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## Effective Adjudication through Administrative Appeals in Slovenia

Polona Kovač\*

### 1. Introduction

#### 1.1. The Slovene administrative framework

Slovenia underwent deep-seated social changes, starting from independence in 1991 and full membership of the EU in 2004, which led to political and economic transition to a post-socialist system. Inevitably, these changes affected the political-administrative system as well. Therefore, the public administration reforms, including the regulation of administrative procedural law, were a more or less systematic set of strategies and activities. Considered to be one of the most successful post-socialist states, Slovenia introduced public administration reforms soon after gaining independence, and has been working intensely on such processes ever since.

In Slovenia, administrative procedures – following the Austrian heritage with *Allgemeines Verwaltungsverfahrensgesetz* (1925) – are understood as being decision-making in individual cases, as opposed to any type of procedure carried out by a public body. The legal systems of Austria, Germany, and Slovenia, for example, still share many common aspects, such as the separation of powers with various approaches to restricting power, including the Administrative Court as a specialised body supervising the work of the centrally organised Government, and the Constitutional Court as the body designed to resolve issues pertaining to constitutional law. In the Slovene tradition and legal order, administrative procedures are considered a path by which authorities establish, modify, or terminate an administrative (legal) relationship with a private party by applying general norms to a specific set of facts. The subject-matter decided in administrative procedures is the rights (mainly of a positive status) and legal interests or obligations of an individual or several identified or identifiable parties relating to administrative (substantive) law. Administrative procedures are thus an activity carried out by public authorities and result in the issuance of an individual authoritative administrative act. Under such doctrine, the main focus is on the principle of the administrative act.<sup>1</sup>

\* PhD, Assistant Professor, Faculty of Administration, University of Ljubljana, Gosarjeva 5, Ljubljana, Slovenia, email: [polona.kovac@fu.uni-lj.si](mailto:polona.kovac@fu.uni-lj.si).

1 G.F. Schuppert, *Verwaltungswissenschaft (Verwaltung, Verwaltungsrecht, Verwaltungslehre)*, 2000, p. 772. However, even in some countries where administrative procedures traditionally refer to specific decision-making, theory and legal regulation are evolving towards a broader understanding (e.g. in Spain or Germany, see W. Rusch, 'Administrative Procedures in EU Member States', in SIGMA Conference on Public Administration Reform and European Integration, 2009, <<http://www.oecd.org/dataoecd/49/34/42754772.pdf>> (last visited March 2013), p. 5; D.J. Galligan et al. (eds.), *Administrative Justice in the new European Democracies*, 1998, pp. 17-26; J. Barnes, 'Towards a Third Generation of Administrative Procedure', in S. Rose-Ackerman & P.L. Lindseth (eds.), *Comparative Administrative Law*, 2011, pp. 336-356). Normally, two groups of procedures are distinguished in this context: (1) individualised decision-making and adjudication (*Verwaltungsverfahren*) and policy-based decisions with general effect, regulatory acts, rule-making, procedural arrangements, and the public policy cycle (*Gestaltungsverfahren*). One of the rare Council of Europe directives on individual administrative acts is

Administrative procedures in Slovenia are mainly regulated by the General Administrative Procedure Act (*Zakon o splošnem upravnem postopku*, ZUP, GAPA), in force since 2000.<sup>2</sup> Moreover, administrative procedures in the Austrian-German circle, Slovenia as well, are governed in more detail by several sector-specific laws, such as the Tax Procedure Law (as is the case in nearly the entire EU).<sup>3</sup> With regard to their significance and extent, administrative procedures represent one of the most important processes in the legal system of the Republic of Slovenia. According to the records of the ministry responsible for public administration, up to 10 million administrative acts are issued in Slovenia every year, either upon a party's request or *ex officio*. Administrative acts issued as a result of administrative procedures are subject to an administrative appeal, which is mandatory before a review of legality by the Administrative Court.<sup>4</sup> An administrative appeal is filed on average in approximately 1-3% of cases. From one fifth to one third of rejected appeals (which make up 60% of all appeals filed) are further referred to the Administrative Court. The right of access to court is based on Articles 23, 156, and 157 of the Slovene Constitution and the European Convention on Human Rights (ECHR), which Slovenia ratified in 1994. In Slovenia, the judicial review in administrative matters is defined by the 2006 Administrative Dispute Act (*Zakon o upravnem sporu*, ZUS-1, ADA). After the finality of an administrative act as decided by the Administrative Court or the appellate Supreme Court, parties also have the possibility to pursue the matter before the Constitutional Court as well as the European Court of Human Rights. This sometimes makes the protection of parties' rights rather difficult since in order to have access to court the parties must exhaust all prior remedies,<sup>5</sup> which is often quite ineffective due to the months-long procedures.

### 1.2. On the effectiveness of the administrative appeal

We understand an institution to be effective when it meets the objective of its regulation in practice. In administrative relations, what is effective is that which generally contributes to the main purpose of administrative procedures, i.e. to balance the parties' rights and assert the public interest in accordance with the purpose and content of sector-specific regulations. As Pitschas & Walther state,<sup>6</sup> in managing administrative matters in a modern state, consideration is to be given especially to the relatedness among the individual functions of the administration within the entirety of authoritative functions, and to the effectiveness and rationality of the efforts toward the common welfare as an aggregate of sector-specific public interests. As Harlow & Rawlings state,<sup>7</sup> the entire administration can be assessed in qualitative terms if its complaint system features several characteristics. Any legal remedy must be (1) easily accessible and well publicised, (2) simple to understand and use, (3) speedy, with established time limits for action, and the parties kept informed of progress, (4) fair with a full and impartial investigation, (5) effective, namely addressing all the points at issue, and providing appropriate redress, and (6) informative, i.e. providing information to management so that service can be improved. In this respect, the effectiveness of adjudication must be considered not only as Weber's technical rationality in the sense of fulfilling the objectives (*Zweckrationalität*) where the administration or its actions are rational

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Resolution No. 77 (31) on the Protection of the Individual in Relation to the Acts of Administrative Authorities.

2 Official Gazette of the Republic of Slovenia Nos. 80/99-ZUP, 70/00-ZUP-A, 52/02-ZUP-B, 73/04-ZUP-C, 119/05-ZUP-D, 105/06-ZUS-1, 126/07-ZUP-E, 65/08-ZUP-F, 8/2010. For more on the development, see P. Kovač, 'Modernizing administrative procedural law in Slovenia as a driving force of efficient and good administration', 2011/2012 *The NISPAcee journal of public administration and policy*, no. 2, pp. 39-66.

3 Cf. Statskontoret, *Principles of Good Administration in the Member States of the EU*, 2005, <<http://www.statskontoret.se/upload/Publikationer/2005/200504.pdf>> (last visited March 2013), p. 72; C. Harlow & R. Rawlings, *Law and Administration*, 1997, p. 181; D. Heckmann (ed.), *Modernisierung von Justiz und Verwaltung. Gedenkschrift für Ferdinand O. Kopp*, 2007, p. 44.

4 The Administrative Court was established in Slovenia in 1997. Other countries have different systems of judicial control over the actions of the administration; a rough distinction is made between a) the group of countries without a specialised administrative court (Denmark), b) the group of countries where administrative control is exercised by general courts with special administrative sections (e.g. Spain, the Netherlands, Slovenia until 1996), and c) the group of countries with specialised administrative courts (France and its *Conseil d'Etat*, Sweden, Italy, Germany, Belgium, Greece, Portugal, cf. J. Ziller, 'The Continental System of Administrative Legality', in B.G. Peters & J. Pierre, *Handbook of Public Administration*, 2005, p. 265). Establishing an autonomous Administrative Court as a form of judicial review of administrative acts enables better accessibility for the parties and more specialisation in administrative matters. In Slovenia there are also other forms of judicial review in addition to the general one – for instance, specialised social courts in obligatory social insurance matters.

5 V. Androjna & E. Kerševan, *Upravno procesno pravo [Administrative Procedural Law]*, 2006, pp. 454, 639.

6 R. Pitschas & H. Walther (eds.), *Mediation im Verwaltungsverfahren und Verwaltungsprozess*, 2008, pp.11-13.

7 Harlow & Rawlings, *supra* note 3, p. 405.

and the expected results exceed the burdens, but also effectiveness is to be understood as value-based rationality (*Wertrationalität*), whereby the appeal is effective only if the related rules are implemented in accordance with the purpose of the regulation as well as with the principles of good administration as a contribution of the administrative system to the functional requirements of the social environment in the light of social values. The rationality and effectiveness of procedures are in fact essential for solving complex societal issues, particularly in relation to economic development and investment capacity, the mitigation of economic downturns, etc.<sup>8</sup> Hence, a modern state measures the effectiveness of its administration through elements of administration accessibility (the dispositive nature of legal remedies), the speed of asserting rights and legal interests (deadlines), the equality of the parties before the law, the suspensiveness and devolution of legal remedies, etc. A quantified perspective – whereby the criterion of the effectiveness of appeals or other legal remedies is only met if the appeal procedures reduce the caseload of the courts, considering that in Slovenia an appeal is the procedural basis for the initiation of an administrative dispute – is rather common but much too narrow if considered within a social context.<sup>9</sup> Thus, if the substantive result is not up to the expectations of the parties but the procedure is conducted in a manner so as to respect legality, personal dignity, participation, due process, non-arbitrariness, then the regulation of administrative procedures is politically correct.<sup>10</sup>

This article addresses several issues at theoretical, regulatory, and empirical levels to assess the effectiveness of appeal adjudication in existing Slovene regulations and in administrative law and the case law. Our aim is to provide an overview of the state of the art in a normative sense and empirical developments between 2007-2011 in Slovene administrative appeal procedures to provide grounds for improvement in the sense of good administration principles. The article focuses on the appeal as an internal administrative objection tool enabling the public administration to improve its functioning as a partner of parties in administrative relations. We address the issue of the ways and extent to which the administrative appeals procedure contributes to good governance and the effective adjudication of conflicts between administrative authorities and citizens in Slovenia. Following an introductory discussion of good administration guidelines (Section 2), we first analyse the Slovene administrative appeal system in theory and law (Section 3). In the second part of the article (Section 4), an empirical study of the extent and trends of administrative appeals and judicial review procedures is carried out.

## 2. Towards good administration by resolving conflicting legal interests in administrative matters

Since the administrative relationship is by nature unilateral, the law on administrative procedure is intended to protect the weaker party in relation to the administrative authority. Thus, administrative procedures are a fundamental instrument of the rule of law (*rechtsstaat*) and democracy, particularly in relation to the protection of the constitutional rights of individuals against possible abuse of power by administrative bodies.<sup>11</sup> In order to ensure a minimum uniform level of protection for the rights of the parties in all areas of administration, most countries have adopted an administrative procedure act (APA), the purpose of which is to ensure a subordinate, yet standardised, application of the main APA safeguards in various administrative matters. Thus, the administrative and, as well, the internal appeal procedures are a fundamental instrument of the rule of law and democracy, particularly in relation to the protection of the constitutional rights of individuals from a possible abuse of power by administrative bodies.<sup>12</sup>

8 R. Godec (ed.), *Upravni zbornik [Administrative Proceedings]*, 1993, pp. 141–145; Schuppert 2000, *supra* note 1, pp. 783–787; Rusch, *supra* note 1, p. 5; W.J. Hopkins, 'International Governance and the Limits of Administrative Justice: the European Code of Good Administrative Behaviour', 2007 *New Zealand Universities Law Review* 22, no. 4, p. 713.

9 P. Kovač, 'Effectiveness of legal remedies in administrative proceedings: the case of Slovenia', 32nd EGPA Annual Conference, 2010, <<http://egpa2010.com/documents/PSG10/Kovac.pdf>> (last visited December 2012).

10 M.D. McCubbins et al., 'Administrative procedures as Instrument of Political Control', in C. Coglianese & R.A. Kagan (eds.), *Regulation and Regulatory Processes*, 2007, p. 13.

11 H.P. Nehl, *Principles of Administrative Procedure in EC Law*, 1999, pp. 70-100; cf. Ziller, *supra* note 4, p. 261.

12 McCubbins et al., *supra* note 10, p. 19.

In the light of good governance, the regulation of administrative procedure law in Slovenia aims at the restriction of absolutist power despite a frequently unfavourable balance between democracy and rationality.<sup>13</sup> Such a balance is particularly important when it concerns relations under administrative law where the changing role of the state leads to changes in the role of the administration, the latter no longer being the sole bearer of power, as also the Government needs to ensure that the administration of public affairs is run through partnerships and networks of social subsystems, such as the economy and civil society.<sup>14</sup> This directly applies (also) in law and administrative relations, since a key element of good governance is good administration, comprising classic procedural entitlements or the rights of defence in relations with or even directly towards the party. The right to good administration is provided by Article 41 of the European Charter of Fundamental Rights.<sup>15</sup> In the Slovene legal system the notion of good administration as such is not specifically defined although it is directly applicable based on the European Charter of Fundamental Rights and individual provisions of the Constitution and GAPA.<sup>16</sup> The purpose of the right to good administration (and good governance) is to guarantee every natural and legal person impartial, fair, and reasonably prompt decision-making regarding their case. Of particular importance in this respect is the European *Code of Good Administrative Behaviour*,<sup>17</sup> adopted by the European Ombudsman in 2001 and revised in 2005.

Therefore, there is a need for a trade-off between efficiency and fair results in all administrative procedures. In this regard, theory has developed the issue of contestability.<sup>18</sup> Despite the latter, the efficiency of public administration is only legitimate if it implies justice and legality; legitimacy is in fact based on the rationality and legality of authoritative administrative acts.<sup>19</sup> The fact that private interests are taken into account in public decision-making contributes to better decision-making since information is obtained and conflicts are resolved in advance and the decision (even if unfavourable) is more readily accepted by the parties. Consensual resolution of conflicts of interest in administrative matters is indeed a value-added component in the overall concept of good governance. This context leads to the so-called third generation of administrative procedures<sup>20</sup> which – considering the traditional and defence-oriented issuance of general and individual administrative acts – focuses on creative partnerships among social groups and thus on the greater legitimacy of public policies or authoritative acts. It is therefore imperative to ensure all legitimate participants in (administrative) proceedings the possibility to truly participate. This enables a catharsis of their interests irrespective of the subject-matter, as well as a greater degree of acceptance of the decision by the parties, irrespective of the supremacy of one over the other. Eventually, it leads to comprehensive actions in the sense of the rule of law. Procedural guarantees, particularly the right to be heard and consensual dispute resolution, are the main reasons for understanding such procedures in their function of integrating the public, private, and third sectors in the concretisation of the general good.<sup>21</sup> The appeal system is of special importance to ensuring good administration since it enables rapid and effective adjudication internally within the public administration itself with no need to burden the courts.

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13 Cf. Venice Commission (European Commission for Democracy through Law), *Stocktaking on the Notions of "Good Governance" and "Good Administration"* (Study no. 470/2008, CDL-AD(2001)009), 2011, <[http://www.venice.coe.int/docs/2011/CDL-AD\(2011\)009-e.pdf](http://www.venice.coe.int/docs/2011/CDL-AD(2011)009-e.pdf)> (last visited December 2012), p. 15.

14 Cf. G.F. Schuppert, 'Chapter 18: Partnerships', in M. Bevir (ed.), *The SAGE Handbook of Governance*, 2011, pp. 287-298.

15 OJ C 83/337, 30 March 2010.

16 Good administration is regulated even at the constitutional or legislative level in, for example, Finland, the Netherlands, and Latvia (Statskontoret, supra note 3, p. 15). See also *Recommendation CM/Rec(2007)7 of 20 June 2007 on good administration* issued by the Council of Europe and containing a section devoted to appeals against administrative decisions and compensation. 'Good' is not only what is lawful but also what may not be improper – as opposed to illegal conduct or maladministration (Nehl, supra note 11, pp. 19, 39, Bevir, supra note 14, p. 374, P. Langbroek & M. Remac, 'Ombudsman's Assessments of Public Administration Conduct: Between Legal and Good Administration Norms', 2011/2012*The NISPAcee journal of public administration and policy*, no. 2, pp. 153-182).

17 Cf. Hopkins, supra note 8, p. 723.

18 Harlow & Rawlings, supra note 3, p. 502.

19 McCubbins et al., supra note 10, p. 3.

20 Barnes, supra note 1, p. 337.

21 Schuppert 2000, supra note 1, pp. 810-813; Statskontoret, supra note 3, pp. 35-37.

### 3. The Slovene administrative appeal system through the lens of good administration

#### 3.1. *The administrative appeal in Slovenia within the constitutional and European framework*

A legal remedy in the Slovene administrative appeal system is a specific procedural action that initiates, before the competent body, the procedure to review and establish the compliance of a specific administrative act with an abstract legal norm. This involves, in particular, the right to a defence of the parties in a procedure.<sup>22</sup> Pursuant to Articles 25, 157, and 158 of the Slovene Constitution, the legal remedies provided by law (the GAPA or a sector-specific law), the administrative appeal and court remedies are the only way to modify, annul *ab initio*, or annul an administrative act. They are primarily an instrument for ensuring the legality of such acts. The appeal is the only legal remedy applied prior to the act becoming final, even though the Slovene GAPA recognises a further five extraordinary legal remedies. The right to administrative appeal is provided for by Article 13 of the GAPA, which operationalises the constitutional and international right to an effective remedy pursuant to Article 25 of the Slovene Constitution, Article 13 of the ECHR, Article 47 of the EU Charter of Fundamental Rights, and Council of Europe Recommendation Rec (2004)6 of the Committee of Ministers to Member States on the improvement of domestic remedies (12 May 2004). The latter leads to convergence on the European level.<sup>23</sup> It highlights the importance of the effectiveness of legal provisions in practice; hence a legal remedy must enable the elimination of the infringement stated by the party.

Thus, the effectiveness of legal remedies is part of the principle of the rule of law (Article 2 of the Slovene Constitution) and is directly related to equality before the law, the protection of personality and human dignity, the equal protection of rights, the right to judicial protection, legality, an administrative dispute, and finality. The constitutional arrangement allows an exception, namely the exclusion of appeals based on a sound reason, which is aimed at distinguishing a specific administrative area from the general rule.<sup>24</sup> Similarly, it is an expression of the right to be heard and of the protection of legal interests and legality. Especially the non-suspensiveness of a legal remedy is incompatible with the requirement of the effectiveness of a remedy, as derived from the provisions of the Constitutional Court in cases U-I-297/95 and U-I- 339/98. The exclusion of the suspensory effect of an appeal must be reasonably grounded otherwise it implies a violation of the equal protection of parties' rights (Article 22 of the Slovene Constitution).

#### 3.2. *The characteristics of an administrative appeal in Slovenia*

In Slovenia, an administrative appeal is a mandatory (i.e. before court action can be taken), always devolutionary, and in principle suspensory remedy. The GAPA furthermore lists seven procedural errors (*errores in procedendo*) which are considered to be severe violations infringing upon formal legality (Article 237(2) of the GAPA).<sup>25</sup> These can be classed into three groups: (1) issues relating to unlawfulness (illegality) linked to the administrative body (jurisdiction, the impartiality of officials), (2) issues relating to the party (legal interest, proper representation, the right to be heard, communication in an official language), and (3) issues relating to the administrative act as a prescribed form (such as the fact that it must be in writing and contain the prescribed elements).<sup>26</sup> However, not every procedural error guarantees the appellant success – the appeal is rejected if the error is not significant. This applies even in the event of incorrect reasoning, if the operative part is correct. The principle applied is *in dubio pro actione*,<sup>27</sup> i.e. the contested administrative act is confirmed if violations are non-essential, which is an expression of

22 L. Šturm (ed.), *Komentar Ustave Republike Slovenije [Commentary on the Constitution of the Republic of Slovenia]*, 2011, p. 393.

23 Cf. Rusch, supra note 1, p. 4; P. Willemsen et al. 'Effective adjudication in administrative proceedings', research proposal, in *32nd EGPA Annual Conference*, 2010, <<http://vkc.library.uu.nl/vkc/montaigne/research/Documents/Effective%20adjudication%20in%20administrative%20proceedings.pdf>> (last visited December 2012), p. 5; K.-P. Sommermann, 'Das Verwaltungsverfahrensgesetz im europaischen Kontext: eine rechtsvergleichende Bilanz', in H. Hill et al. (eds.), *35 Jahre Verealtungsverfahrensengesetz- Bilanz und Perspektiven*, 2011, p. 201.

24 Cf. Šturm, supra note 22, pp. 392-411; Heckmann, supra note 3, p. 45.

25 T. Jerovšek & P. Kovač, *Upravni postopek in upravni spor [Administrative Procedure and Administrative Dispute]*, 2010, p. 211; Androjna & Kerševan, supra note 5, p. 472.

26 But in Slovenia there is no systemic effort to increase the efficiency of procedures, such as the transfer of certain fair procedure safeguards regarding non-essential procedural errors in Germany in 1996 despite a possible breach of constitutional and EU safeguards (cf. M. Künnecke, *Tradition and Change in Administrative Law: an Anglo-German Comparison*, 2007, pp. 152, 167).

27 Cf. Rusch, supra note 1, p. 7; Kovač 2001/2012, supra note 2, p. 57.

legal certainty. An appeal or a court action on grounds of administrative silence can be invoked as well to overcome maladministration.<sup>28</sup> An appeal may be filed pursuant to the GAPA (Articles 222 and 255) also if the administrative body fails to act, i.e. if the act concerning the party's request has not been issued within the prescribed time limit. A failure to act means that the competent administrative body does not issue an administrative act within two months, unless a shorter or longer deadline is provided by sectoral law. Thereby, the law defines failure to act as a fictitious negative act granting the right of appeal. According to the ADA (Article 28/3), in force since 2007, also a failure to act in an appeal procedure may constitute grounds for an appeal in an administrative dispute or even a special appeal if within three years from the start of the administrative procedure a decision on the merits has not been concluded (referring to the right to a decision within a reasonable time as enshrined in Article 6 of the ECHR). This prevents a 'yo-yo effect'.<sup>29</sup>

In the Slovene legal order, the appeal thus has a fourfold purpose. Firstly, due to its dispositive nature and devolutionary and suspensory effects, the appeal is an instrument of protection for the rights of the parties. Secondly, since the right of appeal is also guaranteed to representatives of the public interest (i.e. the state attorney), the appeal also protects legality. Pursuant to the GAPA, the *reformatio in peius* for the appellant is restricted, as it applies only in the event of reasons justifying certain extraordinary legal remedies or in the event of the most severe violations.<sup>30</sup> Thus, the appeal body may, in order to protect the public interest or the rights of third parties, interfere with the legal status of the appellant to the detriment of the first-instance administrative act, if particularly severe errors have been established in the procedure at first instance or in the issued act, as defined by the GAPA (Articles 274, 278, and 279). The appeal body *ex officio* examines – irrespective of the reason invoked by the appellant – only violations of substantive law and seven absolute, significant procedural errors (Article 247 of the GAPA). Thirdly, particularly with the appeal body's power to assess *ex officio* absolute and significant procedural errors and the misapplication of substantive law, the appeal aims at the coherence of the administrative system in a specific field and at the equality of the parties. But in Slovenia an appeal is never optional with regard to further court review as is the case in some other (EU) countries.<sup>31</sup> The Slovene appeal belongs to the group of hierarchical appeals or so-called objection procedures (*recours hiérarchique*, *Widerspruch*). Therefore an appeal is also a measure to reduce courts' workload and solve disputes by means of an out-of-court agreement between the administrative authority and the party.<sup>32</sup>

To sum up, the regulation of the (internal) administrative appeal in Slovenia by the Constitution, the GAPA, and the ADA is rather traditional and pursues primarily legality and rarely effectiveness. Such regulation is still (over-)detailed and lacks the stimulating elements of a modern participative and consensual definition of administrative relations. Developmental trends regarding the regulation of administrative procedures throughout the world indicate that greater flexibility in defining such relations is advisable although this also implies the greater accountability of those who adopt and implement them. Additionally, it appears necessary to update the existing court practices, which mainly focus on the inquisitive principle<sup>33</sup> and provide for greater discretion in the sense of evaluating the legality and suitability of administrative acts.

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28 Cf. Hopkins, *supra* note 8, p. 725; O. Jansen, *Comparative Inventory of Silencio Positivo*, 2008 (Institute of Constitutional and Administrative Law at Utrecht School of Law, Utrecht), p. 2.

29 Cf. Willemsen et al., *supra* note 23.

30 Androjna & Kerševan, *supra* note 5, p. 493.

31 Willemsen et al., *supra* note 23.

32 Since the 1980s, such an objective has been highlighted particularly in the countries where courts have a greater caseload than (hitherto) in Slovenia. Cf. Council of Europe, Committee of Ministers, *Recommendation No. R (81) 7 on measures facilitating access to justice; Recommendation No. R (86) 12 concerning measures to prevent and reduce the excessive workload in the courts*. But some authors (e.g. Harlow & Rawlings, *supra* note 3, p. 391) argue that the mere reduction of the burden of the competent bodies is not a sufficient reason for alternative dispute resolution, although this applies throughout the world.

33 Cf. Künnecke, *supra* note 26, pp. 46, 149; Rose-Ackerman & Lindseth, *supra* note 1, p. 345.

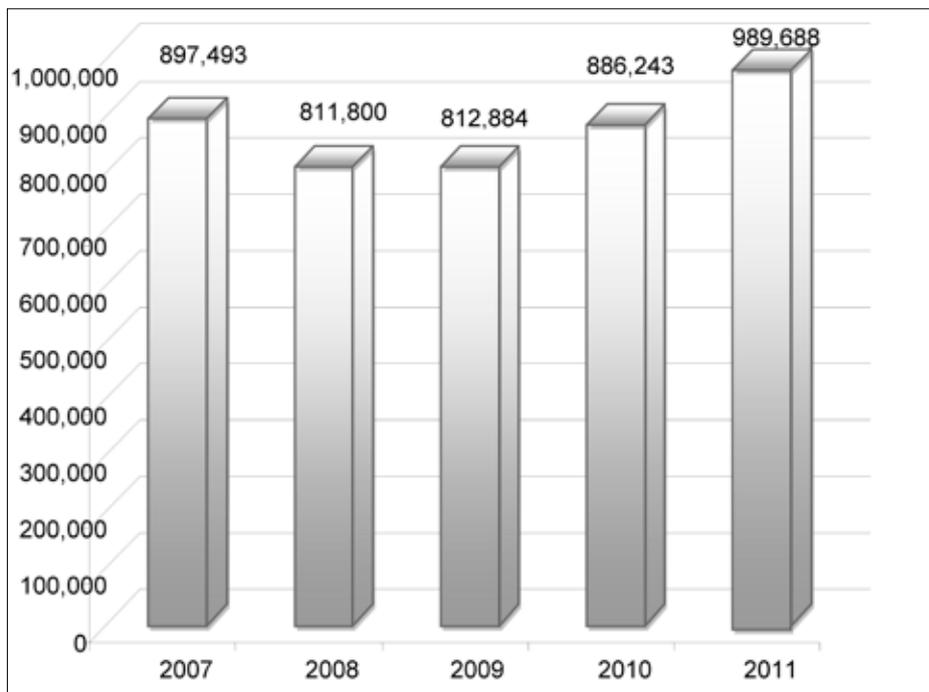
#### 4. An empirical study of the effectiveness of adjudication in administrative appeals in Slovenia

An empirical study was designed and carried out in order to evaluate the administrative appeal regulatory system in terms of its effect on Slovene administrative and judicial praxis. Several combined research methods were used in order to compare the objective statistical reports from field ministries, individual administrative authorities, and courts from the 2007-2011 period to the rather subjective public opinion polls and a survey carried out in 2012 of the opinions and experiences of officials in ministries, administrative units, and urban municipalities (forty respondents, entailing a response rate of approximately 33%).

##### 4.1. Administrative appeals and court actions in general administrative unit matters

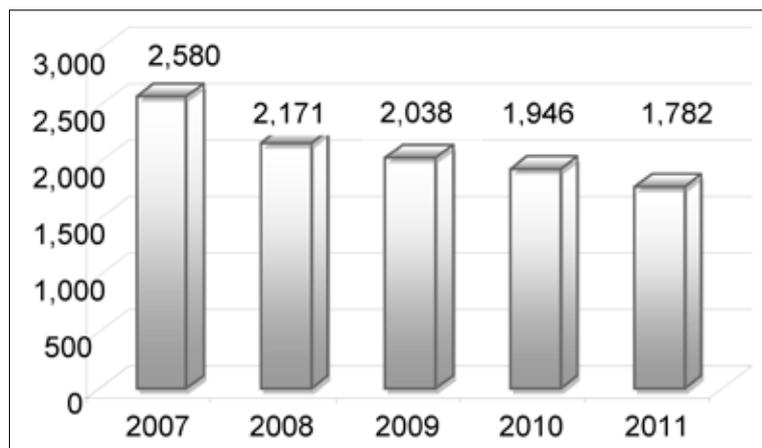
One of the basic problems in estimating the workload and effectiveness of administrative bodies is the categorisation of procedures, which is rather inconsistent in Slovene administration. Despite such restrictions, the data on particular administrative units which keep the most consistent records and monitor annual trends nevertheless serve for an analysis and evaluation of the effectiveness of administrative procedures in general as well as of appeals. The general administrative units are local administrative bodies that cover approximately 100 of the most typical administrative procedures (building permits, agricultural licences, visas, social benefits, access to information of a public nature, etc., but not including inspections and taxes). There are 58 administrative units (AU) in Slovenia, employing approximately 3,000 officials. The data presented in the diagrams below show the state of the art and trends as regards the effectiveness of adjudication in administrative matters in these fields in the last five years. There were between 812,000 and 990,000 cases conducted annually from 2007 to 2011, with 1,782 appeals filed in 2011 and 2,580 in 2007.

Diagram 1 Administrative acts issued by administrative units 2007-2011



Despite an increasing number of cases, the number of appeals has decreased, amounting in total to only 0.2% per million cases solved (from 0.18% in 2011 to 0.39 in 2007). Appeals filed are on average rejected due to formal irregularities in about 6% of cases. The AUs themselves solve approximately 10-12% of cases.

Diagram 2 Administrative appeals filed against the acts of administrative units 2007-2011



The respective ministries grant an appeal on average in merely 20% of cases. In approximately 20% of the denied appeals parties decide to pursue further court action. In such a context, most of the respondents from the mentioned administrative authorities in the 2012 survey evaluated the situation as stable over recent years, even though some note the decrease in appeals despite a higher degree of clients' awareness of their rights as well as less satisfaction in society. One of the most interesting statements in this regard was 'better more work prior to issuing an act and less on appeals'. But a more detailed analysis according to the administrative area reveals that the situation is not fully uniform. In the field of internal affairs, for instance, where the largest number of administrative acts is issued (up to 90%); the level of appeals is below average. On the contrary, the highest number of appeals is in the field of construction and spatial planning (e.g. 3.2% in 2010, which is far above the average of 0.2%). A higher rate of appeals and court actions filed and granted is observed in areas where regulations are more numerous and are amended more frequently, such as construction (e.g. the 36-50% of successful court actions from 2007-2011 is a consequence of the non-uniform use of substantive regulations). Within the concept of good administration, the 2012 survey also dealt with the understanding of the appeal as an opportunity for improvement. The latter was stated by all respondents, although some of them believe that the appeal is primarily a criticism with regard to another body. To conclude, the number of appeals and court actions seems to depend more on the awareness of the right to legal remedies than on mistrust in the administration.<sup>34</sup> Favourable ratings especially in AUs were given for a friendly and client-oriented attitude and the speed of work, while the most frequent reasons for dissatisfaction on the part of both clients and officials are unclear regulations (and their frequent amendments that complicate instead of simplifying) and delays due to, for example, the mass replacement of documents or defects in the central information system.

#### 4.2. Appeals and court actions regarding building permits

Given the evident collision of interests and several parties with opposing interests involved in such procedures, as well as limitations regarding space as a constitutionally protected good, and the complex legislation, construction issues are amongst the most complicated topics of administrative procedures.<sup>35</sup> This area traditionally records the largest share of appeals and court actions as well (in addition to 6% of building permits being challenged annually, an additional 8% of all building inspection acts are

34 According to public opinion polls (i.e. the 2007-2011 'Politbarometer' surveys carried out with regard to the Slovene national system; *Politbarometer, Public Opinion and Mass Communications Research Centre reports 2007-2011*, <[http://www.cjm.si/sites/cjm.si/files/file/raziskava\\_pb/](http://www.cjm.si/sites/cjm.si/files/file/raziskava_pb/)> (last visited December 2012)), a relatively low number of people trust the state administration (only 6 out of 24 institutions have a lower rating). Additionally, trust in general in Slovenia has recorded a downward trend over recent years. Considering the control data on client satisfaction in the annual surveys in AUs, as well as the perceptions of the officials involved in the mentioned survey (2012), such an outcome is not a coincidence or a lump non-objective judgement. The ratings of administrative units namely range around 4.5 out of 5 and have been increasing over the years, reaching 4.8 in 2011.

35 B. Gruden, *Procesna pravilnost izdaje gradbenih dovoljenj [Procedural correctness of the issue of building permits]*, 2011 (master thesis, Faculty of Administration, Ljubljana).

brought before the court). It is an interesting sector also in terms of Directive 2006/123/EC<sup>36</sup> since the effectiveness of decisions is particularly important for investors. The main sector-specific law in Slovenia is the Construction Act (*Zakon o graditvi objektov*, 2002), which provides for a few special procedural rules departing from the provisions of the GAPA, e.g. shorter appeal deadlines (8 days).

The body competent to issue building permits is the AU as a local office of the state Government. Another specific feature of the legislation concerning construction issues is the right of the investor to start construction only after the building permit has become final, which means that actual construction work can only begin upon a completed appeal procedure and upon a completed administrative court dispute. The latter lasts at least approximately nine months – thus, the duration of procedures is a major issue in Slovenia.<sup>37</sup> Likewise, the parties are more often caught between levels of decision-making (the yo-yo effect), since in this field over 43% of appeals in recent years have been granted, compared to approximately 20% in general, and even 68% of these cases are not decided by the ministries as appellate bodies but merely returned to AUs for a new procedure. Nevertheless, the overall data (see Table 1) proves that the appeal in this area is an effective adjudication tool.

*Table 1 Procedures in spatial planning matters conducted by administrative units*

Year	2007	2008	2009	2010	2011
No. of all administrative acts related to the environment & spatial planning in AUs	29,290	No data	29,871	29,718	29,560
No. of building permits issued by AUs	11,991	13,486	14,970	No data	No data
No. of appeals	1,028	No data	1,050	950	884
% of appeals against all building permits	3.5	No data	3.5	3.2	3.0
% of appeals referred to the appellate ministry (not substituted by the AUs themselves)	70	No data	85	86	85
No. (and %) of appeals due to administrative silence	No data	No data	26 (3%)	9 (1%)	16 (2%)

Sources: the websites of the Slovene Ministries & Gruden, supra note 35

The share of appeals resolved by the administrative unit on its own is relatively high, as approximately 80% of appeals are referred to the appellant ministry. In appeal procedures, 38% of appeals were rejected and 43% granted. The overall shares of appeals denied and granted in all administrative areas is 60% and 20%, respectively, hence adjudication through appeal procedures in this field is rather more effective than on average. On average, it takes approximately 21 days for an administrative act (a permit) to be issued. It is interesting that AUs with higher caseloads demonstrate higher productivity per unit and employee in terms of the duration of procedures. Productivity seems to even grow with an increase in the number of appeals, perhaps also because of the necessary reorganisation and specialisation of tasks.<sup>38</sup> In general, it may be concluded that over the years the appeal has proven to be a very effective filter of court accessibility in construction issues, since 88% of disputes are already resolved in appeal procedures. Furthermore, in 67% of the cases the parties did not even file a court action although they were not successful with the appeal. When they did, they only had a slightly more than 10% chance of success. The share of appeals is larger than the administrative average, while the share of court actions is smaller, meaning that the appeal plays a role as a filter with regard to the burden on the court.

#### *4.3. The Administrative Inspectorate's findings on Slovene good administration or maladministration*

A similarly low level of illegality and other dysfunctionality as in AUs is noted by the Administrative Inspectorate regarding the public administration in Slovenia in general. The Administrative Inspectorate

<sup>36</sup> Cf. Jansen, supra note 28, pp. 4-13.

<sup>37</sup> According to the survey on procedures for the issuance of simple and complex building permits in 2008 and 2009, in 40 out of 58 administrative units (Gruden, supra note 35), the latter conducted around 12,000-15,000 procedures every year. This means that on average 13 employees of each administrative unit issued around 20 permits or negative administrative acts each. However, the workload related to the size of the administrative unit had no statistically relevant impact on the duration of procedures or rate of success of the appeal; this only affects the greater workload and effectiveness of officials in larger units (with as many as 70 procedures per official) compared with smaller units.

<sup>38</sup> Gruden, supra note 35.

has been operating since 2010 within the ministry which is competent for public administration.<sup>39</sup> Pursuant to Article 307 of the GAPA, the Administrative Inspectorate exercises control and has some classic inspection powers in individual control procedures but can only impose certain measures (like ordering an official to attend additional training if his conduct in procedures is found to be illegal or improper). The problems reported to the Administrative Inspectorate mainly refer to the long time it takes to issue an administrative act and a lack of response or action (approximately 15% of 600-1,000 reports per year), particularly in environmental and spatial planning issues, and lately – due to a broadening of competences in 2011 – the authorities’ avoidance of enabling parties to have access to public information (see Table 2).

Table 2 Share of issues reported to the Administrative Inspectorate by authority and action (in %)

Authority supervised / Year	2007	2008	2009	2010	2011
Ministries with executive agencies and governmental offices	45	46	44	50	43
Administrative units (local state units)	26	24	23	20	15
Municipal administrations	15	15	16	15	24
Bearers of public authority	14	15	17	15	18
<b>Type of action / No. of all actions</b>	<b>968</b>	<b>757</b>	<b>623</b>	<b>767</b>	<b>1218</b>
Reply (only) by letter	668	498	363	540	598
Referral to other body	153	107	73	49	51
Official note or record with recommendations	147	152	187	178	569

In most cases, however, the Administrative Inspectorate only forwards its findings and recommendations to the head of the inspected body and delivers annual reports to the Government. The latter should provide for horizontal measures, which in Slovenia, unfortunately, are not implemented in a manner that uses the report of the Administrative Inspectorate as a basis for regulatory feedback and reorganisation.

#### 4.4. Trends in the administrative dispute such as the judicial review of administrative acts in Slovenia

In terms of *ex post* administrative court disputes, the data relevant to an assessment of the effectiveness of appeals are provided by the court statistics of the Administrative and Supreme Courts of Slovenia. Every year, on average, 3,800 appeals are filed in relation to administrative matters. Namely, one has to note that the occurrence of court actions varies significantly per individual administrative area. In the construction area, as a classic field of dispute, the rate of court action against administrative appeal acts is 6%, while in tax matters it is as much as 12%. When measuring the effectiveness of adjudication within appeal procedures in terms of the burden on the court or the prevention thereof, it has to be concluded that the system in Slovenia functions satisfactorily, as the mandatory appeal has reduced court caseload substantially, as is evident from the data in Table 3.

Table 3 The scope and duration of administrative court actions against administrative appeal acts

Year	Court actions	Cases solved	Solved in 3 or between 3-12 months (% of all)	Actions rejected (%)	Actions denied (%)
2007	4,154	4,644	18 27	15	60
2008	4,299	4,931	20 27	12	60
2009	3,607	4,835	21 32	12	54
2010	3,339	4,096	24 38	9	56
2011	3,635	3,519	33 41	11	58
Annual average	3,807	4,405	23 33 (56% resolved in 1 year)	12	58 (22% granted)

39 Jerovšek & Kovač, supra note 25, p. 246.

In defining court accessibility at the same time, attention was paid to the duration of procedures. Evident progress has been made in eliminating backlogs thanks to the efforts of all actors in the judicial administration, resulting in the number of cases solved exceeding the number of court actions filed and in an evident decrease in the duration of procedures and the share of cases with a delay. More than half of cases are solved in less than a year, revealing a constant acceleration in resolving cases with the same staffing structure, namely slightly more than 30 judges in the entire country. In the past five years, a quarter of cases were resolved in less than three months, in 2011 a third; the procedure lasted more than two years in only 7% of cases on average in the five-year period and only 1% in 2011. The average duration of the cases in 2011 was 9 months. Furthermore, the effectiveness of appeals does not depend on the type or status of the appellant, i.e. whether it is a state body or a private party and whether the party is represented by a qualified representative or an attorney. The latter is only reflected in the formal completeness of the complaint, which statistically is rather irrelevant and has little impact on the success of the appeal.<sup>40</sup>

Yet despite the above differences and deviations, data reveal that especially general administrative units interpret the substantive law as does the hierarchically higher ministry and Administrative Court, which leads to a high level of legality and unity within the Slovene administrative-justice system. In general, all administrative procedures in Slovenia are represented by the following shares:

- 0.2-5% of administrative appeals are lodged against administrative acts (especially in individual areas with several opposing interests and frequently amended regulation);
- 20% of appeals are granted; about half of them returned for renewed procedures;
- 20% of appeals are dismissed owing to formal deficiencies and approximately 60% are rejected and 20% denied; court actions are initiated against 20-30% of rejected appeals.

It may be concluded that these ratios are more or less adequate and meet expectations since there are few appeals and most of them (60-80%) are rejected since the bodies at the first instance comply with the general and specific instructions of appellate bodies. The share of appeals denied (for being filed too late) is also as expected. These estimates are further confirmed by the share of court actions filed in approximately 3,000-4,000 cases, i.e. in 20% of the cases where the appeal was rejected, although the situation is less favourable in administrative areas with more disputable interests. Another indicator of the stability of the situation is the reason for success with a court action. Disputes of full jurisdiction, e.g. in the event of the administrative silence of an appeal body or a violation of constitutional rights, are very rare, accounting for only 0.1-0.3% (5-12) of all cases. But more significantly – every year more than a third of administrative acts challenged before the court are annulled *ab initio* on grounds of substantive reasons, less than a third on grounds of a wrongly established actual state of affairs, and an unexpectedly low third of all court actions on grounds of procedural errors by administrative bodies.

The administrative appeal in Slovenia as a procedural precondition for judicial protection thus plays its role in most of the cases as it forces the control (appeal) bodies to carry out legal and uniform actions. For this reason, it may well be considered an effective tool for balancing public and private interests and an admissible filter of accessibility to the court according to the ECHR. Likewise, the usual suspensiveness does not seem to affect the protection of public and private interests. Given the systemic rules that bind the administration to act as an instrumental executor of prescribed norms (detailed regulation, no *exceptio illegalis* or mediation, possible *reformatio in peius* when a legal interest is jeopardised, etc.),

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40 Cf. L.M. Veny et al. 'Red tape, lawyers and the burden of proof: legal speed dumps on the road to effective adjudication?', in *33rd EGPA Annual Conference*, 2011, <<http://egpa-conference2011.org/documents/PSG10/Veny-Carlens-Verbeeck.pdf>> (last visited March 2013), p. 17, on the significant and empirically confirmed although not linear connection of the attorney with the formal completeness of the application; and D. Dragos, 'Effectiveness of Administrative Appeals – A Comparative Perspective and the Case of Romania', material for Erasmus lecture (Faculty of Administration, Ljubljana), 2011, who reports a higher rate of success for appeals lodged by the prefect in Romania. According to the survey of administrative bodies in Slovenia (2012), respondents noted that 'an appeal might be more successful if the party is represented by an attorney', due to a better knowledge of the field legislation and procedural rules (deadlines, the required elements of the application, etc.). On the other hand, one respondent even stated that: 'Attorneys have no interest in closing the case early. Thus, filing appeals by the parties themselves normally reduced the duration of procedures and led to a more rapid closure of the case than if attorneys were involved.'

it may be assessed that for Slovenia it is traditionally and *de lege ferenda* wiser to retain the existing regulation. Nevertheless, in some parts of the system with more interests to adjudicate it would be wise to consider other tools – like mediation or non-devolutionary objection. The latter is to be exceeded by means of ethical tools if the Slovene administration is to pursue good governance.

## 5. Conclusions

Administrative procedures are a multifaceted tool for ensuring balance between the rights of parties (which are provided by the Constitution and protected under substantive law) in their relations with the authorities, and effective implementation of public policies. In order to guarantee good administration, the protection of legally relevant interests, both private and public, in administrative procedures and in general should be as effective as possible. In this respect, it is necessary to consider the effectiveness of appeals in administrative matters. Pursuant to Slovene legislation, an appeal is, as a general rule, admissible and suspensory if not excluded, and given the suspensory effect of sector-specific law, always devolutionary, which makes it an effective legal remedy also according to empirical analysis within general administrative units and regarding building permits, as shown in this study. On average, a few million administrative acts are issued in Slovenia at first instance, e.g. one million by administrative units, with an overall appeal rate of only 1-3%, even in the most disputed segments. The rate of success is about 20%; about 4,000 unsuccessful appellants decide to bring their case further to court but only a fifth succeed with the court action. Based on this analysis, Slovenia can serve as an example of a system with an administrative appeal which is mandatory before lodging a court action, since in this manner the parties have the opportunity to settle the contested act by means of dialogue with the issuing or hierarchical public authority.

However, a (mandatory) appeal should not be understood in a narrow sense and intended only to prevent the courts from having an excessive workload. The appeal – as in the case of Slovenia following the Austrian model – should serve as a procedural precondition for court reviews or as an alternative together with mediation and other procedures for adjudicating and resolving a dispute between the parties to the case.<sup>41</sup> Merely old patterns of administrative conduct, considering the radical social changes, no longer suffice. Therefore, consideration needs to be given to in which administrative areas and to what extent traditional principles and rules of administrative procedures should be preserved or modified. A key change that has been observed throughout Europe is at least a partial redirection from mere authoritative decision-making to consensual dispute resolution. In appeal procedures the latter means more discretion, additional remedies, and ethical guidelines given to authorities to resolve a collision of interests by means of amicable administrative contracts. There are numerous opportunities for further development, yet a systemic approach is needed with long-term measures involving the administrative system as a whole. ¶

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41 Cf. Pitschas & Walther, *supra* note 6.