THE NISPACEE JOURNAL OF PUBLIC ADMINISTRATION AND POLICY, VOL. XV, NO. 1, SUMMER 2022

10.2478/nispa-2022-0003

Effectiveness of Administrative Appeal in Slovenia and Croatia – Between National Traditions and EU Standards

Polonca Kovač[1], *Urška Ribič*[1]

Abstract

The administrative appeal is a multifunctional legal remedy whose purpose is to protect the rights of the parties vis-à-vis the authorities and provide – through a generalisation of cases – a regulatory feedback loop leading to better sector-specific regulations. The administrative appeal is thus a constitutional guarantee of democratic governance, as well as a mechanism of good administration and effective public policies, as long as it is implemented in line with the purpose of regulation. To examine the theoretical and regulatory objectives of the administrative appeal in Slovenia and Croatia and test its compliance with EU trends, a comparative analysis of the key provisions of the systemic laws on the general administrative procedure (APAs) was carried out. In such context, specific effectiveness criteria were developed, focusing on the admissibility, devolution and suspensiveness of the administrative appeal, as well as on the duration of the administrative appeal procedure. The achievement of the regulatory objectives of the APAs in both countries was further examined through interviews with experts in administrative procedural law and, for Slovenia, through an analysis of administrative case law. The findings suggest that the most challenging issues are the (non-)suspensiveness of the appeal and the duration of procedure. Hence, the administrative appeal may well be a fairly suitable safeguard of the constitutional rights of the parties in individual cases, but on a systemic level, its potential for good administration is not fully exploited. This instrument should therefore be further developed, e.g., through a

1 University of Ljubljana, Faculty of Public Administration, Ljubljana, Slovenia.

Open Access. © 2022 Polonca Kovač, Urška Ribič, published by Sciendo.

This work is licensed under the Creative Commons Attribution-NonCommercial-NoDerivatives 4.0 License.

mutatis mutandis application of the APA in all administrative acts and an even more consistent application in the most disputable administrative procedures, particularly in terms of the suspension of enforcement pending administrative finality and the still reasonably long procedures.

The key points for practitioners are:

- The administrative appeal has various functions, such as protecting international and constitutional safeguards of the parties to the procedure and ensuring a coherent administrative-legal system;
- In the EU, procedural issues in individual Member States can largely be regulated autonomously; however, there are certain characteristics necessary to define the appeal as an effective tool;
- Slovenia and Croatia regulate the administrative procedure in a rather similar way, yet there are some crucial differences in effectiveness of the administrative appeal both in law and, particularly, in practice;
- Experts, especially from the CEE region, can learn about the gap between theory and practice in the selected countries, which enables them to compare other similar national systems in line with the EU standards.

Keywords:
administrative procedure, administrative appeal, effectiveness, theory v case law, Slovenia, Croatia, EU

Acknowledgement

The authors acknowledge the financial support from the Slovenian Research Agency, research core funding no. P5-0093, programme "The Development of an Efficient and Effective Public Administration System in Slovenia and the EU."

1. Introduction

Legal remedies are fundamental mechanisms for the protection of the rights of the parties in (administrative) legal procedures and are particularly relevant in administrative relations where rights are granted to and obligations imposed on natural and legal persons with an overriding public interest (more in Avbelj, 2019; Auby, 2014). As the heterogeneity and scope of administrative relations grow over time, a particular emphasis is placed on the trade-off between the public interest and the rights or legal interests of individual persons in the position of/towards a party (Hofmann et al., 2014; Dragos & Neamtu, 2014; Rose-Ackerman & Lindseth, 2010).

Therefore, any instrument pertaining to the rights of defence of the parties vis-à-vis the authorities – which indeed include administrative appeals against first-instance decisions – is relevant for constitutional democracy. The rule of law is seen in limiting the power of the state, government institutions and officials in relation to citizens and other entities and in ensuring that such authoritative decisions are legally justified. It is therefore a matter of limiting power so that superiority is not abused, while at the same time enabling citizens and businesses to operate under the same conditions (Galetta et al., 2015; Trondal & Peters, 2013). This contsext is specifically relevant for the new democracies, such as the Eastern European countries (Janderová, 2019; Ropret et al., 2018, p. 131).

The appeal is a fundamental remedy that is usually defined by three complementary objectives. First, in terms of admissibility and dispositive, devolutive and suspensive effects, the appeal is an instrument for the protection of the rights of the parties. Second, since the right of appeal also pertains to the guardians of the public interest, the appeal also protects the legality, which is further confirmed by the administrative authority's power to reverse a decision to the detriment of the appellant, as there is no prohibition of *reformatio in peius*. Third, the appeal also seeks to ensure the coherence of the administrative system in a given area and the equality of the parties before the law, which is mainly achieved through the appellate body's power to assess *ex officio* any absolute procedural errors and misapplications of substantive law. Moreover, the administrative appeal also serves other functions – for example, the feedback obtained in appeal procedures concerning the (non-)implementation of substantive law eventually leads to better regulations. This, however, raises the question of when an administrative appeal, or any other mechanism for that matter, is deemed effective in the sense of drafting regulations that give effect to constitutional guarantees and implementing such (Avbelj, 2019). The true purpose of legal instruments, in general, is indeed their effectiveness, which is achieved when legality is ensured and arbitrariness and maladministration are prevented. Legal instruments are deemed effective when they turn the objectives of the norms into practice, which in the case of remedies means being used in accordance with the purpose of the regulation, to the extent intended, etc. The effectiveness of a remedy is one of the fundamental principles of European and constitutional law and a key component of the rule of law. In such context, the effectiveness of a legal instrument is achieved – according to Weber's theory – when, in practice, the letter of the law is implemented as planned at the time of its regulation (Godec, 1993; Pusić, 1989; Schuppert, 2000; Kovač, 2013).

The article analyses the administrative appeal and its specifics in two selected countries – the Republic of Slovenia and the Republic of Croatia, which share similar legal systems and a common past (Koprić et al., 2016; Đanić Čeko & Kovač, 2020). For several centuries, these two countries had been under the same governing entities, evolving under the influence of the Austro-Hungarian administrative procedural law, the Yugoslav era of socialism and its General Administrative Procedure Act (1956), the process of independence (1991) and the adoption of national constitutions, and the

full integration into the European Union (Slovenia in 2004 and Croatia in 2013). In both countries and their respective administrative traditions, administrative systems rely on codified and detailed administrative procedures, with the public administration enforcing the constitutional guarantees and legal rules, which brings the administration quite close to the judiciary (Schuppert, 2000; Koprić & Đulabić, 2009). In addition, Slovenia and Croatia are both small countries with 2.08 million and 4.07 million inhabitants, respectively. The Slovenian and Croatian (administrative) legal systems are thus easily comparable, particularly as regards the relevant constitutional provisions (Article 25 of the Slovenian Constitution and Article 18 in the Croatian Constitution) and the APAs. This analogy is valid, although the Slovenian APA has been in force since 1999, while the Croatian APA was modernised in 2009[2]

The central research question focuses on how administrative appeals are regulated and implemented in the legislation of the two selected countries in terms of effectiveness and compliance with EU trends. The research aims to examine and improve the regulatory framework of administrative appeals considering the given effectiveness criteria. Its purpose is to provide the theoretical and practical bases to propose improvements and thus make Slovenian and Croatian regulation and administrative case law (more) consistent with the development trends of administrative procedural law in the EU; however, these national laws are left to the discretion of the Member States. For a thorough analysis and study of the constitutional significance of the administrative appeal, the following two research questions were formulated:

Q1: Shall the provisions of the APAs in Slovenia and Croatia primarily consider the administrative appeal as a constitutional category of defence of the parties vis-à-vis the authorities?

Q2: Do experts' assessments and administrative case law confirm the effectiveness of the administrative appeal in terms of the admissibility, devolution, and suspensiveness and duration of procedures?

The structure of the article is as follows: the introduction is followed by a section setting out the theoretical and normative framework of the administrative appeal as the sole or main ordinary remedy in administrative matters. The third section describes the methodology used in the research to test the effectiveness of administrative appeals in Slovenia and Croatia and is followed by the presentation of the results of empirical analyses of the expert interviews and selected case law, examining the two research questions posed above. The discussion is followed by a conclusion.

2 The Slovenian Zakon o splošnem upravnem postopku, Uradni list RS, No. 80/99ff; the Croatian Zakon o općem upravnom postopku, Narodne novine RH, No. 47/09ff.

2. Contextual Framework of Administrative Appeal and its Effectiveness

The administrative appeal or an effective remedy is a constitutional guarantee in many countries. This is particularly true for Slovenia and Croatia, given their Austrian Rechsstaat tradition (on the APA as lex generalis in the countries of the former Yugoslavia; Koprić, 2005; cf. Hofmann et al., 2014). The right to appeal is an important component of fundamental human rights. It is considered a fundamental and comprehensive remedy in almost every administrative procedure. Most European countries recognise the right to appeal against decisions of first-instance administrative authorities, and it is usually considered a rule in comparative law (Đanić Čeko & Kovač, 2020). In administrative matters, the right to a remedy is relevant in conjunction with other rights of defence in a fair procedure, as it counterbalances the primacy of the public interest and administrative authority with the rights and legal benefits of the party. The appeal – as an ordinary legal remedy – was defined as a constitutional guarantee in Slovenia and Croatia already in 1991 and 1990 (see Avbelj, 2019; Kovač & Kerševan, 2020; Koprić & Đulabić, 2009). It was later revised or refined for many administrative areas, mainly under the national APAs of 1999 (Slovenia) and 2009 (Croatia).

Legal remedies help to develop greater respect for the rights and freedoms of individuals and contribute to citizens' trust in the administration. In addition, administrative appeals also contribute to minimising litigation and reducing the workload of the courts and are therefore also consistently promoted by the Council of Europe. The right to an effective remedy is set out in Article 13 of the European Convention on Human Rights (ECHR) and Article 47 of the EU Charter of Fundamental Rights (EU Charter, Official Journal of the EU, No. C 83/389), yet a prior exhaustion of national remedies is mandatory for judicial protection at this level (Kilpatrick et al., 2000; Moldovan & Bucatariu, 2019; Sever et al., 2016; Dragos & Neamtu, 2014). The effectiveness of a remedy is relevant also according to the CJEU[3] case law, which advocates such legal (judicial, as well as administrative) protection that not only provides a more or less *pro forma defence*, but also properly protects the party in a particular legal situation. In this respect, Article 13 ECHR explicitly emphasises the effectiveness of legal protection already at the national level. This is also highlighted by ECtHR jurisprudence, both as regards the rights to good administration and as regards remedies or their effectiveness. According to ECtHR case law, the

3 As quoted by Galetta et al. (2015, p. 18): "*The right is enshrined in Art. 47 of the Charter, in Art. 6 and 13 ECHR and recognised as a general principle of EU law is a key component to a legal system under the rule of law. According to this principle, neither the EU nor MS can render virtually impossible or excessively difficult the exercise of rights conferred by EU law, are obliged to guarantee real and effective judicial protection (C14/83) and are barred from applying any rule or applying any procedure which might prevent, even temporarily, EU rules from having full force and effect (C-213/89)*."

administrative appeal is important in terms of (un)reasonable time for a decision, as the duration of the procedure is counted from the time the administrative appeal is filed, for example the rights of defence or the rights to good administration, such as to have access to one's file, to be heard, to be given the reasons for decision with an indication of available remedies, to have one's case decided within a reasonable time, to have access to the court.[4] Among the more recent cases – and in terms of effectiveness of the appeal compared to judicial protection – the Puškar case, C-73/16, 27.9.2017, is noteworthy. In this case the CJEU pointed out that conditioning a decision with the prior exhaustion of the available remedies before national administrative authorities must be such that the specific rules for claiming those remedies do not disproportionately affect the right to an effective remedy before a court. It is effective if it does not cause a substantial delay, suspends the limitation period or the enforcement of rights or obligations, and does not entail excessive costs.

In the administrative sphere, sector-specific laws often provide for limited remedies, primarily because their purpose is to provide for the effective implementation of public policies. By doing so, a prompt enforcement of disputable administrative acts can be ensured. The use of remedies is also limited under the APA, as their excessive use might cover up (possible) maladministration. Unrestricted use of remedies could lead to irresponsible decision-making by the authorities, thereby undermining citizens' trust in the rule of law. Legal remedies are an indispensable part of every country's legal system. They make it possible to eliminate errors in the work of public authorities caused by the negligence or wilful misconduct of public officials or parties to a procedure. In many cases, the quality of the work of public authorities has been preserved thanks to a well-designed and elaborate system of legal remedies which, in addition to its normative design, largely depends on the knowledge and experience of the public employees whom it serves. In a narrower sense, the appeal is seen as an expression of dissatisfaction with the outcome of an administrative procedure, with the process of preparing or delivering administrative services, and with the direct attitude towards the parties. In the administrative procedure, and more broadly in the context of administrative governance as a whole, the instrument of appeal should thus be seen as a form of constructive criticism, helping the public administration keep pace with social change. The appeals concerning its services or parties to the procedure allow the public administration to continuously learn and, as a learning organisation, incorporate its findings into future practice (Gruden et al., 2008). Moreover, as the right of appeal also pertains to the guardians of the public interest, such as the state prosecutor and the state attorney, the right of appeal also

4 See Yukos v Russia, 14902/04, 20.9.2011 and Jussila v Finland, 73053/01, 23.11.2006, Wurzer v Austria, 5335/07, 6.3.2012. On procedural prerequisites, see Božić v Croatia, 22457/02, 29.6.2006, on the reasonable time for decision and independence of the tribunal, as well as on the right to be heard also at this stage see Zumtobel v Austria, 12235/86, 21.9.1993, Driza v Albania, 15.3.2011, Seidl et al. v Austria, 45322/08, 19.12.2013. As regards the duration of proceedings, see Stibilj v Slovenia, 1446/07, 5667/07, 6.10.2015, Štokalo et al. v Croatia, 15233/05, 16.10.2018.

protects legality. In parallel, the appeal seeks to ensure the coherence of the administrative system in a given area and the equality of the parties before the law (Koprić et al., 2016).

Thus, a public administration – as a guardian of the public interest – is effective if, in line with European standards, it counterbalances its objectives with the protection of the rights of the parties. The latter include the accessibility of the administration (in the case of remedies, through their admissibility and the party delimiting the subject matter of the proceedings), the speed of enforcement of the rights and legal benefits (suspensiveness and time limits), and the equality of the parties before the law (especially devolution; Dragos & Neamtu, 2014; Galetta et al., 2015). The administrative appeal should be relatively easily accessible, simple to understand and use, relatively quick with set time limits for action and keeping the parties informed of progress, comprehensive so as to address all relevant aspects of the problem and to ensure adequate redress. Finally, this remedy needs to be informative so as to provide the information necessary to improve the service (Kovač, 2013, p. 40; Moldovan & Bucatariu, 2019, p. 15). The appeal should not be interpreted only in a narrow sense or intended only to reduce the workload of the courts (as in Dragos & Neamtu, 2014). In Croatia and Slovenia alike, the appeal should serve as a procedural prerequisite for judicial review or as an alternative, together with mediation and other procedures, to adjudicate and resolve a dispute between the parties. In this respect, the regulation in the selected countries is rather traditional and primarily pursues the principle of legality rather than that of quality and good administration.

Comparatively speaking, the regulation of the administrative appeal in laws is still too fragmented and lacks the stimulating elements of a modern participatory and consensual definition of administrative relations. Looking at the provisions of the Slovenian APA, one finds that the appeal is directly regulated in Articles 13 and 229–259, so over thirty articles, while the Croatian APA regulates the appeal in Articles 12 and 105–121, i. e. still nearly twenty articles. These include a series of provisions on the powers of various bodies, participants in the appeal procedure, grounds for appeal, legal effects of the appeal, etc. (Kovač & Kerševan, 2020; Koprić & Đulabić, 2009). Furthermore, the question arises whether the solutions listed are optimal for the resolution of disputes or a balanced protection of the public interest and the parties involved. This is the case in particular concerning the sequential stages for adjudicating a dispute, first through an administrative appeal and then through a two-stage administrative dispute, which is the case in both Slovenia and Croatia, but not necessarily in other comparable countries. In Germany, for example, the possibility of an administrative appeal procedure before administrative bodies has been abolished, opening the way to administrative dispute as the most effective remedy. In Austria, a constitutional reform was carried out to establish and strengthen a multi-tier administrative judiciary to replace the appeal procedure before administrative authorities (Dragos & Neamtu, 2014). For this reason, some authors (e.g., Kerševan, 2016) find that, given Slovenia's small size and the characteristics of its administrative

system, the number of decision-making stages is still appropriate or already too high, as raising their number would only put a strain on the procedures without producing better results.

In addition, the Slovenian and Croatian APAs also provide for several other (extraordinary) remedies. Yet, unlimited remedies might lead to irresponsible decision-making, bringing the level of trust in the law (and in the state or the authorities) close to zero and thus undermining the rule of law. This is why, constitution-wise, finality takes precedence over legality, which is expressed in the temporal limitation of remedies. In this sense, a comparison with the envisaged EU APA, as adopted by the European Parliament in 2016 in the form of the Resolution for an open, efficient and independent EU administration (2016/2610(RSP); see Hofmann et al., 2014; Đanić Čeko & Kovač, 2020), shows that the trend moves towards more targeted regulation with fewer remedies and greater legal certainty. In fact, the draft EU APA has a total of four articles (22–25) concerning forms of dissatisfaction of the parties, whereby the first one only refers to technical errors. Thus, in the EU APA, the whole set of interventions comes down to a few options, i. e. to setting aside or annulling the original decision, either in favour or to the detriment the parties.

An effective (administrative) legal instrument is one which, in practice, achieves the objective of the regulation. In administrative procedures, effective is what generally contributes to the actual purpose of the administrative procedure, which is the balance between the rights of the parties and the pursuit of the public interest (Godec, 1993). In such regard, a distinction needs to be made between organisational or administrative rationality and political or political-science rationality. The first one means rationality in terms of the goals of the administrative system, and the second one means the contribution of the administrative system to the functional requirements of the social environment in the light of social values. According to Weber, rationality can be understood as rationality in terms of goals (*Zweckrationalität*), comparing the expected benefits and burdens, and as rationality in terms of absolute values (*Wertrationalität*).

Effectiveness is further conditioned by the implementation of regulations in the real world. An effective legal instrument is one that is applied in accordance with the purpose for which it has been regulated and to the extent provided by the regulation (e.g., extraordinary remedies to be applied only exceptionally, appeals applied regularly but not in the majority of first-instance cases). In this respect, it is important to consider the overall effectiveness of the administrative system, not just the effectiveness of the instrument in question, as well as the State and the addressees of the norms (Pusić, 1989, pp. 224, 348).

The effectiveness of a remedy is therefore one of the aspects of the principle of the rule of law, intertwined with equality before the law, equal protection of rights, the right to judicial protection, legality, finality, etc. (Avbelj, 2019, pp. 239ff; cf. Janderová, 2019). In view of the judgments of the ECtHR, as well as constitutional court case law and judicial and administrative decisions, the effectiveness of a remedy can be assessed

by several elements. These include admissibility, substantive legitimacy in conjunction with the dispositive effect of a remedy, prerequisites such as deadlines and exhaustion of remedies, devolution, suspensiveness, and scope of powers in applying the remedy. The right to a remedy may also be effective if the decision is first served and fully reasoned, and the appellant is given access to the file. Hence, the decision begins to have a legal effect on the party only when it is properly served, when also the time limit for the appeal begins to run. In such regard, the specifics of various procedures must also be considered. In addition, the time needed to resolve the case is relevant, i. e., the possibility of appeal due to administrative silence or a faster or at least reasonably long procedure (see Kovač, 2019; cf. Koprić & Đulabić, 2009), as shown in the following table.

Table 1:

The main APA rules by criteria of effectiveness of the administrative appeal

Elements of effectiveness	A brief analysis of APA rules on administrative appeal
(In)admissibility	At the first instance, the party has the right to appeal (Article 13 of the Slovenian APA and Article 12 of the Croatian APA). The appeal is the only ordinary remedy (in the Croatian APA there is also the possibility of objection in certain situations), so it is generally admissible. The APA itself or special laws can exclude an appeal, and although such first-instance decisions are then directly subject to litigation, the dilemma arises as to whether this constitutes an interference with the constitutionally provided rights, as the reasons for and the effects of an action in an administrative dispute are not necessarily the same. The possibility of waiving the right to appeal (e.g., in Slovenia since 2008) may also be questionable – since the appeal is a prerequisite for judicial protection, waiving such right not only leads to administrative finality, but also the actual finality of the case.
(Non) devolution	An appeal is a devolutive remedy, as it is always decided by a higher body than at the first instance, e.g., by a line ministry. To ensure a fair procedure, the case must be decided by a higher and not the same body. This also ensures impartiality, provided that the two instances are truly separated (not a *de facto* appellate instance at the same body).
(Non) suspensiveness	The purpose of an administrative appeal is, as a rule, its suspensiveness, which means that it usually delays the enforcement of a decision pending the decision on the appeal, unless the public interest or a sector-specific law requires otherwise. Non-suspensiveness may *de facto* have a greater impact on the legal position of a party than the waiving of the right to appeal, which makes it constitutionally questionable in such context. Furthermore, non-suspensiveness of the appeal under the APA applies, in principle, to procedural decisions, although the latter may just be decisions on the merits.
Deadlines and administrative silence	The deadline for an appeal under the APA is, in principle, 15 days from the serving of the decision, unless otherwise provided by a sector-specific law. Administrative silence applies at both instances. If the party suffers damage because of administrative silence, they are entitled to compensation.

Sources: Auby, 2014; Koprić et al., 2016; Sever et al., 2016; Kovač & Kerševan, 2020

In sum, the administrative appeal serves several functions, i. e. the protection of human rights, legality and public benefit, fewer referrals to the higher instance, concern for the integrity of the field, optimal sector-specific regulations, and good administration. From this point of view, the many characteristics of the appeal – including admissibility, devolution (always), suspensiveness (set as a rule but there are possible exceptions by *leges speciales* and also based on GAPA in individual cases), and reasonably long procedures – are all relevant for its effectiveness.

3. Research on the Effectiveness of Administrative Appeal in Practice

3.1 Methodological outline

To answer the initial research question on the constitutional relevance of the administrative appeal, combined social science research methods were used, such as dogmatic, normative and comparative analysis. For the empirical part, the analysis of the state of play and trends based on expert interviews with several selected professors of administrative law and the analysis of publicly available case law were used, followed by the axiological and ontological evaluation of results. The second research question refers to the assessment of the effectiveness of appeal in practice. Here, the intended aims and functions of this instrument in law, as elaborated in the previous section, are compared to its effects in scrutinised administrative procedures and further judicial reviews, based on objective statistical data and subjective evaluations by acknowledged experts. Thus, a combination of expert interviews and case law analysis was used to conduct the empirical part of the research.

Unlike in Slovenia, where the Supreme Court publishes most of its decisions on administrative disputes categorising the cases by instrument (by keyword search) and by the relevance of a particular instrument, case law in Croatia was not accessible. For the Slovenian part, a combined analysis of the twenty most relevant and twenty most recent court decisions (forty in total) on administrative appeals was used to examine, *inter alia*, whether the individual elements of effectiveness are still more or less the same as years or decades ago. The Supreme Court database covers a period of approximately thirty years (1992–2021), whereby the relevance of a case is determined based on common indicators, such as accessibility by the parties or reference to hierarchically higher regulations. Among the more recent ones, cases from 2018–2021 were analysed. The above data and cases were also presented to the experts participating in the interviews.

For Croatia, where no such database exists, greater weight was given to the analysis of scientific literature and expert interviews. These were carried out in a way

that the questions on the effectiveness criteria defined in the previous section were first answered by one expert from each country. Based thereon, the questionnaire was supplemented and eventually, in the summer and autumn of 2021, replies were obtained from three experts from Slovenia and Croatia, respectively. The respondents included experts in both theoretical and practical aspects of the administrative appeal, identified as such through the analysis of their roles and research work. Three respondents per country were chosen to ensure greater objectivity of replies, while attention was also paid to ensure that they were experts with different lengths of experience (senior, junior) and from different faculties.5 For easier processing, the interview questions were standardised and allowed the possibility of additional explanations and remarks.

3.2. Results

The expert interviews show a very similar situation in Slovenia and Croatia, which is not surprising given the parallel development and rather analogous legal arrangements in both countries. The results of the interviews are presented in the table below, summarising the aspects common to both countries and focusing on the substantive elements of the effectiveness of administrative appeals, as there are almost no differences at the country level except for (the lack of) statistical data on the duration of procedures and court cases in Croatia. Overall, however, the administrative appeal is seen in both countries (only) as an instrument ensuring constitutional guarantees rather than an instrument of broader good administration (Galetta et al., 2015; Đanić Čeko & Kovač, 2020). Therefore, the respondents were more or less unanimous that the national APAs should be further shortened or targeted while examining the existing rules that are (or might be) constitutionally disputable.

Table 2.

Expert views on the effectiveness of the administrative appeal in Slovenia and Croatia

Elements of effectiveness	Dilemmas between the letter of the law and administrative-judicial practice – Slovenia	Dilemmas between the letter of the law and administrative-judicial practice – Croatia
(In) admissibility	As a rule, the administrative appeal is admissible and complies with the constitutional provisions. In practice, constitutional dilemmas are raised only	As a rule, the administrative appeal is admissible and complies with the constitutional provisions in Croatia too.

5 Acknowledgements are due to Prof. Dr. Janez Čebulj, Matjaž Remic, LLM, and one of the Assistant Professors at the Slovenian university wishing to remain anonymous on the Slovenian side, and to Prof. Dr. Frane Staničić, Assist. Prof. Dr. Mateja Held and Assist. Prof. Dr. Ana Đanić Čeko on the Croatian side. Had there been markedly different country-level responses, additional interviewees would have been sought, but this did not prove necessary.

	occasionally (e.g., limitation of grounds for judicial review). Violation of the rules of procedure appears to be a rather common reason for appeal. Experts' views regarding too many (even extraordinary) remedies vary, but most are in favour of a revision (less remedies).	However, there is a lack of data as regards both the systemic overview of case law and statistical trends of administrative procedures generally and in individual administrative areas. Experts' views regarding the scope of remedies is in favour of preserving the present legal regulation.
(Non-) devolution	The appeal – as a form of hierarchical administrative supervision – is properly regulated when there seems to be no devolution due to centralisation or smallness in certain types of bodies and immediate administrative dispute would be more appropriate.	
(Non-) suspensiveness	Suspension of enforcement is a key feature of the effective legal protection of the parties and can only be limited by a prominent need to protect the public interest. In practice, this is still an open issue, especially in tax and environmental matters. Non-suspensiveness can imply a greater interference with the constitutional effectiveness of a remedy than the exclusion of the appeal, and that compromises can also be sought through interim injunctions.	Suspension of enforcement is a key feature of the effective legal protection of the parties. However, there is a problem of too many special administrative procedures opening up exceptions that are often not justified. Again, due to the lack of empirical data, further assessments are limited.
Duration of procedure	Lengthy procedures are a significant problem in Slovenian practice, both in the administration and the judiciary. Here, the gap between what is prescribed and what is implemented in practice is the largest. Hence, it would be advisable to redefine the APA provisions in the future, e.g., to regulate the question of when at the second instance the decision must be made on the merits and what applies in case of administrative silence, i. e., positive fiction only exceptionally, as it indeed protects the parties but simultaneously generates other problems. Therefore, functioning mechanisms of coercion by the second-instance body brought down to a lower level are more desirable as an even more top-down coordinated administrative organisation.	Excessively long procedures are even more problematic in practice in Croatia than in Slovenia. However, there are no systematic data and analyses available, particularly ECtHR case law confirms that Croatia has various systemic issues that need to be resolved in this field. Consequently, experts have pointed out to take especially organisational measures to reduce the duration of procedures on both administrative and judicial levels. The principle of legitimate expectations emphasised in the EU is also important in such regard.

Source: own, based on the experts' opinions gained in 2021.

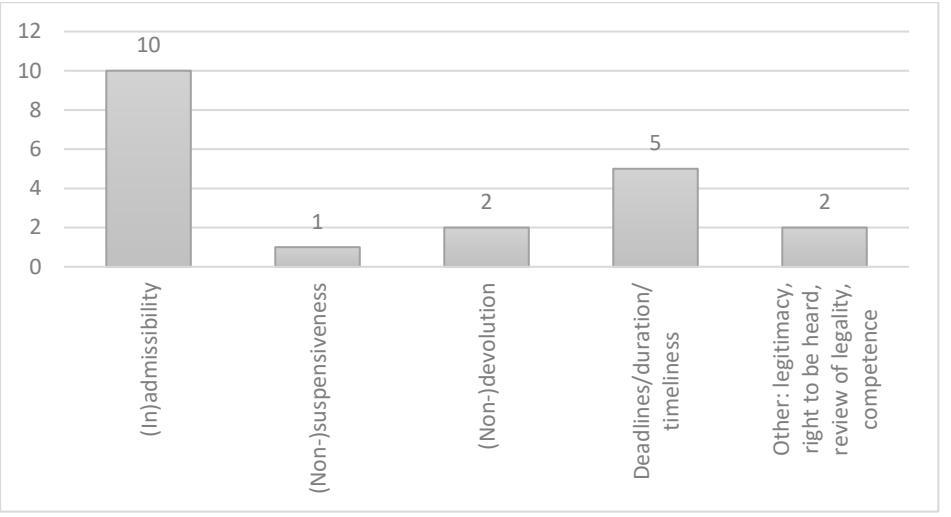
Asked to assess which element of effectiveness they found the most problematic, the respondents highlighted non-suspensiveness (aggregate score: 3–4 on a scale of 5, 5 being the most problematic) and duration of procedure (average score: around 4). Inadmissibility of the administrative appeal was less problematic (average score: 1–2), with the administrative dispute providing a largely satisfactory alternative in both countries. The same applied to devolution. The scores match strongly when it comes to disputability of the rules and the gap between what is prescribed and what is actually implemented in practice. According to the experts, such gap was most noticeable in the duration of procedures (same generally and for the CEE and respective countries in particular, see Dragos & Neamtu, 2014; Koprić et al., 2016; Sever et al., 2016; Kovač, 2019; Đanić Čeko & Kovač, 2020). In addition, the respondents were asked which administrative areas they estimated to record the most appeals and why. Their replies were compared with the data from court databases. The Slovenian experts highlighted construction, environment and taxes, where conflicting interests between investors and accessory participants or taxpayers are the most numerous. There are no quantitative data for Croatia, but social affairs are presumed to be quite problematic (Kekez, 2018).

Furthermore, the case law of the Slovenian Supreme Court in administrative disputes was analysed, namely the cases related to (preliminary) administrative appeals. Unfortunately, there is no such database available in Croatia, so analogical assessments could not be applied. The same problem ha been emphasised in other studies (Dragos & Neamtu, 2014; Auby, 2014; Sever et al., 2016). Although comparative views are limited hereby, the insight into empirical figures in Slovenia are helpful to additionally highlight the importance of the effectiveness (criteria) of the administrative appeal. Moreover, we believe that based on the very similar if not identical constitutional and statutory regulation as well as problematic issues put forward by the experts in Slovenia and Croatia, the findings for Slovenia can be extrapolated for both countries and regionally.

In Slovenia, the Supreme Court decides in administrative disputes at the appellate level. Even more illustrative are the cases of revision regarding violations of the law. Figure 1 refers to the twenty most relevant decisions of the Supreme Court and, interestingly, nearly perfectly matches the presentation of the twenty most recent decisions (Figure 2). Nevertheless, there have recently been a few more disputes about non-suspensiveness and other elements of effectiveness, and less about devolution. These data confirm the above emphasised experts' opinions that (non)suspensiveness and duration of procedures seem to be more problematic over time. Contrary, there are rather established views and consistent case law found upon (in)admissability, (non)devolution and other dimensions of the administrative appeal as exposed above (e.g., issues of competence and *locus standi*).

Figure 1.

Criteria of effectiveness of the administrative appeal in the most relevant decisions of the Slovenian Supreme Court 1992–2021

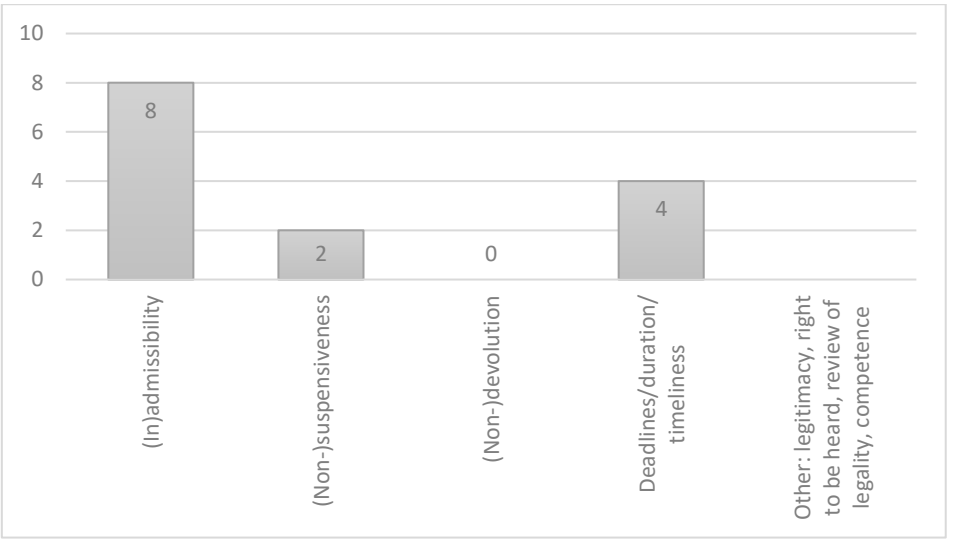


Sources: own, elaboration based on the data from the Supreme Court of the Republic of Slovenia

The analysis of court decisions in administrative cases shows that the criterion of effectiveness most often tested over the long run was the admissibility of the appeal, mainly in the sense of whether it is an administrative case at all, whether administrative or other acts are challengeable by the appeal, and whether the APA applies (*mutatis mutandis*). For example, see Decision I Up 172/2019, 10.3.2021, questioning whether a letter lacking the prescribed elements is an administrative act at all – as such, it cannot have legal effects and cannot be subject to appeal. Similar dilemmas arise where civil and public law elements intertwine (see Decisions I Up 51/2020, 28.10.2020, 151/2019, 1556/2006, 18.12.2019, for healthcare, environment, education; see also Decision I Up 184/2020, 21.4.2021, stating that owing to effects, access to the court and prior impartiality must be checked even in a decision terminating the procedure based on Article 23 of the Slovenian Constitution). Furthermore, case law highlights the questions concerning deadlines, service, and legal protection, which is expected considering previous analyses (Kovač, 2019; see Decisions I Up 58/2020, 24.2.2021, 121/2009, 23.12.2009, Judgements 957/2003, 17.1.2006, 898/2002, 26.10.2004). The analysis of the reasons for the appeal, however, shows that in over half of the most relevant and the most recent cases, the reasons for the appeal intertwined, i. e. concerning factual and legal issues, which confirms the importance of procedural rules for balancing all legal interests.

Figure 2.

Criteria of effectiveness of the administrative appeal in the most recent decisions of the Slovenian Supreme Court 2018–2021



Sources: own, elaboration based on the data from the Supreme Court of the Republic of Slovenia

A more detailed study of individual decisions shows their joint message, i. e. that several criteria of effectiveness are usually associated at the constitutional level. E.g., in Decision I Up 39/2021 of April 21, 2021, the Court states that already the first-instance administrative body must verify the allegations of the party claiming that according to the sector-specific law the non-suspensiveness of the appeal was inconsistent with constitutional provisions (e.g., in tax matters under Articles 23, 25 and 33 of the Slovenian Constitution). This is the case especially in the absence of a legal possibility to suspend the enforcement by a special act that would be subject to judicial review. Moreover, Judgment I Up 823/2003 of March 23, 2006 emphasises, based on the legality and constitutional relevance of an effective appeal, that non-suspensiveness cannot be determined by an act lower than a law.

As for the areas where dilemmas about administrative appeals arise, environment and construction stand out among the most relevant cases (seven out of 20 cases), followed by taxes (five out of 20; here, the number of cases as well as the value of disputes count, see Moldovan & Bucatariu, 2019). In recent years, dilemmas mainly arise in taxes, followed by environment, construction and healthcare (4–5 cases out of 20, respectively). This confirms the above expert assessments and raises the question of whether sector-specific laws should contain a larger number of proportionate, yet

more specific rules compared to the APA.

4. Discussion and Recommendations

The results of theoretical-normative and empirical analyses confirm that the administrative appeal is a necessary instrument of classical and modern EU law. It is also highly relevant for the administrative system as it protects citizens' rights against *a per definitionem* superior authority. Therefore, the administrative appeal is primarily an instrument for ensuring the constitutional rights of the parties and legality as part of democratic governance, but can also have a broader impact on the provision of good administration and effective public policies. However, the comparative analysis for Slovenia and Croatia shows dilemmas at the level of its regulation and even more so implementation, which leads us to think that the administrative appeal and its application are not as simple and unambiguous as it may seem at first glance.

Therefore, the answer to the first research question shall be that national APAs see the appeal primarily as a constitutional category, which was confirmed based on the review of literature and legislation, as well as the comparison between the two laws in respective countries and trends in the EU. Both the Slovenian and Croatian APAs indeed express the constitutional relevance of the appeal as the operationalisation of the constitutional rights of the parties, since the provisions of both constitutions – Article 25 of the Slovenian Constitution and Article 18 of the Croatian Constitution – guarantee the use of the appeal in the national (administrative) legal systems. The APA allows the rights, obligations and legal benefits of individuals to be decided in accordance with the Constitution. The Constitution is thus the basis for the provisions of the APA and, vice versa, the APA provisions express the constitutional relevance of the appeal (Knez in Kovač & Kerševan, 2020, pp. 31ff, who also emphasises the constitutional provisions on the rule of law, separation of powers, legality, equal protection of rights, administrative dispute, and judicial supervision over the administration). Therefore, the relevance of constitutional provisions regarding appeals in administrative matters is not only in the possibility of filing this remedy but in the effective protection of the legal benefits of the individual. Should any regulation or practice prevent such, it would be unconstitutional. The substantive and procedural aspects of decision-making must comply with the legal framework of national law, but above all with the highest legal acts, i. e. constitutions, as well as rules deriving from other acts and regulations and international law.

The procedural rules of administrative and judicial procedure are primarily at the discretion of individual countries but are still partly influenced by international rules, such as the ECHR and the EU Charter of Fundamental Rights (Sever et al., 2016; Janderová, 2019). In this respect, the APA and the procedural guarantees of administrative relations can be seen as a "little constitution" (Rose-Ackerman &

Lindseth, 2010; Schuppert, 2000). The administrative procedure and its general codification under the APA should serve as a framework for dialogue between stakeholders and for the establishment of a more collaborative society, with the administrative appeal as an instrument for the conciliation of interests (more in Dragos & Neamtu, 2014). This is indeed positive, but there is also a need to consider the appeal from a broader perspective, taking into account the comparisons with other EU countries and scientific literature (see Hofmann et al., 2014; Galetta et al., 2015; Koprić et al., 2016).

As regards the differences between the two countries in this study, the ten years younger Croatian AP, adopted in 2009, is more concise and has fewer provisions on the administrative appeal than the Slovenian one, adopted in 1999. Yet, even the more recent act is still insufficiently targeted compared to the draft EU APA as adopted by the European Parliament in 2016 (see Hofmann et al., 2014). Thus, our research did not detect any significant differences between the two countries as to the understanding and effectiveness of the administrative appeal, which is clearly due to a similar geopolitical position and (legal) tradition that Slovenia and Croatia share. The two countries also have almost the same constitutional system, and they are both signatories to the ECHR and members of the EU. However, those post-socialist countries that have joined the EU have not been very successful in public administration reforms; however, the proper implementation of administrative procedures at the national level represents a significant European standard in systemic change (Khadzhyradieva et al., 2020; Randma-Liiv & Drechsler, 2017; Trondal & Peters, 2013).

It is therefore no surprise that the empirical data deriving from the expert assessments and case law analysed in the previous section show practically the same problems for Slovenia and Croatia – which are probably similar in other CEE countries, as well. From a constitutional point of view and considering the impact on the legal status of the parties, the main problems of effectiveness in Slovenia and Croatia include firstly the non-suspensiveness of the administrative appeal. This attribute is more often a rule rather than an exception from the constitutional guarantees, just like the duration of procedures that exceed the prescribed and reasonable length for an enforceable decision. On the other hand, literature and interviews suggest that the systemic regulation of deadlines with negative fiction under the APA is adequate, as several forms of legal protection are available to remedy and prevent administrative silence. In general, the findings of the analysis show that in Slovenia and Croatia, the appeal under the APA is effective in terms of the mentioned criteria, which are also taken into account when deciding on the appeal, while exceptions (e.g., non-suspensiveness of the appeal) are only allowed in rare cases and for strictly justified reasons. However, the second research question striving to verify the good practice in Slovenia and Croatia in terms of admissibility, devolution, suspensiveness, and duration of procedures, can only partially be answered positively.

All these aspects are adequately regulated at the normative level, but there are

gaps in practice, most notably in areas that are also otherwise controversial, such as environment, construction, taxes, and social services. Therefore, it is necessary to examine how the APA could be more targeted, and above all make officials and parties in administrative procedure aware of the actual purpose of the appeal. To this end, it is necessary to continue with comparisons between the countries in the region that Slovenia and Croatia wish to follow in the development of society, as well as with empirical research, which is a prerequisite for data-based decision-making for better regulations in the future. Considering that the APA represents a key (business) process of public governance, the above findings show that in Slovenia and Croatia the actions towards pursuing the modern principles of good governance (see Galetta et al., 2015; Janderová, 2019) are not optimal. The reform potential otherwise offered by administrative procedural law through the codification of the APA is not (yet) fully exploited (Đanić Čeko & Kovač, 2020).

In addition, when looking into ways how each individual country achieves fundamental APA principles and rules as derived from different guidelines and comparative research on APA content, there are important differences among them, with some approaches being more effective than others. Transposing best practices to Slovenia and Croatia, for instance, from Austria and Estonia has already been suggested by other studies on the regulatory but even more importantly on the implementation level (e.g., Sever et al., 2016). In terms of regulated time limits, the Estonian APA is flexible and sets a general rule to conduct AP without undue delay. In case of delay, the administrative authority must immediately issue a notice when the decision is expected and state the reasons for delay. The obligation of active performance is given to the administrative authority, and most of the burden is not on the parties, as in the Slovene and Croatian systems. Furthermore, when the nature of the matter allows the use of alternative dispute resolutions (ADR), these should be introduced and used throughout all instances (Dragos & Neamtu, 2014; Koprić et al., 2016).

Above all, introducing an optional or alternative access to administrative appeal and/or judicial review – replacing traditional setting with the appeal being a prerequisite to access the court – might speed up procedures. When combined with less instances and more merit-oriented instance control, such a system should offer more effective legal protection in practice as found out comparatively (as partially in Austria). The possibility of administrative courts to decide on the merits is very important and should also be promoted in the Slovene and Croatian systems, as this prevents the "yo-yo" effect and improves the procedures' efficiency, giving the parties a final decision within reasonable time (Sever et al., 2016). The current regulation indeed enables such decision-making, but in practice the authorities should actually make use of it. Furthermore, it would be advisable to consider which authorities should decide on appeals. By creating collegiate bodies to deal with administrative appeals it would be possible to combine the specific knowledge of individual administrative areas with legal knowledge and thus strengthen the effectiveness of the remedy, as is

currently the case with courts in administrative disputes. The increased professional capacity of appellate bodies would lead to faster completion of appeal procedures, as well as to shortening the entire decision-making process and reducing the number of cases returned to the first instance and the number of decisions annulled in administrative disputes (Kerševan, 2016). Moreover, there is the issue of the "apparent devolution" in local self-government or social care institutions, where the appeals seem just an obstacle on the way to the court, considering that the success rate of appeals in these bodies is 1% or less (Kovač & Kerševan, 2020). According to Barnes (in Rose-Ackerman & Lindseth, 2010), the functions of the administrative procedure and, at least partly, of the administrative appeal are both negative in the sense of limiting the abuse of power and arbitrariness, and positive, leading to well-founded and development-oriented public policies that satisfy the social and economic interests. There is still significant room for the latter in the region.

5. Conclusions

The main objectives provided by the APA in all administrative relations are the protection of the public interest and the rights of the parties, and hence the effective implementation of public policies. In such regard, the APA ensures authoritarianism of relations in the sense of the interests of an individual party being subordinate to the interests of the community, as well as the protection of the rights and legal benefits of affected persons, thus preventing arbitrariness, misapplication of law, and abuse of the hierarchical position of the administrative body. In a broader sense, the true meaning of the APA lies in the pursuit of the basic principles and rules of applicable administrative law as well as in the operationalisation of constitutional guarantees and the development of democratic and effective public administration and society. This applies to the APA as a whole and specifically to the provisions on administrative appeal.

Regarding the research questions, this study proved the international and constitutional character of the administrative appeal. The Slovenian and Croatian constitutions as well as GAPAs provisions are in line with the EU standards in this respect, although there are some considerations in terms of sector-specific peculiarities and further implementation. Namely, as regards devolution and relatively also admissibility of the administrative appeal, Slovenian and Croatian practices are compliant with the international and statutory principles while practice is questionable in terms of too broad non-suspensiveness and often excessive duration of procedures.

In sum, compared to European trends, the Slovenian and Croatian APAs are too conservative despite respective constitutional outlines and traditions. The administrative appeal has, in fact, a multifunctional charge, which in the selected countries is not yet fully used to build good administration. According to the analysis

of scientific literature, comparative analyses, expert assessments and analysis of case law, the national legal systems and administrative case law in the region are mainly limited to protecting the rights of the parties. It is therefore time for the modernisation of both law and practice, following the positive experience of comparable EU countries, so that an effective administrative appeal helps develop good public governance.

The administrative appeal is an indispensable instrument of any modern (administrative) legal system, protecting the parties' rights and preventing unlawful conduct or abuse of power by the authorities. At the same time, operational mechanisms need to be put in place to ensure that this is the case also in practice, while the society should be made as inclusive as possible. Appeals should not be understood only in a narrower sense or aimed only at preventing, for example, the excessive workload at courts but should be seen as a valuable source of information for developing new solutions.

References

Auby, J.-B. (ed.). (2014). *Codification of Administrative Procedure*. Bruylant.

Avbelj., M. (ed.). (2019). *Komentar Ustave Republike Slovenije [Commentary to the Constitution of Republic of Slovenia]*. New University, Nova Gorica, European Law Faculty.

Dragos, D. C., & Neamtu, B. (eds). (2014). *Alternative Dispute Resolution in European Administrative Law*. Springer.

Đanić Čeko, A., & Kovač, P. (2020). Comparative Analysis of an Administrative Appeal in Croatian, Slovenian and EU law. *EU and Comparative Law Issues and Challenges Series (ECLIC), 4,* 1065–1096. https://doi.org/10.25234/-eclic/11940

Galetta, D.-U., Hofmann, H. C. H., Puigpelat, M. O, & Ziller, J. (2015). *The General Principles of EU Administrative Procedural Law*. European Parliament.

Godec, R. (ed.). (1993). *Upravni zbornik [Administrative Compendium]*. Institute of Public Administration at the Ljubljana Faculty of Law.

Gruden, B., Kovač, P., & Stare, J. (2008). The Management of Complaints in Slovene Public Administration. *Organization, 41*(1), 22–29.

Hofmann, H. C. H., Schneider, J.-P., & Ziller, J. (eds). (2014). *The ReNEUAL Model Rules*. ReNEUAL. www.reneual.eu.

Janderová, J. (2019). Impact of the Rule of Law as a Fundamental Public Governance Principle on Administrative Law Interpretation in the Czech Republic. *Central European Public Administration Review, 17*(2), 117–140. https://doi.org/-10.17573/cepar.2019.2.06

Kekez, A. (2018). Public Service Reforms and Clientelism: Explaining Variation of Service Delivery Modes in Croatian Social Policy. *Policy and Society, 37*(3), 386–404. https://doi.org/10.1080/14494035.2018.1436505

Kerševan, E. (2016). The principle of effective legal protection in administrative law in Slovenia. In Z. Szente (ed.), *The principle of effective legal protection in administrative law: A European comparison* (pp. 266–280). Routledge.

Khadzhyradieva, S., Slukhai, S., & Rachynskyi, A. (2020). Public Administration in Ukraine: Adjusting to European Standards. *NISPAcee Journal of Public Administration and Policy, 13*(1), 81–108. https://doi.org/10.2478/nispa-2020-0004

Kilpatrick, C., Novitz, T., & Skidmore, P. (2000). *The Future of Remedies in Europe.* Hart.

Koprić, I. (2005). *Administrative Procedures on the Territory of Former Yugoslavia.* OECD.

Koprić, I., & Đulabić, V. (eds). (2009). *Modernizacija općeg upravnog postupka i javne uprave u Hrvatskoj [Modernisation of General Administrative Procedure and Public Administration].* Institute of Public Administration, Zagreb.

Koprić, I., Kovač, P., Đulabić, V., & Džinić, J. (2016). *Legal Remedies in Administrative Procedures in Western Balkans.* Regional School of Public Administration.

Kovač, P. (2013). Effective Adjudication through Administrative Appeals in Slovenia. *Utrecht Law Review, 9*(3), 39–50. https://doi.org/10.18352/ulr.235

Kovač, P. (2019). Pomen in posledice molka organa pri odločanju v upravnih *zadevah* [Significance and Effects of Administrative Silence in Administrative Matters]. *Podjetje in delo, 45*(6/7), 914–929.

Kovač, P., & Kerševan, E. (eds). (2020). *Komentar Zakona o splošnem upravnem postopku (ZUP), 1. In 2. knjiga [Commentary to the ZUP, Books 1 and 2].* Official Gazette of the Republic of Slovenia.

Moldovan, O., & Bucatariu, G. (2019). Effectiveness and Efficiency of Administrative Appeal Procedures: A Case Study on Tax Disputes in Romania. *Central European Public Administration Review, 17*(2), 9–33. https://doi.org/-10.17573/cepar.2019.2.01

Pusić, E. (1989). *Društvena regulacija: granice znanosti i izkustva [Societal Regulation: Limits of Science and Experience]*. Globus, Faculty of Law.

Randma-Liiv, T., & Drechsler, W. (2017). Three Decades, Four Phases: Public Administration Development in Central and Eastern Europe, 1989–2017. *International Journal of Public Sector Management, 30*(6–7), 595–605. https://doi.org/10.1108/IJPSM-06-2017-0175

Ropret, M., Aristovnik, A., & Kovač, P. (2018). A Content Analysis of the Rule of Law within Public Governance Models: Old vs. New EU Member States. *NISPAcee Journal of Public Administration and Policy, 11*(2), 129–152. https://doi.org/-10.2478/nispa-2018-0016

Rose-Ackerman, S., & Lindseth, P. L. (eds). (2010). *Comparative Administrative Law.* Elgar.

Schuppert, G. F. (2000). *Verwaltungswissenschaft (Verwaltung, Verwaltungsrecht, Verwaltungslehre).* Nomos.

Sever, T., Đanić Čeko, A., & Kovač, P. (2016). Effective legal protection against the excessive length of administrative decision-making: The cases of Slovenia and Croatia. *NISPAcee Journal of Public Administration and Policy, 9*(1), 135–166. https://doi.org/10.1515/nispa-2016-0007

Trondal, J., & Peters, G. B. (2013). The Rise of European Administrative Space: Lessons Learned. *Journal of European Public Policy, 20*(2), 295–307. https://doi.org/10.1080/13501763.2013.746131