

CONTENT

INTRODUCTION	7
--------------------	---

CHAPTER ONE

THE EUROPEANIZATION OF ADMINISTRATIVE LAW.....	11
--	----

HARMONIZING SERBIA'S ADMINISTRATIVE LAWS WITH EUROPEAN ADMINISTRATIVE SPACE PRINCIPLES by <i>Stevan ULIĆ</i>	13
--	----

ADMINISTRATIVE REFORM IN MONTENEGRO AND CAPACITY TO IMPLEMENT EUROPEAN UNION LAW by <i>Dražen CEROVIĆ</i>	21
---	----

CHALLENGES FOR PUBLIC ADMINISTRATIONS OF CANDIDATE STATES REGARDING EU LAW AND COSTANZO OBLIGATION by <i>Erlir PUTO</i>	29
---	----

GOOD ADMINISTRATION AND GOOD GOVERNANCE AS THE KEY ELEMENTS OF THE EUROPEAN ADMINISTRATIVE SPACE by <i>Ivan KOPRIĆ</i>	39
--	----

CHAPTERTWO

THE IMPACT OF THE LISBON TREATY ON ADMINISTRATIVE LAW.....	51
--	----

TREATY OF LISBON - ON ITS STRUCTURE AND ASPECTS OF INFLUENCE ON ADMINISTRATIVE LAW AND PUBLIC ADMINISTRATION by <i>Boris LJUBANOVIĆ</i>	53
---	----

CHAPTER THREE

THE EUROPEAN CODE OF GOOD ADMINISTRATIVE BEHAVIOUR.....	61
---	----

THE PRINCIPLE OF GOOD ADMINISTRATIVE BEHAVIOUR IN THE EUROPEAN UNION AND BOSNIA AND HERZEGOVINA by <i>Zlatan MEŠKIĆ and Enis OMEROVIĆ</i>	63
---	----

CHAPTER FOUR

TOWARDS CODIFICATION OF EU ADMINISTRATIVE PROCEDURE LAW	77
---	----

TOWARDS THE CODIFICATION OF EU ADMINISTRATIVE PROCEDURAL LAW by <i>Dario ĐERĐA</i>	79
--	----

CONTEMPORARY AND FUTURE PERSPECTIVES OF ADMINISTRATIVE PROCEDURE IN THE EU by <i>Ana PAVLOVSKA-DANEVA</i>	85
---	----

CODIFICATION OF EUROPEAN ADMINISTRATIVE PROCEDURE LAW AND ITS REFLECTIONS ON SERBIAN PUBLIC ADMINISTRATION REFORM by <i>Dejan VUČETIĆ</i>	99
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CHAPTER FIVE

CONCLUSIONS.	
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HARMONIZING SERBIA'S ADMINISTRATIVE LAWS WITH EUROPEAN ADMINISTRATIVE SPACE PRINCIPLES

Stevan ULIČ

Abstract

European Administrative Law is a product of convergence between national legal systems, the legal system of the European Union and the legal system of the Council of Europe in the process of creating principles and rules which regulate issues related to the organization, functioning, accountability and supervision of the administration within member-states and candidate countries applying for European Union membership. The concept of the European Administrative Space is the result of practical needs of the future member-states of the European Union and represents a framework for defining guidelines which their respective administrations should follow in order to be capable for future administrative tasks, both on the national level, as well as the level of the European Union. Regarding Serbia's administrative legislation, in particular laws regulating administrative procedure and administrative disputes, the European Commission's Serbia 2013 Progress Report explicitly specifies that "with regard to the legislative framework, a new Law on General Administrative Procedures (...) have yet to be adopted and the Law on Administrative Disputes has not yet been fully aligned with European standards for judicial review of administrative acts." In this context, the article examines the issue of harmonizing Serbia's administrative laws with European Administrative Space standards.

Keywords: European Administrative Space. Harmonizing Serbian Administrative Laws with the Acquis Communautaire. Law on General Administrative Procedure. Law on Administrative Disputes.

I. Administrative Law and Social Regulation

Administrative law represents a complex area of contemporary law within which, depending on the development or stagnation of social processes, new legal (sub) systems appear and existing one disappear. In referential literature, two major administrative law concepts dominate: the traditional and the modern. The traditional concept rests on the premise that administrative law regulates the exercise of "administrative power"; while the modern concept rests on the premise that administrative law regulates "public services".^{3,4}

In defining the subject matter of administrative law, it is crucial to define "administration". The modern concept sees the administration as a "systems of social regulation". This means that administrative activities that regulate social processes are seen as legitimate influence on the behavior of citizens according to previously set standards. In accordance with this, the administration as a "systems of social regulation" has the task of neutralizing the negative effects of contingency as a result of possible illegitimate behavior in social interaction.⁵

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⁴ Stevan Lilić, *Upravno pravo / Upravno procesno pravo, (Administrative Law / Administrative Procedure Law)* 8th edition, 40-48.

⁵ *Ibidem*.

In contrast to the traditional normative concept of repressive administrative action, the modern concept of administrative action rests on the premise that in exercising administrative authority, not only must "legality" be respected, but "legitimacy" must be observed, as well. Consequently, administrative procedures and administrative decisions do not become "legitimate" simply by virtue of being conducted and enacted "legally" by an administrative authority, but must be procedurally justified in each particular case, as well as evaluated on the basis of the value content of each particular decisions.⁴

2.Origins of European Administrative Law

Administrative Law, apart from the perspective of national legal systems may also be viewed from a comparative perspective, i.e. from the aspect of other legal systems. This is the subject of research of a specific legal discipline - Comparative Law. As other disciplines, Administrative Law may also be studied comparatively as Comparative Administrative Law, which on the other hand, interacts with International Administrative Law. International Administrative Law originated as a discipline with regard to resolving administrative disputes of international organization and its civil servants. The League of Nations was the first international organization to introduce an administrative tribunal for resolving these disputes, and was later followed by other international organizations (e.g. the International Labor Organization, World Health Organization etc.).⁵

As is International Administrative Law, European Administrative Law is also developing. European Administrative Law is the final step in the process in which different legal systems interact and create principles and general norms in administrative areas where these are applied. This is a system of legal rules and principles which are formed either by spontaneous interaction or are created by the decisions and will of the court, the legislator, political factor etc. Elements which contribute to the creation of the phenomenon of European Administrative Law are the legal systems of the member-states of the European Union which interact with the legal system of the European Union, but also with other legal systems, primarily the legal system of the Council of Europe.⁶

The most significant subsystem of the European Administrative Law is the Administrative Law of the European Union. Administrative Law of the European Union as a part ("branch") of the legal system of the European Union consists of a set of legal rules and general principles which regulate the organization, functioning, accountability and supervision (control) of the administration of the European Union.⁷ However, due to the many dilemmas which exist in this area (e.g. in defining the status and structure of the EU), the Administrative Law of the European Union is a discipline which is in a state of "searching for its identity".⁸

Although the Administrative Law of the European Union represents the core matter of European Administrative Law, the influence of the legal system of the Council of Europe in creating European Administrative Law is not to be dismissed. Countries in the European Union have an increasing variety of administrative tasks and there is growing significance and influence of the public administration on social interaction in general. Administrative agencies are increasingly

⁴ Stevan Lilić, "Legitimacy of Administrative Action." In *Law in Transition: Serbia-Slovakia*, edited by Svetislav Tabaroši, Beograd: Pravni fakultet, 1999.

⁵ H.B. Jacobini, *An Introduction to Comparative Administrative Law*, 241-242. New York/London/Rome: Oceana, 1991.

⁶ De la Sierra, Susana. "The Constitutional Bases of European Administrative Law." In *What's New in European Administrative Law*, edited by Jacques Ziller, 29. Florence: European University Institute, 2005. De la Sierra also indicates that regulations of the World Trade Organization contribute to the creation of European Administrative Law.

⁷ Aviani, Damir. "Pojam i izvori upravnog prava Evropske unije" (Notion and Sources of Administrative Law of the European Union), *Zbornik radova Pravnog fakulteta u Mostaru XV* (2002): 233.

⁸ Lilić, Stevan with Katarina Jozić, *Evropsko upravno pravo (European Administrative Law)*, 16. Beograd: Pravni fakultet, 2011.

involved in many different fields with the task of rendering "public services" to citizens and improving social conditions. From this expanded domain of administrative activity stems the possibility of infringing individual human rights. Because of this, effective protection of civil rights from unlawful and illegitimate administrative action needs to be the fundamental guideline for contemporary states which is to be achieved by coherent implementation of the principles of the rule of law and the protection of human rights.⁹ In protecting human and civil rights from unlawful actions of the administration, a significant role is played by the European Court of Human Rights in Strasbourg. Through its case law, this Court has developed general principles that the administrations of the Council of Europe member-states must apply in their administrative activity and which legislators should incorporate in their respective national legislative framework. The legal system of the Council of Europe influences the legal system of the European Union, as standards developed by the European Court of Human Rights in applying the European Convention of Human Rights and Fundamental Freedoms, are respected by the European Court of Justice. Also, apart from the standards based on the case law of these courts, their recommendations, as well as other documents adopted by the Council of Europe influence the convergence of administrative systems of Council of Europe member-states.

European Administrative Law, apart from influencing the convergence between national legal systems the legal system of the European Union and the legal system of the Council of Europe in the form of defining the general principles of administrative law, is actively creating principles and rules that regulate the organization, functioning, accountability and supervision (control) of the administration within the member-states of the European Union, as well as the candidate countries.¹⁰

3.The Concept of European Administrative Space

The European Union represents a specific form of regional integration, and in many respects differs from other forms of regional cooperation which appear worldwide. One of the main features of the European Union, and at the same time the most significant difference in relation the other forms of regional and international cooperation, is its "supranational" component.¹¹ The Lisbon Treaty, which entered into force on 1 December 2009, is an international agreement amending two previous treaties: i.e. the Treaty on European Union (Maastricht Treaty) and the Treaty establishing the European Community (Rome Treaty), which was renamed the Treaty on the Functioning of the European Union.

The concept of the European Administrative Space is the result of practical needs of the future member-states of the European Union and represents a framework for defining guidelines which their respective administrations should follow in order to be capable for future administrative tasks, both on the national level, as well as on the level of the European Union. The formulation "European Administrative Space" initially was used in publications by SIGMA,¹² a joint initiative of the OECD and the European Union (in the implementation of the then *Phare Program*) with the goal of strengthening the capacities of governments and administration in Central and East European countries.

⁹ Vučetić, Dejan. "Evropski standardi zaštite ljudskih prava prilikom upravnog postupanja - iz ugla Republike Srbije" (European Standards in the Protection of Human Rights in Administrative Procedures - from the Angle of the Republic of Serbia). In *Ustavne i međunarodnopravne garancije ljudskih prava*, 175. Niš: Pravni fakultet, 2008.

¹⁰ Lilić, Stevan with Katarina Jozić, *Evropsko upravno pravo* (European Administrative Law), 11-13. Beograd: Pravni fakultet, 2011.

¹¹ Lučić, Sonja. "Konstitucionalizacija pravnog sistema Evropske unije - Uloga Evropskog suda pravde" (Constituting the Legal System of the European Union - the Role of European Court of Justice), *Pravni život* 7-8 (2004).

¹² SIGMA-Support for Improvement in Governance and Management in Central and Eastern European Countries (www.sigmaxweb.org).

In this context, the term "European Administrative Space" is used to designate a set of administrative principles, values and standards which form the contours of European Administrative Law.¹³ By conceptualizing European Administrative Space, the organization, functioning and activity of administrative agencies based on standards and principles of the *acquis communautaire* are to be "harmonized" with the administrative systems of the future European Union member-states.¹⁴

The administrative capacity of a European Union member-state candidate for implementing EU membership obligations is evaluated by the method of comparing their administrative capacities with the existing administrative capacities of the European Union member-states. The quality of the administration needed to implement obligations stemming from EU membership is not defined beforehand by the *acquis communautaire*. However, by "supervising the quality of administrative action" in concrete cases it is possible to gradually define certain values and standards which make up "principles" of the European Administrative Space" as segment of the Administrative Law of the European Union.

The supervision of the quality of administrative action and administrative capacities, thus creating European Administrative Space standards, is largely generated by the European Court of Human Rights. The European Court of Justice (Court of Justice of the European Union) is steadily defining a substantive number of administrative law principles by calling upon the general principles of administrative law which are common to all member-states. The most important principles created by the Court must be implemented by all member-states in their national administrative systems when they implement European Union Law, *inter alia*, the principle of proportionality, the principle of non-discrimination, the principle of legitimate expectations, etc.

4. Serbia's Administrative Laws and European Administrative Space Standards

In a document titled *Enlargement Strategy and Main Challenges 2013-2014*, the European Commission¹⁵ concludes that "Twenty years ago, the Western Balkans were torn by conflict. At the same time, the European Union agreed the conditions, known as the Copenhagen criteria, for entry of future Member-States into the EU. The Copenhagen criteria reflect the values on which the EU is founded: democracy, the rule of law, respect for fundamental rights, as well as the importance of a functioning market economy. This paved the way for the historic transformation and accession of the countries of Central and Eastern Europe. Ten years later, at the Thessaloniki Summit in 2003, the EU granted all countries of the Western Balkans a clear perspective of EU membership, subject to fulfillment of the necessary conditions, in particular the Copenhagen criteria and the conditions of the Stabilization and Association Process (SAP)."(...) "The historic agreement reached by Serbia and Kosovo in April 2013 is further proof of the power of the EU perspective and its role in healing history's deep scars. It also, crucially, reflects the courage of the political leadership in both countries. In June, the European Council decided to open accession negotiations with Serbia and the Council authorized the opening of negotiations for a Stabilization and Association Agreement between the EU and Kosovo."

¹² Lilić, Stevan. "Primena koncepta Evropskog upravnog prostora u procesu pristupanja Evropskoj uniji" (Application of the Concept of the European Administrative Space in Joining the European Union). In *Pravni kapacitet Srbije za evropske integracije* (Legal Capacities of Serbia for European Integration) knjiga 3. Beograd: Pravni fakultet (2008): 26-37.

¹⁴ Šimac, Neven. "Evropski upravni prostor i europska načela javne uprave" (European Administrative Space and European Principles of Public Administration). *Zbornik radova Pravnog fakulteta u Splitu* 2 (2012): 351-368. Kavran, Dragoljub. "Evropski upravni prostor, reforma i obrazovanje državne uprave" (European Administrative Space, Reform and Educating Public Administration), *Pravni život* 9 (2004): 1063.

¹⁵ European Commission, *Enlargement Strategy and Main Challenges 2013-2014*, Brussels, 16.10.2013, COM(2013) 700 final. p. 1.

This document also concludes that: "Among the key challenges it faces, Serbia will need to pay particular attention to the key areas of rule of law, particularly the reform of the judiciary, fight against corruption and fight against organized crime, public administration reform, independence of key institutions, media freedom, anti-discrimination and protection of minorities." (...) "The government also needs to enhance its steer in the area of public administration reform and further develop a transparent, merit-based civil service system." (...) "As regards its ability to take on the obligations of membership, Serbia has continued aligning its legislation to the requirements of the EU legislation in many fields, efforts which were underpinned by the adoption of a National Plan for the Adoption of the *acquis*."¹⁶

In another document titled *Serbia - 2013 Progress Report*,^{16,17} the European Commission examines Serbia's ability to take on the obligations of membership (i.e. the *acquis*) as expressed in the Treaties, the secondary legislation and the policies of the Union. The analysis is structured in accordance with the list of 33 *acquis* chapters. In each sector, the Commission's assessment covers progress achieved during the reporting period and summarizes the country's overall level of preparations. In this document, the European Commission states that: "In February, the government adopted the National Plan for the Adoption of the *Acquis* (NPAA) for the period 2013-2016. It replaces the National Program for Integration (NPI) for 2008-2012 under which 88% of the planned legislation was reported having been enacted."

Regarding Serbia's administrative legislation, particularly laws regulating administrative procedure and administrative disputes, the Serbia 2013 Progress Report explicitly specifies that: "With regard to the legislative framework, a new Law on General Administrative Procedures and a Law on local government employees and salaries have yet to be adopted. The Law on Administrative Disputes has not yet been fully aligned with European standards for judicial review of administrative acts."¹⁸

A similar (or rather identical) formulation assessing Serbia's administrative legislation was contained in the previous *Serbia-2012 Progress Report*: "The legislative framework is still incomplete. New legislation on general administrative procedures and on local government employees and salaries is yet to be adopted. The Law on Administrative Disputes still needs to be fully aligned with European standards for judicial review of administrative acts."¹⁹

5.Law on General Administrative Procedure and European Administrative Space Standards

It is interesting to note that according to the Serbian Government's *Action Plan for Implementing the Reform of Public Administration (2004-2008)*, the new Law on General Administrative Procedure was to be adopted by the end of 2004. However, more than a decade later, this Law is still "in procedure". Also interesting is that this Law is constantly present in the European Commission's *Serbia Progress Reports* in the chapters on the "rule of law" as legislation that needs to be "harmonized" with European standards, a condition Serbia needs to fulfill on its road to European integration.²⁰ On insisting that the "legislative framework be finalized" by adopting a new law on general administrative procedure, the European Commission is actually saying something very

¹⁶ *Op. cit.*, pp. 28-30.

¹⁷ European Commission, *Serbia -2013 Progress Report*, Brussels, 16.10.2013, COM(2013) 700 final. p. 7.

¹⁸ *Op.cit.*, p.8.

¹⁹ European Commission, *Serbia-2012 Progress Report*, Brussels, 10.10.2012, SWD(2012) 333 final. p. 9.

²⁰ Serbia Progress Reports available at the European Commission's "Enlargement" web-site: <http://ec.europa.eu/enlargement/countries/strategy-and-progress-report/>.

simple: the present general administrative procedure law in Serbia is not a "Serbian law" as the one presently in force in Serbia is actually the general administrative procedure law adopted in 1997 by the now non-existing Federal Republic of Yugoslavia.²¹

The Head of the European Delegation to Serbia, recently "surprised" the public when he, on the occasion of presenting the Serbia Progress report for 2012, emphasized "zero tolerance" towards corruption, and pointed out that Serbia still had not adopted a new law on administrative procedure, and that this represented "fertile grounds for corruption and the prolonged procedures" (source: www.euractiv.rs).

Why has the Law on General Administrative Procedure,²² which is daily applied to thousands of cases (social and medical security, construction permits, child care etc.), become an anti-corruption target. The answer is hidden in the formulation of the Law as to what follows when an administrative agency does not render a decision. In theory and court practice, this situation is known as the "silence of administration", as the administrative agency is "silent" in regard to the request or appeal of the party in administrative procedure. Recently, a public round table debate was held on the topic of "Implementing the Recommendation of the Ombudsman", organized by two non-governmental organizations. The results of this project showed that a large portion of the problem in implementing the recommendations of the Ombudsman deals with the "silence" of administrative agencies. In one illustrative case, the ombudsman concluded that a ministry (for sport) has "made an error, as it has, infringing the principles of good administration, failed to notify the party of the outcome of the procedure and deliver the decision", and in this concrete case, "has deprived the party for two years the possibility to submit a complaint or initiate procedure before the administrative court for judicial review".

In a document titled *Strategy of Administrative Reform (2004)*, the Government of Serbia, *inter alia*, states that in public administration "there are trend that obviously cannot be avoided, and which deal with (...) the changing of attitude which sees the administrative as a service to the citizens, and not as a powerful tool of authority". Not much is needed to make the connection between the resistance to change the perception that the administration is "as a powerful tool of authority", on one side, and the decade long delay in adopting Serbia's new Law on General Administrative Procedure ("as a fertile ground for corruption"), on the other. The roots of this resistance in transforming the administration into a "service for citizens" are numerous and include inertia, unprofessionalism, formalism, bureaucratic arrogance, professional conservatives, but above all a "favorable climate for corruption" which exists in administrative procedure as the Law on General Administrative Procedure, *ex lege* defines the "silence" of the administration as "rejecting the request of the citizen".

The silence of the administration represent a specific procedural legal institute which is reflected in unjustified delay or unjustified omission of enacting an administrative decision. The silence of the administration means that the inactivity of the administrative agency is breaching the statutory obligation of the administrative agency to process requests and enact decisions. By being "silent", the administrative agency acts unlawfully. The present Law on General Administrative Procedure treats the silence of the administration as "rejection of the party's request" which causes great difficulties for the citizens (e.g. when applying for citizenship), as additionally they have to

²¹ Lilić, Stevan. "Kontroverze u vezi sa novom radnom verzijom Nacrta Zakon o opštem upravnom postupku Srbije - u kontekstu evropskih integracija (Controversies Regarding the New Draft Law on General Administrative Procedure of Serbia - in the context of European integration). In *Prespektive implementacije evropskih standarda u pravni sistem Srbije (Perspectives of Implementing European Standards into the Legal System of Serbia)* knjiga 3. Beograd: Pravni fakultet (2012): 11-28.

²² Law on General Administrative Procedure (Zakon o opštem upravnom postupku), "Službeni list Savezne Republike Jugoslavije", br. 33/1997,31/2001; "Službeni glasnik Republike Srbije", br. 30/2010.

engage in legal and administrative procedure in proving their case (submissions, appeals, court procedures etc.), and experience additional expenses and loss of time.

A solution for this "silence" naturally exists, and as a matter of fact is rather simple. From the position of the rule of law and the principle of efficiency in rendering public services, the existing (negative) option prescribed by the Law on General Administrative Procedure is "standing on its head". When put on its feet, we get a (positive) option according to which in case of delay or obstruction of the administrative procedure, it is *ex lege* provided that the request of the party has been granted (and not rejected). With this simple legislative intervention in the Law on General Administrative Procedure, overnight the bureaucracy would lose its position of "a powerful tool of authority" and become what it should be, a "public service" to the citizens. Maybe this is the real answer behind the "mystery" why the new Law on General Administrative Procedure has not yet been adopted and why Serbia's administrative procedure legislation has not been harmonized with standards of the European Administrative Space.

6. Law on Administrative Disputes and European Administrative Space Standards

The European Commission's *Serbia Progress Report for 2013*, states that The Law on Administrative Disputes has not yet been fully aligned with European standards for judicial review of administrative acts.²³ Similar formulations were contained in the previous Progress reports. *Action Plan for Implementing the Reform of Public Administration (2004-2008)* stated that the Law on Administrative Disputes was to be adopted in by the end of 2004. The adoption of this Law was "only" five years overdue: the Law on Administrative Disputes was adopted in 2009.²⁴

In the public debate preceding the adoption of the new Law on Administrative Disputes, serious caution was expressed as to the quality of the Draft, as well as to certain solutions which did not comply with standards of European Administrative Space. Among these, it was indicated that the Draft did not have a narrative which explained the included solutions, that there were numerous contradictions within the text (*contradictio in adiecto*), and most notably that the Draft did not include an appeal as a "regular legal remedy". Eventually, the initial Draft was partially upgraded (e.g. a narration was added), making the final Draft better than the initial one.

The main defect of the 2009 Law on Administrative Disputes is that it provides no appeal mechanism in regard to decisions of the administrative court.²⁵ This is why this Law is "not harmonized" with European Administrative Space standards and why it is constantly referred to in the European Commission's Progress Reports on Serbia as "not fully aligned with European standards for judicial review of administrative acts". The irony of this solution is the Law on Administrative Disputes provides "extraordinary legal remedies", but does not provide a "regular" legal remedy (i.e. appeal).²⁶ However, it is interesting to note that in spite of these assessments of the European Commission, there are scholars in Serbia that claim that this Law is "a modern piece of legislation", harmonized with European standards, "not only with the European Convention on Human Rights, but also with recommendations of the Council of Europe regarding administrative disputes".

Publisher:

Centre for SEELS

For the Publisher: Prof. Dr. Goran Koevski, Manager

²³ European Commission, *Serbia-2013 Progress Report*, Brussels, 16.10.2013, COM(2013) 700 final, p. 8.

²⁴ Law on Administrative Disputes (Zakon o upravnim sporovima), "Službeni glasnik Republike Srbije", br. 111/2009.

²⁵ Lilić, Stevan. "Nacrt zakona o upravnim sporovima Srbije u kontekstu evropskih standarda" (Draft Law on Administrative Disputes of Serbia in the Context of European Standards). In *Pravni kapacitet Srbije za evropske integracije* (Legal Capacities of Serbia for European Integration) knjiga 4. Beograd: Pravni fakultet (2009): 24-37.

²⁶ Zoran Tomić, *Kometar Zakona o upravnim sporovima* (Commentary on the Law on Administrative Disputes), Beograd: Službeni glasnik, 2010.

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Financed by:

Preparation and publishing of the Book "EU Administrative Law and its Impact on the Process of Public Administration Reform and Integration into the European Administrative Space of South East European Countries", is financially supported by the Federal Ministry for Economic Cooperation and Development (BMZ) of Germany and implemented through the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, Open Regional Fund for South East Europe-Legal Reform.

Design and publishing:

ARCUSS Design Skopje

Circulation:

700 copies

The content of this Book reflects personal opinion, experience and viewpoints of the authors and it does not correlate to the standpoint and the editing policy of the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH.

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CIP - Каталогизација во публикација

Национална и универзитетска библиотека "Св. Климент Охридски", Скопје

342.35.071.2:341.171.071.51 (4-12:4-672ЕУ)

EU administrative law and its impact on the process of public administration reform and integration into the European administrative space of South East European countries. - Skopje:

Centre for South East European law school network, 2014,-115 стр.

;30см

Фусноти кон текстот. - Содржи и: Conductions ISBN 978-608-4697-11-4

а) Јавно право - Јавна администрација - Реформи - Интеграции Југоисточна Европа COBISS.MK-ID 97076746