INSTITUT ZA JAVNU POLITIKU

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Serbia's Law on Administrative Procedure and "Protecting" Public Interest

AUTHORIAL TEXT

The Ministry of Public Administration and ReSPA have jointly organized a regional conference in Belgrade on the subject "Law on General Administrative Procedure". At the same time, this was a good incentive for the opening of a public debate on the new Serbian Law on General Administrative Procedure (LGAP), especially in order to include all relevant subjects in a joint effort to harmonize and coordinate the administrative decision-making process (which is measured by thousands of decisions made daily) with corresponding European standards in providing public services to citizens.

The basis for adopting a new Serbian LGAP rests on the premise of a "completely changed role of public administration". This implies gradual, but resolute transformation from the "administration as an instrument of government" to an "administration as a modern service for citizens". This means that Serbia, apart from the need to fulfill the agreed political and project (financial) requirements , needs to approach the subject in accordance with the principles of the "European Administrative Space", particularly in the context of the European Commission's Serbia Progress Report for 2014, regarding the "implementation of political criteria which

demand the stability of institutions guaranteeing democracy, rule of law and human rights". It is essential to unshackle the new Serbian LGAP from all "missed penalty shots" of the previous versions, such as: the new LGAP is enacted in order to "harmonize it with the new Serbian Constitution" (which isn't true); or that "there is no need for legislative impact assessment of the LGAP" (also not true); or defining administrative issues defined as "undisputed" (also not true).

From the value point of view, there is a preliminary issue regarding the formulation of the text in current LGAP, but also the texts of previous LGAP drafts: is the "protection of public interest" really the main task of public administration (as it is often heard at round tables debates and expert conferences). The answer to this question defines whether the administration functions as a governmental entity "rendering public services", or as an instrument of government exercising "state commanding authority", as Belgrade professor Radomir Lukić, according to the Soviet doctrine, taught more that 50 generations of law students.[1]

However, one thing is certain – in a democratic society, "protection of public interest" is not the task of the administration. This is the role of other government institutions: first and foremost this is the task of the public prosecutor and the courts. The essence of administrative procedures is not "protection", but "realization" of public interest. From the theoretical standpoint, "protection" of public interest implies imposing sanctions (due to breach of law), while "realization" implies determining the disposition. A decision of the tax administration is not rendered in order to "protect" legality (as taxing is not a "punishment" for violating tax laws), but rather represents the "implementation" of the (tax) law, i.e. the concretization of a legal obligation (disposition). The statement (S.Jovanović) "…the rule of law exist when the administration is brought within the limits of the law…" implies that rule of law protects the citizen from the administration, and not that the administration protects the rule of law form the citizen. Rule of law (legality) is protected by courts, including in administrative disputes where courts decide on the legal of administrative decisions. The concept that the administration's task is "protection of public interest" represents a relic from the earlier period of "administrative socialism" based on the concept of "unity of government" (not separation of powers) where the administration was equated with judiciary in "protecting public interests". As the draft of the new Serbian LGAP also contains these formulations (i.e. art. 120/2, 150/3), this situation demands resolute correction.

On the other hand, the question arises to what extent should the existing LGAP be amended. Following the "if it ain't broke, don't fix it" rule (R. Reagan), interventions should be directed towards points which are the least disturbing for the existing practice of administrative procedure, However, LGAP must be innovated in order to reach the goal set as a part of "political criteria" of the rule of law, democracy and standards of good governance (i.e. efficiency in conduct of proceedings; guarantees of rights, legal interests and carrying out public duties of citizens; guarantees of public administrative transparency and individual privacy protection; introduction of e-government and IT communications etc.).

In conclusion, efficient administrative procedures on all institutional levels, from ministries and other state authorities, to local government, public enterprises, institutions and agencies, are important preconditions for opening the “democracy and the rule of law” chapter in Serbia’s EU accession process. In order to prevent it from becoming just “a dead letter on paper”, after adopting the new LGAP in parliament it is necessary to vertically and horizontally harmonize it with collateral legislation. What is also need is comprehensive educational preparation for administrative officers through programs to improve their knowledge and upgrade their professional capacity. The practice and examples in the region (Croatia, Montenegro, Bosnia and Herzegovina) speak in favor of these arguments.

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[1] *Nota bene:* Today this concept is still imposed by Belgrade professors Zoran Tomić, Dobrosav Milovanović and Marko Davinić, and in particular in LGAP legislative working groups by (junior member) Vuk Cucić.

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