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SERBIA

GENERAL ADMINISTRATIVE LAW FRAMEWORK

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Preface

This report updates the administrative framework portion of Sigma's June 2007 assessment report on Public Service and the Administrative Framework in Serbia.

We use the notion of general administrative law to denote those parts of administrative law that are applicable – fully or partially, primarily or supplementarily – to all administrative settings, public bodies, administrative activities and administrative relationships. In other words, general administrative law would be the part of administrative law that is not only applicable across the whole administration, but also contains principles and norms that give rise to special regulations or specific organisational functioning.

Administrative law is the refined product of the pursuit in the course of history of the liberal goal to submit public powers to the law by ensuring that any action of the state is subject to the law or ruled by law. Modern democratic states derive their administrative law from their constitutions. The study of administrative law in a country cannot be dissociated from that of constitutional law.

The general legal framework for the administration is nevertheless comprised, first and foremost, of administrative law. A first approximation of the definition of administrative law is that it is a part of national public law (in EU Member States it is also now a part of the supranational legal order of the EU) that regulates the powers, competences (responsibilities), organisation and functioning of public authorities or of the public administration as a whole. This regulation includes relations established internally between administrative bodies and externally with other administrative bodies and with the general public.

Civil service legislation forms a part of administrative law, which is the instrument used by civil servants to ensure that the administration operates under the rule of law. Reforming the civil service without reforming the general administrative law would be an incomplete reform. For that reason this assessment attempts to answer the following question:

Do Serbian administrative practices and the legal administrative framework guarantee the principle of legality in administrative decision-making, and are they sufficient and appropriate to guide civil servants and public officials and to make them accountable for their performance?

The Principle of Legality and Administrative Values in the Constitution of 2006

A controversial referendum, held on 28-29 October 2006 and favoured by just over 50% of the voters, approved the current Serbian Constitution. This Constitution still raises some doubts among international observers¹.

Article 1 of the Constitution declares Serbia as a state of Serbian people ruled by law and social justice, the principles of civic democracy, and commitment to European principles and values, thus amalgamating the notions of a civic democracy based on the individual citizen and an ethnic-based state in a rather bewildering way, which counters the mainstream European understanding of liberal democracy.

Article 198 states that “individual acts and actions of state bodies, organisations with delegated public powers, bodies of autonomous provinces and local self-government units must be based on the law” and the “legality of final individual acts deciding on a right, duty or legally grounded interest shall be subject to reassessing before the court in an administrative proceedings, if another form of court protection has not been stipulated by law”. Article 36 grants to citizens access to courts and other state bodies to seek legal remedy against any decision concerning their rights, obligations or lawful interests. Article 67 provides for the right to professional legal assistance under the conditions established by law.

Article 35 establishes the right of citizens to obtain compensation for material or immaterial damages inflicted by the unlawful or irregular work of a state body, entities exercising public powers, and bodies of the autonomous provinces or local self-governments.

Article 51 recognises the right to obtain accurate, timely and complete information on issues of public importance and imposes on the media (but not on state bodies) the obligation to respect this right. Article 56 establishes the right to petition; it states that “no person may suffer detrimental consequences for opinions stated in the petition or proposal unless they constitute a criminal offense”.

Article 136 declares that the public administration is bound by the Constitution and the law, and that it is independent [sic] and accountable to the government. Public administration affairs are the competence of ministries and other public bodies according to the law. The internal organisation of ministries and other public bodies is to be regulated by the government.

The law may allow for the delegation of public powers to the autonomous provinces and local self-governments (article 137) as well as to other public bodies or enterprises. Article 12 states that “the state power is restricted by the right of the citizens to provincial autonomy and local self-government” and only subject to supervision in terms of its constitutionality and legality. A similarly unusual configuration of autonomy of provincial and local governments as a right of the citizens is stated in article 176.

The Ombudsman (Civic Defender) is given constitutional standing (article 138) to “monitor the work of public administration bodies”. Judicial offices are excluded from the remit of the Ombudsman.

The Prosecutor is given the task of taking measures “to protect constitutionality and legality” (article 156), a responsibility which approximates that institution to the former Soviet *prokuratura* and departs from the Council of Europe recommendation to the effect that the public prosecutor should be competent only in criminal cases². In addition, this responsibility is somewhat shared by the Constitutional Court (article 166), which is attributed by article 167 a number of functions that usually

¹ See International Crisis Group (November 2006), “Serbia’s New Constitution: Democracy Going Backwards”, Europe Briefing No. 44, Belgrade/Brussels, 8 November 2006. Available at www.crisisgroup.org See also the Report of the Special Representative of the UN Secretary-General on the situation of human rights defenders, Hina Jilani, approved by the UN General Assembly on 4 March 2008 (A/HRC/7/28/add.3).

² Council of Europe Recommendation No. (2000)19 states that “public prosecutors are public authorities who, on behalf of society and in the public interest, ensure the application of the law where the breach of the law carries a criminal sanction, taking into account both the rights of the individual and the necessary effectiveness of the criminal justice system”.

belong to administrative courts. The Constitutional Court may undertake actions on its own initiative (article 168), which is counterproductive, since it means giving to the Court an unwelcome legislative role and therefore unduly pushing it into the political arena.

A hierarchy of legal acts is contained in articles 194 and 195.

Protection of Legality by Civil Servants

According to article 18 of the Law on Civil Servants (Law N° 79/2005 – CSA), a civil servant is obliged to execute his/her superior's verbal order unless he/she deems that the order is contrary to the law or rules of the profession, or that its execution might cause damage. In such cases, the civil servant is to communicate this objection to the superior, and in the event that the superior re-issues the same order in writing, the civil servant must then execute the order and notify in writing the "Principal" (secretary of ministry or director of the relevant authority). A civil servant must refuse to execute a verbal and/or written order that, if executed, would represent a criminal offence, and he/she must notify the head of the authority (Principal) of the case in writing, indicating when the order was issued.

Given the authoritarian administrative culture that still exists in Serbia, however, it is doubtful that civil servants will have the resolve to object to the fulfilment of illegal instructions.

Organisation of the Administration

State Government

The government is fully subject to the Constitution and to the legislation adopted by the National Assembly, as stated in article 2.1 of the Law on the Government (*Official Herald*, Nos. 55/2005 and 71/2005), which predated the 2006 Constitution. According to this law, the government oversees the functioning of state administration authorities as well as the constitutionality and legality of "acts of general applicability" of autonomous provinces, local self-governments, and any other institution or body exercising public powers (by delegation from institutions of the Republic). The government is politically accountable to the National Assembly for the state of affairs and execution/implementation of laws in all policy areas under its jurisdiction, as well as for the performance of state administration authorities.

The Law on the Government was implemented by means of a number of organisational and functional regulations: Rules of Procedure of the Government, Organisation of the Cabinets of the Prime Minister and Deputy Prime Minister, General Secretariat of the Government, Office for Accession to the EU, Office for Co-operation with the Media, and other services of the government.

However, the actual implementation and compliance with these rules of procedure seem to be defective, especially with regard to the requirements and procedures to be followed for submission, discussion and approval of government decisions (bills of laws, by-laws, general acts and even singular decisions). Such requirements and procedures are circumvented when ministers want the government to adopt urgent decisions, a situation which seems to happen too frequently and has an obvious impact on the quality of decisions, both in formal terms and in terms of the proper assessment of the implications and impact of these decisions (see below under the section on quality of legislation).

State Administration

With regard to the state administration, the Law on State Administration (*Official Herald*, N° 79/2005) sets forth the following "working principles" (articles 7-11):

- Autonomy and legality: although autonomous in the execution of their tasks, state administration authorities are to act "within and in accordance with the Constitution, statutory legislation (laws), other regulations and acts of general applicability and under the supervision of the government;
- Expertise, impartiality and political neutrality, by providing for everyone's equal legal protection in exercising rights, obligations and legal interests;

- Efficiency in dealing with parties' rights;
- Balance (proportionality) and respect for rights, personality and dignity of parties;
- Transparency (principles of publicity and free access to information).

The state administration is considered as a direct administration exercising state powers and made up of ministries, administrative authorities within ministries, and special organisations and administrative districts (article 1). However, according to article 28, there may be several administrative authorities having differentiated legal personality and autonomy within a ministry (called “integrated authority”), which causes confusion when considered the notion of a public agency regulated by a separate law (see below). Integrated authorities are of three types, namely “authorities”, “inspectors” and “directorates”, with a bewildering attribution of responsibilities set out in article 29. In addition to these authorities, there are “special organisations” (article 33), whose differentiated existence is justified by the need for “greater autonomy” than that required by an “integrated authority”. A “special organisation” (article 34) may be a secretariat or bureau and may also have a differentiated legal personality.

The deconcentrated administration of the state is entrusted to the administrative districts in the territory (article 38 ff.), established by a decision of the government. The 29 districts are managed by a head and co-ordinated within the state administration and with local governments and provinces by an Administrative District Council (article 42), which includes the head of the district and the presidents of municipalities and mayors of the cities located within the district's territory.

According to the Law on State Administration, the competences or “domain” (area of responsibility, mandate) of state administration authorities are to be regulated by statute (article 2). The competences of the state administration are summarised as policy analysis and law-drafting, monitoring (inspection), and implementation of legislation, including adjudication of administrative decisions and issuing of administrative acts (article 17).

The law devotes a chapter (articles 45-50) to internal oversight and administrative inspection (see below) and to the monitoring of tasks delegated by the state, referred to as “conferred state administration tasks” (articles 51-57). The resolution of conflicts of attribution among administrative authorities is regulated in articles 58-60 and is attributed to the government. These articles also regulate the system of administrative appeals within the state administration.

Article 64 establishes the principle of compulsory administrative co-operation and information-sharing among administrative authorities.

The Law on State Administration was followed by the adoption of a number of by-laws: on Principles of Internal Organisation and Staffing of Ministries, Special organisations and Services of the Government; on Administrative Districts; etc.

In spite of the Law on State Administration, it seems that overlapping tasks and functions between various ministries and state administration authorities are still not uncommon, which causes confusion in citizens' dealings with administrative authorities³. The organisation of the administration still seems to be excessively complex and confusing. In this regard, the passing of this law would have been a good opportunity to add transparency to the organisational set-up of the state administration. Carrying out a systemic review of the state administration would be useful for clarifying the responsibilities of the various administrative bodies and organisations.

Rules on the establishment and common legal regime of agencies are provided in a separate law (Law on Agencies, *Official Herald*, Nos. 18/2005 and 81/2005). Agencies are defined as organisations established to carry out developmental, specialised and/or regulatory tasks of public interest that do not require a constant direct political supervision, provided that such tasks can be more efficiently performed by this type of organisation than by a state administration authority and in particular when the tasks can be entirely or mainly financed from the fees or charges paid by the users of the services rendered. The establishment of an agency with competences over the whole territory of Serbia must be

³ Sigma interview with representatives of the Chamber of Commerce in Belgrade on 9 April 2008.

authorised by an act of the government (article 8) and published in the *Official Herald*. Sub-national governments (provinces and local self-governments) may also establish public agencies for the implementation of their own competences.

Agencies may be given power to issue normative acts to implement primary legislation in the relevant area. They have their own separate legal entity. The rules related to the state administration apply to a public agency with regard to legality of its operations, professionalism, political neutrality, impartiality and other aspects (use of official language and script, etc.). The Law on Agencies foresees all necessary mechanisms for ensuring the accountability of the agency to the founding state or local administration authorities, as well as oversight of its functioning and performance. A number of pre-existing organisations are now ruled by this law (Privatisation, Development of SMEs, Tobacco, Spatial Planning, Commercial Registries, Medications and Medical Equipment, etc.)

Local Administration and Decentralisation

The local self-government in Serbia is composed of 167 municipalities and five cities and is regulated by the 2002 Law on Local Self-governments, implemented since 2004. A new Law on Local Public Finance was enacted in 2006 and came into effect in the 2007 budgets. There has been no substantial change in local government responsibilities since 2004. Municipalities retain a wide range of communal and utility services, but a law establishing municipal rights to ownership of property is still missing, which causes difficulties in the management of communal and utility services. Some new pieces of legislation are under preparation, but still not enacted, including a new law on local self-government (expected to regulate municipal ownership rights) and a new law on territorial organisation. The devolution of tax collection and tax administrative functions to local governments has produced mixed results because of poor political and technical management of the process.

Administrative Inspectorate

As indicated above, the Law on State Administration contains a chapter on internal oversight. In this chapter, a distinction is made between “supervision of work”, “inspectoral control” and “other forms of supervision regulated by a separate statute”. Supervision of work – the sole form of internal control regulated in this law – has two main modalities: legality (compliance with and adequate implementation of laws and regulations pertaining to the service) and “purpose”. The second modality aims to assess the “efficiency, cost-effectiveness and purposefulness” of the organisation of business and of decisions. Ministries are mainly responsible for both types of supervision with regard to integrated authorities and, if so established by law, to special organisations as well.

Specifically, the internal supervision of the administration aimed at supervising the work of the administration is addressed in article 45 of the Law on State Administration. “Inspectoral control” is to be regulated by a separate law, which has not yet been enacted. However, an Administrative Inspectorate has been in operation since 1995, first within the Ministry of Justice and since 2003 within the Ministry for State Administration and Local Self-Government. Inspectors are not concerned with internal financial control⁴ or with ensuring the quality of public services, but only with the regularity and legality of administrative operations. Inspectors act according to an annual inspection plan, but may also act upon the request of a citizen or civil servant.

There are two administrative inspectors, based in Belgrade, who inspect all authorities of the central government and 15 other authorities, covering two districts each. The competence of the Administrative Inspectorate embraces all public administrations (state, local, and judicial offices). These inspectors examine compliance with existing laws and regulations and the proper application of the Law on Civil Servants (CSA) and the general Labour Law, the use of the official language and script, the use of the state stamp/seal, the electoral census, etc. Each inspection activity must result in minutes, which could contain, inter alia, a list of measures that the inspected state or local authority must take to rectify the irregularities that have been found. The Inspectorate is also competent to inspect court offices. The Administrative Inspectorate reports to a deputy minister.

⁴ See Sigma’s 2008 assessment report on Public Internal Financial Control (PIFC) in Serbia.

Heads of offices are personally liable to comply with the Inspectorate's requirements. The fact of non-compliance is administratively described as an abuse of power and may lead to a criminal offense of abuse of office or dereliction of duty (articles 359 and 361 of the Penal Code). Inspectorate minutes constitute presumptive evidence in court cases.

Ministries and other central administration bodies do not have specific internal inspection services or units. Only the city of Belgrade has its own administrative inspectorate, which performs its functions with total separation and independence from the state inspectorate.

There is usually co-operation between the Administrative Inspectorate and other state bodies, such as the state Ombudsman or existing municipal or provincial ombudsman institutions (see below).

Accountability, State Liability and Compensation

Concerning accountability, the existing legislation foresees the accountability of the bodies of the state administration – of the relevant minister to the government and of the government to parliament. To this end, ministries and special organisations all have to submit annual performance reports, giving an account of the implementation of their respective annual business plans, which are adopted in December for the following fiscal year.

The existing legal framework and the Law on Civil Servants (CSA) regulate the accountability and direct liability of staff in the public administration. However, implementation of the accountability principle is still limited, as hardly any responsibility is delegated to the staff, i.e. the minister signs nearly everything and often takes responsibility for even routine decisions. Since staff are usually not empowered to take responsibility, it may take some time before they will think in accountability terms when preparing or taking decisions.

Article 35 of the 2006 Constitution establishes the right of citizens to obtain compensation for material or immaterial damages inflicted by the unlawful or irregular work of a state body, entities exercising public powers, or bodies of the autonomous provinces or local self-governments.

Article 5 of the Law on State Administration states the liability of the state for damages caused to natural or legal persons by unlawful or improper operations of state administration authorities. The proceedings for recovery of damages caused to citizens or private legal persons by illegal acts or unlawful actions of public officials are decided, upon petition of the aggrieved party, by the regular district courts that have competence in the location where the damage occurred. This damage is compensated by the state or local government whose official is deemed to be responsible for the damage. The courts of general jurisdiction, municipal or district, also decide on suits arising from contracts concluded between government administrative agencies and private physical or legal persons.

The aggrieved party has the right to claim compensation directly from a civil servant when the damages were caused by him/her intentionally or as the result of gross negligence. In such cases, after the state or local government administration has compensated the third party for the damages caused, the administration may then – within six months from the date of payment – reclaim compensation from the civil servant. Therefore, the state or local government is entitled to recover any compensation paid for damages from the person whose unlawful or negligent action caused the damages.

There seems to be some gap here between the existing system of liability for damages caused by public administrations in Serbia and common standards set in EU Member States, as laid down in national legislation or as defined by the case law of the European Court of Justice, which also include liability for damages caused in the case of lawful and regular operation of public services (objective or strict liability without tort).

Finally, public officials discharging administrative duties are criminally liable before regular municipal or district courts, and can be prosecuted without any previous hierarchical permission.

Administrative Procedures

The Law on General Administrative Procedures is based on the former Yugoslav law of 1986, which in turn was based on the Austrian law of 1925. Some changes were made when a new law was passed in 1997 for the Federal Republic of Yugoslavia. The law was last changed in 2001 when the penalties

regulations were amended. New drafts of these laws were produced in 2004 and submitted for public consultation. Comments aimed at improving these drafts and ensuring their alignment with common standards were provided, including by Sigma, but no further action was taken by the ministry in charge.

The existing law regulates the basic principles of administrative procedures, but it is rather complicated and creates very lengthy procedures. In addition, there are numerous special administrative procedures regulated by special laws, which further complicate administrative decision-making processes and, more generally, adversely affect the transparency of public decisions. Moreover, several issues, important for a modern administration, are not regulated, such as issues linked to electronic tools or certain legal constructs.

The Serbian administrative procedure applies the principle of double instance. Citizens have the right to request the review of an administrative act by a supervisory agency, and this review is also an essential precondition for filing an administrative lawsuit in court. Individual decisions or rulings of state administration authorities addressed to specific parties can be appealed and overruled through an internal recourse. If the decision was taken by a minister, the adjudication of the internal appeal belongs to the government.

There is a need for a general law on administrative procedures that is totally aligned with the basic principles of administrative law prevailing in the majority of EU Member States and that guarantees the respect of individual and collective rights and interests as well as the principle of legal certainty in administrative decision-making.

Free Access to Information

Article 51 of the Constitution recognises the right to obtain accurate, timely and complete information on issues of public importance and imposes on the media (but not on state bodies) the obligation to respect this right. Everyone has the right of access to information kept by state bodies and organisations with delegated public powers, in accordance with the law. On the other hand, while article 42 of the Constitution also guarantees the protection of personal data, article 46 authorises the restriction by law of the right of free access to information when that restriction is required to protect, among others, “the morals of a democratic society and the national security of the Republic”.

A Law on Free Access to Information of Public Importance (LFAIPI) has been in force since November 2004. The law gives any person the right to demand information from public authorities, including state bodies, organisations vested with public authority, and legal persons funded wholly or predominately by a state body. The request should be in writing, but if it is made orally, the public authority should record it and treat it in the same way as a written request. Public authorities are required to respond within 15 days.

Access to information is restricted or limited in the cases described in article 9 of the LFAIPI. This includes the denial of the right to access if that access would “make available information or a document qualified by regulations or an official document based on the law, to be kept as a state, official, business or other secret, i.e. if such a document is accessible only to a specific group of persons and its disclosure could seriously legally or otherwise prejudice the interests that are protected by the law and outweigh the access to information interest” (article 9-5).

Article 13 confers a rather arbitrary power to public authorities by stipulating that “a public authority shall not allow the applicant to exercise the right to access information of public importance if the applicant is abusing the rights to access information of public importance, especially if the request is irrational, frequent, when the same or already obtained information is being requested again, or when too much information is requested”.

To implement the right of access to information of public importance held by public authority bodies, a Commissioner for Information of Public Importance is established by the law (article 1) as an autonomous state body, independent in fulfilling its authority. Article 35 describes the competences of the Commissioner, who is to monitor compliance with the law, hear cases relating to

denial of access to information, delays, excessive fees, and refusal to provide the information in the form or language requested by the applicant. The Commissioner can also propose amendments to the legislation and inform the public of the ways in which it can make use of the rights granted by the law. His/her decisions are binding on public authorities. If the relevant body fails to release the information, the Commissioner can ask the government to enforce the decision.

The decisions of the Commissioner may be appealed before the Supreme Court. Appeals of denials relating to the National Assembly, President, Cabinet, Supreme Court, Constitutional Court and Public Prosecutor are not allowed to be heard by the Commissioner because they have a higher standing than the Commissioner. Appeals in those cases can only be made directly to the Supreme Court. By the end of 2007, the Supreme Court had ruled on six complaints against these highest authorities and 76 complaints against the Commissioner's decisions, with a total of 48 judgments passed to date.

The Commissioner published reports on implementation of the LFAIPI in March 2006, March 2007 and March 2008. According to the March 2008 report, it seems that the Commissioner's Office is understaffed, as it has only one-third of the staff foreseen in the systematisation (staffing table), according to which it should have 21 staff, and the office premises are insufficient, although the budget allocation seems to be sufficient. The Commissioner points out that "the effects of implementation of the Law on Free Access to Information would undoubtedly have been far better if only the competent authorities had been more willing to eliminate certain administrative and other obstacles impeding the implementation of the law. In order to convey a more realistic sense of the actual achievements, this report reiterates facts about key obstacles that significantly affected the implementation of the law, to which we have been drawing the attention of competent authorities for three years with little success"⁵.

Among these obstacles, the Commissioner singles out the following: 1) failure to enforce the law and absence of liability for infringements; 2) failure to enforce the decisions of the Commissioner; 3) inadequate normative environment, with blatant inconsistencies between the LFAIPI and other laws and the fact that competent authorities seem unaffected by this lack of consistency of the legal system; 4) lack of relevant complementary legislation, such a sound law on state secrets and confidentiality and sound legislation on data protection.

The current Law on Data Protection was passed in 1998 and is widely ignored. There is no law protecting state secrets, although the Criminal Code prohibits the disclosure of state secrets. This absence of regulation was no obstacle for the government to raid the offices of the Helsinki Committee for Human Rights in 2004 and seize a book based on the state secrets claims.

The situation with regard to free access to information, together with the lingering tendency to secrecy in the public administration and citizens' distrust in the administration, hamper the full implementation of the law. Transparency in the public administration has not yet been achieved, despite the efforts of NGOs and leading figures in the administration.

Quality of Legislation

Article 64 of the Law on State Administration contains the obligation for ministers to consult with other ministries and special organisations while preparing a draft law or regulations of general application. Article 39 of the Rules of Procedure of the Government sets as a mandatory requirement for draft laws to be adopted by the government and submitted to parliament the elaboration of a detailed and comprehensive Regulatory Impact Analysis (RIA), which should be submitted with the draft unless the proposing ministry provides a sufficient and satisfactory explanation not to do so. The preparation of government regulations is not constrained by that obligation. However, the elaboration of comprehensive RIA has not yet become a standard practice in the Serbian Government and in the state administration system.

⁵ See the Commissioner's "Report on the Implementation of the Law on Free Access to Information of Public Importance in 2007", Belgrade, March 2008, page 16, available at www.poverenik.org.rs.

The Legislative Secretariat is in charge of checking the constitutionality and legality, including the compatibility with the existing legal framework, of each new legislative act, and it is also in charge of drafting certain legislation (see above). However, the Secretariat is understaffed (only 25 staff) and therefore usually has too little time to thoroughly check new legislation. About 40 legislative items are on the Council of Ministers (CoM) agenda every week, and it is considered that too many issues placed on the CoM agenda should in fact be resolved by the ministries. During the past year, due to constant political tensions within the coalition government and beyond, the pressure to propose new legislative acts – without allowing the Legislative Secretariat to take the time to properly assess the proposed legislation – has increased considerably and eroded the effectiveness of the Secretariat. Review of EU-related legislation is carried out by the Serbian Office of European Integration (SOEI), which has 42 staff. There are often conflicts of attribution between the Legislative Secretariat and the SOEI on the issue of which body is responsible for “certifying” the harmonisation of legislation.

The Council for Regulatory Reform was set by ordinance in 2003 (*Official Herald*, No. 41/2003). The Council is presided by the Minister of Economy, and other Council members are deputy ministers of all relevant ministries. Initially the Council was, inter alia, tasked “to launch initiatives and proposals for amendments of the current laws, regulations and general acts and for the enactment of new ones and to give prior opinions on draft laws, regulations and general acts examined by the boards of the Government of Serbia insofar as these are relevant for the operation and development of private entrepreneurship and enterprises”. The opinion of the Council (as is the opinion of the Legislative Secretariat) is a mandatory requirement before a draft law may be sent to the government for decision.

Amendments to the Rules of Procedure of the Government (RoP) and to the Ordinance on Setting up of the Council for Regulatory Reform (*Official Gazette of the Republic of Serbia*, No. 113/2004) expanded the role of the Council. Article 34 of the RoP regulates in a rather detailed way the memorandum that has to accompany a draft proposal submitted to the government stating the reasons for adopting the proposal as well as an analysis of the foreseeable effects of the submitted draft law, other regulation or general act. This analysis includes in particular an evaluation of the costs to citizens and to the economy, in particular to SMEs, and of whether the possible effects of adoption justify the costs. The Council for Regulatory Reform is very much geared towards economic development, and its work is targeted to implement the OECD guidelines on regulatory reform. Mention has been made of plans to broaden RIA and to possibly move the Council to the centre of government rather than housing it in the Ministry of the Economy.

For the time being, however, and according to the Legislative Secretariat, the quality of draft legislation prepared by ministries and submitted to the government for adoption is too often very poor or highly unsatisfactory. In general in the proposed legislation lacks consistency, provides too many contradictory definitions, is written in poor language and bad wording, includes no impact assessment, and does not respect the hierarchy of legal instruments. Furthermore, draft regulations are too often submitted to the Legislative Secretariat at a later stage or at the very last moment and sometimes they even go directly to government sessions without any quality screening. Legislative planning is not carried out, and legislation is made in a rather impromptu manner. Drafting techniques in ministries are considered to be poor as the drafters have not been properly trained and staff turnover is too high.

Overall, the quality of legislation is poor, although it varies between ministries. However, efforts are increasing to improve legislative quality through policy co-ordination, some training and strengthening of the Council for Regulatory Reform.

Administrative Justice

As indicated above, the legality of individual acts of public and delegated authorities that impinge on rights, duties or “legally grounded interests” is always subject to judicial review (article 198 of the Constitution).

Currently, the judicial review of administrative acts is carried out in accordance with the Administrative Disputes Act of 1996, which slightly amended the Act of 1952. Within the Serbian

legal context⁶, the term “administrative act” does not refer to all acts of public authorities, but only to individual acts: “Consequently, normative acts (rules), material acts, and contracts cannot constitute the subject matter of administrative lawsuits because they are not administrative acts by definition, even though they are acts of public administration. An unlawful material act of government administration or a contract may be challenged in a regular civil or commercial lawsuit. A normative act (rule) of the administration or some other government agency cannot be directly challenged in an administrative judicial action.”⁷ This notion of an administrative act that may be subject to judicial review departs from the recommended doctrine of the Council of Europe. Recommendation (2004)20 of the Council of Europe’s Committee of Ministers considers that it should be possible to challenge administrative acts – both individual and normative legal acts, as well as physical acts of the administration (*faits accomplis*) taken in the exercise of public authority – that may affect the rights or interests of natural or legal persons, including the refusal to act in cases where the administrative authority is under an obligation to implement a procedure following a request.

These assumptions impose severe limitations on the possibilities for judicial control of the administration and hamper the legality of administrative action.

In addition, the current system assigns the judicial review of the administration to ordinary district courts, which are not specialised in administrative law. At the top of the system, the Administrative Chamber of the Supreme Court deals with the review of individual acts of the highest state administration authorities, and it is the Constitutional Court that deals with the review of acts of general application and regulations.

The Law on Organisation of Courts, as amended in 2006, called for the establishment of the specialised, first-instance Administrative Court, hierarchically located just below the Supreme Court, by January 2007, following several postponements that had occurred since October 2001. However, the Court has not yet been established, pending the adoption of a new Law on Administrative Disputes. The draft of this law is part of the “judicial package of laws” due to be adopted in 2008.

At present, the bulk of administrative cases falls under the jurisdiction of the Supreme Court’s Administrative Chamber. There are 18 judges and 20 advisers in the Chamber, and the influx of cases was 16,000 in 2006 and 12,000 in 2007. The Chamber is organised in six panels of three judges each, acting on general administrative law matters.

The most common cases concern the legality of final administrative acts issued by state administrative bodies in the first instance. The Supreme Court hears these cases in the first and final instances in a three-judge panel. An appeal against a decision in an administrative dispute is permitted only in exceptional cases. Such an appeal is heard by the Administrative Chamber in a five-judge panel. These proceedings are closed to the public, however, due to the complexity that a certain disputable matter may entail; whenever the Court finds it necessary, in order to have a better presentation of the facts, it may decide to hold a hearing.

The Supreme Court, represented by a three judge panel, hears in the second instance appeals against judgments issued by district courts. A five-judge panel hears appeals on extraordinary legal remedies to review an already firm judgment. A special panel hears cases concerning conflicts of jurisdiction between panels on administrative disputes within district courts and litigation panels of district and municipal courts.

The judicial review of administrative decisions seems to focus on the correct application of legislation in the decisions made by the administration, but usually does not involve a full review of the factual basis upon which such decisions have been made. However, the court usually does not use this prerogative, but sends the case back to the administration, with the request for a new decision to be made in view of the court’s opinion. Consequently, it may be said that the administrative justice system does not have full jurisdiction, except in some cases (when, for example, compensation for damages or restitution is sought simultaneously with the annulment of an act).

⁶ See Vučetić, Dejan (2005), “Serbian Judicial Review of Administrative Acts and European Standards for Administrative Disputes” in: *Facta Universitatis*, Series Law and Politics, Vol. 3, No. 1, pp. 73-90.

⁷ Vučetić, op.cit., page 75.

The current arrangements for judicial review of administrative decisions have many flaws: a too narrow concept of reviewable administrative acts; no full redress because courts have no independence in establishing the facts; the absence of an obligation to hold oral hearings on *ex parte* requests; the absence of an obligation to publicise the decision; etc. These flaws and some others render judicial review inadequate and severely weaken administrative accountability. They also diminish guarantees of adequate and just administrative decisions that respect basic democratic principles and individual rights.

This problem becomes even greater in view of the considerable room for discretion that is recognised in general by the legislation. Together with unclear procedures and limited possibilities for appeal, this wide discretionary scope in legislation can easily lead to arbitrary decision-making in the administration, legal uncertainty and proliferation of corruption.

In any event, the 2006 Constitution (articles 166 and 167) further complicates judicial review – and also weakens constitutional justice – as it attributes to the Constitutional Court the protection of ordinary legality, which should be the competence of the administrative courts. The remit of the Constitutional Court should be confined to the protection of the constitutionality of laws and the conformity of their individual application with constitutional values.

The procedure of judicial review of administrative acts in Serbia is only partially consistent with procedural standards derived from recommendations of the Council of Europe. The system remains weak and cannot guarantee full and adequate protection of citizens' rights and legitimate interests from unlawful actions and decisions of state authorities and other public bodies; it therefore jeopardises the rule of law and legal certainty in administrative decision-making.

Ombudsman (Civic Defender)

The Serbian Constitution of 1991 did not recognise the Ombudsman as having a constitutional standing. The 2006 Constitution recuperates that standing for the Ombudsman in article 138, where the “civic defender is described as an independent state body which shall protect citizens’ rights and monitor the work of public administration bodies, body in charge of legal protection of propriety rights and interests of the Republic of Serbia, as well as other bodies and organisations, companies and institutions to which public powers have been delegated”. It is not allowed to monitor the work of the National Assembly, President of the Republic, government, Constitutional Court, courts and public prosecutor’s offices.

The Ombudsman, or Civic Defender, is appointed and dismissed by the National Assembly and is accountable to it. According to the Venice Commission of the Council of Europe, “it is regrettable that there is no protection of the Civic Defender against unjustified preterm dismissal by the National Assembly. While the Civic Defender should indeed present reports to the National Assembly, it seems questionable to state that the National Assembly supervises the Civic Defender (see Article 99) and that the Civic Defender shall account for his/ her work to the National Assembly”⁸, especially if this accountability is understood as the possibility of early removal of the incumbent from office for reasons not foreseen in the law.

The current Law on the Ombudsman predates the 2006 Constitution, as it was adopted in September 2005. According to provisions in the law, parliament was supposed to appoint the Ombudsman within six months of adoption of the law (i.e. by January 2006), but this appointment did not occur until June 2007, and the appointed Ombudsman took office in July. The expert service or secretariat of the institution was established in December 2007 and contains 39 staff on its staffing table, but it is not yet fully staffed. . The institution is facing some additional difficulties in relation to its intended fast and steady capacity-building, as the four deputies foreseen in the Law have not yet been appointed by parliament, and the office is not equipped with sufficient computers and software.

The Ombudsman has jurisdiction in two main areas: human rights and the functioning of the administration in all areas dependent on the executive branch of the government; its remit does not

⁸ See Venice Commission’s *Opinion on the Constitution of Serbia*, Opinion No. 495/2006 adopted by the Commission at its 70th plenary session, Venice, 17-18 March 2007 [CLD-AD(2007)004, page 13].

include judicial offices. The Ombudsman's Office has already received and processed some 800 complaints from citizens, of which almost 50% have related to court proceedings, and are therefore out of the Ombudsman's competence. In addition, the Ombudsman initiated ten investigations on his own motion – nine on human rights and one on corruption against the Direction for Common General Affairs under the Prime Minister. The Ombudsman submitted its first report to parliament in March 2007. The Serbian population apparently had its doubts about the establishment of the Ombudsman institution, but the Office hopes to progressively overcome this mistrust.

The Ombudsman's Office has temporarily overcome its capacity shortage by delegating certain cases to local ombudsman institutions, appointed by cities/towns or municipalities (currently numbering 14); the *Voivodina* Ombudsman was appointed by the provincial assembly. The Local Government Act of 2002 provided the legal basis and the possibility for units of local self-government to establish a civic defender or ombudsman to protect individual and collective rights and interests of citizens and to conduct overall control of the administrative functioning. This law envisages the possibility, not the obligation, of establishing civic defenders at local self-government level, but only if this institution is considered to be necessary and possible to organise and finance. Local ombudsman institutions have been established in a small proportion of towns and municipalities.

Constitutionally (article 138-1), the Republic's Ombudsman can monitor provincial and local government administrations. Legal regulations have not yet arranged completely the relationship between local self-government ombudsmen and the Republic's Ombudsman. Essentially they both have the same attributions, i.e. protection of human rights and supervision of the administration. Their work is complementary with regard to a violation of human rights at either local or state level. It is often impossible to clearly distinguish local violations of citizens' human rights if these violations are caused by acts and actions of state administrative authorities⁹. The possibilities are real for mutual encroachment between ombudsmen at the various levels, and this problem has to be worked out carefully if these institutions are to perform smoothly.

In addition, another possible source of conflict has arisen concerning children's rights. According to the Law on the Ombudsman, one of the deputies is given the responsibility of protecting children's rights. However, a new separate law on the establishment of a special ombudsman for children is now being drafted with foreign assistance. This draft should be halted. International technical assistance is often exclusively driven by the interests of donors and not by those of the beneficiary country.

⁹ See Dimitrijević, Predrag (2005), "Do We Need Local Ombudsman –Protector of Human Rights?" in: *Facta Universitatis*, Series Law and Politics, Vol. 3, No. 1, pp. 25–35.

Recommendations

1. A new law on general administrative procedures is needed, and special procedures need to be reduced to a very minimal number. The new general legislation should clearly be aligned with the basic principles of administrative law prevailing in the majority of EU Member States and should guarantee the respect of individual and collective rights and interests as well as the principle of legal certainty in administrative decision-making.
2. Work should be resumed and completed on the effective establishment of a more comprehensive system of specialised administrative justice, which is fully aligned with European standards.
3. In spite of the clear improvement represented by the Law on State Administration and the Law on State Agencies, the organisation of the administration still seems to be excessively complex and confusing. In this regard, more transparent structures and distribution of competences among administrative bodies and authorities are still necessary.
4. Protection of legality by civil servants, democratic accountability mechanisms, and legislation on administrative and personal liability as well as compensation rights should be better aligned with democratic standards, by adding the possibility of strict liability and by promoting a culture of responsibility within the administration.
5. Transparency in the administration needs to be improved. The Law on Free Access to Information of Public Importance should be reviewed, as well as all of the legislation dealing with secrecy and transparency of public actions and decisions, as well as with the protection of individual privacy. A sound balance needs to be struck among those competing values, and consistency among the various pieces of legislation regulating these matters should be ensured.
6. Means and efforts should be invested in increasing the overall quality of administrative legislation, including planning, training, and close monitoring of law-drafting processes.
7. The Ombudsman should be supported and its staff and IT equipment completed, and the relationships between the Republic's Ombudsman and its local and provincial counterparts better regulated so as to avoid any conflict of attributions and to enable the development of smooth and co-operative working arrangements.