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Administrative Procedures

1. ADMINISTRATIVE PROCEDURES AND INTEGRITY CHALLENGES IN THE WESTERN BALKANS

Administrative procedures are a set of rules on appropriate conduct when deciding from the position of the state power on the rights and obligations – including legal interests – of natural or legal persons under certain circumstances.[1] In the Western Balkan countries, this matter is regulated, as a rule, by law – by the General Administrative Procedure Act as the main, general legislation. However, rules on administrative procedures may additionally be found in a number of special regulations governing certain administrative areas, such as taxes, foreign currency operations, public procurement, etc.; consequently, these rules are applicable only to these specific areas.

While the administrative procedure laws are not part of the anti-corruption laws, they are important for integrity and anti-corruption efforts because they prescribe all the activities that need to be taken, or rather, the operations that need to be carried out in the business process to reach a decision on an administrative matter. They regulate also all the decisions that result from administrative procedures or that are made in the course of administrative proceedings.[2]

The group of persons vested with the power to pass decisions by implementing administrative proceedings is very wide and includes not only the civil service, but the entire public sector.[3] The cases involved are

1 On the notion, meaning and importance of administrative proceedings see Dragan Milkov, *Administrative Law II – Administrative Activity*, Faculty of Law, Novi Sad 2016, p. 67

2 D. Milkov, *Administrative Law II – Administrative Activity*, Faculty of Law, Novi Sad 2016, p. 67.

3 These, primarily, public officials and state employees in public bodies and organisations (ministries, administrations, directorates, secretariats, agencies, institutes, centres) and persons working in local self-administration unit organisations. General service employees working in public services (publicly owned companies, public institutions and other organisations vested with public powers in accordance with law) have the power to decide

frequently complex. Public officials should protect only the interests of the institutions they work for or the institutions they represent, and not their own interests or other illegitimate interests. One of the functions of administrative procedures is to minimise the possibility of such abuse, and this is precisely why they are so important from the standpoint of integrity.

The role of administrative procedures in strengthening the integrity of individuals, public servants and the institutions they work for or represent, and consequently the integrity of the society as a whole, is multi-faceted. Firstly, administrative procedures the uniformity of actions in identical or substantially similar situations.[4] Secondly, whether administrative proceedings will be efficient and fast depends on the rules governing them –speed and effectiveness are important since delays in decisions that determine the rights and obligations of natural and legal persons may incur damage to such persons and may also open for corruption. In addition, administrative proceedings based on a set of pre-established and known procedures for performing certain tasks facilitate the training and specialisation of those who implement them, which represents a prerequisite for a correct application of the rules.[5] The rules contained in administrative procedures are important also for the efficient monitoring of the work of those who conduct administrative proceedings, which also helps prevent abuse of position.

However, administrative procedures *per se* are not a guarantee that the administrative functions will be carried out in practice. They need to be adequate, that is, the actions that are envisaged need to be carefully defined, based on previous experience and appropriate standardisation. However, if they are not applied as envisaged, it will be very difficult to prevent unlawful actions, which in turn may result in irregular decisions. This might easily infringe on the legal interests of the persons who are a party to the proceedings, and would also be contrary to the public interest – unlawful actions and irregular decisions jeopardise the legal state and the rule of law.[6]

The persons who apply administrative procedures have integrity when they act impartially, independently and transparently, applying the required

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on one's rights and obligations or legal interests; such powers are also vested in certain natural persons and other organisational forms (commissioners, ombudspersons, funds, sports'associations, and the like).

4 Đ. Dario, "Open Issues Relating to Administrative Proceedings in Croatia", in: *Collection of the Faculty of law of the University of Rijeka*, Rijeka 2007, p. 407.

5 D. Milkov, p. 68.

6 Đ. Dario, p. 67.

knowledge and skills in line with the ethical standards. Only under these conditions can they contribute to efficiency, transparency and accountability in their work, strengthening integrity of the institutions in which they work or which they represent. This also strengthens public integrity, due to the emerging public awareness that corruption is risky and unprofitable.

In Serbia, Macedonia, Montenegro, Bosnia and Herzegovina, Albania and Kosovo*, a number of problems have been observed in terms of administrative proceedings that affect or may affect integrity. These problems are present to a lesser or greater degree in all these countries, and the following shortcomings can be singled out:

An excessive number of special rules for separate administrative procedures in specific administrative matters[7] (over 50 special procedures in total), which are not adequately harmonised with the overarching legislation.

In most countries, administrative procedure rules are overloaded with extraneous information or requirements, for example, numerous technical details. Such information should rather be transferred from the primary legislation and general acts to the secondary legislation. As a result of that, the regulations are not systematic, and the procedures are very complex. This makes the regulations difficult to understand and implement.

In most Western Balkans countries, the administrative procedure legislation tends to lack clear and precise criteria that a public official may use when exercising his/her discretion. In addition, even though some extent of discretionary power is necessary in administrative proceedings, in most regulations these powers are wider than it is necessary, which may lead to unequal treatment or corruption.

1. The issue of personal accountability of public officials to ensure lawfulness, expedience, and proper decisions is inadequately regulated. Namely, the majority of regulations do not regulate this type of accountability of public officials – the decision-making is, for the most part, formally vested with the manager (an individual or a collegiate body) and thus centralised.

2. Administrative procedures do not include adequate rules to ensure efficient control of public officials' work. This is visible especially in inadequate rules governing a party's right to have insight into the case file, inadequate rules governing efficient legal remedies, and lack of transparency of the administrative procedures.

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7 For instance, on customs, taxes, construction, pension insurance, health insurance, patents, foreign currency operations, interior affairs, reparcelling, etc.

3. Time limits for conducting procedural actions in the course of administrative proceedings are not adequately regulated, and there are no efficient sanctions for failure to observe them. As a result, administrative proceedings may be inefficient, which supports corruption.

4. Provisions governing administrative silence in most regulations in the observed countries are inadequate– instead of the stating that in case of no answer from the administration the party's request is granted, the general assumption is that the request is denied. This reflects negatively on integrity, as it enables public officials not to perform their tasks without any consequences, even when they intentionally fail to perform their tasks and intentionally harm the public interest.

5. The rules governing the recusal of public officials from proceedings are not sufficiently precise, which is most visible from the fact that the group of persons for which recusal is prescribed is too narrow. In some regulations, the criteria for recusal are insufficiently regulated, which results in too broad interpretation and is a potential source of abuse of position.

2. WHAT ARE THE INTERNATIONAL STANDARDS FOR ADMINISTRATIVE PROCEDURES WITH RESPECT TO INTEGRITY?

In the last decade of the 20th century, a series of corruption scandals have shaken not only countries in transition but also many developed countries around the world, which indicates the need for international (global) regulation of the ethical aspects of public services, and reinforcement of their integrity. Significant activities have been implemented by the most prestigious international organisations – the UN, OECD, Council of Europe, EU, and others. Thus, numerous documents, including international recommendations and guidelines for the introduction of new or for improving existing national norms and institutional frameworkshave been adopted.[8] Although largely in the form of recommendations and guidelines, which are not formally binding, these documents are widely accepted as many countries have voluntarily incorporated them in their national legislation. One of the most important international conventions in the field of administrative procedures is the Convention for the Protection of Human Rights and Fundamental Freedoms, which promotes and protects the right to a fair trial.

8 S. Korac, *Ethical Dimension of Public Administration*, doctoral dissertation defended at the Faculty of Political Sciences, University of Belgrade 2013, p.151.

1. UN DOCUMENTS

1.1. One of the first documents adopted by the UN in this area was the International Code of Conduct (1996).[9] Article I, under the heading *General Principles*, specifies the rules relating to administrative procedures, promoting clearly the general principles of these procedures: the principle of independence (paragraph 1); the principle of acting in the public interest (paragraph 1); the principle of legality and the rule of law (paragraph 2); the principle of efficiency and effectiveness (paragraph 3); the principle of impartiality (paragraph 3); the principle of non-discrimination (paragraph 3); and the principle of proportionality.

1.2. In 2001, the UN General Assembly adopted the Standards of Conduct for the International Civil Service,[10] primarily intended for the UN officials. However, the impact of these standards goes beyond the UN, as the rules contained in them have been recognised as sound, and as such have been copied at the national level in several countries around the world. These standards relate also to administrative procedures, as they promote several general principles underlying these procedures: the principle of impartiality and independence (Article 5); the principle of impartiality(Articles 8, 9 and 11); the principle of accountability (Article 13) and the principle of non-discrimination (Article 15). In addition to emphasising the accountability of the UN officials in relation to the achievement of the UN's ideals, visions and values, the Standards of Conduct for the International Civil Service at the same time recall that integrity implies qualities such as probity, independence, loyalty, reliability, impartiality, incorruptness, tolerance, and understanding.[11]

1.3. The UN Convention against Corruption from 2003 is significant in that it obliges the signatories[12] of the Convention to develop pre-emptive anti-corruption policies and mechanisms, and to adopt a code of conduct to strengthen integrity (Articles 5 and 8).[13] More specifically, Article 1 sets out the objectives of the Convention: (a) to promote and strengthen measures to prevent and combat corruption more efficiently and effectively; (b) to promote, facilitate and support international cooperation and technical assistance

9 International Code of Conduct for Public Officials, Annex to Action against corruption– General Assembly resolution 51/59 of 12 December 1996, www.un.org/documents/ga/res/51/a51r059.htm.

10 Standards of Conduct for the International Civil Service, International Civil Service Commission, UN General Assembly Resolution 56/244, dated 24 December 2001, http://icsc.un.org/resources/pdfs/general/standardse.pdf.

11 For more details see: S. Korac, p. 151.

12 The Convention has been widely accepted (140 States), including all the Western Balkan countries included in this study.

13 UN Convention against Corruption, UN General Assembly Resolution 58/4 dated 31 October 2003. Available at: https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf.

in the prevention of and fight against corruption, including asset recovery; (c) to promote integrity, accountability and proper management of public affairs and public property.

2. OECD DOCUMENTS

The OECD has adopted several Recommendations contained in the Principles for Managing Ethics in the Public Service.[14] A total of twelve of these principles elaborate four main integrity system management goals: determining and defining integrity, guiding towards integrity; monitoring integrity and enforcing integrity. These principles should serve as a guide for countries, and should be incorporated into their respective national instruments.

OECD/SIGMA (Support for Improvement in Governance and Management), established at the joint initiative by the OECD and the European Commission, also operates within the OECD. OECD/SIGMA has adopted several documents that are relevant to integrity of public officials, including the European Principles for Public Administration (1999), which are the most relevant to administrative procedures.[15] This document promotes and specifies the following administrative procedure principles: the principle of legal certainty, the principle of transparency, the principle of accountability, and the principle of efficiency and effectiveness.

In 2005, OECD/SIGMA developed a detailed checklist for the contents of a general law on administrative procedures.[16] This document specifies a list of the most important principles of administrative procedures that are relevant for integrity: legality, impartiality, procedural fairness, openness and transparency, accountability and liability. In addition, it includes principles governing the conduct of administrative proceedings (with the elaboration of their contents).[17] The fact that OECD/SIGMA monitors and oversees the administrative capacity-building process, as one of the main EU accession conditionalities, makes these rules binding in a certain sense, particularly for those countries that are in the process of joining the EU.[18]

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14 1998 Recommendation of the OECD Council on Improving Ethical Conduct in the Public Service, Including Principles for Managing Ethics in the Public Service, http://www.oecd.org/gov/ethics/oecdprinciples formanagingethicsinthepublicservice.htm.

15 SIGMA, *European Principles for Public Administration*, SIGMA Paper No. 27, OECD publishing, 1999.

16 Check List for a General Law on Administrative Procedure, http://www.sigmaweb.org/publications/37890936.pdf.

17 These principles relate to: Scope of the Law; Principles Governing the Administrative Procedure; Administrative Act; Real Acts; Administrative Contracts; Special Procedures; Execution.

18 For more details see: D. Vucetic, "European Administrative Procedural Rules and General Administrative Procedure of the Republic of Serbia", in: *Collection of the Faculty of Law in Nis,* Nis 68/14, p. 178.

3. COUNCIL OF EUROPE DOCUMENTS

The standards in the EU for integrity and conduct of public officials are set out in several documents of the Council of Europe. The most important of these is undoubtedly the Model Code of Conduct for Public Officials from 2000.[19] The integrity standards specified in this document aim to assist public officials to adapt their conduct, but also to make the general public in Europe aware of the conduct they should expect from their public officials.[20] Article 4 of the above Model Code clearly states the principle of the legality of public officials' actions, Article 5 promotes the principle of independence and impartiality, while Articles 6 and 7 promote and protect the principle of proportionality. However, the document is not formally binding and is more of a *soft law*. Nevertheless, its rules are widely accepted and incorporated into the national legislation on administrative procedures in many countries.

The Council of Europe has also adopted several recommendations that are relevant for administrative procedures. These include: Resolution (1977) 31 on the Protection of the Individual in Relation to the Acts of Administrative Authorities;[21] Recommendation Rec (2003) 16 on the Execution of Administrative and Judicial Decisions in the Field of Administrative Law;[22] Recommendation CM/Rec (2007) 7 of the Committee of Ministers to Member States on Good Administration;[23] Recommendation No. R (80) 2 Concerning the Exercise of Discretionary Powers by Administrative Authorities,[24] etc. The aim of these recommendations is not to unify the member states' legislation on general administrative procedures but, as stated in Resolution 31 from 1977, to improve the general recognition of specific principles in the member states' legislation and practice. In other words, these recommendations serve as a roadmap for the achievement of equity in the relations between the public administration and the citizens.[25]

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19 Code of Conduct for Public Officials, Recommendation Rec (2000)10 from 11 May 2000, http://workspace.unpan.org/sites/internet/Documents/UNPAN038306.pdf.

20 S. Korac, p. 152.

21 Resolution (77)31 on the Protection of the Individual in Relation to the Acts of Administrative Authorities, https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2009032&SecMode=1&DocId=752646&Usage=2.

22 Recommendation Rec(2003)16 of the Committee of Ministers to member states on the execution of administrative and judicial decisions in the field of administrative law, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID =09000016805df14f.

23 Recommendation CM/Rec (2007) 7 of the Committee of Ministers to member states on good administration, https://www.coe.int/t/dghl/standardsetting/cdcj/CDCJ%20Recommendations/CMRec(2007)7E.pdf.

24 Recommendation No. R (80) 2 Concerning the exercise of discretionary powers by administrative authorities https://wcd.coe.int/com.instranet.InstraServlet?Index=no&command=com.instranet.CmdBlobGet&InstranetImage=601039&SecMode=1&DocId=674666&Usage=2.

25 D. Vucetic, pp. 176–178.

The Convention for the Protection of Human Rights and Fundamental Freedoms[26] was adopted under the auspices of the Council of Europe, and it has been ratified by all the Western Balkan countries included in this study. The part of the Convention relevant to administrative procedures is Article 6, which regulates the right to a fair trial. The European Court of Justice also applies this Convention as part of European law, although the EU is not its signatory.

4. EU DOCUMENTS

The European Union has paid considerable attention to the issue of the public officials' integrity. That is confirmed particularly by the fact that, in accordance with Article 41 of the 2000 Charter of Fundamental Rights of the European Union, the political commitment of all the member states to ensure the citizens the right to good administration was proclaimed at the EU summit in Nice.[27] Article 254(a) of the Treaty of Lisbon provides that in carrying out their mission, the institutions, bodies, offices, and agencies of the Union shall have the support of an open, efficient, and independent European administration, and that the institutions, bodies, offices, and agencies of the Union should conduct their work as openly as possible to promote the participation of civil society.[28]

The provisions of Articles 15 and 16 of the Treaty on the Functioning of the European Union[29] contain the rules on the transparency of administrative actions conducted by the EU bodies, access to documents, and the processing of personal information. From the perspective of administrative procedures, the most important provision is that of Article 298, paragraph 1, of the Treaty on the Functioning of the EU, as it emphasises the procedural dimension of the right to good administration[30] (promoted under Article 41 of the EU Charter of Fundamental Rights, adopted in 2000, in Nice). However, these provisions are of a general nature, and need to be further elaborated through secondary legislation. In this regard, the most widely

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26 The Convention for the Protection of Human Rights and Fundamental Freedoms. Available at: http://www.echr.coe.int/Documents/Convention_SRP.pdf.

27 "Charter of Fundamental Rights of the European Union", *Official Journal of the European Communities*, 2000/C 364, 18 December 2000, http://ec.europa.eu/comm/external_relations/human_rights/doc/charter_364_01en.pdf, p. 18.

28 "Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community", Lisbon, 13 December 2007, *Official Journal of the European Union*, C 306, 17 December 2007, http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2007:306:SOM:EN:HTML, pp. 50, 118.

29 Treaty on the Functioning of the European Union (consolidated version), http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12016ME/TXT.

30 Article 298, paragraph 1 of the Treaty on the Functioning of the EU reads: In carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration.

recognised document at the international level is the European Code of Good Administrative Behaviour, which was drafted by the European Ombudsman and adopted by the European Parliament in 2001, making it binding for the public officials in all the authorities and bodies of the Union.[31]

The EU has adopted several directives that are relevant to administrative law, the most important one being Directive 2006/123/EC on Services in the Internal Market,[32] adopted on 12 December 2006. It requires the simplification of administrative procedures (Article 5), the designation of points of single contact with the administration (Article 6), the rule of the right to information (Article 7), and the use of electronic means of communication in administrative proceedings (Article 8). It also promotes the principle of non-discrimination and the principle of proportionality (Articles 10 and 20), as well as the principle of transparency (Article 22(1)(c)).[33]

3. WHAT IS THE GENERAL LEGAL FRAMEWORK FOR ADMINISTRATIVE PROCEDURES IN THE WESTERN BALKANS COUNTRIES?

3.1. ALBANIA

Legal framework: The main source of the administrative procedural law in the Republic of Albania is the Administrative Procedure Act from 2015[34] (hereinafter: the APA).

The principle of legality: The principle of legality is regulated by Article 4 of the APA, which provides that public administration bodies exercise their

31 The European Code of Good Administrative Behaviour, www.ombudsman.europa.eu/resources/code.faces.

32 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32006L0123.

33 D. Vucetic, (pp. 178–179) states also that the sources of the European administrative procedural law do not have the necessary clarity and precision, and that some of the provisions of the Code are not followed by the relevant legal norms, and that the Committee on Legal Affairs has proposed to the European Commission that, on the basis of the authorisation referred to in Article 298 of the Treaty on the Functioning of the EU, it should initiate the adoption of the European Administrative Procedure Act. However, this initiative has not yet been implemented, and there are many opponents of such a stance, indicating that the EU documents have sufficient grounds for the harmonisation of the administrative procedural rights, and even for their unification, and that recourse to the powers referred to in the above Article 298 of the Treaty on the Functioning of the EU does not have sufficient arguments, as it is relevant primarily to the European administration (and not to the national administrations).

34 General Administrative Procedure Act, Act No. 44/2015 from 30 April 2015.

administrative activities in accordance with the Constitution of the Republic of Albania, ratified international agreements, and the applicable legislation in the Republic of Albania, within the scope of their powers, and in conformity with the objectives for which those powers have been granted to them (paragraph 1). Paragraph 2 stipulates that the legitimate rights and interests of any party to the proceedings cannot be violated by the actions of the administrative authorities unless it is provided for by law and in accordance with the procedure prescribed by the law. Article 10 of the APA regulates the principle of lawful exercise of discretionary powers, and in paragraph 1 explicitly states that such powers should be exercised under the following conditions: they are provided for by law; they do not exceed the limits set by law; the decision adopted is in accordance with the objective for which the discretionary power has been granted and in accordance with the general principles of the APA; and the decisions adopted is in line with the previous decisions of that authority on identical or similar matters.

The principle of proportionality: The principle of proportionality is regulated by Article 11. of the APA, which in paragraph 1 provides that the public authorities, when limiting the rights or interests of the party to the proceedings, must comply with the principle of proportionality. Paragraph 2 of the same article specifies when it is considered that the public authorities' actions are in accordance with the principle of proportionality: that is necessary to achieve the purpose of the law and the means and measures that affect the rights or legal interests of the party to the least extent possible have been applied; that is suitable for achieving the purpose set forth by law; and such means and measures are proportionate to the need that has caused their implementation.

The principle of accountability: The principle of accountability is regulated explicitly by Article 15 of the APA, as a general principle of administrative procedures. It is specified that, when conducting administrative proceedings, the public authorities and their employees shall be accountable for the damage caused to private parties, in accordance with the relevant regulation. There is no explicit rule on the delegation of the decision-making power in administrative proceedings to a responsible official. In addition, Article 90 of the APA explicitly states that the final decision in the administrative proceedings is adopted by the public authority, while Article 99, paragraph 3, prescribes that the decision is signed off by the responsible official or the chairperson, i.e. the secretary of the collegial body.

The principle of transparency: The principle of transparency has been specified as one of the general principles of the APA. It is regulated by Article 5, which provides, as a general rule, that the public authorities should perform their activities transparently and in cooperation with the natural

or legal persons involved in that activity.[35] Article 10 of the APA specifies the principle of providing active assistance, stipulating explicitly the right of the parties and other persons involved in the administrative proceedings to obtain information on the proceedings, and to inspect the case files, including electronic records. Paragraph 3 of Article 10 stipulates that a public authority should inform the parties to the proceedings about their rights, to prevent them from suffering any negative consequences on that account.

The principle of effectiveness and procedural economy: The Albanian APA does not specify the principle of effectiveness and procedural economy as one of the general principles of administrative procedures. However, the rules relevant to procedural economy are contained in Article 91 of the APA, stipulating, as a general rule, that administrative proceedings must be completed promptly, within the legal time limits specified by a separate law (paragraph 1), or if such time limit is not specified, within 60 days (paragraph 2).[36] In the event of the state of emergency, the administrative proceedings must be completed within three months from the date of the abolishment of the state of emergency (paragraph 3). Any failure to comply with the specified time limits implies the obligations of the responsible authority or the responsible official to explain directly, within maximum 10 days, to the superior authority the reasons for the failure to comply with the time limit. Regarding the principle of effectiveness, which primarily requires a successful and comprehensive decision on the rights and intentions of the parties to the proceedings, the Albanian APA does not provide for a specific rule. However, that is linked to the principle of *ex-officio* investigation referred to in Article 77 of the APA, according to which a public authority should establish *ex officio* the relevant facts and evidence and decide on the limits of such proceedings. Paragraph 3 of Article 77 stipulates explicitly that the authority conducting pre-trial proceedings should obtain *ex officio* the evidence of facts, events or subjective circumstances. For that purpose, it may request from other authorities to provide specific evidence and may request the party to provide only the necessary elements for the identification. However, Article 78 of the APA specifies the obligation of cooperation between the public authority and the party in the course of the administrative proceedings, and, in this

35 The principle of transparency is complemented in the APA by the principle of notification referred to in Article 6, according to which everyone has the right to access public information about the activities of public authorities, without the obligation to justify the request. If a public authority refuses to provide such information, it is obliged to adopt its decision in writing and to explain it, and to provide instructions about the right to appeal, as part of the decision. The public authority is not obliged to disclose information that presents a state secret (Article 7 of the APA, regulating the principle of protection of the state secret), or confidential personal information that is considered secret under separate regulations (Article 8 of the APA, regulating the protection of confidential data).

36 According to paragraph 3 of Article 91, it is envisaged that the 60-day time limit begins to run from the date when the party that initiated the administrative proceedings has submitted all the documentation necessary for deciding in that proceedings.

respect, the party is obliged to provide the evidence requested by the public authority at their request.

The principle of impartiality: The principle of impartiality points to the necessity for public officials to be objective in relation to the parties to the proceedings, which is a necessary condition to allow them to make a lawful decision, protecting the public interest. This principle is elaborated in the rules of Articles 30–32 of the APA. Legal impediments to the conduct of administrative proceedings are specified by Article 30, and include the following events: a) public official has a direct or indirect personal interest in the decision-making at hand; b) his/her spouse, cohabitant or relatives up to the second degree, have a direct or indirect interest in the decision-making at hand; c) the public official or the persons referred to in sub-paragraph b) above have a direct or indirect interest in a case objectively the same or under the same legal circumstances as the issue at hand; ç) the public official has participated as expert, adviser, private representative or advocate in the case at hand; d) persons referred to in sub-paragraph b) of this article, have participated as experts, representatives, advisors or advocates in the case at hand; dh) against the public official or the persons referred to in sub-paragraph b) above a judicial process has been initiated by the parties in the administrative proceedings at hand; e) the case in question is an appeal against a decision taken by the public official or by the persons referred to in sub-paragraph b) above; ë) the public official is member of a collegial body, or the persons referred to in sub-paragraph b) above are debtors or creditors of the interested parties in the administrative proceedings at hand; f) the public officials or the persons referred to in sub-paragraph b)above have received gifts from the parties before or after the start of the administrative proceedings at hand, g) the public official or the persons referred to in sub-paragraph b) above are friendly or hostile towards the interested parties in the administrative proceedings at hand; gj) the public official or the member of a collegial body or the persons referred to in sub-paragraph b) above have been involved in any of the following events: i. possible negotiations for future employment of the official or the persons referred to in subparagraph b) above while exercising office, or negotiations for any other form of post-office private interest relations; ii. engagement in private activities for profit purposes or any income-generating activity, as well as engagement in profit and non-profit organisations, trade unions or professional, political, government organisations, or any other organisations, h) in any case when it is provided by the legislation in force. The recusal procedure is regulated by Article 31 of the APA, specifying that a public official who observes any of the above impediments (which relates to him/her personally or to any other public official) must promptly inform his/her superior about it, in order for the public

official with the impediment disqualifying him/her to conduct the proceedings to be recused. A request for recusal may also be filed by the party to the proceedings on grounds of any impediment referred to in Article 30, and such request must be submitted in writing and properly documented. In each of these events, the public official will be suspended from the proceedings until the superior authority has decided on the request for recusal.

3.2. BOSNIA AND HERZEGOVINA

Legal framework: The main sources of the administrative procedural law in Bosnia and Herzegovina (hereinafter: BiH) include: 1. at the state level – the 2002 General Administrative Procedure Act[37] (hereinafter: the BiH GAPA); in the Federation of BiH – the 1998 General Administrative Procedure Act[38] (hereinafter: the FBiH GAPA); 2. in the Republic of Srpska – the 2002 General Administrative Procedure Act[39] (hereinafter: the RS GAPA).

The principle of legality: The principle of legality is regulated by Article 4 of the BiH GAPA, prescribing that the authorities acting in administrative matters should act in compliance with the laws, other regulations, and general acts of the institutions vested with public powers, adopted by such institutions on the basis of their public powers (paragraph 1). When public authorities have discretionary powers to decide, they are obliged to decide within the scope of their powers, and in accordance with the objective for which such powers have been granted (paragraph 2).[40] Article 4 of the FBiH GAPA stipulates the identical rule, while the Republic of Srpska regulates the principle of legality in Article 5 of the RS GAPA with almost identical content. However, none of the laws stipulates that a public authority, or a public official, is obliged to take into account previous decisions made on identical or similar administrative matters. This legal gap negatively affects the legal security of the parties in the administrative proceedings.

The principle of proportionality: The principle of proportionality is regulated by Article 5 of the BiH GAPA, and by Article 5 of the FBiH GAPA, through the rules specified under the heading *Principle of Protection of the Rights of the Parties and Protection of the Public Interest*. Both the laws stipulate the

37 The General Administrative Procedure Act, *The Official Gazette of BiH*, Nos. 29/2002, 12/04, 88/07, 93/09, 41/13 and 53/16.

38 The General Administrative Procedure Act, *The Official Gazette of the FBiH,* Nos. 2/98 and 48/99.

39 The General Administrative Procedure Act, *The Official Gazette of RS*, Nos. 13/2002, 87/7 and 50/10.

40 Article 4, in paragraph 3, explicitly stipulates that the GAPA applies also to institutions that have public power to decide on administrative matters based on discretionary powers.

obligation of the authorities and institutions vested with public powers, when imposing obligations on the parties in the administrative proceedings and choosing among several measures that achieve the goal intended by the law, to apply those that are more favourable for the party (Article 5, paragraph 3, of the BiH GAPA and FBiH GAPA). The Republic of Srpska does not regulate the proportionality principle separately either. It is not stipulated under Article 6, which regulates the principle of the protection of the parties' rights and the public interest.

The principle of accountability: The principle of accountability is not explicitly provided for within the framework of the GAPA that regulates the general principles of administrative procedure. However, the rules relevant to this issue are derived from other applicable legal rules. Thus, Article 10 of the BiH GAPA regulates the Principle of Independence in Decision-Making, according to which the public authority conducting the proceedings decides independently, complying with the principle of legality, and the authorised official establishes independently the facts and circumstances on the basis of which he/she applies the regulations, or the general acts, in a particular case. Article 36, in paragraph 1, specifies that "the official authorised to conduct the proceedings and to decide" is the manager of the public authority or the official in the same public authority authorised by the manager to decide in the administrative matters. It is stipulated that specific actions in the course of the proceedings may be taken by another professional official under the authorisation by the manager of the administrative authority,[41] or that the manager or the head of the public authority may authorise another official from the public authority to issue a decision.[42] The same principle applies also to the administrative matters decided by an institution vested with public powers, and in that case a decision is made by the manager of that institution, or by the official authorised by the manager to do so (Article 36, paragraph 2). The signatory of the decision is specified by Article 209 of the BiH GAPA, stipulating that a decision is signed off by the official person who is authorised, pursuant to Article 36, paragraph 1, to issue the decision (the head, or the manager, of the public authority or the official authorised by him/her). If a decision is made by a collegial body, it is signed off by the chairperson of that body. The Federation of BiH and the Republic of Srpska stipulate almost identical rules. In the Federation of BiH, they are specified in Article 14 (principle of independent decision-making), Articles 29 and 32 (the official person authorised to conduct the procedure, or the

41 Article 30 of the GAPA stipulates that in the administrative matters under the competence of the Council of Ministers of Bosnia and Herzegovina, the proceedings are is conducted and prepared by the authorised person or body designated by the act by the Council of Ministers, unless otherwise provided by law or other regulation.

42 This person cannot be authorised only to issue an act deferring the execution of a decision.

chairperson of the collegial body as the person in charge of conducting the proceedings), Article 202 (signatory of the decision), while in the Republic of Srpska they are specified in Article 11 of the RS GAPA (corresponding to Article 14 of FBiH GAPA); Article 31.a. (corresponding to Article 29 of the FBiH GAPA); and Article 199 (corresponding to Article 202 of the FBiH GAPA). In accordance with the above, it is clear that none of the three laws includes explicit rules on the personal accountability of public officials for unlawful and unreasonable conduct.

The principle of transparency: The principle of transparency has been specified as a general principle only in the FBiH GAPA. It is regulated by Article 6, stipulating that, when acting in administrative matters, the administrative authorities and institutions vested with public powers are obliged to provide the parties in the proceedings access to the necessary information, the prescribed forms, and the administrative authority's webpage, and to provide them with other notices, advice, and professional assistance (paragraph 1). However, this right does not include the information that is classified in accordance with the regulations on the protection of personal information, or confidential information (paragraph 2). From the point of view of the administrative proceedings, the principle of transparency is reflected also in the way in which the law regulates the parties' rights to inspect the case files and to be informed about the course of the proceedings. While at the BiH state level and in the Republic of Srpska the principle of transparency is not specified within the general principles in the GAPA, it can be derived indirectly from the recognised rights of the parties, including third parties who have a legal interest, to inspect the case files and to be informed about the course of the proceedings.[43] The FBiH GAPA stipulates this issue in Article 72.[44]

The principle of effectiveness and procedural economy: At the BiH state level, the GAPA does not stipulate explicitly the principle of effectiveness and procedural economy. However, this issue is covered to a certain extent by the principle of procedural efficiency (Article 6). It is stipulated that administrative

43 This issue is stipulated in Article 79 of the BiH GAPA, i.e. Article 68 of the RS GAPA. The rules of the above articles correspond in terms of their content to the rule of Article 72 of the FBiH GAPA.

44 With respect to this issue, it is stipulated that the parties have the right not only to access the case files, but also to copy, or duplicate, the files at their own expense. In addition to the parties in the proceedings, the same right is also recognised to third parties who can prove that they have a legal interest in doing so. However, this right does not include: records of deliberation and voting, official reports and draft decisions, or confidential records, if their disclosure could harm the purpose of the proceedings, or if it is contrary to the public interest or the justified interest of one of the parties or a third party. A request to access the case file does not have to be approved, but, in that case, the party, or interested third party, has the right to file a complaint. Such complaint must be decided promptly, within of 48 hours. The above rules are based on the Administrative Procedure Act that was in force in the former SFRY republics and has not been substantially revised since.

proceedings should be resolved promptly, completely and properly, including a comprehensive examination of the matter at hand. In contrast, the FBiH GAPA and the RS GAPA regulate the principle of procedural economy as one of the general principles of administrative procedures (Article 11 of the FBiH GAPA; Article 14 of the RS GAPA). Both the laws stipulate the identical rule that requires the administrative proceedings to be conducted promptly, and with as little cost as possible for the party in the proceedings, and for other participants in the proceedings. In the FBiH GAPA, this principle complements the principle of efficiency (Article 8), obligating the public authorities and institutions vested with public powers to ensure that the rights and interests of the parties in the proceedings are exercised efficiently, or prompt, complete and proper resolution of administrative matters, including their comprehensive examination. While the principle of effectiveness is not formulated as one of the general principles of administrative procedures, it is elaborated under the rule of Article 127, paragraph 3, of the FBiH GAPA, stipulating that the public official conducting the procedure must obtain *ex officio* the information about the facts available in the official records (maintained by that or another public authority, or by a public company or a public institution). However, the RS stipulates explicitly that the principle of economy has no priority over the principle of truth (Article 8 of the RS GAPA). As in the FBiH GAPA, in the Republic of Srpska, the principle of effectiveness is not stipulate explicitly, and it is covered by Article 124 of the RS GAPA, which obligates the pubic authorities to obtain *ex officio* the information about the facts available in the official records.

The principle of impartiality: The principle of impartiality points to the necessity for public officials to be objective in relation to the parties in the proceedings, as a necessary condition to allow them to make a lawful decision, protecting the public interest. This principle is elaborated in the rules of Article 42 of the BiH GAPA, Article 35 of the FBiH GAPA, as well as Article 32 of the RS GAPA, which specify the grounds for recusal of the authorised official from the administrative proceedings. With that respect, the BiH GAPA stipulates: a specific relationship with the party to the proceedings (blood relations), participation of the official in the administrative proceedings (in any capacity), or participation of the official in the first-instance procedure. The same grounds for recusal are stipulated in the RS GAPA, and in the FBiH GAPA, with the latter (the FBiH GAPA) expanding the above list to include also the following grounds: the official is in a close personal relationship with the party or with a person authorised to represent the party; he/she has economic and business relations with the party; or he/she behaves towards the party in a discriminatory manner. All the observed legislation stipulates the recusal procedure in an almost identical way: as soon as he/she learns of any of the grounds for not taking part in handling or deciding on

a particular case, the official is obliged to suspend further involvement in the case, and to notify the head of a public authority about it.[45] The recusal procedure may also be initiated by the party to the proceedings, not only on the legally prescribed grounds, but also in any other circumstances that call into question the impartiality of the official (Article 44 of the BiH GAPA, Article 37 of the FBiH GAPA, and Article 34 of the RS GAPA). This general provision allows for the extension of the grounds for recusal beyond the list specified by law, giving the discretionary power to the competent authority to decide upon it.

3.3. KOSOVO*

Legal framework: the General Administrative Procedure Act from 2016 (hereinafter: the GAPA), effective from June 2017.

The principle of legality: The principle of legality is regulated by Article 4 of the GAPA and requires (in paragraph 1) the public authorities to perform administrative activities in accordance with the Constitution, and the general administrative rules – the GAPA; they are applied within their scope of action and in accordance with the goal for which they have been established. Paragraph 2 stipulates that the statutory rights and the interests of the party cannot be violated by the activities of the administrative authorities unless otherwise provided by law. Administrative discretion is governed by paragraph 3 of the GAPA, providing for the following conditions under which this power may be exercised: 1. that there is a statutory discretionary power, 2. that the person exercising administrative discretion is authorised to do so by law, and that in that case he/she decides taking into account particularly the principle of proportionality, 3. that the decision is not contrary to all generally accepted scientific or technical norms and that is not contrary to the fundamental legal principles or human reason. In addition, Article 8 of the GAPA explicitly stipulates the principle of lawful and reasonable expectations – the predictability principle. This principle is included also within the principle of legality, as it strengthens the legal certainty by requiring public authorities to act in a predictable manner, respecting legitimate expectations (rule of law, the principle of legality), and previous decisions of the administrative authority in the same matter.

The principle of proportionality: is governed by Article 5 of the GAPA as one of the general principles of administrative procedure. Paragraph 1 of Article 5 stipulates that specific rights or legal interests of the party may

45 In accordance Article 35 of the GAPA, the authority that decides on the recusal is the high-ranking public official managing the public authority, while the recusal of high-ranking public officials is decided by the Government.

be restricted exclusively in accordance with the principle of proportionality. Paragraph 2 provides for the conditions for the confirmation of compliance with the principle of proportionality as follows: the restriction of the party's rights or legal interests is necessary to achieve the objectives prescribes by law; the restriction is appropriate for achieving that objective; the restriction is proportionate to the desired objective (the restriction is not more extensive than is necessary, e.g. fines).

The principle of accountability: While it is not stipulated as a general principle of administrative procedure, the principle of accountability is derived from other GAPA legal rules. Specifically, Article 26regulates the issue of the responsible official – it sets down the rules for the appointment of the responsible official for the administrative procedure, and refers, in this regard, to the public authority internal organisation rules, unless the law in this respect explicitly provides otherwise. The manager of a public authority designates, in accordance with the internal organisation rules, a unit responsible for each type of administrative procedures under the competence of the public authority. The head of the responsible unit may conduct the proceedings personally or may delegate it to another officer in the unit. The law stipulates explicitly that the head of the responsible unit or the official designated by him/her to conduct specific proceedings is responsible for conducting that proceedings (Article 26, paragraph 3). A collegial body may also delegate the obligation to conduct administrative proceedings and decide in the proceedings to its member, who is obliged to inform the collegial body about the outcome of the conducted proceedings (paragraph 4). Sub-delegation is expressly forbidden (Article 27 of the GAPA), which means that the official designated in accordance with these rules cannot transfer that authority to another officer. The responsible official conducts the administrative proceedings, decides on the matter, signs off the decision he/she has adopted, and informs the party about it. This rule sets the legal basis for the personal accountability of public officials (their disciplinary accountability).

The principle of transparency: This principle is regulated by Article 9 of the GAPA, which in paragraph 1 sets out the obligation of public authorities to act in a transparent manner. Moreover, on the basis of the GAPA itself (paragraph 2 of Article 9), a public authority guarantees the right of the party to be informed in the course of the proceedings about the state of their case, by appropriate means, and in accordance with the law. The party may be denied such information expressly to protect personal, business or professional information, which is protected by the relevant laws (paragraph 3). However, this article does not stipulate the right of third parties to be informed about the actions of public authorities. This right could be derived

indirectly from Article 11, regulating the information and active assistance principle (which, as defined in the law, is not limited to the right of the party as a participant in the proceedings to access the information relating to that proceedings, and includes also third parties). Specifically, paragraph 3 of that article stipulates that the authority must provide to the interested persons and the parties to the proceedings the information relevant for the conduct of the administrative proceedings. However, that is insufficient.

The principle of effectiveness and procedural economy: Article 10 of the Kosovo* GAPA formulates this principle as the principle of non-formality and efficiency of administrative procedure. The non-formal nature of the procedure is regulated by paragraph 1 of that article, which stipulates that the administrative procedure is not subject to any particular form, unless it is expressly provided otherwise by law. Paragraph 2 stipulates that the proceedings must be conducted as efficiently as possible (as promptly as possible, with the minimum possible cost), the only limitation being not to jeopardise that that is necessary for the legitimate and appropriate outcome of the administrative procedure. In this case, the Law does not provide sufficient guarantees for the effectiveness of the proceedings (appropriate and complete resolution of the administrative matter on the basis of the properly and fully established factual situation and proper application of material law), favouring efficiency, or economy. That is not a good solution as some complex cases require a more careful procedure and are more time intensive. The limitation of the principle of economy by referring to non-jeopardising that that is necessary for a legitimate and appropriate outcome of the proceedings is rather too arbitrary and gives room for abuse in the interpretation of the principle in specific situations.

The principle of impartiality: This principle is stipulated explicitly as the principle of administrative procedure (Article 7), and it is elaborated by the provisions on the recusal of public officials (Articles 29–31). Thus, in principle, (Article 7, paragraphs 1 and 2), a public authority, or an official, must act objectively and impartially, and must not be influenced by any professional, family, friends', political interests or other political pressures. The grounds for recusal of public officials are specified in Article 29 of the GAPA, which in paragraph 1 provides for a general prohibition for a public official to be involved in the administrative proceedings if he/she has a direct or indirect personal interest in the subject matter at hand. Sub-paragraphs 1.1. to 1.10. list the situations that particularly point to this (1.1.he/she is related to the party, the private representative or advocate of the party to any degree of lineal consanguinity, or to the fourth degree of collateral consanguinity, or he/she is a spouse or a relative up to the second degree, irrespective of whether the marriage has been dissolved or not; 1.2. his/her spouse, cohabitant or

relatives up to the second degree, have a direct or indirect personal interest in the matter at hand; 1.3. he/she is the party, the private representative or advocate of the party, or he/she is a debtor or a joint debtor to the party, or he/she was heard as a witness or an expert, or he/she participated as the adviser or advocate of the party; 1.4. he/she or the persons referred to in sub-paragraph 1.2. above have a direct or indirect interest in the case that is similar to the case at hand; 1.5. the persons referred to in sub-paragraph 1.2. above participated as experts, witnesses, legal advisors or attorneys in regard to the matter at hand; 1.6. he/she or any person referred to in sub-paragraph 1.2. above is in a judicial process with the parties; 1.7. he/she is a member of or the superior authority deciding on an appeal against a decision brought by him/her personally or by the persons referred to in subparagraph 1.2. above; 1.8. he/she or the persons referred to in subparagraph 1.2. above have received from the parties to the administrative proceedings gifts or services at prices significantly lower than the market value before or after the beginning of the proceedings at hand; 1.9. he/she is involved in a guardianship, adoptive, or foster relationship with the party, the private representative or advocate of the party; 1.10. in any other situation that is expressly stipulated by law or that might call in question his/her impartiality.

The recusal procedure is regulated by Article 30 of the GAPA, including the rule that any official who suspects that he/she might be in any situation referred to in Article 29 (or who suspects that another official might be in such a situation) should immediately recuse himself/herself from the administrative procedure and notify his/her superior about the recusal, or notify his/her superiors about any suspicion of an impediment involving another official. The recusal of an official person may also be requested by the party to the proceedings on any grounds referred to in Article 29. The final decision on recusal is made by the competent superior authority (Article 31).

3.4. MACEDONIA

Legal framework: The main source of administrative procedural law in the Republic of Macedonia is the General Administrative Procedure Act from 2015[46] (hereinafter: the GAPA), which has been in effect since 1 July 2016.

The principle of legality: The principle of legality is regulated by Article 5 of the GAPA, which provides for the obligation of the public authorities[47]

46 General Administrative Procedure Act, *Official Gazette of the Republic of Macedonia*, No.124/15.

47 The term “public authorities” is new, and it was introduced by the 2015 General Administrative Procedure, which applies to all authorities and organisations that conduct administrative proceedings and decide in these proceedings. These include, first of all,

to act in accordance with the Constitution of the Republic of Macedonia, its legislation, and ratified international treaties (paragraph 1). Paragraph 2 of the same article provides explicitly that a public authority is obliged to ensure legal consistency, or to implement the law in the same way in the administrative matters that are based on identical or similar factual situations. When deciding on the basis of discretionary powers, the public authority should act within the limits of the law that has granted it such powers, and in accordance with the purpose for which such powers have been granted, and is obliged to justify such decisions (paragraph 3).

The principle of proportionality: The principle of proportionality is governed by Article 6 of the GAPA, and this is a new principle that has replaced the Principle of Protecting the Rights of Parties and the Protection of the Public Interest, contained in the previous GAPA. The essence of this principle is the obligation of the public authority to enable the parties to the administrative proceedings to exercise and protect their rights and legal interests without any excessive limitation, without jeopardising the public interest (Article 6, paragraph 1). In addition, when the party to the proceedings or other participant in the proceedings is imposed obligations in accordance with the law, the public authority must apply the legal measure that is the least severe for the party, or other participant in the proceedings, provided that that measure can achieve the intended legal objective (paragraph 2). It is understood that this general rule refers to the situation when a decision can be implemented in different ways, through different measures.

The principle of accountability: While the principle of accountability is not explicitly regulated in the part of the GAPA that regulates the general principles of administrative procedures, it is reflected in the principle of the delegation of powers in Article 13 of the GAPA. The Law seeks to limit the role of political appointees, directors, mayors, rectors, deans, directors of institutes and the chairpersons of other management bodies in public institutions to decide on administrative matters. Accordingly, each public authority should establish a special department or sector to manage specific

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ministries, public administration authorities, organisations established by law, other state authorities, legal and natural persons entrusted with the public competencies, as well as municipal authorities, the city of Skopje authorities, and generally the City of Skopje (local government authorities) when, acting in their legal capacity, they act, decide on (adopt individual administrative acts) and undertake other administrative activities in the administrative matters. The GAPA applies also to situations when a public authority carries out its duties from the administrative law through other unilateral administrative actions, which are not covered by the administrative act but relate to the citizens' rights, obligations or legal interests. Also, the GAPA needs to provide legal protection in the delivery of services of general interest (e.g. telecommunications, electricity, water supply, etc.), to ensure that the privatisation of the delivery of public services does not impair the legal protection of the users of these services. B. Davitkovski, *et al*., "New General Administrative Procedure Act in the Republic of Macedonia and its Applicability", *Legal Life* 10/2016, p. 269.

types of administrative procedures, and the head of that sector or department, or the authorised official, would be primarily a professional and competent official (and not an office holder), and as such they would be authorised to conduct administrative proceedings and to decide in administrative matters. This principle is operationalised in the rules of Article 24 of the GAPA where it refers to the authorised official. It is stipulated that a public authority should act through an authorised official, who is designated by a separate law or secondary regulation. If such authorised official has not been appointed, a head of a public authority should adopt an organisational act designating the organisational unit responsible for each type of administrative activities and its competences.[48] The authorised official should conduct and complete the proceedings. This provides the legal basis for the personal accountability of public officials in the public authorities that decide in administrative proceedings.

The principle of transparency: While the principle of transparency is not specified as a separate principle in the GAPA, it is reflected in the legal rules for administrative proceedings that regulate the party's rights to inspect the case files and to be informed about the course of the proceedings. Thus, Article 42 of the GAPA stipulates that the parties to the proceeding have the right not only to inspect the case files, but also to copy or duplicate the files at their own expense. In addition to the parties to the proceedings, the same right is also recognised to all third parties who can prove that they have a legal interest in doing so (paragraph 1). The party to the proceedings, or a third party, should submit a request to inspect the case file to the public authority, which should decide on the request immediately (paragraph 2). As a rule, case files are inspected on the premises of the public authority that maintains the records, under the supervision of an official. Exceptionally, subject to a special approval, they may be inspected in the offices of another public authority or in a diplomatic/consular mission of the Republic of Macedonia abroad (paragraph 3). In accordance with Article 42, paragraph 4, of the GAPA, with respect to files kept in electronic form, the public authority is obliged to provide all technical assistance to allow such files to be inspected or copied. The approval for the duplication of files in electronic form is issued by the public authority, in accordance with the provisions of the Electronic Government Act. Article 43 stipulates that the right to inspect the case file may be limited only by a separate law, with the aim of protecting other legal interests established by law. In accordance with the above, it can be concluded that the GAPA of the Republic of Macedonia contains adequate rules that protect the principle of transparency in accordance with the international standards.

48 B. Davitkovski *et al*., p. 271.

The principle of effectiveness and procedural economy: The GAPA of the Republic of Macedonia, in Article 7, regulates the principle of procedural economy as one of the general principles of administrative procedures. The rule requires that the administrative proceedings are conducted expediently and with as little cost as possible for the parties to the proceedings, as well as for other participants in the proceedings. The principle of economy complements the principle of efficiency, which obliges the public authorities to ensure full respect of the parties' rights and legal interests, as well as a complete establishment of the factual situation. The contents of the principle of economy imply also that it includes the principle of effectiveness, which is explicitly confirmed and elaborated within Principle of Establishment of Material Truth (Article 10 of the GAPA), and which requires a public authority to establish all the circumstances of importance for proper establishment of the factual situation in administrative proceedings (paragraph 1). To this end, paragraph 2 of the same article obliges the public authority to obtain, examine, and collect the information available in official records *ex officio*, unless access to this information is prohibited by a separate law. The public authority may request from a party in the proceedings only the information and documents that are necessary to establish the factual situation and other relevant circumstances that are available in the official records (Article 10, paragraph 3).

The principle of impartiality: The principle of impartiality points to the necessity for public officials to be objective in relation to the parties to the proceedings, which is a necessary condition to allow them to make a lawful decision, protecting the public interest. This principle has been elaborated in the rules of Article 25 of the GAPA, stipulating the following grounds for recusal of the authorised official from the administrative proceedings:

- if he/she has a direct or indirect interest in a particular case;
- if he/she is related to the party to the proceedings or its legal representative to a specified degree of kin;
- if he/she is in a guardian, adoptive parent, adoptee or foster parent relationship with the party to the proceedings or its legal representative, or proxy;
- if the official or the persons referred to in the preceding two paragraphs (subparagraphs 2 and 3 of Article 25 of the GAPA) has participated in the proceedings in the capacity of the party to the proceedings, a witness, an expert, the attorney or legal representative of the party;
- if the official or the persons referred to in subparagraphs 1 and 2 above have a direct or indirect interest in a case that is related to the case at hand;
- if court proceedings have been initiated between the party to the proceedings and the official or the persons referred to in subparagraphs 2 and 3 above;

- if the official or the persons referred to in subparagraphs 2 and 3 above are debtors or creditors of the party to the proceedings;
- if the official receives income from the party to the proceedings or is member of its management or supervisory or similar body;
- if the official or a person referred to in subparagraphs 1 and 2 above has received gifts from the party to the proceedings before or after the administrative proceedings has been initiated.

As soon as he/she learns that any of the grounds for recusal applies, the official is obliged to request immediately from his/her superior to be recused from the proceedings, and the same applies to members of a collegial public body. Any other official who finds out that there is any of the grounds for recusal is obliged i to inform his/her manager about it. In addition to the official, a request for recusal may be filed also by the party to the proceedings, provided that the party specifies the reasons for doubting the impartiality of the official. The request for recusal will be decided by the manager of the public authority, or by the collegial body if the recusal request refers to a member of that body. In accordance with Article 26 of the GAPA, the request for recusal should be decided no later than during the following day upon receipt of the request, and after the request is adopted, the authorised official will be immediately recused from the proceedings, and replaced by another official. Otherwise, the accountability for unlawful conduct would be assumed by the superior (Article 26, paragraph 2). Paragraph 3 of that same article provides that the superior who decides on the recusal of an official should appoint another official to conduct the proceedings in his/her place. As a rule, that should be someone from the same public authority. If a member of a collegial body is recused, that body should continue to work without the member who has been recused (paragraph 4). In that case, the collegial body decides with the majority of votes of the attending members.

3.5. MONTENEGRO

Legal framework: The main source of administrative procedural law in the 2014 Republic of Montenegro is the General Administrative Procedure Act of 2014,[49] which became effective on 1 July 2017[50] (hereinafter: the

49 General Administrative Procedure Act, *Official Gazette of Montenegro*, No. 56/14 dated 24 December 2014, 20/15 dated 24 April 2015, Amendments to General Administrative Procedure Act, *Official Gazette of Montenegro*, No. 40/2016.

50 It was envisaged originally that the new GAPA would apply from 1 July 2016, but the Amendments to the General Administrative Procedure Act from June 2016 deferred its application until 1 July 2017.

new GAPA). Until then, the 2003 General Administrative Procedure Act[51] (hereinafter: the previous GAPA) was applied.

The principle of legality: The principle of legality is not new, and it is regulated by Article 4 of the previous GAPA, or Article 5 of the new GAPA. The main rule from the previous GAPA specifies that the public authorities acting on administrative matters should decide in compliance with law and other regulations. If the public has discretionary powers, it must decide within the scope of its powers and in accordance with the objective for which those powers have been granted. The same is stipulated by the new GAPA, but the new rule specifies that, when acting on administrative matters, the public authority is obliged to take into account all previous decisions made on identical or similar administrative matters. This amendment serves to strengthen the legal certainty of the parties to the administrative proceedings, and thus the new GAPA defines the principle of legality as "the principle of legality and predictability." The principle of predictability is, in fact, new, and stipulates that the authority that deviates from its previous decisions on identical or similar matters must provide an adequate explanation for it (Article 5, paragraph 3 of the new GAPA). Article 5, paragraph 5, of the new GAPA, regulates the appropriate conduct of a public authority in administrative matters in which it decides exercising its discretionary powers, and specifies that it should do so within the scope of its powers and in accordance with the purpose for which those powers have been granted. Furthermore, it should act in accordance with the previous decisions made by the public authority on materially identical administrative matters.

The principle of proportionality: The principle of proportionality is also not new and it is regulated by Article 5 of both the previous GAPA and the new GAPA. However, the rules of these articles are different, not only in the name of the principles: the previous GAPA refers to the principle of the Protection of Citizens' Rights and the Protection of the Public Interest. The new GAPA regulates the principle of proportionality more comprehensively, in wording that is more comprehensible for the parties to the proceedings, and stipulates that an administrative authority may restrict some of the parties' rights only if that is proportionate to the goal to be achieved, and if it does not violate human rights and freedoms. In a situation when a public law authority imposes specific obligations onto the party to the proceedings, the authority is obliged to apply the measures that are most favourable for the party, provided that those measures can achieve the same objective.

The principle of accountability: While the principle of accountability is not regulated explicitly in the part of the GAPA that regulates the general principles

51 General Administrative Procedure Act, *Official Gazette of Montenegro*, Nos. 60/03 and 32/11.

of administrative procedures, it is derived from the other relevant legal rules relating primarily to the principle of the independence of administrative proceedings, which is provided for by the previous GAPA (Article 10), as well as by the new GAPA (Article 12), but also on the basis of the rules on the delegation of powers to authorised officials specified by the new GAPA. The principle of independence in the new GAPA (and the almost identical rule in the previous GAPA) requires a public official to establish the facts and circumstances in the administrative proceedings independently, and to decide on the basis of such facts and circumstances. Specifically, the facts and circumstances that will be used as evidence should be selected on the basis of an independent assessment – conscientiously and founded on careful assessment of individual facts and the evidence as a whole. In addition, the rules on the authorised official, in Article 46 of the new GAPA (the previous GAPA does not contain such a rule) that specify that an authorised official is the person designated by a public authority's internal organisation and establishment act to conduct administrative proceedings and adopt decisions are also relevant to the principle of accountability. If the authorised official is not appointed, the decision in the administrative proceedings is made by the head of the public authority (paragraph 2), or the person authorised by him/her (paragraph 3).[52] The new GAPA stipulates explicitly that the public authority, before issuing a decision, has to designate in an appropriate manner the officials authorised to decide on administrative matters, and those authorised to take actions in the course of the proceedings (paragraph 4). That provides a clear legal basis for the personal accountability of public officials. A collegial body, in accordance with Article 47 of the new GAPA, decides by a majority of votes, if not otherwise prescribed by law, and may authorise its member to conduct the administrative proceedings and propose a decision. Article 22 of the new GAPA stipulates explicitly that the decision is signed off by the public official who has approved it, thus completing the rules on the principle of accountability of public officials.

The principle of transparency: While the principle of transparency is not specified within the general principles in the previous GAPA, it is reflected clearly in the rules on the right to inspect the case file and the right to be informed about the course of the proceedings (Article 69 of the previous GAPA). The parties to the proceeding are guaranteed by law the right to inspect, duplicate, or photocopy, the relevant case files, and a third party has the same right to do so if it can prove its legal interest. This right excludes records on deliberation and voting, and draft decisions, as well as records

52 This is an important innovation in relation to the previous GAPA, which did not include such explicit rules and which provided for a centralised decision-making system in which decisions were made and signed off on behalf of the "administrative authority" or "collegial body".

that are kept confidential, if their disclosure could harm the purpose of the proceedings or if it is contrary to the public interest. This regulation, however, does not specify the right of the party to the proceedings to inspect case files that are kept in electronic form. The above legal gap has been remedied in the new GAPA, which, in Article 16, prescribes this right, as well as the right of the party to the proceedings to be informed about the course of the proceedings in accordance with the law, which is specified as a principle of general administrative procedures. The principle is further elaborated in Articles 68 and 69 of the new GAPA whereby the parties to the proceedings have been granted the right to submit a request to inspect the case file in a written, verbal or electronic form; the parties are guaranteed the right to duplicate the files at their own expense, or to inspect them free of charge (paragraphs 1 and 2 of Article 68). In accordance with paragraph 3 of that same article, the parties to the proceedings can inspect the files not only on the premises where they are held, but also, in justified cases, on the premises of another authority or a diplomatic/consular mission. The right of the party to the proceedings to inspect the case files kept in electronic form is explicitly stipulated by Article 68, paragraph 4, of the new GAPA. Article 69 regulates explicitly the right of the party to the proceedings, includes third persons who have proven a legal interest in the case, to be informed about the course of the proceedings. That also strengthens the principle of transparency of administrative proceedings.

The principle of effectiveness and procedural economy: The principle of effectiveness and procedural economy in the new GAPA has been considerably extended compared to that in the previous GAPA.[53] This principle is regulated by Article 10 in the new GAPA, providing that the administrative proceedings must be conducted without any delay and with as little cost as possible, ensuring that all the facts and circumstances relevant to the successful and full protection of the rights and the legal interests of the parties to the proceedings, or other participants in the proceedings, are properly established. Based on the above, it can be concluded that the efficiency of the proceedings also relates to its effectiveness, and this is an important innovation compared to the previous GAPA, which promoted solely the principle of procedural economy. Article 13 of the new GAPA introduces a new principle of administrative proceedings – the principle of obtaining data *ex officio*. That this rule has been elevated to the level of a principle is a clear indication of the importance attached to this issue. That is justified, considering that this is probably the most important innovation of administrative procedures that will significantly contribute to their reform

53 The principle of procedural economy in Article 13 of the previous GAPA insists that the procedure should be conducted without any delay, and in such a way not to undermine a complete and accurate establishment of the factual situation and ensuring that all the necessary evidence for the adoption of a lawful and appropriate decision is obtained.

and modernisation. Thus, when deciding in administrative proceedings, the public law authority should *ex officio* inspect, obtain, and process the information available in the official records and registers maintained by that public authority or by other competent authorities, unless access to such information is restricted by law.

The principle of impartiality: The principle of impartiality points to the necessity for a public official to be objective in relation to the parties to the proceedings, which is a necessary condition to allow them to make a lawful decision, protecting the public interest. This principle is elaborated in the rules on the recusal of public officials from the proceedings, which are contained in both the previous GAPA (Article 30) and the new GAPA (Article 48).[54] The grounds for the recusal of a public official from the proceedings include: the public official is a party in the administrative proceedings (in any capacity), a specific relationship with the party to the proceedings (blood relations), and the participation of the public official in the first-instance proceedings. In accordance with Article 35 of the previous GAPA, the provisions on the recusal of the public official apply also to collegial bodies, and, in accordance with Article 36, to record takers. The new GAPA, in Article 48, elaborates, or extends, the grounds for the recusal of the public official (member of the collegial body, the record taker), introducing the following grounds for their recusal: if the public official has received remuneration or other income or is engaged in the management board, the supervisory board or the working or professional body of the party to the proceedings, or if the outcome of the proceedings can result in a direct benefit or harm to him/her (paragraphs 5 and 6 of Article 48). Paragraph 7 of the same article sets out the general rule under which recusal is necessary also if there are other facts that may undermine the impartiality of the authorised official, including all other contingent circumstances that cannot be anticipated by the Law. When he/she finds that any of the grounds for recusal applies, the authorised official is obliged to suspend further his/her involvement in the case. The recusal procedure can be initiated also by the party to the proceedings, under the same condition.

3.6. SERBIA

Legal framework: The main source of administrative procedural law in the Republic of Serbia is the 2016 General Administrative Procedure Act,[55] which came into effect on 1 June 2017 (hereinafter: the new GAPA). Until that

54 In addition to the provisions on the recusal of officials, both the previous and the new GAPAs contain the provision on the recusal of record takers, thus extending the principle of impartiality to those participants in the proceedings as well.

55 General Administrative Procedure Act, *Official Gazette of RS*, No.18/2016.

date, the 1997 General Administrative Procedure Act applied (hereinafter: the previous GAPA).[56]

The principle of legality: The principle of legality is not new, and it is regulated by Article 5 of both the previous GAPA and the new GAPA. The main rule of the previous GAPA specifies that, when acting on administrative matters, the authorities should decide in compliance with law and other regulations. If a public authority is authorised to decide at own discretion, it must decide within the scope of its powers, and in accordance with the objective for which those powers have been granted. The same is stipulated by the new GAPA, which elaborates this further, in two directions. Firstly, the new legislation requires the administrative authorities to act in accordance with other general laws as well, in addition to the GAPA; and secondly, a new rule has been introduced specifying that, when acting on administrative matters, a public authority is obliged to take into account all previous decisions made on identical or similar administrative matters. These amendments are aimed at strengthening the legal certainty of the parties in administrative proceedings, and thus the new GAPA defines the principle of legality as "the principle of legality and predictability." The principle of predictability is, in fact, an innovation, and its essence is that the public authority must adhere to the practice it has set up and decide in all identical or similar cases in the same manner. That is confirmed also by the rule specifying that if the authority deviates from the decisions it has made previously on identical or similar administrative matters, it must justify the different conclusion adequately (Article 141, paragraph 4 of the new GAPA).[57] Although not explicitly stated, it is understood that the principle of legality and predictability should be applied also in the administrative proceedings in which the authority decides by exercising discretionary power. In that case, the authority must act in compliance with the law and other regulations and general acts, taking into consideration all previous decisions made in identical or similar cases.

The principle of proportionality: The principle of proportionality is also not new, and it is regulated in Article 6 in both the previous GAPA[58] and the new GAPA. However, the new GAPA regulates this rule in a more comprehensive way, and it is more comprehensible to the parties to the proceedings. It is stipulated that, when adopting decisions restricting the parties' rights or affecting their legal interests, an administrative authority is obligated to do so in accordance with the purpose of the regulation it implements and under

56 General Administrative Procedure Act, *Official Gazette of FRY*, Nos. 3/97 and 31/07; *Official Gazette of RS*, No. 30/10.

57 For more details see: Lj. Pljakic, "Administrative proceedings in the New General Administrative Procedure Act", *Legal Life* 10/2016, p. 240.

58 In the previous GAPA, this principle was formulated as the Principle of Protection of Citizens' Rights and Protection of the Public Interest.

the condition that there is no alternative action that is more favourable for the party and that could achieve the same purpose. If an administrative authority imposes an enforcement measure on the party, it must choose, between several options, that measure that is the most favourable for the party. This principle applies also to administrative enforcement proceedings in general.[59]

The principle of accountability: While the principle of accountability is not explicitly regulated in the part of the general principles part of the GAPA that regulate administrative procedures, it is derived from other relevant legal rules, primarily relating to the principle of independence of administrative proceedings, which is regulated by both the previous GAPA (Article 11) and the new GAPA (Article 12), by also by the rules on the delegation of powers to authorised officials in the new GAPA. The principle of independence in the new GAPA (and the almost identical rule in the previous GAPA) prescribes that public officials should establish the facts independently and apply the laws and regulations that regulate the administrative matter based on such facts (Article 12, paragraph 2). Article 39, paragraph 1, explicitly requires a public authority to act in administrative matters through an authorised official. Paragraph 2 of Article 39 specifies that the authorised official is a person assigned to a position that includes conducting the proceedings and deciding in administrative matters, or only the tasks of conducting administrative proceedings or undertaking specific actions in the course of such proceedings. Only if the authorised official has not been appointed, in accordance with paragraph 3 of the same article, the decision in the administrative proceedings is made by the manager of the public authority. This is an important innovation compared to the previous GAPA, which did not contain such an explicit rule. It provided for a centralised decision-making system in which decisions were made and signed off on behalf of the "administration authority" or "collegial body" (Articles 192–195 of the previous GAPA). The new GAPA stipulates explicitly that the authority, before issuing a decision, has to designate in an appropriate manner the public officials authorised to decide on administrative matters, and those authorised to take actions in the course of the proceedings (paragraph 4).That clearly provides the legal basis for the personal accountability of public officials. A collegial body, in accordance with Article 39, paragraph 5, of the new GAPA, may authorise its member to conduct the administrative proceedings and prepare a decision. Article 201 of the new GAPA stipulates explicitly that the decision should be signed off by the public official who has adopted it, and when an administrative matter is decided by a collegial body, it should be signed off by the chairperson, unless otherwise provided by law or other regulations. This completes the rules on the principle of accountability of public officials.

59 Lj. Pljakic, p. 241.

The principle of transparency: The principle of transparency was not specified as a general principle in the previous GAPA, but it was clearly reflected in the rules on the inspection of case files and obtaining information about the course of administrative proceedings (Article 70 of the previous GAPA). The law guaranteed the right of the party to inspect, duplicate, or photocopy, the relevant case files, and third parties enjoyed the same right if they could prove their legal interest. This right excluded the records of deliberation and voting, official records, and draft decisions, as well as confidential records, if their disclosure would harm the purpose of the proceedings or if it was contrary to the public interest. The party that was refused a request to inspect the case files had the right to a complaint, and such complaints had to be followed up urgently (the party was able to file a complaint within 24 hours, and the complaint was to be decided within 48 hours from the date of the complaint). That regulation, however, did not address the right of the party to the proceedings to inspect the case files that were kept in electronic form. However, that legal gap has been remedied in the new GAPA which, in Article 64, elaborates and supplements the above rights of the parties to a proceeding, including other persons who prove their legal interest in doing so (Article 6). The new Law has been extended in the sense that the party to the proceedings is permitted to inspect the case files not only on the premises where they are held, but also, in justified cases, on the premises of another authority or a diplomatic/consular mission (paragraph 1). The same rule specifies that the party to the proceedings may receive a photocopy of the file, at his/her request, by post or in any other suitable way. The Law stipulates explicitly the right of the parties to inspect case files kept in electronic form, whereby the authority is obligated to ensure that the documents in electronic form can be downloaded or printed (paragraph 2). Paragraphs 3 and 4 of Article 64 of the new GAPA guarantee the protection of personal and other classified information. A provision that specifies that the fee for inspecting the case file cannot exceed the expenses incurred by the authority for the preparation and delivery of a copy of the file (paragraph 7), and the right of the party to the proceedings, another public authority, or an interested person to be informed about the course of the proceedings (paragraph 8), reinforce the principle of transparency in administrative proceedings.

The principle of effectiveness and procedural economy: The principle of effectiveness and procedural economy has been considerably extended in the new GAPA, compared to the previous one.[60] This principle is regulated

60 The principle of effectiveness referred to in Article 7 of the previous GAPA insists on the success and quality of deciding in administrative matters, while the principle of economy referred to in Article 14 calls for the proceedings without any delays and with as little cost as possible. Both these principles are covered, i.e. corrected by paragraphs 1 and 2 of Article 9 of the new GAPA.

by Article 9 of the new GAPA and it came into effect on 8 June 2016.[61] It stipulates that the public authority conducting administrative proceedings is obligated to do so in a way that enables the parties to the proceedings to exercise their rights successfully and comprehensively, without delaying the proceedings, and with as little cost as possible (Article 9, paragraphs 1 and 2, of the new GAPA). Paragraph 3 introduces the most important innovation to administrative proceedings in relation to the previous GAPA: the rule by which a public authority is obliged to obtain *ex officio* the information and facts necessary for decision-making that are available in the official records, or to retrieve and process this information. The parties to the proceedings may be requested to present only information that is necessary for identification, and the documents to support the facts that are not available in the official records. The principle of effectiveness and procedural economy is further elaborated in Article 103 of the new GAPA,[62] which stipulates explicitly that the public authority should obtain *ex officio* the information and facts that are available in official records and that, if such records are kept by another authority, that authority is obliged to provide the requested information free of charge within 15 days, unless other time limit has been specified. In accordance with Article 207 of the new GAPA, an authorised official who does not obtain *ex officio* the facts relevant to the conduct of the proceedings that are available in the official records has committed an offense and may be appropriately penalised.[63]

The principle of impartiality: The principle of impartiality points to the necessity for public officials to be objective in relation to the parties to the proceedings, which is a necessary condition to allow them to make a lawful decision, protecting the public interest. This principle is elaborated in the rules on the recusal of public officials from administrative proceedings in both the previous GAPA (Article 32) and the new GAPA (Article 40). The grounds for recusal of a public official from the proceedings include: the public official in the administrative proceedings is in a specific relationship with the party to the proceedings (blood relations), he/she is a party to the proceedings (in any capacity), or he/she participated in the first-instance proceedings. In addition to these grounds, the new GAPA, in Article 40, stipulates that an authorised official must be recused from the proceedings if he/she has received remuneration or other income form the party to the proceedings, or is engaged in the management board, the supervisory board or the working or professional body of the party to the proceedings, or if the outcome of the

61 This principle applies not only to the GAPA, as the general procedural law, but also to specific administrative proceedings.

62 Article 103 of the new GAPA came to effect on the same day as Article 9 (8 June 2016).

63 Lj. Pljakic, p. 242. A fine is stipulated for an authorised official in the amount of RSD 5.000 to 50.000.

proceedings may result in a direct benefit or harm to him/her (paragraphs 6 and 7 of Article 40). Paragraph 8 sets out the general rule under which recusal is necessary: if there are other facts that undermine the impartiality of the authorised official, including all other contingent circumstances that cannot be anticipated by the Law. An authorised official is obliged to suspend further involvement ina case when he/she finds that one of the grounds for recusal applies, or when the recusal procedure is initiated by the party to the proceedings, under the same condition.[64] The rules on the recusal of an official also apply to experts and record takers who participate in the proceedings. Their recusal is decided by the official conducting the proceedings.

4. KEY ISSUES RELATING TO THE IMPLEMENTATION OF THE EXISTING REGULATIONS AND WAYS TO OVERCOME THEM

4.1. THE PRINCIPLE OF LEGALITY

In the most basic sense, the principle of legality requires that administrative procedures are conducted in accordance with the Constitution, laws and the secondary legislation. Naturally, this principle presupposes that laws are properly applied. The legislation governing administrative procedures in the Western Balkan countries demonstrate certain shortcomings that challenge the full application of the legality principle.

That is true in most of the countries that have been analysed.[65] The existence of numerous special rules for special administrative proceedings that depart from the general administrative rules and procedures cause practical problems. In addition, in most of the countries, the administrative procedure rules are excessive and include numerous (technical) details that could be transferred to secondary legislation. Due to such shortcomings, the administrative procedure rules are not sufficiently systematic and lack sufficient standardisation. As a result, their practical application tends to be

64 The recusal of an official is decided by the head of the authority, i.e. other authorised body, and if this is not the case, then the second-instance or supervisory body. The recusal of a collegial body is decided by the chairperson of that body, and the recusal of the chairperson is decided by the collegial body (Article 41).

65 This particularly relates to general administrative procedure statutes that have not been considerably revised over the past five years (Serbia, the BIH entities – Federation and the Republic of Srpska, Montenegro), despite the fact that the circumstances under which these regulations are applied have changed considerably.

difficult, since a public official may not always be sure which regulation or rule to apply in a specific situation.

That situation has an adverse effect on the public officials' professional integrity, since they will not always be able to meet the professional standards of public service: to perform their duties in accordance with law, competently, efficiently, impartially, and in the interest of the citizen. In order for public officials to perform their duties in accordance with legal standards, they need to strengthen their individual capacities and develop their professional skills. Even though the fulfilment of these demands may be seen as an individual duty and the responsibility of each individual public official, bearing in mind the importance of this issue for integrity and the public interest, it has to be regulated and resolved in a systemic manner. The measures that may be taken to this end are numerous, such as the development of a guide specifying the relevant procedures, or of a code of conduct, or similar acts aimed at strengthening the professional integrity of public officials.[66] Trainings, workshops and the similar education courses are also a good tool.

The purpose of such practical guides, a code of conduct and proper training is to communicate clearly to public officials the demands and expected standards related to his/her work. That is indispensable because they act from the position of public power. It is important to ensure that every public official clearly understands what is expected of him/her, what are the main goals of his/her work, and what (personal and professional) competences he/she should have to achieve these goals. In addition, it is important for public officials to be aware of the possibilities for professional development that are available to him/her.

All public officials should be encouraged to ask themselves and actually answer the following questions: What should I expect, and what should others expect from my professional engagement? What are the priorities for my work in the coming period and how may I contribute to their realisation? What do I aspire for in my professional career (what are my goals) and what should I do in the coming period to achieve this? Have I advanced in the performance of my job and have I come closer to the realisation of goals I have set in this respect? Do I find it difficult to accept new tasks, particularly those that require me to develop new knowledge and skills? How can I overcome such difficulties? Which fields of work (tasks) should I focus on in order to advance my professional competence? What kind of support or what kind of professional training do I need in the coming period to upgrade my

66 A number of acts on the implementation of regulations (opinions of line ministries, manuals for application of a law, recommendations, guidelines, instructions, etc.) can be quite valuable in that respect. This can largely mitigate the ambiguities of legal norms and contribute to the harmonisation of administrative practice, which is in the interest of legal certainty.

skills and make progress in accordance with the set goals (aspirations)? Do I support my co-workers in their professional development, do they support me, and how is that support expressed? Etc.

By asking themselves and answering questions like those listed above, public officials would become more aware of the fact that they are personally responsible for the (un)successful performance of their tasks and the achievement of the specified goals. As a result, they have to accept that it is their personal obligation and responsibility to be fully informed of all the legal changes, emerging issues and problems in fields that are relevant for their work, and that they are personally responsible for their own professional development and that it is necessary for them to acquire the necessary skills for the successful performance of entrusted duties and tasks.

The above questions should also be the subject of constructive discussion (workshops, trainings, and similar education courses) that should initially take place at the initiative of the competent person (manager), in accordance with a previously established plan. It is important for such discussions to take place regularly, not just once or a few times a year, as a box-ticking exercise. However, they need not always be formally organised; it is even better if these kinds of questions are raised in informal conversations as well, whenever and wherever possible, since this is a way of continuously demonstrating to the public officials that their efforts to perform their duties and roles to the best of their abilities are recognised and adequately rewarded. Finally, meetings and discussions are an opportunity to get feedback from the public officials about the measures that have been taken.

Skilful facilitation of such discussions (workshops, trainings) encourages public officials to improve continuously their performance. Moreover, this is of crucial importance for the success of any public institution. It is necessary to use all available skills to communicate to public officials the meaning of the questions that have been asked in a way that makes them fully understand and internalise it. Otherwise, there is a danger of public officials showing resistance towards the efforts directed at strengthening of their professional capacities, which they could see as unnecessary or even erratic “imposition” of procedures and an “imposition” of discussions about these issues. Experience shows that, in practice, many public officials – especially those belonging to the older generation – consider that they have fulfilled all the requirements of a certain post and role in the public service by having completed their formal education. As a result, they may be slow and inefficient to adapt to the changes that are necessary in order to modernise public service, in line with the current internationally recognised standards applied around the world. If such prejudice is not counteracted, it is not realistic to expect the required progress in this area. In other words,

all trainings, workshops, procedures, guidelines, etc, would be seen as mere box-ticking exercises, and would not be applied adequately or at all in practice.

Given the above arguments, the responsibility for professional development and advancement of the quality of public officials' work should, to some degree, also be assumed by the state, by actively supporting the measures taken to achieve that goal, including through co-financing such measures and evaluating the performance of those who organise and implement them.

4.2. THE PRINCIPLE OF PROPORTIONALITY

The principle of proportionality, as a principle of administrative procedures, demands that public officials should take only those measures that are appropriate and necessary in the particular proceedings. In other words, when it is necessary to restrict a right or a legal interest of a person, the public official may do so only provided that the purpose of such a restriction cannot be reached in any other way, that is, by actions that would restrict or affect the party's rights or interest in the least possible extent. In cases where a public official orders the party to accept an obligation, the principle of proportionality obliges the public servant to select, among a number of measures, that that is the most beneficial to the party.

This principle is particularly important in cases where discretionary powers are exercised in the administrative procedures, that is, in cases where public officials may choose between several options, all of which are lawful. Discretionary power is necessary in administrative procedures and cannot be fully excluded, but it should be minimised. It should not be too wide, as is the case when public officials have no clear restrictions for its application.

However, the above objections can be made with regard to the majority of regulations on administrative procedures in the analysed countries. Almost all current regulations in these countries envisage that a decision made that is based on discretionary power must be made within the scope of that power and must be in line with the goals for which such power has been granted. Officials frequently face no other restrictions, other than the implication that he or she must also abide by the relevant principles of administrative procedure. Only the new GAPAs of Serbia and Montenegro, which are still not effective, envisage the demand for the public officials to adhere to the established administrative practice when exercising discretionary powers in decision-making. That is a good solution, as it supports legal certainty.

In order to lawfully exercise discretionary powers, public officials must be aware of the fact that their primary duty and role is to serve, or to protect, the public interest. Discretionary powers are not vested in public officials so that they may make arbitrary or impulsive decisions. Quite to the contrary – discretionary powers have a certain purpose, and if that purpose is not completely clear and beyond doubt in the concrete case, then the public official needs to take into account the text of the entire law and pass a decision in the spirit of the law. If that is not fully clear or applicable in the concrete situation either, the public official must (which is his/her duty in any case) pass a decision in accordance with what the public interest mandates. This means that he/she must be ready to pass unpopular decisions, if that is required.

In practical terms, this means that the public official should, without exception, observe the rule that a decision that is to be adopted by exercising discretionary power should always adopted by the authorised official. In such cases, the authorised official is obliged to apply all the envisaged administrative procedures, which includes the procedures established by law, secondary legislation, and the relevant guidelines (if any), and also to take into account all relevant circumstances (legal and factual situation). In addition to acting in accordance with the principle of legality, public officials are also obliged to observe the principle of objectivity and impartiality, and the principle of equality before the law, which requires public officials to refrain from any form of discrimination. The decision passed by the public official must be in accordance with the principle of proportionality and he/she is obliged to pass the decision within the specified (reasonable) time limit, in accordance with the principle of efficiency. Finally, the public official must provide the party with a complete answer (the decision must be adequately justified) in a manner that is clear, complete, and easy to understand.[67]

4.3. THE PRINCIPLE OF ACCOUNTABILITY

The personal accountability of the public officials applying administrative procedures is not regulated explicitly in most of the administrative procedure acts in the analysed countries. Therefore, there is no adequate legal grounds to hold them accountable for unlawful or inappropriate actions. The decision-making system remains centralised, and most decisions are taken at high institutional levels (the terms used are: “administrative authority” or “collegiate

67 If public officials are unsure what to do, they can always ask themselves the following questions, which can help them in decision-making: Is it all right for me to take this activity? Is this activity legal or ethical? Would I be proud to communicate this activity to someone I respect? Does this activity contribute to the reputation of my institution as an institution of integrity?

body"). The decisions are signed off by the authorised person, on behalf of the administrative authority, while the public official who conducted the proceedings and who drafted the decision bears no responsibility for his/her work.[68] Moreover, the administrative procedures in most of these countries do not envisage adequate data protection mechanisms (formal or actual), which jeopardises the public officials' integrity and creates a favourable environment for information trading. Even though administrative proceedings are not confidential in principle (unless expressly prescribed in the specified manner), public officials must be aware that facts that are available to them for performing public office may be confidential and that they are oblige to treat them responsibly. This implies their obligation not to communicate the information from specific proceedings in which they are involved as officials if that would violate the privacy of the parties. It also implies the obligation not to disclose any information that might harm the public interest.

The administrative procedures legislation of the analysed countries should include provisions on public officials' personal accountability for their work and for any disclosure of confidential data, as would serve as a formal guarantee that this issue will indeed be raised and resolved. However, it is even more important that the public officials themselves develop a sense of personal accountability for the results and quality of their work. Specifically, they must be aware that the public service requires officials to be impartial, to continue their life-long professional development, and to comply with the ethical principles and act in a transparent and responsible manner.[69]

The rules on personal accountability of public officials are necessary since they act from the position of public power and, ultimately, it is them who implement public policies. In doing so, they not only have the power to decide on individual rights, obligations and interests of natural and legal persons, but also to decide on the most important social issues, such as the use of public resources and the respect of the fundamental human rights and freedoms. The damage that might be caused by their irresponsible conduct and behaviour is immensurable, even though it is not always apparent at first sight. Such damage reflects particularly in lack of integrity and growing

68 Conversely, the Macedonian GAPA, the new Serbian GAPA, and the new Montenegrin GAPA (which are still not applied) introduce the principle of autonomy in decision-making, and envisage the delegation of powers to the authorised official in order to reduce the powers of politically appointed officials in the procedure where individual rights and obligations and legal interests of natural and legal persons are the subject of decision. However, the experience in terms of the implementation of this rule in practice in Macedonia has shown that the principle of delegation is not applied to a sufficient extent, which is explained by the fact that the officials are reluctant to forgo their powers.

69 For instance, the data from the 2016 Montenegro Administrative Court Performance Report, p. 8, indicates that approximately 50% of actions before the Administrative court are sustained, http://sudovi.me/uscg/izvjestaji-o-radu/).

corruption, which undermines the citizens' trust in public institutions, which may be difficult to rebuild.

Strengthening of personal and professional integrity implies primarily education/training on ethical standards for proper performance of public office, and particularly the promotion of moral values, conduct, and expectations, as well as accountability building. In addition to that, personal accountability can be developed by introducing procedures and disciplinary measures.

Education of public officials should be conceived in a way that will help develop an understanding of the need to foster the public good and to protect the public interest, and to explain the potential damages that can be caused by the abuse of public service. In this respect, the most important tool should be the codes of ethics – the rules for proper conduct that point to individual responsibilities and proper actions by an individual, a group or an organisation.[70] Taking appropriate codes of ethics at the level of individual institutions (administrative authority, publicly-owned company, public institution, etc.) as a starting point, it is desirable and in some cases even recommendable to develop integrity plans that would be tailored to the specific needs of those organisational units.

The essence of codes of ethics, or integrity plans and other similar acts, is to guide, direct and standardise the conduct of public officials in the workplace. In addition to that function, they have a control function as well, since they establish and publicly announce the limits of acceptable conduct that the public officials must not overstep. Most codes, or integrity plans, are formally binding and envisage disciplinary sanctions for noncompliance with the prescribed rules.

With respect to their contents, these acts, as a general rule, promote the following principles: serving the public interest (reinforced by an explanation of the relationship between the public and the private role of public officials); respecting the Constitution, primary and secondary legislation (focusing on the proper application of discretionary powers as a source of ethical dilemmas); performing public duties in accordance with the highest standards of personal integrity; and strengthening the ethical capacities of the public institutions.

Codes of ethics, integrity plans and other types of similar acts, cannot be productive if their content is limited to a list of slogans and nice, or

70 The importance of such codes is supported by the fact that the Commimitte of Ministers of the Council of Europe adopted, in 2000, the Model Code of Conduct for Public Officials, with the aim to set the standards of integrity and conduct of public officials in the European area, but also to inform the general public on what to expect from public officials. See: Model Code of Conduct for Public Officials, Appendix to Recommendation No. R (2000) 10, 11 May 2000, The Committee of Ministers of the Council of Europe, www.coe.int/t/dghl/monitoring/greco/documents/Rec (2000)10_EN.pdf.

desired, principles. In that case they can actually even incentivise various abuses, since they can be used as a cover for such actions. To ensure their implementation in practice, these acts need to be formally binding. However, that alone would not be sufficient if the officials are not encouraged to adopt the values and principles promoted and protected in these acts. With that respect, the codes can be accompanied by adequate trainings, workshops, education courses, etc.

Finally, to ensure full implementation of codes of ethics and integrity plans and their integrity strengthening effects, adequate checks need to be made. These checks should include the following questions: Is there a dedicated policy for the promotion of integrity that includes integrity checks in place (e.g. background checks, mandatory financial status and asset disclosure, integrity testing, post-employment restrictions, codes of ethics, continued education and counselling, etc.)? Are there dedicated entities competent for integrity promotion and corruption prevention? Are there codes of ethics in place and when they were introduced, who drafted and adopted them? What is their legal status, are they binding, and do they specify sanctions for the code violations? Are the codes of ethics applied in practice, and if so, are there reports on the code violations and imposed sanctions, for example, for the past five years?[71]

4.4. THE PRINCIPLE OF TRANSPARENCY

The principle of transparency mandates that the administrative activity should be open and transparent, since this is a crucial precondition for the protection of the rights of the parties to administrative proceedings. A large number of instruments that can be used to operationalize this principle, and those that are particularly relevant to the public officials' integrity and respect of the rights of citizens involved in administrative procedures include: the obligation to provide adequate justification for the decisions made in the course of administrative proceedings, the right of the parties to inspect the case file, and the right to adequate legal remedy.

If the principle of transparency is not adequately prescribed and applied, that complicates or even prevents efficient control of the administrative performance. The administrative procedure regulations in the analysed countries do not show any major shortcomings related to the request to explain adequately the decisions made in the course of these proceedings. However, some criticism may be raised with regard to the provisions specifying the manner in which the party may inspect the case file, as well as the party's right to have access to legal remedies.

71 For more details see: http://www.coe.int/t/dghl/monitoring/greco/evaluations/round5/Greco(2016)19%20en% 20Questionnaire%20Fifth%20Evaluation%20Round.pdf.

When it comes to the party's right to inspect the case file, while most legislation regulates this issue,[72] the gaps relate to the fact that these provisions are not necessarily suited to the modern means of communication, that is, they do not include the party's right to inspect documents kept in electronic form. If this right is not guaranteed by law, that creates even room for potential abuse in providing access to this right. Considering that in practice information and documents are increasingly kept in electronic form, it is obvious that this issue needs to be formally regulated.[73] In the meantime, this gap could be bridged through the development of manuals for the application of the administrative procedure regulations or relevant guidelines that would specify expressly that the party's right to inspect the case file applies also to the records kept in new forms. To ensure the application of that rule in practice, electronic files should be kept and accessed in the standard software applications to maximise the circle of users. The principle of transparency does not apply to confidential information nor information classified as secretin accordance with the relevant regulations.

In most of the regulations that date further back, the legal remedy system is inadequate – this is primarily reflected in the fact that they do not envisage the party's right to waive the right to appeal after the decision has been adopted, and the party has to wait until the expiry of the time limit for an appeal (normally fifteen days) to do so. During that time, the party could suffer damages that are not always recoverable.

Transparency of administrative proceedings is important for integrity as it encourages public official to be loyal and obliges them to report any irregularities or abuse that they have observed. That contributes also to integrity strengthening in the institutions they work in or represent, but also in the society as a whole.

4.5. THE PRINCIPLE OF EFFECTIVENESS AND OF PROCEDURAL ECONOMY

The principle of effectiveness in administrative proceedings means that, when preparing and making decisions, public officials have to ensure that the parties' rights and interests are decided on successfully and duly (completely). In a large number of cases, this principle is met when the procedure is conducted

72 While the Kosovar and Albanian GAPAs do not contain explicit provisions on this issue, that does not mean that in these countries the party to the proceedings cannot inspect the case files. However, the lack of formal guarantees creates room for potential abuse.

73 Recently adopted regulations are an exception in this respect – the Macedonian GAPA (Article 42), the new Serbian GAPA (Article 62) and the new Montenegrin GAPA (Article 68). The latter two are still not applied.

in an efficient manner, but efficiency is not and cannot be the absolute imperative, since prompt adoption of a decision may be the condition for a successful exercise of the rights and legal interests of the party in one case, but this may not be true in another case, if the circumstances of the case require a more time-consuming procedure in order to ensure that a proper decision is reached and that the proceedings is successful.[74] However, one rule that is of critical importance to the principle of effectiveness is that requiring a public authority to inspect, collect and process *ex officio* all relevant data on the facts that are available in the official records. This rule is now present in most of the current GAPAs of the observed countries.

However, concluding administrative proceedings within an appropriate (reasonable) time limit that is suitable to the circumstances of the specific case must be imperative since any needless (unjustified) delay in administrative proceedings can open room for potential abuse. Consequently, it is important that the administrative procedure regulations specify the appropriate timeframes whenever that is possible, and to leave the issue of timeframe open only for those procedural actions for which it is not appropriate to preset the timeframe for their completion, as it needs to be flexible to adapt to the specific circumstances. Only such regulation strengthens the integrity of the officials who apply these regulations.

In most of the analysed countries, the administrative procedure legislation does not meet the above requirements. Consequently, administrative proceedings are inefficient, take too much time and are too expensive. The problem of inadequately set time limits is reflected also in the too short validity period of some certifications and other documents issued in the course of administrative proceedings, which creates bottlenecks, opens room for corruption, and undermines integrity.

In practice, this problem could be overcome by developing relevant manuals on proper application of administrative procedures or instructions, or guidelines, etc. (including instructions by line ministries), elaborating more specifically the issue of procedural timelines. When setting time limits for specific actions in these legal acts, it is necessary to ensure that they are in line with what has been proven as appropriate in specific situations in practice, so that the time limits would be consistent, and in line with the need to ensure legal certainty.

A special case of noncompliance with the time limits that undermines the principle of effectiveness is the situation known as “administrative silence”: when the public body fails to respond to the party’s request within the

74 V. D. Milkov, *Administrative Law II, Administrative Activity*, Faculty of Law in Novi Sad, Novi Sad 2016, p. 80.

prescribed time limit (as a rule, in the analysed countries, that period is one to two months). In that case, modern administrative procedure law tends to assume that the party's request was thus granted. This is important for the public officials' professional integrity. If all requests of the parties were to be uncritically granted (which would happen if administrative silence implied that the request was granted), that would often be damaging to the public interest.

However, in most of the countries, the GAPAs envisage that if a request is not decided on within the prescribed time limit, it is assumed that the request was denied. In that situation, the problem of administrative silence should be resolved by strengthening the personal and professional integrity of public officials, ensuring that they perform their tasks professionally, responsibly, transparently, and in accordance with the ethical standards. The strengthening of the public officials' integrity was already elaborated on in the section dealing with the principle of accountability (and obligation), and hence this discussion will not be repeated here.

4.6. THE PRINCIPLE OF IMPARTIALITY

The principle of impartiality obliges public officials to be impartial in relation with the parties in administrative proceedings but also to be independent from external influences in their work and in the decision-making. This is one of the key preconditions for lawful and correct decision-making because a biased public official may be tempted to adopt decisions that favour illegitimate private interests rather than the public interest. All the administrative procedure regulations in the analysed countries set rules that elaborate the principle of impartiality, and they include, as a rule, the provisions on the recusal of public officials from the administrative proceedings. However, the grounds for such recusal are not the same in all the countries, and the differences include mostly the differences between the old and the new (reformed) administrative procedure regulations.

Thus, in Serbia, Montenegro and the BiH entity – the Republic of Srpska, the rules for recusal of public officials from the proceedings are insufficient, because the grounds for recusal are reduced to four criteria: the public official is already involved in the proceeding in another capacity (as the party, co-authorised person, witness, expert witness, proxy or legal representative of the party); the public official is related to a party in the proceedings to a certain degree of kin; the public official is adoptive parent, adoptive child, guardian or foster parent to the party in the proceedings; the public official participated in the first-instance proceedings or in the adoption of the first-instance decision. The main shortcoming of the above national regulations is that they are

inadequate in the modern-day life and business situations, in as much as that they do not include persons who are in a business relation with the party in the administrative proceedings or who could directly benefit from or suffer damages caused by the outcome of the administrative proceedings. These shortcomings have been fully or partially eliminated in the regulations of Macedonia, Federation of BiH, Kosovo* and Albania, as well as in the new Serbian and Montenegrin regulations that have yet to take effect.

Each public official should be recognise independently situations that may compromise his/her impartiality in administrative proceedings even when such situations are not expressly prescribed by law as grounds for recusal. Fundamentally, that is a question of their personal integrity. However, public officials could be assisted in recognising grounds for recusal from a particular case or administrative proceeding by relevant guidelines or manuals on the proper application of the regulations, which would provide instructions on the proper conduct in the event there are grounds for recusal, indicating the authority they can approach with a request for the issue to be clarified. Appropriate education courses (trainings, workshops) for professional integrity strengthening may also be helpful to achieve that goal. In addition, expressly prescribing that a public official who fails to recuse himself/herself from the administrative proceedings when there were statutory grounds for doing so will be held accountable would add to the above.[75]

4.7. INTEGRITY CHALLENGES IN THE IMPLEMENTATION OF NEW GENERAL ADMINISTRATIVE PROCEDURE ACTS

Most of the observed countries still implement conceptually obsolete legislation on general administrative procedures, which does not respect the current administrative procedure requirements and standards in modern democracies. The new, reformed GAPAs are currently implemented only in the Republic of Macedonia and in Albania, while in the Republic of Serbia and the Republic of Montenegro the implementation of the new legislation has been postponed on several occasions.

Bearing in mind that the new administrative proceedings facilitate to a great extent the legal position of individuals and business entities in these proceedings, and that the role of public officials in the proceedings has fundamentally changed, the question arises as to whether any and what integrity challenges can be expected in the course of their implementation. According to the experience in the application of the new legislation in the

75 In all the countries analysed only the Kosovo* GAPA expressly prescribes disciplinary accountability of an official who fails to recuse himself/herself from the procedure where there are absolute grounds for recusal (Article 34).

Republic of Macedonia and the Republic of Albania, the major challenge appears to be the requirement that public officials should change the awareness about the importance and purpose of the proceedings that are conducted in accordance with the GAPA. This primarily refers to the necessity to ensure fair treatment of the parties to the proceedings, respecting all their rights and obligations, and recognising that the party has not entered into the administrative proceedings to allow the public official to receive his/her salary, quite the opposite: the public official should instruct the party how to exercise its rights and legal interests as easily as possible.[76]

The practice in terms of the implementation of the new GAPA in Macedonia has shown that public officials are not sufficiently prepared for the a of the new rules, and that they often go through the motions, or apply inertly the old regulations without paying enough attention to weather a certain stage in the administrative proceedings is subject to the new rules.[77]

The application of the new principles of administrative procedures, particularly the principle of the delegation of powers and the principle of proportionality, presents a special challenge. More specifically, office holders are reluctant and unwilling to renounce their competencies, and if one bears in mind that they are the ones who should adopt the job classification act, they can clearly ignore the new rules of conduct without any major problems. Regarding the principle of proportionality, it has been noted also that it is almost not applied at all, and that the parties are fined for violations of that principle, because that is one of the effective ways to fill the budget.[78]

5. GOOD PRACTICE EXAMPLES IN OVERCOMING THE CHALLENGES IN THE IMPLEMENTATION OF NEW ADMINISTRATIVE PROCEDURE REGULATIONS

The professional integrity of public officials is at a satisfactory level when they work competently and in accordance with the ethical principles. Professional integrity is a precondition for the public service to be perceived as a reliable and trustworthy partner by the citizens and businesses alike.

76 V. Lj. Pljakic, "Administrative Proceedings in the New General Administrative Procedure Act", *Legal Life*, 10/2016, pp. 248–249.

77 B. Davitkovski *et al*., "New General Administrative Procedure Act in the Republic of Macedonia and its Applicability", *Legal Life* 10/2016, p. 281.

78 B. Davitkovski *et al*., p. 282.

However, in most of the analysed countries, a considerable number of public officials do not have adequate knowledge or skills. They often actively resist change and are sceptical towards the possible benefits that such change might bring.[79] To overcome these obstacles, it is necessary to organise and deliver continuous training focused on improving the professional competences of public officials. In addition to professional development, due attention must be paid also to obtaining, or developing necessary skills, particularly an updated knowledge in the field of information and communication technologies.[80]

Good practice examples in training for public officials in the field of administrative procedures include:

1. *General Administrative Procedure Guidelines*, Human Resource Administration of Montenegro, Podgorica, 2006[81]
2. *Training: Legislative Process Management and Administrative Acts,* Human Resource Management Service of the Republic of Serbia[82]
3. Human Resource Administrative of Montenegro: Programme of Professional Improvement of Public Officials and State Employees – Module *Public Administration and System of Functioning of Public Authorities*

Public officials who are not motivated or willing to undergo continued education, and to change the routine methods of work they have grown accustomed to, will hardly achieve today's expected level of professional competence. To strengthen their professional integrity, they have to accept – and internalise – certain ethical values to supplement their professional competences and skills. However, in almost all of the analysed countries, the improvements in this respect are very slow. That leads to a conclusion that the approach towards raising their awareness and strengthening their ethical capacities has not been continuous and comprehensive.

All public officials must be aware that they serve the public interest, that they are personally responsible for their choices, and that their obligation is to adopt decisions that are as favourable for the parties in an administrative procedure, and the community, as the law permits. That is also what best serves society as a whole. That is why their duty is to adhere to certain principles when deciding in concrete cases. The principles of the General

79 See: S. Karavdic Kocevic, K. Milanovic, "Seven Miles Step in Public Administration Reform – New General Administrative Procedure Act", *Polis* 11/2016, p. 23.

80 It is unbelivable yet true that some public officials still do not use computers because they do not how to use them and are not willing to learn. *Ibid*.

81 General Administrative Procedure Guidelines, available at: http://www.uzk.co.me/stari/publikacije/dokumenti/ 10%20Opsti%20upravni%20 postupak.pdf.

82 Training: Legislative Process Management and Administrative Acts, available at: http://www.suk.gov.rs/sr_latin /strucno_usavrsavanje/obuka_program.dot?id_obuke=1718.

Administrative Procedure Acts provide good guiding principles in that respect, as they guarantee legal certainty, set standards for the protection of the rights of individuals, and safeguard the public interest. In addition, these acts positively affect the personal behaviour of public officials, as they prohibit specific actions, while promoting others.

However, laws in themselves are not sufficient; there is still a need for codes of ethics, guides, guidelines, instructions, and other similar legal acts. For example, honesty as a personal trait is regulated by codes of ethics and moral standards, not solely by statutes. However, honesty as a personal trait is a necessary precondition for observing and applying the general administrative procedures, since it is hardly possible to adhere to the principles of legality, proportionality, accountability, transparency, effectiveness and economy of proceedings, and impartiality if a public official applying those principles is not honest.[83] This is why the general administrative procedure acts and codes of ethics are complementary. That is why such codes of ethics are now common across Europe, as their contribution to the proper implementation of administrative procedures has been recognised.

Good practice examples in the field of ethical conduct by public officials include:

1. Public Sector HR Challenges in France, 2016, p. 6[84]

2. The French civil service

2.3. Rights and obligations of civil servants (2/2)

- Among common **obligations**:
  - ✓ **Dignity, impartiality, integrity**, prohibition of conflicts of interests
  - ✓ Professional activity **entirely dedicated** to the tasks assigned
  - ✓ Hierarchical **obedience**
  - ✓ Professional **secrecy**, duty of **reserve**, **neutrality** and secularism
  - ✓ **Information** of the Public
- Among common **rights**:
  - ✓ Freedom of **opinion** on philosophical, political, belief or trade union matters
  - ✓ **Non-discrimination**, prohibition of sexual or moral harassment
  - ✓ Functional juridical protection
  - ✓ **Participation** rights — Right to **strike**

83 In addition to honesty, other universal values are also embedded in the principles and rules of the General Administrative Procedure Act – e.g. competence, trustworthiness, cooperativeness and engagement, courage and perseverance.

84 Public Sector HR Challenges in France, available at: http://www.thensg.gov.za/wp-content/uploads/2016/09/ DGAFP_Presentation-HR-challenges_20160926_Display.pdf.

2. In South Australia, the Government has adopted a document entitled South Australian Public Sector Values and Behaviours Framework,[85] which promotes courtesy, competence, trust, respect, cooperation and engagement, honesty and integrity, courage and perseverance, sustainability.

3. The English guide "The 7 Principles of Public Life"[86] promotes the following principles of public administration work, which are important for integrity and also represent a standard set of principles of general administrative procedures in Europe: selflessness, integrity, objectivity, accountability, openness, honesty and truthfulness.

4. Guidelines on Compliance with the Provisions of the Ethics in Public Office Acts in Ireland.[87] These Guidelines provide step-by-step instructions for public officials on meeting the requirements of the procedures they apply. In addition, for any ambiguity regarding the action to be taken in the procedure, they clearly indicate the advisory body that public officials may approach to clarify any doubt about the application of the procedures in a particular case. Instructions and guidelines in guides, as well as advice they receive from the competent advisory body, are binding for public officials, unless they directly oppose the enforceable regulations.

5. The Finnish Guidebook for Public Officials (Values in the Daily Job – Public Official Ethics)[88] promotes the principles of efficiency, transparency, competence, trust, courtesy, impartiality and independence, equality, accountability.

6. A good practice example of capacity and professional integrity building: Competency Management in the Belgian Federal Government.[89]

7. A good practice example of simplification of administrative procedures: Quality of Public Administration, A Toolbox for Practitioners, European Commission 2015.[90] This publication promotes the most important ethical principles and values: the duty of a public official to act in the public interest; that a public officials should imagine himself/herself in the role of an individual party in the administrative proceeding when deciding on its rights and interests,

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85 Public Sector Values and Behaviours Framework, available at: http://publicsector.sa.gov.au/wp- content/uploads/20150710-Public-Sector-Values-and-Behaviours-Framework.pdf.

86 The 7 Principles of Public Life, available at: https://www.gov.uk/government/publications/the-7-principles-of-public-life/the-7-principles-of-public-life--2#selflessness.

87 Guidelines on Compliance with the Provisions of the Ethics in Public Office Acts in Ireland, available at: http://www.sipo.gov.ie/en/Guidelines/Guidelines-for-Public-Servants/Public-Servants-Guidelines-10th-Edition-Updated-Nov-2015-1.pdf.

88 Values in the Daily Job – Public Official Ethics, available at: http://workspace.unpan.org/sites/internet/documents/UNPAN91843.pdf.

89 Competency Management in the Belgian Federal Government, available at: https://soc.kuleuven.be/io/onderzoek/project/files/hrm27-country-report-belgium.pdf.

90 Quality of Public Administration, A Toolbox for Practitioners, European Commission 2015, available at http://ec.europa.eu/esf/main.jsp?catId=575&langId=en, p. 82.

because it will best understand what procedures should be applied in order to make the decision in the best interests of the party and, at the same time, in the public interest. The most important ethical values of public officials are: the application of the principles of legality, integrity, impartiality and independence, transparency in work, treating the parties in the proceedings professionally and with respect, and efficiency in work.[91]

6. TRAINING EXERCISES[92]

EXERCISE 1 (the principle of legality)

Facts:

The party has acquired a right through a decision dated February 15, 2002.

However, a new law was subsequently passed (conflicting with the old law), and in accordance with that law, a past ruling is not in conformity with the new law. The new law (its transitional and final provisions) do not regulate the rulings passed before its adoption.

In order to protect the acquired rights, the first-instance body may use the (extraordinary) legal remedy of revoking and changing the ruling at party's request or with party's consent.

The party has not filed a request and does not consent to the change of the ruling.

Question:

1. How to act in that case?
2. Does the new law derogate the old one?

Note:

– The statutory time limits for changing final and finally binding rulings have expired.

– The first-instance body cannot conduct a new administrative procedure until the above act is changed. Otherwise, there would be two valid rulings on the same right that are different in scope and content.

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91 Quality of Public Administration, A Toolbox for Practitioners, European Commission 2015, p. 18.

92 Taken from: Education of Administrative Proceedings Managers and Inspectors in BIH (EuropeAid/132930/C/SER/BA), Training materials including model forms for practical application, March 2016.

EXERCISE 2 (the principle of legality)

Facts:

The party has filed a property claim to regain possession of an apartment (apartment restitution) to the Commission for Real Property Claims of Displaced Persons and Refugees pursuant to the Law on Transfer and Settlement of Property Claims (Official Gazette of the BIH Federation, No. 6/04, 22/04 and 59/05).

The same authority had already acted on the claim and passed a negative ruling. Unsatisfied, the party has filed a new claim.

Question:

1. How should the competent administrative authority act on the repeated claim?
2. Can the administrative authority dismiss the claim on the grounds of ne bis in idem?
3. Is the administrative authority under the obligation to conduct administrative proceedings and decide on the merits of the party's claim?

Note:

Excerpt for Judgment of the BIH Supreme Court No. 070-0-Uvp-07-000471 of30 October 2009: The property claim for the repossession of the apartment submitted to the Commission for Real Property Claims of Displaced Persons and Refugees, which should be decided by administrative authorities in accordance with the Law on Transfer and Settlement of Property Claims, cannot be dismissed solely on the grounds that the administrative authority has already issued a ruling on the request of the party submitted to that authority, and the administrative authority is obliged to conduct administrative proceedings and decide on the merits of the party's claim.

EXERCISE 3 (the principle of legality – predictability)

Facts:

A party files a motion for renewal of proceedings based on the knowledge that different decision have been passed in other similar cases.

The party legitimately expects that the administration shall act in the same way in similar cases, which gives the party a degree of certainty related to the administrations' actions.

This “new” information gives the party legal grounds to file the motion for renewal of administrative proceedings.

Question:

1. Should the renewal of administrative proceedings be granted?
2. What are the grounds for renewal?
3. Are there grounds to deny the motion, and if so, what are they?
4. What is a “new fact”?

Note:

Excerpt from Judgment of the BIH Supreme Court No. U-4373/01 of 03 June 2004: The knowledge of the party that in other similar cases it was decided differently does not present a new fact that would allow for the renewal of administrative proceedings.

EXERCISE 4 (the principle of legality, the principle of efficiency)

Waiving the right to appeal

Facts:

After the first instance ruling was adopted, the party has waived the right to appeal (by a statement made on the record, or a special submission, etc.). After that, the party files an appeal to the first-instance authority within the time limit for appeal.

Question:

1. Is the authority under the obligation to act on the appeal or should it dismiss the appeal? On what grounds?
2. Can the party waive the right to appeal at all?
    a. No (this is a constitutional right and the party should have sufficient time to consider what to do and whether to file the appeal).
    b. The party may waive the right to appeal but the waiver cannot subsequently be revoked.
    c. The party may waive the right to appeal and the waiver can be subsequently revoked (as is the case with the rules on revoking the motion).

Notes:

1. **Croatian GAPA, NN 47/09**:

The right of appeal and withdrawal from appeals
Article 106

(1) A party may waive its right of appeal in writing or orally on the records from the day of receipt of the first-instance decision until the day of expiry of the time limit for lodging appeals.

(2) Waiver of the right of appeal in matters with several parties produces legal effect only when all parties waive their right of appeal.

(3) A party may withdraw from an appeal before delivery of the decision on the appeal.

(4) When a party withdraws from a lodged appeal, proceedings upon the appeal shall be terminated by a decision.

(5) Waiver of or withdrawal from appeals may not be revoked.

2. ***Republic of SrpskaGAPA, Official Gazette of RS/***02,07,10 – does not include a norm on the issue/administrative practice!

3. ***Serbian GAPA:***

Waiving the right to appeal
Article 156

A party may waive the right to appeal from the moment it was informed of the ruling until the expiry of the time limit for appeal.

Waiver of the right to appeal **cannot be revoked**.

Only if all the parties and the person whose motion to be recognised the capacity of a party in first-instance proceedings has been denied waive the right to appeal. The ruling becomes final and enforceable.

EXERCISE 5 (the principle of proportionality)

Facts:

A party filed a request for free access to information of public importance to the Ministry of the Interior regarding the spending of the Ministry's budget

funds. The Ministry of the Interior denied the request, referring to the confidentiality of information and the protection of national security.

The party has filed a complaint to the Commissioner for Free Access to Information, who annulled the decision of the Ministry of the Interior and ordered that the requested information be provided to the party.

Question:

1. Has the Commissioner for Free Access to Information made the right decision?
2. Has the principle of proportionality been respected in the decision of the Ministry and in the Commissioner's decision?