tax disputes resolution procedures*.

4. *Efficiency in the use of public resources and effectiveness in accomplishing the policy goals established in legislation and in enforcing legislation* (“the three E’s method”)

**The Efficiency and effectiveness principle** for good governance can be achieved with performance management systems (TQM, CAF or others), which make it possible to evaluate and enhance the efficiency and effectiveness of public services to assess and improve their performance. Good governance is efficient when the results meet the agreed objectives, especially with the possibility to use all available resources. Additionally, efficient governance can be achieved with the **principle of sound financial management**, which predicts prepared multi-annual plans with the consultation of the public. That way, risks are properly estimated and managed, including by the publication of consolidated accounts and, in the case of public-private partnerships, by sharing the risks realistically. The public authority takes part in the arrangements for inter-municipal solidarity, fair sharing of burdens and benefits and reduction of risks with equalization systems, inter-municipal cooperation, mutualisation of risks and others. Additionally, this principle can be identified with **ensuring the quality of mediation principle** (Article 4), which encourages mediators and organizations providing a mediation process with effective quality control mechanisms concerning also the provisions of mediation services. Member States have to inspire their mediation entities to initial and further training for mediators in order to ensure the conduction of an effective, impartial and competent mediation process.

By following EAS principles through mediation principles for efficient good governance we could be a step closer to the formation of European Administrative law. If each Member State respects the common principles and accepts good practice solutions, the common European Administrative Space lives in practice. Diversities amongst Member States could be brought to the lower level only by exchanging practice, communication and coordination. Innovation of good governance with fully used mediation potential would create empowered citizens with more will to listen and participate in the decision-making processes. These principles through ‘*mediative communication*’ could reach a higher level of administrative capacity, public services efficiency and rationality of decision-making, which leads us to convergent EAS.

### 13.4 Current Stage of Mediation in Croatian Public Administration

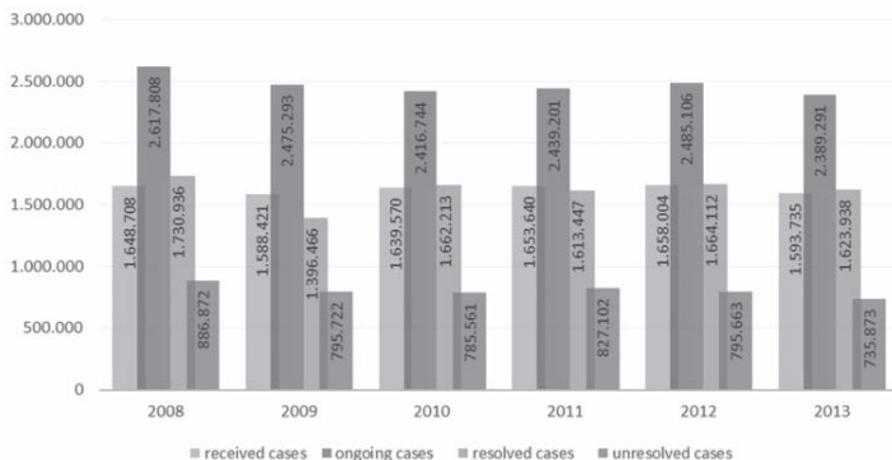
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The current stage of mediation cases in Croatia is poor, although Croatia has the highest number of court litigation cases in the EU. The average of all received litigation cases at all Croatian courts are nearly 1.500.000 per year (see Figure 1). In a period of 6 years, all Croatian courts have more than 2 million ongoing litigation

cases on average per year and every year almost 800.000 litigation cases remain unresolved.

**Figure 1**

The average number of litigation cases in all Croatian courts from 2008 till 2013



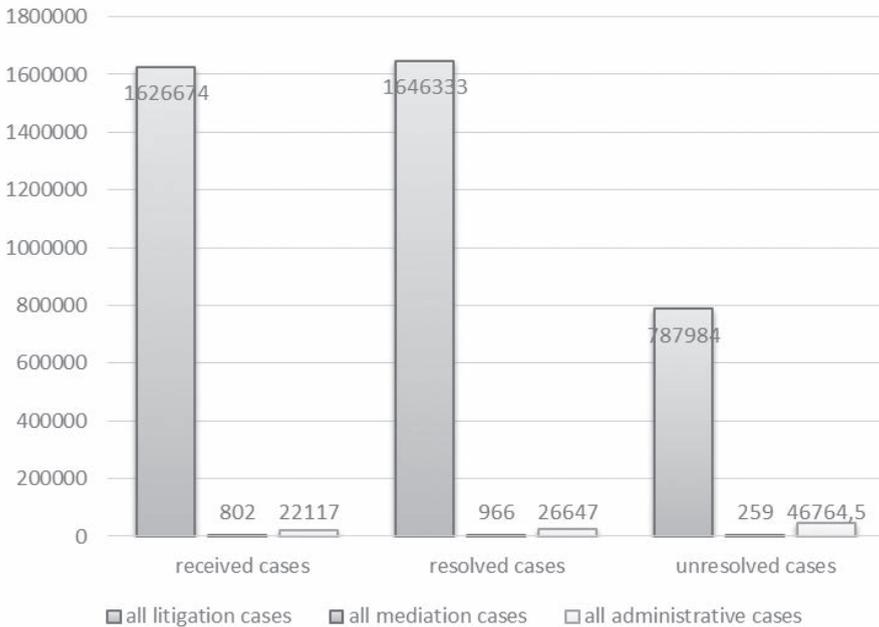
Source: Annual report of the Croatian Supreme Court in Zagreb, 2013.

The above results confirmed that almost a third of the Croatian population is resolving their disputes in court. Furthermore, from the average of all litigation cases, the Administrative courts (four Administrative courts and one Higher Administrative court) in average receive around 22,117 administrative cases per year, of which almost less than half are resolved per year (26,647 from 46,764.5 unresolved administrative cases). This means that from the average of all litigation cases received, there are 1% of administrative cases and less than 0.3% of mediation cases, (see Figure 2 below).

We can argue that a small number of mediation cases exist because not all Croatian courts offer mediation or conciliation in all litigation cases. From all Croatian courts, mediation is incorporated in the Higher Commercial court, five Commercial courts, the District court (in Zagreb) and eight County courts. Consequently, the statistical data reports are not harmonized. For example, annual reports from Commercial courts propose data on the number of litigation cases resolved with conciliation. Annual reports from the Higher Commercial court and County courts contain, besides the data on received and (un)resolved cases, also data on (un)successful mediation, from which we cannot deduce what (un)successful mediation means.

**Figure 2**

Comparison of the average litigation, court-annexed mediation and administrative cases in the Croatian courts for 2008–2013



Source: Annual report of the Croatian Supreme Court, 2013.

Mediation in Croatia is used more in consumer and business disputes, which are also a part of the public domain. Besides the Croatian court connected mediation, private-public bodies<sup>34</sup> also provide out-of-court mediation or a so-called in-house appeal procedure, which is regulated with the public (universal) service obligation (PSO or USO). These private-public bodies are regulated under public administrative law as public providers of public universal services<sup>35</sup>. If the consumer and public provider do not reach a settlement, the public service issues an administrative decision and furthermore, the consumer has the right to an administrative appeal on the public regulatory agency after the Administrative court and then in the High Administrative court. The consumer complaint process as an in-house ADR mechanism is almost the same in all public services. Unlike, in the *telecommunications sector* where before the consumer appeal in a public regulatory agency, has

34 By private-public bodies we mean private-public companies, public agencies or public universal services in various sectors, such as telecommunication, energy, gas, postal and health services, insurance, public traffic, tourism etc.

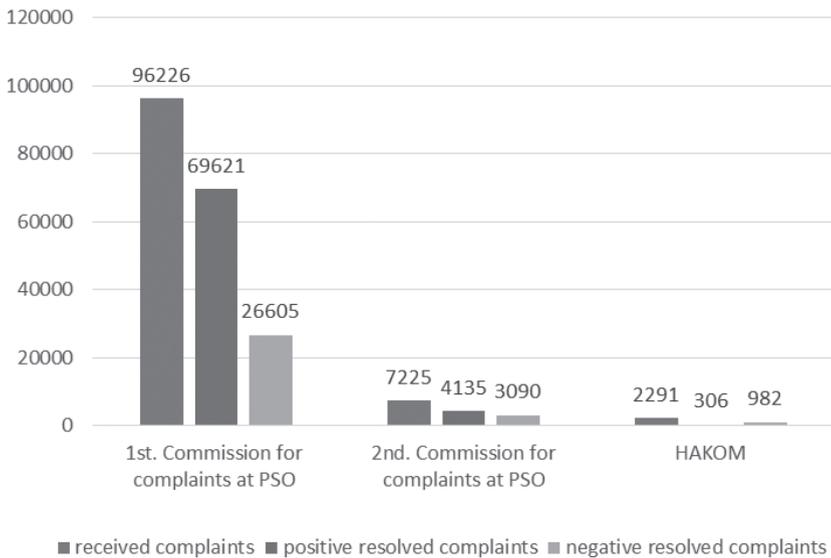
35 For example, almost all Croatian *public services* have adopted in-house mediation, which can resolve disputes between the public service as a public body and its user as a consumer.

to complain to two Complaint Commissions with a two-stage in-house complaint procedure.

The Administrative courts do not collect data on administrative cases of disputes between public services and consumers. Therefore, we cannot predict how many of all the administrative cases received are a consequence of unsuccessful ADR procedures in private-public bodies. Figure 3 indicates the movement of consumer complaints from the first complaint stage at the Telecommunication public services till the appeal process at the Croatian Telecommunication Regulatory agency (HAKOM). On average, the 1<sup>st</sup> Complaint Commission receives more than 95,000 consumer complaints per year, of which 22 % of all cases received are resolved negatively (26,605). The 2<sup>nd</sup> Complaint Commission receives around 7,000 consumer complaints, from which 30 % are resolved negatively (3,090). In fact, the Energy Regulatory agency receives more than 2,000 consumer appeal cases, of which 30 % are also resolved negatively (982). In Regulatory agencies' annual reports, there is no data on the submitted administrative appeals at the Administrative courts.

**Figure 3**

Statistical comparison of the average of all consumer complaints in the Croatian telecommunication public services (PSO) and at the Croatian Telecommunication Regulatory Agency (HAKOM) for 2008–2013



Source: Annual reports of the Croatian Telecommunication Regulatory Agency (HAKOM), 2008–2013.

Beyond all obstacles in the ADR legal regulation and a small number of ADR cases in Croatia, there also exists some ADR good practice at the Croatian State Attorney's Office, which has imposed an obligatory mediation process in cases where the State is being sued<sup>36</sup>.

The Croatian State Attorney<sup>37</sup> represents the State in civil, administrative, criminal, financial and other cases. In practice, the State Attorney has approximately 60,000 received cases per year, of which there are 76 % litigation cases (48,532), 5 % administrative cases (3,117) and 19 % other cases (12,006)<sup>38</sup>. Mediation cases are included in the group of other cases, which means that every year there are more 10,000 cases resolved by mediation<sup>39</sup>. Maybe Croatia is in need of imposing an obligatory mediation process at all levels of the domestic legal system, although this is the very opposite of the main mediation principle of voluntariness. Almost 79 % of the Croatian population would like to know better their legal rights<sup>40</sup>. Therefore, it seems that Croatians have to be forced to try and trust the mediation process, otherwise they do not know of its existence.

### 13.5 Efficient Solutions Towards EAS

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#### *1) One coherent ADR mechanism model, which is applicable to all legal fields*

Almost 750 different ADR schemes exist in the EU, but only 400 of them were reported to the European Commission<sup>41</sup>. They are all based on different procedures carried out by different entities. If Member States are obligated to impose EU legal regulation into their domestic legal systems, which have to be efficient, then the duty of the EU is to establish one coherent ADR model, which would be applicable to all legal fields. In general, it is considered that administrative appeals are not a form of ADR, although ADR is increasing in administrative law with the priority to improve the relationship between the administration and citizens. The adminis-

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36 Mediation is stated in Articles 30 and 90 of the State Attorney's Act (2009), Official Gazette, No. 6/09, 153/09, 116/10, 145/10, 57/11, 130/11, 72/13, 148/13, 33/15, 82/15.

37 The Croatian State Prosecution or Attorney represents the Republic of Croatia and takes legal action within its jurisdiction to protect the Croatian Constitution and legality before the Constitutional Court, the Supreme Court, the High Commercial Court and the High Administrative Court of the Republic of Croatia. It also takes legal action within its competence in international and foreign courts and other bodies, and gives the request of state bodies' opinions on draft laws and other regulations. See more on [www.dorh.hr](http://www.dorh.hr).

38 See the Annual report of the Croatian State Attorney's Office for 2014.

39 Mediation cases are proposed after article 186 of the Civil Procedure Law, Official gazette, No. 89/14.

40 See for example Standard Eurobarometer 83 of May 2015 for Croatia on [http://ec.europa.eu/public\\_opinion/archives/eb/eb83/eb83\\_en.htm](http://ec.europa.eu/public_opinion/archives/eb/eb83/eb83_en.htm).

41 See more in Directorate General for Health and Consumers – DG SANCO, 2011, p. 6.

trative appeal may be included, in the broader sense, in the category of ADR tools for the realization of disputes by courts; it has been strongly recommended by the Council of Europe and has found its way into most jurisdictions, as well as in EU law<sup>42</sup> (e.g. the new proposed rules for administrative contracts). Essentially, there is a need to develop a coherent ADR framework not just for civil proceedings, but also within public administrative law across all Member States and in accordance with common principles. The convergence designs European administrative space in terms of one coherent ADR system which combines different ADR bodies with different ADR schemes, all interconnected under the main ADR body. The best practice of ADR systems points out the successful structures of an “administrative” ADR system (e.g. in Belgium and The Netherlands) and the possibility of transferring them to the domestic legal ADR system in all EU countries. Both Belgium and The Netherlands have a strong and stable structure of the ADR system, which combines a greater number of different ADR bodies under the one called “Mediation umbrella”.

### *2) Harmonized statistical Registers of the data on the contractual disputes across Member States and its public authorities*

It is crucial to analyze and gather data on contractual conflicts between public authorities and private parties, because the disputes can arise on legality questions, but also, they can consist of side questions such as payments and restitution. In the second case, mediation would be an ideal instrument for a quick, efficient and more creative tool. Innovative and open institutions must search for new ways to deal with the disputes concerning private parties and public authorities, because only efficient tools can improve local development and participatory citizenship.

### *3) Specified data selection at the Administrative courts (specified sector submitted administrative appeals)*

The specification of data in the Annual Reports of Administrative courts does not select submitted administrative appeals from negative administrative decisions issued by the Regulatory Agency or PSO/USO. If the selection of this data was harmonized in all public administrative bodies (also providers of service in general interest – PSO), then we can see how many unsuccessful ADR cases are brought to the Administrative court, or, even how many ADR cases are issued negatively by the 1<sup>st</sup> or 2<sup>nd</sup> stage of the Commission at the PSO and where the citizen as a consumer does not file an administrative appeal. Additionally, it is important to harmonize the structure selection of data in annual registers or reports of all public authorities. In this context, it is also important to develop or impose harmonized Quality management system tools, such as TQM, CAF, EEE or EFQM, which can help measure the efficiency of public servants in public bodies. With harmonized efficiency tools,

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42 See Dragos, D.C. in Marrani, D. in ReNUAL, 2014, p.540.

we would be able to analyze all selected data of the public administration together and see the true and right picture of where we stand on the scale.

#### 4) *Empowering citizens' knowledge with the active state promotion of existing ADR mechanisms*

The Europe 2020 Strategy<sup>43</sup> supports that “citizens [are] to be empowered to play a full role in the single market”, which “requires strengthening their ability and confidence to buy goods and services cross-border”. A strong need for the promotion of ADR mechanisms exists in the EU. Although, the EU has issued more than enough strategies, plans, constructive papers, regulations etc. on the field of ADR for its promotion, in practice, a high level of citizens’ (or consumers’) and businesses’ (or public bodies’) lack awareness about the existence of various ADR schemes. For example, both Belgium and The Netherlands have an effective ADR system, which is available on-line as the Online Dispute Resolution (ODR) platform<sup>44</sup> to all citizens and businesses. In fact, the on-line component even makes the ADR system more visible and recognizable to all citizens, consumers, businesses, private and public entities in the country. Indeed, Belgium has also taken care of the socially disadvantaged and older citizens with the activation of all public schools and libraries with on-line accessibility to teach them “know how” to navigate on the ODR platform.<sup>45</sup>

## 13.6 Conclusions

Preventing conflicts by mediation is a proceeding that tries to understand the needs and legitimate expectations of citizens and educates both private parties and public authorities to be more open and participative. By participating, citizens learn about the benefits, expectations, and better understand their obligations under the Public Administration. With citizens’ cooperation, public administrations achieve efficiency and the possibility of higher development. Mediation can be the most efficient solution for both public and private interests, which leads to future cooperation, development of economics and building solid administrative capacities with empowered citizens. Building efficient cooperation with one mediation coherent model leads us to the fulfilment of EAS common principles. If this coherent model is applicable to all legal fields, this shows not only an efficient functioning of the “*acquis communautaire*”, but also a starting point for a unified European Public Administration.

Mediation is a useful tool by which cooperation is being developed and new investments are being encouraged. Local and regional governments must not fail to

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43 See European Commission: *Europe 2020, a strategy for smart, sustainable and inclusive growth* (2010), p. 5.

44 The Belgium ODR platform accessible on <http://economie.fgov.be/belmed.jsp>.

45 More about the Belgium ADR system in Voet (2013), p. 34–36.

cooperate with private parties, which necessarily includes identifying and analyzing the needs and possibilities of both citizens and public authorities. The best way to achieve cooperation is through communication, which effectively can be reached with ADR methods. Even the Croatian State Attorney Annual Report<sup>46</sup> emphasizes that the parties must make an effort to resolve disputes by ADR in all appropriate cases, whether under civil or administrative law. The communication developed during the mediation process, means that both private and public parties gain a clearer understanding of their position, which leads them to new partnerships. The Croatians' need for action is to harmonize measurement tools for mediation practice in the public administration, which could show the real picture of its success.

Taking into account the needs and existing problems of public administration, mediation can be seen as an added value to European good governance. Additionally, mediation can be used as a communication bridge between all Member States towards common European administrative space, which can provide high level cooperation with innovative dynamics. Developing a culture change with participation, negotiation and coordination, we can face new challenges within expectations to develop more responsive and open community. To mediate means to build cooperation with mutual understanding to achieve good governance and satisfied citizens as a long-term orientation.

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46 Annual Report of the State Attorney of the Republic of Croatia for 2014, p. 106, 151.

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## 14. Impact of the Organizational Environment on Administrative Coordination: The Case of Two Croatian Ministries

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Teo Giljević

### 14.1 Introduction

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The key research issue of the chapter is how the administrative organization environment impacts administrative coordination. Every organization exists in a specific physical, technological, cultural, and social environment that it needs to adapt to, and the survival of the organization itself depends on the type of relation that it will develop with wider systems whose element it is (Scott, 2003). Therefore, it is possible to define an organization's environment as "all the elements that are outside of the organization and can affect it" (Koprić et al., 2014). It can be stable, which implies that changes in it are rare, slow or small-scale, or unstable, which would mean that it is changeable, turbulent, and dynamic. External factors of an organization, in other words, the environment factors, are the factors that the organization can impact only to a certain extent. It therefore must adapt to them if its goals are survival and development (Sikavica, 2011).

The administrative organization has to adapt to its environment as well, in particular because administrative organizations are frequently more susceptible to pressures and restrictions from the environment than other organizations, so contemporary research stresses that specifically the environment of an organization is exceptionally important for an analysis of administrative organizations (Rainey, 2003). The more similar the *output* of an administrative organization is to the one required by the environment, the easier it will also be for the administrative organization to obtain the necessary energy from the environment, given that this will satisfy the social environment of the administration, primarily the citizens, who have the most important say in democratic systems.

Earlier, in line with the command-and-supervise principle, administration only prepared draft legislation for a representative body. Nowadays, in accordance with the new approach of governance – *good governance* – the authorities and ad-

ministration must also include other participants in the decision-making. Modern legislation drafting techniques also include public consultations and the participation of the general public through a public hearing.

## 14.2 Administrative Organizational Environment

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Administration acts within the environment and is limited by it. Heffron, analyzing the environment of administrative organizations in the USA, mentions two basic components of the environment: the general environment of all organizations in a specific society and the specific environment that is unique for each individual organization. The general environment consists of social and cultural values, political and legal norms and values and economic, demographic, and technological conditions in society. On the other hand, the specific environment of individual organizations consists of those organizations, groups, and individuals with whom the organization has a direct interaction (see Heffron, 1989).

Koprić highlights that there are three most important areas of the environment for an administrative organization: the administrative system, the political system and the citizens, in other words, a wider social environment of the political and administrative system (Koprić, 1999). Some authors also add international, i.e. global environment, which impacts administrative organizations by creating and sometimes imposing its rules. Examples of this are the EU administrative criteria (Koprić et al., 2014; Sever, Kovač, 2016).

The administrative system is the human cooperation system whose elements are administrative organizations, and is marked not only by the characteristics and processes common to all human cooperation systems, but also by some specific traits arising from the nature of its elements, administrative organizations, and specificities of the immediate environment (Pusić et al, 1988). With the development of a country, its administrative system changes as well and administrative functions become increasingly complex. Modern administration is no longer single and centralized as before and obtains the form of the public sector. In such conditions, when the complexity is increased for each and every administrative organization, inter-organizational networks for policy formulation emerge, and the focus switches from an individual organization to programmes (Koprić, 1999; Koprić, 2017).

Members of the European Union, as well as EU Enlargement countries, are existing in the European Administrative Space which can also be seen as an important area of environment of administrative organizations. Koprić et al. define European Administrative Space (EAS) 'as an informal *acquis* of the EU related to the organisation and functioning of public administration' (Koprić et al, 2011: 1538). The basic idea of EAS is administrative harmonization and the convergence of traditional models of public administration and traditional administrative solutions. Application of EAS is supported by the appropriate procedures and accountability

mechanisms. EAS includes recognised standards, principles and values that should be implemented by national and European administration within the EU (Koprić et al, 2011; Koprić, 2014; Kopric, 2014a; Sever, Kovač, 2016).<sup>1</sup>

Pusić defines the political system as the “type of institutional network and the corresponding orientation structure in the awareness of a significant number of members of a community, where the constant process of the differentiation of interests and behaviour motivated by them is integrated within the framework of specific basic rules that they themselves occasionally change under pressure from differentiation under the influence of political interaction and as a consequence of the changes in the environment” (Pusić, 1974).

Citizens, in order words, the social environment of an administrative organization, are taking over an increasingly big role – the role of associates, i.e. partners to the administration. Pierre and Peters stress that, if decision-making is subjected only to technical and rational *policy* analysis without the inclusion of social actors, the administration may become autistic. Therefore, the governance process represents a continual set of adjustments of political and administrative activities to the challenges from the environment (Pierre and Peters, 2005). The value of participation, i.e. participation in public affairs, has gained legitimacy, and a number of institutions have been developing that have the task to ensure the participation of citizens in public affairs, particularly through raising awareness, supervision of government and seeking information about its activities, by providing expert assistance in policy making and resolving public problems, by participating in management bodies of public institutions. (Koprić et al, 2014). Participation is one of the principles of good governance proposed in the White Paper on European Governance.<sup>2</sup> An increasing need for cooperation between the public, private sectors, and the non-profit sector, as well as the complexity of the connections in the contemporary democratic society imposes new values. One of them is the transparency of public government and public governance, which is nowadays at the core of good governance and has become a part of what is considered high-quality public government. Contemporary society requires an open, visible, and accessible government that continually informs citizens and organized stakeholders about what it does and how it spends public resources (Musa, 2014).

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1 Despite its primarily pragmatic value, European Administrative Space is also a theoretical notion which has several different meanings: normative, cultural, political, sociological and comparative-administrative (see more Koprić et al, 2012).

2 The Commission of the European Communities (2002) European Governance: A White Paper, Brussels, 25.7.2001, COM (2001) 428 final. Five principles underpin good governance: openness, participation, accountability, effectiveness and coherence.

### 14.3 Administrative Coordination: The Term Administrative Coordination

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The term “coordination” as a mutual harmonization of different activities has become one of the key terms of administrative science and *policy* research that is frequently used in an insufficiently specified manner. Koprić et al. define administrative coordination as a continual, concurrent channelling of a number of continual administrative activities towards a common goal. SIGMA states 8 dimensions of coordination: coordination of the preparation of government sessions; coordination of legal conformity; coordination of the government programme and priorities, and their link to the budget; coordination of the policy content of proposals for the Government; co-ordination of communications; coordination of the monitoring of government performance; coordination of relations with the President and Parliament, and coordination of specific horizontal strategic priorities (SIGMA, 2004).

This chapter begins with the definition of coordination as a process of harmonization and adaptation of decisions and activities of a number of actors with a view to attaining a certain goal that cannot be attained by activities of one actor only (Giljević, 2013).

#### 14.3.1 Types of Administrative Coordination

The differentiation between positive and negative coordination was first introduced by Fritz W. Scharpf. He was applying it to situations in which the plans of one actor imply external impacts for the others, in other words, when costs and benefits are unevenly distributed. Negative coordination implies primarily bilateral negotiations in which involved actors express their disagreement and possibly take the veto position. Consent and/or refusal, as the case may be, are conditioned exclusively by individual judgments on the costs and benefits, due to which negative coordination is primarily a mechanism for preventing problems. On the other hand, positive coordination is a mechanism of efficient resolution of problems. By means of multilateral negotiations, a decision about the goals and plans of all involved actors is taken in an innovative way, by comparing the solution favourable for each of the actors (Mayntz and Scharpf, 1975; Scharpf, 1978).

#### 14.3.2 Instruments of Administrative Coordination

Coordination instruments represent specific activities and structures created with a view to improving coordination. They can be classified into two categories: structural-formal and informal instruments.<sup>3</sup>

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<sup>3</sup> Bouckaert et al. divide instruments into structural and managerial. The latter include leadership, planning, and creating common values, in other words, in a wider sense, desired organizational cultures (Bouckaert et al., 2010).

The basic trait of formal instruments is that they are provided in advance by specific acts of the organization. The structural-formal instruments of coordination may be differentiated according to the level of hierarchism. The least hierarchical structural form is the liaison and/or boundary spanning, as the case may be, inter-organizational groups and the coordinator are in the middle, while coordination units that can have all the characteristics of an organization are the most hierarchical (Alexander, 1995). The boundary spanning is the channel for formal communication, interaction, and coordination between its mother organization and other organizations. The next in order is the inter-organizational group that represents one of the more frequent structures for inter-organizational coordination, especially in administration, according to the good governance model. It is also called a working group, a task force, a steering committee. Working groups can be standing and ad-hoc. A lack of formal powers is frequently stressed as their deficiency, in other words, they are not politically strong enough. Their function is important anyway, as a kind of *ad hoc* network for the transfer of information and harmonization of the central level with the rest of the territory (Alexander, 1995). Such expert working groups are also active in the Croatian administrative system. Regulation on Principles for the Internal Organization of State Administration Bodies provides that, for the preparation of draft legislation, issuing opinions and proposals on important issues from the remit of state administration bodies, advisory working bodies (committees, working groups etc.) may be established within the state administration bodies for a discussion on specific issues. In the drafting procedure, experts such as representatives of stakeholders may be appointed as members of expert working groups in accordance with applicable legislation or on the basis of a public call; in this process, account should be taken of the criteria of expertise, previous public contribution to the subject issues, and other qualifications relevant for the issues regulated by law or another piece of legislation, or are provided for by an act of a state administration body.<sup>4</sup>

On the other hand, informal coordination instruments include various relationships of both the members of the organization and its environment.<sup>5</sup> People feel better in them and people in them satisfy their own needs for self-determination (Katz and Kahn, 1967). Chisholm mentions numerous informal channels of coordination in a study on a public transportation organization in the San Francisco area. Those informal contacts frequently make up for formal contacts and they make up for the tardiness and bureaucracy (Chisholm, 1988).

In order to operationalize the administrative coordination variable, the following indicators have been selected in this chapter: working groups for drafting legislation and policy making, opinions on legislative drafts prepared by other

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4 The Code of Practice on Consultation with the Interested Public in Procedures of Adopting Laws, Other Regulations and Acts.

5 Informal relationships constitute an informal organizational structure only provided that they affect the formal goals of an organization, its formal structure or activity (Koprić, 1999).

central state administration bodies, opinions on legislative drafts obtained by the observed organizations from other central state administration bodies, the type of contacts (formal and informal), and carrying out public consultations.

## 14.4 Ministry of Public Administration and Ministry of Entrepreneurship and Crafts as Case Studies

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The study begins from the question about whether and how the environment of an administrative organization affects the administrative coordination as an external variable in drafting legislation and public policy formulation.

### 14.4.1 Study Methodology

When choosing between the qualitative and quantitative methodologies, research uses the mixed or combined methodology. Such research papers in 27 literatures are designated as the “concurrent triangulation design” (Creswell et al. 2003) which implies that the researcher uses two different methods to confirm, corroborate, or compare the validity within a study. Some authors call the combining of methods triangulation, whereas others call them a multiple methods approach, considering that triangulation relates only to the combining of various data collection methods in the same research project (Tkalac-Verčić et al., 2010). Campbell and Fisk use the term “multiple operationalism”, Payne talks about the so-called “eclecticism”, whereas Denzin uses the term “triangulation” (Halmi, 2005).

This research uses methodological triangulation and data triangulation. Two case studies were selected as the basic research strategy – Ministry of Public Administration and Ministry of Entrepreneurship and Crafts. Data were collected by combined methods: documentation analysis, semi-structured interviews, and questionnaires with closed questions. An analysis of documents were provided for quantitative data (the number of working groups, the number of meetings, the number of regulations etc.), and also qualitative data. Semi-structured interviews were conducted with members of the observed organizations (employees and officials of the Ministry of Public Administration and Ministry of Entrepreneurship and Crafts), as well as the external members who cooperated with the observed organization in the preparation of draft legislation and policy making through participation in expert working groups (members of academia, representatives of civil society organizations, officials and employees of other administrative organizations). In parallel with the interviews, a survey was also carried out and attitudes to specific questions were tested by the use of the Likert scale in the questionnaire. A significant problem of the research was the fact that all necessary data regarding the Ministry of Entrepreneurship and Crafts could not be collected. Minister Gordan Maras stopped the interviews after the first one was completed. Also, the Ministry did not provide the requested data. Interviews were conducted only with external members who coop-

erated with the Ministry in the preparation of draft legislation and policy making through participation in expert working groups.

Semi-structured interviews were conducted with 74 people. There were 21 people interviewed from the Ministry of Public Administration, of whom 6 were officials and 15 civil servants with managerial duties. Also, 30 external members of working groups for drafting legislation of the Ministry of Public Administration were interviewed (representatives of other administrative organizations, civil society, academia) who participated in the working groups in the course of 2012 and 2013. From the Ministry of Crafts and Entrepreneurship, a full interview was completed only with one civil servant. However, that interview cannot be used in data analyses, due to the fact that it is not possible to protect anonymity of source. Also, 15 external members of working groups for drafting legislation of the Ministry of Crafts and Entrepreneurship were interviewed. After the interview, respondents were given time to complete the survey.

#### **14.4.2 Administrative Coordination of Ministry of Public Administration and Ministry of Craft and Entrepreneurship**

According to the results of the survey carried out, the respondents believe that the complexity of the environment significantly affects administrative coordination (Mdn=4, IQR=0). Also, the respondents were also offered for consideration the ranking of several variables that may affect administrative coordination: the complexity of the environment, the administrative capacity, the type of the administrative activity, and the complexity of the organization. In the ranking of the variables, the complexity of the environment is first in terms of the impact, and the administrative capacity is the second, the third is the type of administrative activity, and the fourth the complexity of the organization.

##### *Expert Working Groups*

In April 2012, a total of 14 expert working groups (hereinafter: EWGs) was established in MPA in which a total of 111 people participated. 51 people from MPA participated (17 officials and 34 civil servants), 31 from among the civil servants in the administrative system and 28 from the ranks of civil society and academia. In 6 EWGs 1 official participated, in 4 EWGs 2 officials, in one EWG 3 officials participated, whereas in two EWGs no officials participated.

Some of the respondents interviewed stressed that at the very beginning of the mandate, MPA established a number of working groups for which there were no clearly defined goals, and the first meetings dealt with general topics. It can be concluded that the leadership of MPA engaged and used independent expertise and experts outside of the state administration at the very beginning of the policy formulation process, and even in the phase of the very defining of priorities, in the areas where there was no clear guidance (*"In the first transitional phase of this govern-*

ment the working groups were a surrogate for administrative routine. What people in the Ministry otherwise do on a daily basis i.e. prepare regulations, was supposed to be done through EWG"). In the establishment of the working groups mentioned above one can recognize positive coordination, as understood by Scharpf as a mechanism whereby a decision about the goals and plans of all involved actors is adopted in an innovative manner through multilateral negotiations (Scharpf, 1978).

One of the interviewed officials stressed the need for the interested public, the experts, and all the stakeholders, to be included in the phase of policy making. He notes that it was possible to manage that in MPA in the areas where the public was interested and active (*"In MPA this happened in several areas, where the public is interested and active. Co-policy making by the public is more significant than the classic administrative area"*). The best examples for public policy making are the Civil Partnership Act and the Associations Act, and those examples also prove the importance of the political will itself.

According to claims from the interview given by the members of MPA, this ministry applies various models when it comes to the legislation adoption process. This depends on whether a legislative act is of a professional or technical nature, and only employees working on respective activities are engaged. An example of such pieces of legislation is the State Registers Act, drafting involved employees of MPA and employees of a first-tier state administration body. On the other hand, legislative acts such as the Associations Act and the Civil Partnership Act were drafted by involving all the stakeholders.

On the other hand, it is hard to determine how many expert working groups were established in the Ministry of Entrepreneurship and Crafts in the same period because they did not provide information in accordance to the *Right of Access to Information Act (RAIA)*. The Ministry replied that they do not keep records of that type of information. However, on the internet site of the Ministry there was information about two expert working groups. The expert working group for the Craft Act involved six members of NGO (Unions, Craft Camber) and six members of the administrative system. The second expert working group was for the Strategy of Entrepreneurship Development 2013–2020.

According to the claims from the interview given by the member of administrative system, working on the Craft Act was an example of malfunctioning cooperation. He emphasised the arrogant attitude of civil servants and officials from MEC, ignorance, disrespect (*"...they were very arrogant ... they were not ready to listen to the arguments of external members of the working group"*). The impression of the respondent was that officials from MEC were not sure what they wanted to accomplish with the Craft Act and there were no usual agreements with the Croatian Chamber of Trades and Crafts. Members of the Chambers were especially displeased with working on the Crafts Act because of threats and disregard (*"we*

*found out about a new Draft Proposal Act on Crafts from the media...”; “there was no dialogue, experts were disregarded”).*

### *Providing and Requesting the Opinion of Other Administrative Organizations*

Due to a specific scope of work, for instance legislative acts pertaining to civil servants’ activities, the Ministry of Public Administration frequently seeks opinions of all administrative organizations (*“We submit... to all bodies for opinion... after those opinions are collected, we have to see which of those are acceptable and what we will include in a draft legislative text, and what is not acceptable, in the Table with comments we specify why it is not”*). Some civil servants of the Ministry of Public Administration have emphasised that the procedure for requesting and collecting opinions can frequently be a decelerating factor (*“we wait for them for a very long time, a month or so...”*).

In the course of 2012, MPA prepared 193 opinions on legislative drafts, reports and public policies, whereas in 2013 they prepared 430 opinions on legislative drafts and public policies (more than double the number, 122.7%, in comparison with 2012).

Civil servants and officials of MPA claim that administrative organizations frequently request their opinions, especially because the remit of the Ministry includes the oversight of the implementation of the General Administrative Procedure Act, but also due to the practice in hand. The position of MPA employees is that their opinions are partially adopted. A large number of civil servants in leading positions in MPA stressed as a frequent problem that the deadlines for submitting opinions are very short (*“often the deadline has already expired when a legislative act is received at the Ministry, and there is no time for the preparation of the opinion”*).

Due to the scope of work of the MEC, Standing Orders of the Croatian Government provides the obligation for state administration bodies in the preparation of draft legislation to consult a professional association (Chamber of Commerce, Chamber of Crafts and Trades). The Crafts Act also stipulates that one of the prerogatives of the Chamber of Crafts and Trades is to be consulted in all matters concerning crafts. However, members of the Chamber of Crafts and Trades stated in interviews that the MEC did not consult them enough as stipulated in the Standing Orders of the Croatian Government and Crafts Act. On the other hand, civil servants from other administrative organizations stated that the MEC consult them regularly. The MEC did not provide data for this research about the prepared opinions on legislative drafts, reports and public policies that were made by other administrative organizations.

### *Formal and Informal Contacts*

In the survey, both civil servants and officials of the MPA said that they have frequently both formal and informal contact with members of other administrative organizations. Some of the officials of MPA have particularly stressed the importance of informal contacts that can improve coordination in the adoption of acts and accelerate the processes (“...I call an official in another ministry and tell them ‘please send it in Word format so that we can retrieve it and edit it’. This ‘networking’ is important here, and it is good”). Informal channels can make up for the gaps in the formal structure, such as tardiness, and accelerate obtaining information, as also shown by Chisholm in his study by illustrating how formal channels may sometimes be too slow (Chisholm, 1988).

Concerning the fact that conducting interviews was stopped in the Ministry of Entrepreneurship and Crafts at the beginning of that process, it was impossible to collect the necessary data concerning formal and informal contacts.

### *Public Consultations*

According to the *Report on the Implementation of the Code of Practice on Consultation with the Interested Public in Procedures of Adopting Laws, Other Regulations and Acts in 2012*, prepared by the Office for Cooperation with NGOs of the Government of the Republic of Croatia, the MPA conducted seven public consultations. Three draft proposals of laws did not receive any comment (Draft Proposal Act on the Amendments to the State Registries Act, Draft Proposal Act on Electoral Register, Draft Proposal Act on the Amendments to the Act on the Financing of Political Activities and Election Campaign), one (Draft Proposal Act on Personal Name) received three comments, another one (Draft Proposal Act on Local Elections) received 9, a third one (Draft Proposal Act on the Right to Access to Information) received 10. The highest number of comments was submitted for the Draft Proposal Act on the Amendments to the Act on Local and Territorial (Regional) Self-government, 19. The respondents also felt that the environment was more turbulent regarding the draft proposal act when they mentioned particularly the preparation of that act, which involved a lot of politics.

*The Report on the Implementation of the Code of Practice on Consultation with the Interested Public in Procedures of Adopting Laws, Other Regulations and Acts in 2013* states that in 2013 the Ministry of Public Administration carried out three public consultations. Out of 705 of those who submitted comments, 466 comments were taken into consideration. 78 comments were adopted, whilst 14 were adopted partially. The Draft Civil Partnership Act attracted the highest number of comment providers, as many as 651, of whom 623 were individuals, 21 associations, 3 from the ranks of trade unions, employers and religious communities, and 4 categorized as others. The Draft Associations Act received a total of 223 comments from 54

comment providers. Of those, 5 were individuals, 40 associations and five trade unions, employers and religious communities, and four from the “other” category.

According to the *Report on the Implementation of the Code of Practice on Consultation with the Interested Public in Procedures of Adopting Laws, Other Regulations and Acts in 2012*, there is no data about public consultations that were conducted by the Ministry of Entrepreneurship and Crafts. *The Report on the Implementation of the Code of Practice on Consultation with the Interested Public in Procedures of Adopting Laws, Other Regulations and Acts in 2013* states that in 2013 the Ministry of Entrepreneurship and Crafts carried out four public consultations. Out of 79 of those who submitted comments, 560 comments were taken into consideration. 200 comments were adopted, while 13 were adopted partially. The Strategy of Entrepreneurship Development attracted the highest number of comments, as many as 325, from 29 providers of whom 2 were individuals, 4 associations, 5 from the ranks of trade unions and employers, 2 from academia and 16 others. The Crafts Act received a total of 236 comments from 48 comment providers of whom 20 were individuals, 19 associations and 9 others. The Act on the Amendments to the Free Zones Act received a total of 7 comments, and for the Act on the Amendments to the Act on the State Aid for Education and Training there were no comments. External members of working groups of MEC expressed positive attitudes toward public consultations. They stated that public consultations help them to monitor the legislation process in the area of their interest and also actively participate in creating public policies.

## **14.5 Characteristics of Political-Administrative System**

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### **14.5.1 Contingency of Administrative System Due to Accelerated Adoption of a Large Number of Laws**

In interviews, the respondents, both inside and outside the administrative system, frequently mention, as one of the main problems, that regulations in the Republic of Croatia are too often adopted in an urgent procedure (“...*there is a little bit too many laws under urgent procedure*”; “*I generally think that in our country laws are adopted too quickly*”). In the Report on the Implementation of the Annual Plan of Normative Activities for 2013, the Legislation Office of the Government of the Republic of Croatia (hereinafter: LOG) states that in 2013, 45 law proposals from the Annual Plan for 2013 and 299 *ad hoc* law proposals were adopted. This means that in 2013, only 13 per cent were planned and as many as 87% adopted laws were *ad hoc*. LOG states that this large number of *ad hoc* legislative activities was influenced by external and internal factors. The external factors mentioned include the harmonization of Croatian legislation with the EU *acquis* and the current economic situation that “requires a fast change of legislation to respond to adverse economic trends”.

The impact of the approximation to the EU *acquis* was also perceived by the interviewed respondents, as assessed by one of the MPA officials: “*The EU accession has set a bad practice, especially in the last several months prior to EU accession, when many bad things were let go because we had to, as there was no time*”. Similar comments were also received from representatives of civil society organizations, who stressed that this had also created problems with external stakeholders (“...*this lack of time where the Government is often pressed to work within short deadlines, which we have had an opportunity to see, and we strongly objected to them in this EU accession process... deadlines needed to be met and it was necessary to adopt 80 laws within 6 months, which, of course, does not make sense because you cannot prepare them well enough*”).

It should be noted, however, that LOG also indicates internal factors that have affected a large number of *ad hoc* laws and regulations, namely: the insufficient level of the process of monitoring the implementation and evaluation of legislation on operational levels, a low administrative capacity of central state administration bodies (hereinafter: CSABs) on the level of sectoral policy analysis, a lack of formulation of priorities, the legislation planning process is not linked to identifying priorities in CSABs, CSAB priorities are not fully linked to the strategic priorities of the Government of Croatia, interdepartmental coordination of CSABs is not on a level that would enable linking legislative measures with the attainment of the strategic goals of the Government of Croatia.

Internal factors have also impacted the excessive number of procedures for the adoption of laws in urgent procedure, as can be seen from discussions with interviewed civil servants of the MPA. One of them pointed this out specifically as an example of poor coordination: “*there were a number of cases where a ministry decided on its own initiative that it wished quickly, in an urgent procedure, to adopt certain acts. As soon as you have the ‘urgent’ designation for any act, there is a very high risk that any attempt at serious policy coordination will be jeopardized... well, there are a couple of ministries that are simply... under-capacitated organization-wise and organizational management is quite poor in that case...*”

The Constitutional Court of the Republic of Croatia expresses concern in its Report on the Law Enactment Procedures and about the Standing Orders of the Croatian Parliament because “in recent parliamentary practice, the procedure for the enactment of laws under urgent procedure has become almost the rule, and not an exception.” The Constitutional Court stresses that amongst the laws adopted under urgent procedure, there were also some general systemic laws, including those of an organic nature such as, for instance, the Ombudsman Act. In the observed period (2012 and 2013) the Croatian Parliament adopted a total of 498 laws, of which 92 were under regular procedure (18.5%), whereas as many as 81.5% were adopted under the urgent procedure.

### 14.5.2 Impact of Political Leadership

A large number of the civil servants interviewed in the ministries concluded that it is specifically the political will that is the key factor because it provides guidance and support to the expert level. Some of them noted that a significant factor is also the political power of the minister and his capacity to impose his solutions on the standing working body of the Government of Croatia (“... *the political will of the ruling majority, in the long run, decides about the adoption of legislation, and the personal attitude of the minister is important because he can still affect the course of the preparations and, in some aspects, it can have a major influence on the formation of the will of the ruling majority*”). Some see political will primarily as a “*clearly articulated idea*” necessary for experts to do their job.

Officials pointed out that in the case of some laws and regulations the key to a job well done was also the fact that they had had political support (“... *if it hadn't been for the political support for this whole issue, there would not have been any results...*”). Others mentioned that specifically politics can hinder cooperation and coordination. They also stress that the political position and political influence may impact public policy making and the success of the implementation of reforms.

External members in EWGs also pointed out that their work on specific issues was greatly affected by politics, which, in some situations, completely changed direction (“...*when it came to a certain phase, we went in one direction, however, we were stopped by politics from saying this and they said they wanted something different...*”). Some external members who cooperated with MPA were exceptionally disappointed by political interventions saying that the arguments of external members in one EWG were not taken into consideration precisely because of political impacts (“...*other solutions were shaped outside the EWG that were not even discussed at the EWG*”; “...*a large number of experts' proposals were eliminated at the very beginning for political reasons...*”). Therefore, the external members concluded that the reasons that affected the coordination the most were the external actors, primarily political actors that had not even been included in the working group (“*coalition partners, some ministers, parliamentary representatives, mayors who were not included in EWG*”).

Speaking about the influence of politics, the majority of the external members interviewed claimed that coordination in the Ministry of Entrepreneurship and Crafts was influenced by political parties, especially because there was no sufficient coordination in the coalition government. This was especially evident in the conflict of jurisdiction between the MEC and the Ministry of Economy which was run by a minister who was a member of a different political party (HNS).

### 14.5.3 Impact of Wider Social Public

Besides politics, the respondents recognized the impact of other factors such as civil society, the general public and the number of participants who were interested in

resolving specific issues (“...if you are under the magnifying glass of the public, you are more susceptible to the influence”; “The more important and sensitive issue you have at hand, of course, the more interested parties there will be, the more opposing views and the more they will be difficult to ‘handle’”). MPA officials said in interviews that they believe that a more turbulent social-political environment and a greater interest of the media sometimes makes dialogue and coordination more difficult, but, also, such cases do require more coordination. The Civil Partnership Act has again been highlighted as one of the positive examples.

Some civil servants also claim that it seems to them that their work is frequently not guided by situation analysis and strategic thinking, but by the interest of the public and the media regarding a specific issue (“...in a very large number of cases an amendment is not made on the basis of a report or evaluation, but may be on media requests..”). Therefore, most civil servants claim that the environment, especially politics and the media have quite an impact on the overall legislative process, as well as on coordination.

External members concluded that the draft legislation process is easier when there is consent about a certain issue in society (“The best cooperation was the one in the preparation of the Electoral Register Act... Maybe for the whole time the desire for the electoral registers to finally become streamlined was prevailing..”). The efficiency of external pressures was also stressed, such as pressures from the EU and also pressures by civil society and for a certain issue to be resolved (“...such as the Right of Access to Information Act (RAIA), since there was a strong role in the whole sector it was pushed through, and specifically the European Commission requested that, so things went smoothly..”).

In interviews, external members of the working group of the MEC, unions and Croatian Employers’ Association, highlighted that stakeholders’ propositions should be taken into account (“... We have a problem with some ministries; we have to teach them what social dialogue is and social partnership, so that they have to include stakeholders like us. We are a problem to them like a stone in their shoes. It is lot easier to make a bill without asking anyone... but when we are included and other interested parties it lasts for a long time...”). Some respondents openly criticized MEC for non-cooperation and for not taking their opinion into consideration.

## 14.6 Conclusion

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On the basis of empirical research the chapter explores the concept of administrative coordination with the focus on the question of how the complexity of the environment impacts the very coordination in the administrative system. The research was carried out as part of two case studies, for which Croatian administrative organizations were selected – the Ministry of Public Administration and the Ministry

of Entrepreneurship and Crafts. The process of coordination in drafting legislation and policy making was observed.

The respondents assessed, through the survey, that the complexity of the environment has a strong impact on administrative coordination in the legislation drafting process and public policy formulation. Both organizations, the Ministry of Public Administration and the Ministry of Entrepreneurship and Crafts, acts in the same political and administrative system of Croatia, which is marked, with respect to the adoption of legislation, by a high contingency in terms of a lack of the planning of activities with the highest number of pieces of legislation being adopted on an *ad hoc* basis. Of course, this makes the job of administration more difficult, as emphasised by numerous respondents from the administrative system, but also outside it. As assessed by the respondents, the adoption of legislation under urgent procedure has also turned out to be one of the bigger problems in coordination. The observed period may be specific for the observation of drafting legislation. The years at issue were the year before and the year of EU accession, when the legislation was still under the pressure of transposing the EU *acquis*. Given that it has turned out that a large number of pieces of legislation adopted in urgent procedure were not related to the harmonization with the *acquis*, it can be concluded that political reasons prevailed, which surely makes the work of administration more difficult. It is logical that there is no time for high quality coordination in drafting legislation if the majority of it (87%) is adopted without planning and *ad hoc*. The findings of the studies point to the conclusion that a contingent political-administrative system, in terms of the activities not being planned, but a large number of pieces of legislation is adopted *ad hoc*, makes coordination in administration more difficult. Studies also suggest that administrative organizations in EU member countries such as Croatia, as well as EU Enlargement, have an even more complex environment which comprises a national administrative and political system and citizens as well as the European Administrative Space.

The respondents mentioned in interviews that politics can have both a positive and a negative impact on coordination, in other words, that coordination was better in cases where there was a political will to adopt a certain piece of legislation.

Of course, the dynamism of the social environment is not constant; sometimes the environment is more dynamic and more turbulent, when there are more interested active stakeholders. This especially varies with the wider social environment, i.e. the citizens. An insight into the level of interest of the wider social environment may be obtained on the basis of data regarding to what extent the public participated in the public consultation about a specific piece of legislation. A change in the dynamism of the environment can be seen from public consultations, depending on the issue that an administrative organization deals with. It can also be concluded, mostly from the perceptions of the respondents, that the environment may improve coordination, given that some members of the working groups pointed out the

impacts of the environment, in particular politics and the media, on high-quality coordination. It can be concluded from the above that a dynamic environment, in terms of an active and interested public, influences a stronger coordination of administrative organizations with the environment.

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The scientific monograph on European Administrative Space (EAS) offers in-depth analyses of the respective notions, such as those elaborated from systemic, methodological, geographical and contextual aspects. It includes 14 chapters from 21 prominent scholars and practitioners from different European countries (Belarus, Belgium, Croatia, Georgia, Luxembourg, The Netherlands, Poland, Serbia, Slovenia, Sweden) and international organizations, some of which are the salient papers from the NISPAcee annual conference held in 2016 in Zagreb. Authors address the EAS as a complex concept in progress, both theoretically and practically. It is considered to be an important tool in the absence of a formal European Union (EU) acquis in the field of public administration, which leads to the necessary integration of EU values, goals, activities and methods to enable the EU political and macroeconomic goals and an effective and equitable implementation of its legal order. Consequently, this book contributes, based on the administrative science framework, as an integrative discipline, to the further evolution of the EAS and good public governance with democratic and efficient public administration worldwide.



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