Europeanization of General Administrative Procedure in Serbia

Marko Davinić
Professor of Administrative Law, Faculty of Law, University of Belgrade,
Belgrade, Serbia
markod@ius.bg.ac.rs

Vuk Cucić
Associate Professor of Administrative Law, Faculty of Law, University of
Belgrade, Belgrade, Serbia
vukcucic@ius.bg.ac.rs

Abstract

Serbia (as well as other countries of the Western Balkan region) recently adopted the new General Administrative Procedure Act (gapa). The drafting and adoption process was strongly influenced by the European Union and its experts from the sigma organization. The paper first analyzes the novelties introduced and improvements made under European influence. The authors then go on to analyze deficiencies of European influence in the drafting process. Two main shortcomings thereof were the false deregulation and debureaucratization of gapa and the 'one-size-fits-all' approach applied in all the countries of the Western Balkan region, in spite of inherent differences in their legal systems. The purpose of the criticism given in the paper is to avoid the same issues in the future, during the process of harmonization of Serbian law with the acquis communautaire.

Keywords
general administrative procedure act – administrative law – Harmonization with EU law – SIGMA technical assistance – public administration reform
1 Introduction*

1.1 Historical Development of Serbian Administrative Law

The Serbian administrative legal system evolved through two distinct, yet connected paths, the process of rule codification regarding administrative proceeding, on the one hand, and the development of judicial control of administrative acts, on the other. Although, chronologically speaking, rule codification of administrative proceeding occurred later, this process shall be described first since it represents the central topic of this paper.

The Kingdom of Yugoslavia (including Serbia as a part thereof) was among the first countries in the world to codify the rules of administrative proceeding by adopting the General Administrative Proceeding Act in 1930 (which entered into force in 1931). Before Yugoslavia, this was done by Austria in 1925 and Czechoslovakia and Poland in 1928.¹ Yugoslavian law was mainly based on its Austrian role model, but was much more extensive, because the legislator included numerous provisions of civil proceeding in it.²

The political changes after World War II led to a discontinuity with the previous legal system. All the laws and regulations enacted before the war were not in force anymore, but could still be applied under two conditions, if there was no new law regulating the pertinent matter and if the provisions of the previous law were not in contradiction with the new constitutional and political order. Therefore, although not in force, certain provisions of the General Administrative Proceeding Act of 1930 were applied by the administrative authorities until a new law was enacted in 1956. The General Administrative Proceeding Act of 1956 took over many provisions of its predecessor and reflected changes in the political system. It also encompassed new chapters on general principles of administrative proceeding, competence of administrative authorities, powers of authorized persons and enforcement of administrative acts.³ This law was amended four times, in 1965, 1976, 1978 and 1986.⁴

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* This article results from the research on the Faculty of Law of the University of Belgrade project Identity Transformation of Serbia.

¹ Zoran Tomic, Opste upravno pravo (Pravni fakultet Univerziteta u Beogradu, Beograd, 2011), 248.
² Dragan Milkov, Upravno pravo II, Upravna delatnost, (Pravni fakultet Univerziteta u Novom Sadu, Novi Sad, 2003), 67.
³ Ibid., 68.
⁴ Tomic, op. cit. note 1, 249.
After the Federal Republic of Yugoslavia (the third Yugoslavia) was created, the 1956 Law with its changes was still in force. In 1997 the new law was passed,\(^5\) which had minor amendments in 2001 and 2010. It was in power until the new GAPA, which was adopted by the Serbian parliament in 2016, and had begun to be applied in 2017 (Official Gazette of the Republic of Serbia, no. 18/2016 and 95/2018).\(^6\)

Judicial control of administrative acts long preceded the process of rule codification of administrative proceeding. The Constitution of 1869 is said to be a milestone in the creation of administrative judiciary in Serbia. This Constitution and the law on the Council of State of 1870 established administrative judiciary in the real sense of the word. The Council of State was created in 1839, but was first authorized to resolve disputes concerning administrative acts by issuing final and binding decisions upon them by the 1869 Constitution.\(^7\) Even before 1869, the Council of State resolved administrative disputes and its decisions were respected by the administration, despite the fact that they were not mandatory.\(^8\) “If compared to when the other states introduced administrative judiciary, it has to be said that the Kingdom of Serbia in that regard is right behind France, and to a certain extent even in front of it, since the French Council of State became a real administrative court only in 1872, when its decisions were proclaimed to be obligatory for administrative authorities.”\(^9\) The Yugoslavian Constitution of 1921 and the Council of State and Administrative Courts Act of 1922 created a two-tier administrative judiciary. There were six administrative courts deciding in the first instance and the Council of State as the appellate instance. The Council of State deliberated in the first instance against the acts of ministers.\(^10\) Both the Council of State and administrative courts were part of the executive, not judiciary branch.

After World War II, the administrative judiciary was abolished. This was due to the new political stance that was under the influence of Soviet doctrine,

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5. A temporary version of this law was enacted in 1996. This was a result of the fact that two houses of the Parliament did not enact the same text of the law. This version applied until the final text of the law was passed in 1997, Ibid., 249, fn. 283.

6. The Law entered into force on the eighth day of its publication in the Official Gazette, and it began to apply on 1 June 2017.


8. Stevan Sagadin, Upravno sudstvo (Drzavna stamparija, Beograd, 1940), 176–180. All translations from Serbian into English are by the authors of the present work unless otherwise noted.

9. Ibid., 181.

10. For detailed description of the administrative judiciary in Serbia before the World War II, see Ibid.
which rejected the idea of judicial control of the administration.\textsuperscript{11} The only control of administrative acts at the time was conducted by the administration itself, either upon a citizens' appeal or ex officio.\textsuperscript{12} Judicial control of administrative acts was reinstated by enacting the Administrative Disputes Act of 1952. Special departments of regular courts (the supreme court of the Federation and supreme courts of the federal units) were in charge of resolving administrative disputes. The reinstatement was a consequence of a changed political situation. Namely, the second Yugoslavia started developing its own form of communism, self-management, thus abandoning the Soviet political and legal tradition of administrative socialism.\textsuperscript{13} The law of 1952 was amended in 1964 and 1976.

The Law of 1952 was applied in the Federal Republic of Yugoslavia with few amendments that had not changed its essence.\textsuperscript{14} The new Administrative Disputes Act was enacted in 1996. Administrative disputes were decided upon by the Administrative Department of the Supreme Court and the special departments of the district courts. The law that is currently in force was passed in the end of 2009. Additionally, as of 2010, the Administrative Court was established. It is competent for all administrative disputes for the entire country. Hence, judicial control is conducted in only one instance and the decisions of the Administrative Court can be challenged only by an extraordinary legal remedy, i.e. only in certain cases, before the Supreme Court of Cassation. Thus, the Administrative Court is a special court within the judicial system of the Republic of Serbia.

In conclusion, evolution of administrative law has had these two pathways in Serbia, and can be compared. Rule codification of administrative proceeding was linear, keeping its original essence with necessary adjustments and modernization. These codified rules were applied even during the period of political and legal discontinuity immediately after World War II. On the other hand, after the turbulent period of its genuine establishment, from the creation of the Council of State until recognition of the mandatory nature of its decisions (1839–1869), judicial control of administrative acts took the form of different major organizational models. To be precise, it went from the French model of administrative courts that are part of the executive (before World War II), to the period of Soviet absence of judicial control (from the end of

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\textsuperscript{11} Dragan Milkov, \textit{Upravno pravo III, Kontrola uprave} (Pravni fakultet Univerziteta u Novom Sadu, Novi Sad, 2003), 57.
\textsuperscript{12} Slavoljub Popovic, \textit{Upravni spor u teoriji i praksi} (Zavod za izdavanje udzbenika srs, Beograd, 1966), 9–12.
\textsuperscript{13} \textit{Ibid.}, 14.
\textsuperscript{14} Tomic, \textit{op.cit.} note 7, 81.
World War II until 1952), and through the Anglo-Saxon system of resolution of administrative disputes by regular courts (1952–2010), to the German model of existence of a special administrative court that is part of the judiciary (since 2010).

1.2 Drafting of the New GAPAs

There were several attempts to change, modernize and Europeanize the 1997 GAPAs. The first one was in 2004. It was a complete failure, given that the draft did not even reach the Government. In 2009, a sequence of connected drafting processes started. There were three working groups that prepared four drafts. All four of them were prepared with direct or indirect involvement of SIGMA experts. SIGMA (Support for Improvement in Governance and Management) is a joint initiative of the OECD and the European Union, whose key objective is to strengthen the foundations for improved public governance, and hence support socio-economic development through building the capacities of the public sector, enhancing horizontal governance and improving the design and implementation of public administration reforms.15 All four draft GAPAs went through the process of public debate and three of them were adopted by the Government and proposed to the Parliament. However, the 2012 and 2014 drafts were not discussed in Parliament due to the upcoming election for parliament. The 2016 draft, the one that was enacted in the end, barely avoided the same fate. It was put as priority legislation and it was adopted only two days before the 2016 election for parliament was called.

The most direct European influence was in the process of preparing the first draft (2009–2012). Half of the drafting group was consisted of SIGMA experts. The 2013 draft resembled its predecessor, though it brought significant novelties in the field of administrative contracts and legal remedies. The 2014 and 2016 drafts kept the basic logic of the two previous drafts (wider notion of administrative matter, introduction of guarantee acts, administrative contracts, factual acts of administration and provisions of public services, new basic principles, a change in the notion of decisions and system of legal remedies – all analyzed in detail below), but significantly departed in respect to the number of provisions and volume of the rules of evidence.

It is also important to mention that the drafting of the new GAPAs was a region-wide process. Countries created on the soil of socialist Yugoslavia (excluding Slovenia, which underwent the process before its accession to EU in 2004 and Bosnia and Herzegovina, which did not yet enter the process), which had common legal legacy, as well as Albania and Moldova, entered the

15 Available at http://www.sigmaweb.org/about/.
drafting process at approximately the same time. This synchronization gave a special impetus to the drafting process and amplified the European influence therein, especially emphasizing the role of SIGMA, which took part, directly or indirectly, in the drafting process in all the countries of the region. Given these features of the drafting process, references shall be made, where appropriate, to the previous Serbian drafts of GAPA and the GAPA's of the countries of the region.

Finally, the authors of the paper took part in the work of different working groups that produced these four drafts of GAPA, enabling them to give better insight to the drafting process and the influence that the European partners had (European Commission and SIGMA) in it.

2 The Influence of the European Administrative Law on National Administrative Systems

Administrative law in every country constitutes a branch of law which is the most difficult to be determined precisely, and which is a subject of permanent discussions in terms of its boundaries and relationship with other branches of law. It is even more so on the supranational level of the EU. Thus, European administrative law has been in constant search for its content and identity in the last few decades. During that time, it has been shaped by court decisions, legal acts of general and individual nature, but also by doctrinal theories and perspectives. That search is far from its end, but the shape of this branch of law has gained much more identity and determination comparing to the past.

European administrative law can best be described from three different perspectives. For the purpose of this paper we will use the following terms: genuine European administrative law, directly Europeanized administrative law, and indirectly Europeanized administrative law.

The first set of rules and principles – the European administrative law in the genuine meaning – governs the implementation of EU law by its own institutions.16 These rules and principles are of eclectic nature and can be found in EU

Treaties, regulations and directives, court decisions, as well as in non-binding acts adopted by the European Ombudsman. Treaty on the functioning of the EU prescribes that “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” (Art. 298, par. 1 of TFEU). In addition, this agreement, establishes the right of citizens to have free access to information, guarantees the protection of personal data, prohibits discrimination on various grounds, and determines the obligation of authorities to explain their activities (Art. 15, 16, 18, 296 of TFEU). Furthermore, the Charter of Fundamental Rights of the EU regulates, among other things, the right to good administration, the right of access to documents, and the right to complain to the European Ombudsman (Art. 41–43 of CFREU). However, those rules were abstract and general in nature and needed further concretization by the EU courts. That is the reason why the main principles of administrative law have been established by the Court of Justice and the General Court (former ECJ and CFI), which have had the most important role in the creation of this branch of law at the EU level. In formulating said principles the courts have, in absence of other sources, relied on the law and tradition of EU Member States. The main principles include the principle of legality of administration, the principle of equality, the principle of proportionality, protection of legitimate expectations and legal certainty, the principle of due process of law, etc. Although they arose from national administrative legal traditions (mainly German and French) these principles have been transferred through the decisions of the CJEU into several other Member States. In a similar way, it has been stressed that “principles from a legal system of one Member State enter legal systems of other Member States through the medium of Community law”. Furthermore, those principles have become part of acquis
communautaire, and as such are important for all candidate and potential candidate countries which are on their path to join the EU. For instance, the principle of protection of legitimate expectations, which originated in German law, was later developed in EU as a result of the judicial activities of the European Court of Justice (now CJEU). This principle was introduced in the Serbian GAPA of 2016, which will be elaborated further in the third chapter of this article. Finally, the European Code of Good Administrative Behavior, adopted by European Parliament on the European Ombudsman’s proposal, is a non-binding (soft law) instrument which explains what the right to good administration on the EU level should mean in practice.

The eclectic nature of the EU administrative law suggests that it has become too complicated, not only for citizens and representatives of different organizations, but also for experts and scholars dealing with this area. For this reason, the European Parliament has been calling on the European Commission to submit a proposal for a regulation on Administrative Procedure of the European Union since 2001. Furthermore, in 2013 the European Parliament adopted the Resolution with recommendations to the Commission on a Law of Administrative Procedure of the European Union (2012/2024(INL)). The Resolution called for the regulation which should codify the fundamental principles of good administration and regulate the procedure to be followed by the EU administration. To reinforce its position, the European Parliament adopted a Resolution on an open, efficient and independent European Union administration – 2016/2610(RSP), which provides a detailed proposal for a regulation on the EU administrative law. Although the European Parliament invited the European Commission to come up with a legislative proposal, the Commission has not presented it yet.

The Research Network on EU Administrative Law (ReNEUAL), which was created in 2009, supports the European Parliament’s initiative for a Law of

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Administrative Procedure of the EU. ReNEUAL comprises senior and junior scholars of national and EU administrative law from leading institutions throughout Europe and beyond. ReNEUAL working groups have developed a set of model rules, which are designed as a draft proposal for binding legislation, identifying best practices in different specific policies of the EU. Furthermore, ReNEUAL addresses the need for simplification of EU administrative law, that has evolved in an unsystematic and non-transparent manner.²⁹

However, the implementation of EU law by its own institutions is more exception than rule since the largest part of EU law is still implemented by national administrative institutions. Thus, the body of law, that we call directly Europeanized administrative law, regulates the implementation of EU law by national institutions. It is stressed, that these rules have been created by the Member States but are heavily modified by EU rules and principles.³⁰ In this area, in a similar way as on the EU level, “there is no uniform administrative procedure because of the principle of administrative autonomy, which means that national authorities follow national procedural rules”.³¹ Consequently, “each public administration and its system of administrative law was rooted in the political and social traditions of its own legal system”.³² However, despite

³⁰ Hofmann, Türk, op. cit. note 16, 2.
this administrative autonomy, the EU has developed a body of law guaranteeing European citizens procedural rights and increasingly forcing national authorities to respect common rules of administrative procedure. “This ‘Europeanization’ of administrative law has pressed Member States to ensure greater transparency, accountability and access to justice in their administrative process and has encouraged more searching judicial review of administrative action.”

In fact, the principles created by CJEU have become binding for national courts and administrative authorities when implementing EU law. Schwarze stresses two factors as crucial for the approximation and Europeanization of national administrative systems: the similar living conditions and administrative tasks in the Member states, as well as the necessity of securing the supremacy and uniform implementation of EU law. On the other hand, Knill emphasizes three interacting factors on which depends the degree and direction of domestic change: “the stage of national regulation in relation to European policies (pre-reform, reform, post-reform), the level of sectorial reform capacity, as well as the prevailing belief systems of the domestic actors”. However, some authors stress that “[i]t is extremely difficult to identify a set of common legal principles that underline the different administrative law traditions of Member States (...). Indeed, talking about ‘common administrative values’ shared by all Member States is historically artificial”. In a similar way, it has been emphasized that “[t]he resistance of national law against Europeanization is the tendency of courts and authorities to build and elaborate on an existing legal system along the lines of their traditional components rather than to integrate elements from outside”. In other words, “[i]ndividual states strive to avoid potential costs of administrative adjustment emerging from European policies that diverge from domestic provisions”. It explains the phenomenon that, “[t]he same European policy might cause

34 Ibid.
35 Cananea, op.cit. note 32, 570.
39 Kadelbach, op.cit. note 16, 175.
fundamental reforms in one country while having no impact at all in others”. Thus, the picture is ambiguous, "[i]ncluding not only the convergence, but also the divergence and persistence of administrative differences across Member States".40 Since Serbia is a candidate country, it is still not implementing EU law, although it has to harmonize its legal and administrative system with the legal system of the EU during the negotiation process.

Finally, the third set of rules and principles has no direct connection with EU law, yet it has been voluntarily modified by it.41 We call those rules indirectly Europeanized administrative law. As Keleman has put it, “the impact of European administrative law at the national level extends beyond instances in which national authorities are implementing EU law. For once a procedural right or remedy is granted in EU-related matters, it becomes difficult to withhold that right or remedy in purely national matters”.42 In a similar way, the European Code of Good Administrative Behavior has provided inspiration for similar texts in Member States of the EU, candidate countries and states outside of the EU.43 For instance, in 2010, the Serbian Ombudsman drafted the Code of Good Administration, under the influence of the European Code of Good Administrative Behavior, and submitted it to the National Assembly for adoption. However, the Assembly has not yet considered the document, for no obvious reason.

The main characteristics of modern administration within Europe, both at the supranational and national level, have been a different form of their mutual cooperation which are blurring traditional lines and differences.44 This cooperation has been described with different terms: joint, integrated, mixed, shared or common administration, administrative network, shared management, etc.45 As a consequence, the implementation of EU law increasingly

42 Keleman, op.cit. note 33, 636.
45 Jans, Prechal, and Widdershoven, op.cit. note 24, 7, 29; Hofmann, Türk, op.cit. note 16, 3; Chiti, op.cit. note 38, 37; Paul Craig, EU Administrative Law (Oxford University Press, Oxford 2018), 80; Paul Craig, UK, EU and Global Administrative Law, Foundation and Challenges (Cambridge
requires ‘composite procedures’ defined as “multi-stage procedures with input from administrative actors from different jurisdictions”.46

This shows that the importance of the Administrative Procedure Act for administrative law, administration and the state in general cannot be overstated. As Rudolph von Ihering emphasized “form is the sworn enemy of arbitrariness, the twin sister of liberty”.47 It has been stressed as well that,

“administrative procedure acts (APAs) resemble a ‘Rosetta stone’, that is, they provide archaeological information that reveals the main patterns of public law at a given historical moment. APAs are essential for the comprehension of state, administration and society. They contribute to the deciphering of the main principles and values of public law and of society itself”.48

Despite the fact that there is no EU regulation or directive which would regulate the structure and functions of national administrations, “EU law has a very strong impact on the organization of the states which intend to accede to the Union in the near future.”49 Namely, “candidate countries are required to have administrative systems and public administration institutions capable of transposing, implementing and enforcing the acquis according to the principle of obligatory results”, and have to meet the criteria adopted by the European Council in Copenhagen, Madrid and Luxembourg.50 In order to help candidate and potential candidate countries in their aspirations towards the EU, SIGMA constructed the term ‘European Administrative Space’ (EAS) as common principles and benchmarks of public administration among EU Member
States. Those principles are mainly based on jurisprudence of the Court of Justice of the EU, and as such have become the part of acquis communautaire. It means that many of those principles have become binding for all candidate and potential candidate countries. Furthermore, SIGMA has prepared numerous publications and documents in the last two decades which should serve as additional guidelines for countries aspiring to join the EU. As a consequence of this process, the new principles, have been introduced in the Serbian GAPA (the principle of legitimate expectations and the principle of proportionality) which will be elaborated further in the following chapter.

The EAS was originally designed as a model and useful tool for candidate and potential candidate countries. Were it to be made synonymous with EU Administrative Law, it would be a clear overextension of the original intent of its creation as an instrument for evaluating public administration reforms.

3 Key Novelties Introduced Under European Influence

As it was mentioned, Serbia has a long tradition of codification of administrative proceeding. Nevertheless, new GAPA brought significant novelties and the most important ones were introduced under the influence of EU standards and benchmarks in this field.

3.1 Widening of the Scope of GAPA
The most significant and the most comprehensive change was widening of the scope of the application of GAPA. The 1997 GAPA regulated only the procedure of issuance of administrative acts – individual, legal, unilateral acts of administration, as well as issuance of official documents (certificates). The central notion on which this concept relied on was the legal institute of administrative matter [upravna stvar]. The administrative matter was not defined in the 1997 GAPA, but in the Administrative Disputes Act (Official Gazette of the Republic of Serbia, no. 111/2009), the law regulating judicial review of administrative acts. Therein (Art. 5), the administrative matter was (and still is) defined as an “individual, non-contentious situation of public interest where legal regulations require future behavior of a party to be authoritatively legally determined”. In other words, it is an individual, non-contentious legal situation in which the rights, duties and legal interest of a party are being decided upon by a public authority. The notion of the administrative act is inseparably linked
with the notion of the administrative matter. The Administrative Disputes Act again, not GAPA, is defining the administrative act in Article 4 as “an individual legal act by which a competent authority, directly applying legal regulations, decides on a certain right or duty of a natural or legal person or other party in an administrative matter” (emphasis added).

The new GAPA considerably enlarged the notion of the administrative matter, i.e. the scope of its application. In addition to issuance of administrative acts and official documents, it extended its application to factual (non-legal) acts of administration, in Serbian legal doctrine known as ‘administrative actions’ [upravne radnje] and provision of public services, i.e. services of general interest, and introduced two legal concepts, comparatively well-known, but new to the Serbian system – guarantee act and administrative contract.

3.1.1 Administrative Actions and Provision of Public Services
The 1997 GAPA regulated only one administrative action – issuance of official documents. The new GAPA has provisions relating to all other factual acts of administration that are relevant for the law, i.e. those undertaken in the process of issuance of individual legal acts (administrative acts and judicial decisions) or in the process of execution of general (regulations) or individual legal acts. The process and conditions for undertaking such actions are regulated by special laws. The new GAPA stipulates legal protection against illegal undertaking or omitting to undertake such actions. For this purpose, a special legal remedy has been introduced in the law – objection [prigovor].52 It is an administrative legal remedy submitted to the authority that undertook or failed to undertake an administrative action. The decision rendered upon an objection is an administrative act and can be challenged in regular legal procedure (administrative appeal and/or judicial review).53 The same goes for the provision of services of general interest.

The reason for introducing the before mentioned mechanism of legal protection against these two types of factual actions was inadequacy of existing means of legal protection. Namely, before the enactment of the new GAPA, Serbian law offered two mechanisms for protection from illegal undertaking or failure to undertake administrative actions or improper provision of public services. The first one was claim for damages filed with civil law courts,

52 Until now, remonstrative legal remedies such as this one existed only exceptionally, in certain policy domains, such as broadcasting: Vuk Cucic, “Appeals in Special Administrative Domains”, 34 Transylvanian Review of Administrative Sciences (2011), 63–79, at 75–77.
i.e. engaging of a civil litigation. The main problem here was the fact that it is not easy to prove that the damage was caused by an action or inaction of the administration or public service providers or that the damage caused is sufficient to justify engagement of a costly and long civil litigation. The other option was to submit a constitutional appeal directly to the Constitutional Court (Art. 170 of the Serbian Constitution – *Official Gazette of the Republic of Serbia*, no. 98/2006). This legal path also proved to be almost impossible to yield any result, given that proving a breach of constitutionally guaranteed human rights and liberties would in most cases be unfeasible. Hence, by providing a new administrative legal protection mechanism through objection submission, the new GAPA filled in a serious *lacuna* in the overall system of legal protection against acts and (in)actions of the administration in Serbian law.

### 3.1.2 Guarantee Act

The guarantee act is a written act by which the competent authority obliges itself to issue an administrative act of certain content in response to a certain request (Art. 18 GAPA). It is a binding opinion of an administrative authority on the application of the law to a certain case. A party can secure its legal position before submitting a request to an administrative authority. More importantly, a party can decide whether it will undertake certain activity, especially commercial activity, based on the administration’s response given in the guarantee act. This significantly improves the legal certainty and business environment.

The guarantee act in the Serbian new GAPA follows the logic of its German predecessor, but regulates the institute in more detail and gives better guidance to the administration and the citizens. This is partly a consequence of the fact that guarantee acts did exist in Serbian law before the enactment of the new GAPA, but only in certain domains, namely, in the field of citizenship, tax procedure, vessels registration, inspection supervision and customs. Special laws regulating these guarantee acts, especially the Customs Act, influenced certain legal solutions in GAPA.

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54 As a rule, aside from claiming damages, there are no special legal remedies foreseen for the protection against factual acts of administration, exception being police actions, Vuk Cucic, Christoph Hofstätter, “Interne und externe Kontrolle der serbischen Polizei”, *Osteuropa Recht* (2014), 42–59, at 51–53.


The law regulates in detail the obligation of the authority to issue an administrative act in accordance with a guarantee act, exceptions from such a rule and mechanisms of legal protection. It is prescribed that the guarantee act cannot go against public interest and interests of third persons. Administrative acts are issued in accordance with previously issued guarantee acts. GAPA stipulates situations in which authority can legally render an administrative act disregarding a previously issued guarantee act – if the facts of the case do not match those described in the request for issuance of a guarantee act, if a party failed to request issuance of an administrative act within legally prescribed deadline and if the legal basis for its issuance changed in a way that new regulation stipulates that all administrative acts issued on the basis thereof have to be annulled, cancelled or amended.

The third exception requires further explanation. This is actually the situation in which a law does have a retroactive effect or prescribes new, higher requirements for parties. In such a case it is logical that if an administrative act does not shield parties from the grasp of the new law, the same goes for guarantee acts issued on the basis of the old regulation. It would make no sense for an assurance that an act of certain content will be issued provides more security that an already issued act. An example would be elevation of ecological requirements. If all those that had an administrative act confirming their compliance with certain legal standards of protection of the environment have to comply with new, higher standards, then the same applies to those that only had a guarantee act describing the level of legal protection of the environment that they had to achieve in accordance with the old regulation.

3.1.3 Administrative Contracts
The new GAPA prescribes the concept of administrative contracts. The contracts that are from a comparative and theoretical point of view considered to be administrative contracts, such as concession contracts, public procurement contracts and contracts on public-private partnerships are already regulated by special laws in Serbia. Nevertheless, they are not defined therein as administrative contracts. Despite having certain features typical for administrative contracts, e.g. a public-private partnership contract and concession contract can be terminated provided public interest so requires, they do not have complete administrative contract legal regime, e.g. legal protection has

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to be sought before civil courts, not in administrative proceeding or before administrative courts.

The new GAPA stipulates a wide definition of administrative contracts – as bilaterally binding written acts concluded between a public authority and a party, which creates, alters or terminates a legal relation in an administrative matter (Art. 22). If compared to its Croatian counterpart, which sets down that an administrative contract can be concluded only for the purpose of execution of the rights and obligations determined in an administrative act (Art. 150), the Serbian GAPA provides a wider definition and thus leaves more space for its application in practice.

The Serbian GAPA has only few provisions on administrative contracts – its definition, changed due to altered circumstances, special instances when the public authority is authorized to terminate the contract and legal protection (Arts. 22–25). Lastly, the law prescribes subsidiary application of the law regulating civil contracts and the provisions of GAPA regulating the administrative act (Art. 26).

3.1.4 The Manner of Introduction of the Guarantee Act and the Administrative Contract

The introduction of two new legal institutes, the guarantee act and the administrative contract, can be regarded as a benefit originating from the process of Europeanization of GAPA. Nonetheless, a serious disagreement between national drafters and the European partners appeared with respect to the manner of introduction of these two legal institutes. The European partners insisted until the very end of the drafting process and even after the final draft had been sent to the Government and the Parliament on immediate introduction of these two legal concepts by GAPA in all administrative domains. In its final note on Draft GAPA, SIGMA states as follows:

“As stated in December’s SIGMA note, the most important unsolved area of disagreement is the regulation of some new institutes such as the Administrative Contract and the Guarantee Act. According to the draft LGAP, the implementation of these institutes will require explicit mention in a specific regulation. SIGMA is of the opinion that, under these restrictions, these institutes will hardly be implemented in the short and medium term.”

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59 SIGMA’s final note, 15 January 2015, sent to the Serbian Ministry of Public Administration and Local Government.
The drafters opted for the introduction in two steps, first by regulating their basis in GAPA and then by endorsing them in laws regulating certain special policy domains. The reason for choosing so was the fact that both of these institutes were already regulated by other pieces of legislation, especially administrative contracts. Thus, there were two ways to avoid conflict between these laws. Firstly, to do what the drafters did – to leave some time to the legislator to adapt the special laws to the basic rules prescribed by the new GAPA. The other way was to amend or even completely remove special laws regulating these types of contracts and guarantee acts. The latter option was unattainable due to the fact that various ministries were competent for these laws (inter alia, the Ministry of Public Administration and Local Government, the Ministry of Interior, the Ministry of Finance, the ministry in charge of public traffic, etc.) and the fact that such reform activity was not possible due to the fact that the drafting process has been interrupted by no less than three elections for parliament. This was also the reason why the drafters decided to regulate only the basics of these two legal institutes. Additionally, the fact that the special laws have to be amended was the reason why the drafters chose not to regulate these institutes, especially administrative contracts, in more detail.

3.2 Introduction of New Basic Principles

Since 1956, laws regulating general administrative proceeding in Serbia contained a special chapter on basic principles of administrative proceeding. The purpose of these principles was two-fold. On the one hand, when and where necessary, to give guidance for the interpretation of other provisions of GAPA. On the other hand, these basic principles served as a boundary, minimum standards of due process for administrative proceedings in special policy domains. The laws regulating these special domains had to be in accordance with these principles, e.g. they could not exclude the right of the party to be heard.

The new GAPA kept these basic principles, but made two important changes. Firstly, it prescribed that the laws regulating special administrative proceedings do not only have to be in accordance with the basic principles contained in GAPA, but also that they are not allowed to lower the level of protection of the rights and interests of parties guaranteed by GAPA (Art. 3.2). Hence, special laws have to be in accordance with all the provisions of GAPA and can lower the level of protection only if this is explicitly allowed by GAPA, e.g. to exclude

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60 The same choice was made in Croatia: Damir Aviani, Dario Djerdja, “Aktualna pitanja pravnog uredjenja upravnih ugovora u hrvatskom pravu”, 3 Zbornik radova Pravnog fakulteta u Splitu (2011), 475–486, at 486.
the right to administrative appeal (Art. 13.1) or to shorten the time period for submission of an administrative appeal (Art. 15.3.1).

The other important change concerns the introduction of new basic principles.

The 1997 GAPA, as well as its predecessor, contained, in the form of basic principles, most of the principles of European Administrative Space (the principles of legality, protection of the rights of citizens and the public interest, inquisitorial principles, the right of the party to be heard, the right to legal remedy, efficiency, procedural economy, etc.). Nonetheless, two were not explicitly mentioned, the principle of legitimate expectations and the principle of proportionality.61

The principle of legitimate expectations, according to which the authority has to stick to the practice it established and to decide identically in identical or similar cases, has been added to the principle of legality (Art. 5.3).62 This, of course, does not prevent the authority to depart from its previous practice if it has good reasons to do so, but it has an augmented duty of justifying such a decision. As mentioned before, we cannot say that this principle was missing in the 1997 GAPA, nor in the Serbian legal system, but only that it was not explicitly mentioned. Namely, the principle of legitimate expectations derived from the principle of legality and the provisions on the duty of the authority to give reasons for its decision, are both contained in the 1997 GAPA, as well as from the constitutional principle of equality of citizens before the law and the constitutional provision guaranteeing equal protection before public authorities (Art. 36 of the Constitution).

The other principle of European Administrative Space extrapolated in the new GAPA is the principle of proportionality.63 It did exist, at least partially, in the 1997 GAPA, within the principle of protection of the rights of citizens and the public interest, which set down, inter alia, that if a party has been prescribed an obligation, the measures taken towards the party shall be those that go the most in its favor, while still achieving the goal set by the law. This provision became a part of the new principle of proportionality, which was supplemented by a provision stipulating that each limitation of the rights and legal interests of a party has to be proportionate, i.e. the least possible and yet achieving the aim of the law.64

61 SIGMA, op.cit. note 50, 8, 14.
62 The same is the provision of Art. 5 of new Montenegrin GAPA, available at http://www.mup.gov.me/biblioteka/zakoni.
63 SIGMA, op.cit. note 50, 8, 10.
64 New GAPA introduced several other important novelties, such as introduction of the electronic communication between the authorities and the parties, introduction of
4 Critical Considerations of the European Influence

In addition to improvements the Europeanization process has brought to GAPA, there were certain aspects of this process, which could be questioned. Two of them stand out. They concern the deregulation and debureaucratization of GAPA and the ‘one-size-fits-all’ approach applied in the process of drafting GAPA’s in the Western Balkan countries.

The European partners approach to the technical aid in drafting the new GAPA in Serbia, as well as in the other countries of the region, was lead by the paradigm that a shorter and less detailed GAPA was the best solution because “[l]ong and too detailed laws become complicated and thus, difficult to read, understand and learn”.65 This process ought to have been done through deregulation, in the sense of completely removing redundant legal norms and debureaucratization, i.e. the process of reducing casuistic approach to drafting and using more general norms.66 Generally speaking, this idea can hardly be contested. Every law, in theory, should be “phrased in a simple, clear and understandable manner and can thus be accessible and commonly known to citizens”.67 However, there are certain features of GAPA that do not support strict application of the ‘short and broad’ approach in its drafting. Also, the application of this approach in practice had certain setbacks.

The first setback was the false deregulation. The most prominent example of this practice was the idea of omission of evidence rules from GAPA’s, meaning that GAPA “should not define at length which are the proofs legally admitted in the administrative procedures [but] [a] cross-reference to the general regulation, which is usually contained in the Civil Procedural Code or in the Penal

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66 Ibid., 24–25.
67 Ibid., 10.
Procedural Code for sanctions, should suffice.”68 This approach has been vigorously insisted upon in all countries of the region and it has been promoted as a good example of deregulation. Nevertheless, deregulation should actually mean removal of superfluous provisions from the legal system entirely, not deleting them in one and then applying them from another piece of legislation. The Serbian legislator did not accept this suggestion. The Ratio behind such a decision lied in the fact that the amount of legal norms that are being applied in the administrative proceeding shall remain the same, only now they will be contained in two separate laws. This will, in turn, make it more difficult for the authorities and especially citizens, as parties, to know what the rules are and how to apply them. Moreover, the principles of establishing facts in the civil procedure, whose rules should have been mutatis mutandis applied in the administrative proceeding, are completely opposite to investigatory principle of the latter. Consequently, all the evidence rules would have to be reinterpreted in the light of this principle. That is a hard enough job for the authorities, not to mention how difficult that would be for the citizens.

The rules of evidence are only an example of false deregulation, i.e. moving one provision to another law, completely removing it from the legal system. As it has been said, there is one more important and general question that has to be posed here. Is it good to have a short GPA with broad provisions? At first glance, the idea sounds appealing. Nonetheless, a deeper analysis of the issue might lead to a different conclusion. Namely, a shorter and broader GPA leads to longer and more detailed laws regulating special policy domains. It is inherent to the laws regulating general administrative proceeding to be complemented by special procedural and material regulations. This is a consequence of a vast variety of special administrative domains in which it has to be applied. However, that does not mean that the legislator cannot do anything to help public authorities and citizens in this respect. The legislator should, in our opinion, strive to recognize all the provisions that can be applied in all policy domains and prescribe them in GPA, as well as to envisage where legitimate departures from its provisions should exist in special regulations.

The other setback concerned the idea of using more general, broad legal norms because “[g]eneral legal terms, may cover a wider range of cases, i.e. also those cases the legislator was not able to anticipate”69 Again, in theory, this is an acceptable idea. No matter how good the law is drafted, there will always be provisions that have to be interpreted in administrative practice and case-law.

68 Wolfgang Rusch, Administrative Procedures in EU Member States (Conference on Public Administration Reform and European Integration, Budva, 2009), 9.
69 SIGMA, op.cit. note 65, 25.
However, more general terms in the law shall lead to an increase of provisions that require interpretation in administrative and court practice. A solution offered is to complement GPA “when necessary, with secondary legislation, handbooks, instructions and other support materials”.70

This specific feature of GPA and these setbacks lead us to the most important question – is this leading us to the de-codification of the rules of general administrative proceeding? Countries such as the Netherlands struggled to codify the rules of administrative proceeding they developed in case-law and regulated in numerous separate pieces of legislation for 14 years.71 Even France, as the country that is a symbol of the legal systems that do not have codifications of general administrative proceeding decided to go towards codification.72 Why promote the opposite tendency in the Western Balkans? In other words, how is scattering of rules of administrative proceeding in laws regulating special administrative domains, other laws, such as laws on civil procedure, secondary legislation, inaccessible internal instructions, case-law, manuals, and handbooks going to help the administration and citizens? Quite to the contrary, it is going to make the rules less transparent, less accessible and more difficult to understand, both for civil servants and citizens. Even in countries with rather short codifications of the rules of general administrative proceeding, such as Germany73 (whose Verwaltungsverfahrensgesetz was used by SIGMA as a blueprint for the change of GPA and its counterparts in the Western Balkans region) and Austria,74 there were no examples of de-codifying such codes, i.e. there were no instances in which certain rules were contained in the general administrative proceeding codification and then erased from it in order to be stipulated within another law.

70 Ibid.
73 Available at https://www.gesetze-im-internet.de/vwwfg/.
All this does not mean that deregulation and debureaucratization should not take place, but that they should be done with more caution and more sense for citizens’ needs. Also, using general legal terms is a widely accepted drafting method. However, it would be good if it would be complemented with insertion of casuistic norms in the form of *exempli causa*, where they are incontestable.

Welcome as it is, the European influence in the GAPA drafting process in the Western Balkans region (and Moldova) had one more shortcoming. All the countries in the region were offered the same model of GAPA. The ‘one-size-fits-all’ approach disregarded the differences between the countries with respect to their legal tradition, i.e. whether they previously had GAPA or not, how the judicial control of administrative activities is organized and in which piece of legislation are conventionally certain legal issues regulated. For example, in Serbia, there was a strong European pressure to introduce the administrative contracts directly by GAPA. This meant that the laws already regulating comparatively the most important types of administrative contracts – public-private partnerships, concessions and public procurements – should have been disregarded in the reform process and that Serbian legal system could have later been stuck with the problem which law to apply, GAPA or special laws already regulating these contracts. Other countries in the Western Balkans region also struggled with this issue. In Croatia, for instance, the first draft GAPA allowed the administrative contracts to be concluded without the need for special law to prescribe such possibility. On the other hand, the draft that was adopted in the Parliament stipulates that administrative contracts can be concluded only if this is prescribed by a special law.\(^{75}\) In fact, Albania is the only country in the Western Balkans region allowing an administrative contract to be concluded *unless that is prohibited by a special law*.\(^{76}\) This is not surprising, given that Albania, unlike other countries in the region, was not part of Yugoslavia and its legal tradition allowed it to introduce such reform, without serious resistance.

The problem was not in the fact that the European partners pushed for the reform of administrative proceeding and introduction of new legal concepts. This was more than welcome. The issue arose with respect to the manner of implementation of the reform and introduction of new concepts. The right

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way for it to be done was to implement it the way EU directives are implemented – seeking to achieve a certain goal, with leaving each state to choose the way they are going to do it and the instruments they are going to use. Unfortunately, the approach resembled more the way EU regulations function. The European partners insisted that the model GAPA should be followed in a stricter way, i.e. that its content should be more or less copied to new GAPA’s in the region.

This yielded two problems. Firstly, this meant that certain issues regulated elsewhere should be regulated in GAPA or that certain institutes should be moved from GAPA to other legislation. This made the work of local legislators more difficult, especially given the fact that the level of legislative work in the countries of the region is already enormous due to the EU accession process. Secondly, this increased already existing resistance to GAPA reform.\textsuperscript{77} The resistance could have been smaller had local legal traditions been better observed and had the overall amendments to the system been of a lesser degree.

5 Concluding Remarks

From the comparative perspective, creation of the Serbian administrative procedural law started early on. The administrative judiciary was first introduced in 1869. Until the beginning of World War II, it followed the French model of administrative judiciary, with the Council of State and administrative courts

being a part of the executive branch of power (1869–1941). After a brief period of abolishment (1945–1952), the judicial review of administrative acts was entrusted to special departments of regular courts (1952–2010). In 2010, the new, specialized Administrative Court was established. It is competent to adjudge all disputes concerning the legality of administrative acts in Serbia. Serbia, as a part of Yugoslavia, was among the first countries to codify the rules of administrative procedure by enacting its first GAPA in 1930. During the years, the changes of the form of state and government had very little influence on GAPA.

GAPA that is currently in force was enacted in 2016 and applied since 2017. From 2009 to 2016, four different drafts of GAPA were made. All four of them were prepared with direct or indirect involvement of SIGMA (EU and OECD joint initiative for assistance in the public administrative reform processes).

In order to help candidate and potential candidate countries in their aspiration towards the EU, SIGMA constructed the term ‘European Administrative Space’ (EAS) as common principles and benchmarks of public administration among EU Member States. The EAS was originally designed as a model and useful tool for candidate and potential candidate countries, the purpose of which it should return to. Were it to be made synonymous with EU Administrative Law, it would be a clear overextension of the original intent of its creation as an instrument for evaluating public administration reforms.

SIGMA provided expert assistance in the process of Europeanization of GAPA. Thus, the new GAPA brought significant novelties and the most important ones where introduced under the influence of EU standards and benchmarks in this field.

The most significant and the most comprehensive change was widening of the scope of application of GAPA. In addition to already regulated procedure of issuance of administrative acts and official documents, it extended its application to factual (non-legal) acts of administration and provisions of public services, i.e. services of general interest, and introduced two legal concepts new to the Serbian system – guarantee act and administrative contract.

The other important European influence was explicit provision of two new principles originating from the European Administrative Space – the principle of legitimate expectations and the principle of proportionality.

In addition to improvements the Europeanization process has brought to GAPA, there were certain aspects of this process, which could be questioned. Two of them stand out. They concern the deregulation and debureaucratization of GAPA and the ‘one-size-fits-all’ approach applied in the process of drafting GAPA’s in the Western Balkan countries.

The first issue with the deregulation and debureaucratization was that they were sometimes false. For instance, it was suggested that the rules of evidence
should be removed from GAPA, only to be used the rules from the Civil Procedure Act. The second problem was that the premise was to erase existing norms from GAPA or make them vaguer, on the one hand, thus increasing the need for more detail regulation in special laws and bylaws and the need for handbooks and other interpretative material. This would aggravate the position of both the civil servants and the citizens.

All countries in the region were offered the same model of GAPA. The ‘one-size-fits-all’ approach disregarded the differences between the countries with respect to their legal tradition. This yielded two problems. Firstly, this meant that certain issues regulated elsewhere should be regulated in GAPA or that certain institutes should be moved from GAPA to other legislation. Secondly, the non-observance of local legal tradition increased already existing resistance to GAPA reform.