

# *Execution in Administrative Matters: Challenges of the Slovenian Practice and Case Law*

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Administrative relations regulate conflicts between public and private interests. Crucial for the realisation of public interest is the realisation of the administrative act, particularly when proceedings are conducted *ex officio* with the purpose of protecting public interest. The study presents the main characteristics of execution as a special administrative proceeding in Slovenia when parties do not fulfil their obligation on voluntary basis and there is a need for forced realisation of legal relation. Theoretical findings are supported by recent administrative practice and case law, which is followed by a critical evaluation. The execution is in practice found as highly disputable in terms of interests' collision despite comprehensive and detailed provisions of Slovenian General Administrative Procedure Act. The outcomes of the analysis serve as basis to formulate the necessary guidelines for future implementation of public

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policies - to be more effective throughout the region where administrative relations are regulated following the Austrian-German model.

*Key words:* administrative proceedings, execution, public interest, case law, Slovenia.

## 1. Introduction

Administrative law relations regulate the rights, legal interests and obligations of individuals and legal entities in their interactions with authorities. In the Austrian-German setting, a traditional distinction is made between general and abstract regulations, applying to cases of where collisions of interests arising in administrative relations are usually less acute, and specific, concrete situations, where an acute conflict needs to be solved by an individual administrative act (decision). The extent and complexity of administrative relations are increasing worldwide, and questions related thereto and to the degree of authoritativeness i.e. subordination of individuals to the community are becoming more and more important. The interest of the community, also defined in law as public interest (or public benefit), must in fact prevail over the partial interests and rights of individuals, if the community is to act concertedly. Quite often, however, public interest needs to be enforced by means of administrative execution. In administrative matters in general and in administrative execution in particular, public interest is considered to be a central category. Its protection is, therefore, the primary purpose of any forced realisation of administrative law relations. If, on the other hand, public interest does not call for authoritative action, (enforced) execution is not justified (any more). The above mentioned derives from the core and basic principles underlying the understanding and regulation of administrative relations. Hence, in execution proceedings, a number of questions inevitably arise as far as the understanding of public interest is concerned. Such questions should also be borne in mind before implementing the relevant procedural acts in a rather formalistic manner, which can eventually cause more damage to the parties or the broader community.

Administrative relations and the protection of public interest therein are normally regulated by a General Administrative Procedure Act (GAPA) or similar code, which in most European countries only applies to in-

dividual administrative acts in concrete administrative relations.<sup>1</sup> In Slovenia, the GAPA was adopted in 1999 based on the Austrian tradition and the Yugoslav legacy.<sup>2</sup> The Slovenian GAPA is still rather traditional. Therefore the execution is rather pursued by an independent law chapter (from Article 282 to Article 306) which counts for one tenth of all GAPA articles. In addition, a number of provisions contained in other GAPA articles directly apply to execution and notions related thereto (executability, executory title, public interest, serving, etc.).

The purpose of this study is to provide a comprehensive analysis of administrative practice and case law in Slovenia in the past years. Furthermore we aim to identify key problems and dilemmas arising in the implementation of the GAPA that can help draw up guidelines to address existing and future challenges. By studying examples and prevailing trends, the research attempts to find out how to effectively protect public interest in administrative matters by necessary (»forced«) execution.<sup>3</sup> Different examination methods (historical, normative, and comparative) are used, together with the prevailing case-based analysis with axiological and deontological methods and synthesis of trend deduction. It is presumed that the bearers of administrative and judicial authority play different roles and have different weight in the administrative system. Public policies are primarily implemented by administrative bodies, while the judiciary is supposed

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<sup>1</sup> However, even in some countries where administrative proceedings traditionally refer to specific decision-making, theory and legal regulation are evolving towards a broader understanding of administrative proceedings, e.g. in Spain or Germany (Galligan et al., 1998: 17-26, Rose-Ackerman, Lindseth, 2011: 336–356). Normally, at least two groups of proceedings are distinguished in this context: individualised decision-making and adjudication (*Verwaltungsverfahren*), and policy-based decisions with general effect, regulatory acts, rule-making, procedural arrangements and public policy cycle (*Gestaltungsverfahren*).

<sup>2</sup> *Zakon o splošnem upravnem postopku (ZUP)*, Official Gazette of the Republic of Slovenia No. 80/99-ZUP, 70/00-ZUP-A, 52/02-ZUP-B, 73/04-ZUP-C, 119/05-ZUP-D, 24/06-UPB2, 105/06-ZUS-1, 126/07-ZUP-E, 65/08-ZUP-F, 8/2010.

<sup>3</sup> As developed in further chapters we distinguish executing the rights and obligations of the parties set in the administrative relations on (more or less) voluntary basis. In general the term »execution« is therefore used as enforcement by the authority as also regulated in GAPA. In comparative scientific literature some authors prefer the expression »enforcement« as opposed to broader (forced or voluntary) »execution« to emphasize the forced nature of the execution in certain cases, but majority of experts and institutions use »execution« (cf. ECHR, <http://www.echr.coe.int/echr/>; or Evroterm as multilingual terminology database, <http://evroterm.gov.si/>). In this analysis and to follow Slovenian GAPA the terminology is in compliance with the mainstream – consistently meaning »execution« as a forced real act following executable legal administrative act which has not been fulfilled by a party obliged to.

to establish legality in the sense of restricting abuse which is conducted by executive bodies. The analysis of examples from recent Slovenian administrative practice and case law thus directly tests the hypothesis that legal regulation of execution pursuant to the GAPA enables a consistent protection of public interest. Moreover, the application of substantive law in administrative proceedings enables an effective implementation of sector-specific public policies which – in addition to the protection of the basic democratic guarantees of individuals in administrative relations – form a constituent part of the concepts of good administration and good governance.<sup>4</sup> Execution thus needs to be regulated and implemented with a balanced formalisation of proceedings, and in particular as part of a systemic regulation of effective yet democratic administrative relations.

## 2. Execution in the Slovenian GAPA

### 2.1. The systemic role of execution in administrative relations

Execution in this analysis is understood in a narrower sense, as a forced fulfilment of the administrative law relation. This relation and administrative execution itself are defined and grounded by an executable administrative act that pursues a legally defined public interest (Androjna, Kerševan, 2006: 605–609). Thus, the execution of a decision taken in an administrative matter cannot be left to discretion, particularly when it comes to imposing obligations on an individual that go to the benefit of the broader community. The effectuation of an obligation should therefore be subject to public law. The administrative body competent for execution may and must provide also for the enforcement of the imposed obligations or the withdrawal (or reduction) of the rights and legal interests of the

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<sup>4</sup> In terms of good governance and good administration, the aim of administrative activities and their legal regulation is to resolve conflicts between public and one or more private interests, encouraging the efficiency of public policies, but restricting the absolute power of the state. The latter, particularly in national public law, primarily reflects as the good administration principle, ensuring the procedural rights of defence to the parties in proceedings. It is therefore widely accepted that good administration is a legal concept in itself (Venice Commission, 2011: 4). On the other hand (good and public) governance is a broader socio-political concept. It can be understood as governmental activity with its administration operations and other societal networks included as opposed to monopolistic hierarchical authority held by core state administration (cf. Bevir et al., 2011).

parties, not merely for their definition »on paper«. For such reason, no time-bar applies in administrative matters and in execution according to the GAPA. Similarly, the failure to initiate execution can be considered a criminal offence since only execution eventually achieves the purpose of the regulation of a conflict relation with individual persons asserting their interests against public interest. If the execution as required by GAPA is not carried out as soon as possible, this could imply a subjective, even criminal liability by the official conducting the procedure and failing to provide for execution, as well as by the head of the body who failed to set up an adequate organisation of work and control over execution (cf. Zima Jenull, 2010: VI).<sup>5</sup> After all, it is common practice of the European Court of Human Rights to expect that the state will provide the resources necessary for the effectuation (with execution included) of its legal order.<sup>6</sup> Yet not every interest for the society or the majority can be considered »public interest«. The latter has a content-related and formal component. In terms of subject matter, public interest can indeed be defined as interest of the social majority that is in accordance with fundamental human rights or minority rights, while formally an interest is considered public when specific values are included in the existing law by the competent regulator (Kovač, Rakar, Remic, 2012: 54). In implementing the regulations, public administration is – owing to the principle of separation of powers – strictly bound by the legally defined public interest, although in concrete matters officials still need to establish public interest upon

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<sup>5</sup> Article 290 of the GAPA provides that execution should be initiated no later than 30 days from the executability of the executory title. Due to the purpose of execution which is to protect public interest, such deadline is purely instructional since despite the delay the competent authority may and must carry out execution even at a later stage (more in Jerovšek, Kovač, 2010: 5, 232). The Slovenian Penal Code (*Kazenski zakonik* (KZ-1), Official Gazette of Republic of Slovenia, No. 55/08 and amendments) explicitly indicates two related criminal offences: abuse of office or official duties (Article 257) and misfeasance in office (Article 258), with a prescribed prison sentence of up to one year. An example thereof can be provided on the field of demolishing a building built without permit and therefore found as illegal with no option to legalise it since it has been placed in the strictly protected national park. If constructing inspector would not take care of demolishing the building, not just defining it as illegal, he could be criminally prosecuted.

<sup>6</sup> Like in judging on the unreasonable length of proceedings (from *Buchholz v. Germany*, 1981), when the court explicitly refused to consider as justifiable argument for delay the statements given by the respondent states arguing that delays were due to insufficient staffing or non-optimal organisation of authority. In Slovenia, the problem is in particular the lack of staff in inspection services. According to the annual reports by the Inspection Council for 2010 and 2011, around 1,500 state inspectors in Slovenia carried out over half a million inspections and issued around 86,000 measures annually.

consideration of the actual state of affairs. However, no action beyond the law, even if inspired by any kind of necessity can be taken as admissible one. Which and to what extent majority and democratic values and practical needs will be included in a specific regulation can be co-defined by public administration only through participation in future policy-making or reregulation.<sup>7</sup>

According to the GAPA, execution takes place as a special administrative proceeding, which is also demonstrated by multiple examples from case law.<sup>8</sup> This means that execution – as forced fulfilment of an administrative law relation – is not only a phase of the »primary« proceeding defining the administrative law relation, but an independent administrative proceeding with several distinctive features. Thus, it is subject to every principle and rule of the GAPA (e.g. representation of the parties, serving, etc.). Given the specifics of such proceeding, the provisions of the GAPA chapter on execution apply as superior to other provisions. The main characteristic is the composition of the execution proceeding, including (1) the legal part with the administrative act (in the form of an order) allowing execution, and (2) the actual realisation of the prescribed execution measure. Among other specifics that derive from actual and legal nature of relations in execution and become evident in individual procedural questions, mention should be made of the special principles of execution applied in addition to the basic GAPA principles. We should also mention the rules on material and territorial jurisdiction depending on the type of execution, procedural conditions to initiate the proceeding, parties to the proceeding (obliged person, entitled person), definition of the beginning and end of proceeding, individual acts in proceeding, legal remedies related to execution, etc. Whether such detailed regulation is in line with the principles of good administration is a matter of debate. Modern procedural law is in fact intended to raise the degree of partnership

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<sup>7</sup> Cf. on interests and collisions among them in legislative policy and in specific cases (Bevir et al., 2011: 374). It is in the nature of state bodies that they are interest-bound and subordinate to specific public interests, for various entitlements, apparent dispositions and even for the right to discretion (Pavčnik, 2007: 128). In such sense, general social interest i.e. how to formulate and realise public interest, is the main issue of study of public administration, as the latter may only do what most members of the society consider to be their interest.

<sup>8</sup> See for example Constitutional Court decision U-I-252/00, 8.10.2003, specifically on tax recovery. The same in the case law of the European Court of Human Rights which, in the interpretation of Article 6 of the Convention on fair trial, also includes the duration of the case and the duration of execution (more in Sever, 2009, see *Hornsby v. Greece*, 1997).

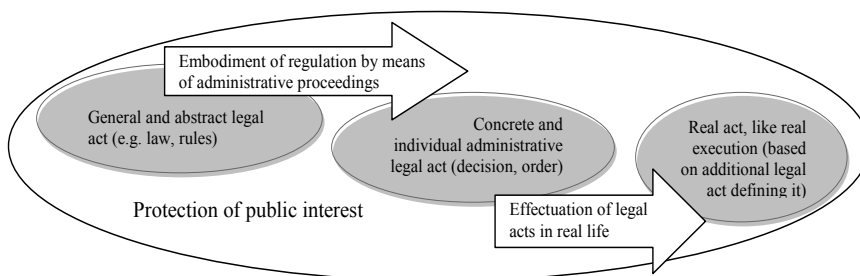
and agreement-based decision-making among different social groups. The necessary level of legal regulation of the relations and the authoritative nature of cogent law should be deemed a consequence of the expected conflictuality of relations and degree of interference with the legal status of an individual party, which is why a similarly detailed regulation and a similar corpus of party's rights are not necessary in all the relations with the administration (cf. Harlow, Rawlings, 1997: 504–516). Therefore, some authors distinguish between several groups of (individual) administrative proceedings or matters and various levels of restriction of administrative authority. Galligan et al. (1998: 44) for example indicate the following basic groups of administrative proceedings: (1) deciding on the reallocation of resources (subsidies) and issuing permits and licences, (2) imposing obligations in public interest, execution included (restricted to the said part of relations!), and (3) investigation by the (e.g. tax) administration where the findings may be used, for instance, by the criminal court. In the first two groups, emphasis is placed on the decision i.e. outcome, while in the latter one proceedings are justified by an inquisitorial maxim rather than applying – as in Slovenia – to all administrative relations.

## 2.2. Executability, locus standi and other procedural prerequisites to initiate execution

As regards the existing and *de lege ferenda* regulation of execution, several theoretical notions need to be distinguished. Importance is given to the definition and consequences of executability as a legal status acquired by individual administrative acts or other executory titles. In theory (cf. Androjna, Kerševan, 2006: 608; Jerovšek, Kovač, 2010: 230), executability is acquired by administrative acts the execution of which – in case of specific procedural assumptions – falls under the responsibility of an administrative or other body. Executability is, in fact, conferred not only to acts where public interest calls for their execution, if not fulfilled voluntarily by a party obliged in certain deadline. But executability as a legal institution refers also to acts or rights and legal interests recognised therein, that also pursue public interest and quite often display a cross-sectional correspondence between public and private interests (e.g. assistance to affected parties in implementing the social state). In general, in administrative relations the rights and obligations are not conferred without legal basis nor directly *ipso iure*. Thus, public interest needs to be defined in both general and abstract legal act, based on which a concrete, individual

administrative act is issued, and is followed by the actual effectuation of defined legal relation by voluntary or by an execution as a forced (legal and real) realisation thereof.

Figure: *Sequence of acts' to protect public interest in administrative relations*



Executability must be understood as the moment from which a right or obligation can be enforced. This applies in particular when the act can no longer be challenged by appeal or serving, if the appeal does not stay the execution.<sup>9</sup> As a general rule, executability begins upon the expiry of the period for voluntary fulfilment of the obligation, which is by its nature a substantive rather than procedural period and thus non-extendable (Kovač, Rakar, Remic, 2012: 207). On the other hand, the execution or the conduct of the execution proceeding is only relevant in case of administrative acts imposing an obligation to the party. Thus, it is carried out only and exclusively for the fulfilment of an obligation, not rights.<sup>10</sup> As regards

<sup>9</sup> With the amendments to the GAPA adopted in 2004, the definition of executability was moved from the chapter on execution (Article 282 and the following) to the chapter on decisions, more precisely Article 224. Thus, the concepts of completeness, executability and finality are defined under the same chapter. The body must define executability with a date, which it indicates in the form of a confirmation in the executory title or in the operative part of the order allowing execution (Article 290 of the GAPA). As a general rule, executability is related to the completeness of the decision unless the appeal is non-suspensive (according to a sector-specific law or Article 236 of the GAPA), or a (additional) period for voluntary fulfilment of the obligation has been set, or a special law determines that executability is bound to finality. The regulation provided by Article 224 of the GAPA whereby executability arises upon completeness – even if other laws provide that executability is bound by finality – is not contrary to the principle of equality since the rules refer to a group of similar positions (cf. Constitutional Court decision U-I-356/04-9 of 11. 5. 2006).

<sup>10</sup> The same executory title may define both rights and obligations; e.g. the holder of a building right also has the obligation to bring the neighbouring land into the initial state when building is completed, which the neighbour asserts by means of execution following the building permit.



the latter, it is up to the beneficiaries themselves whether or not they will apply an acquired right or exhaust it partly or not at all. Execution cannot be carried out (1) if the executory title has not (yet) been issued or has not (yet) become executable, and (2) if the proposer is not the entitled person.<sup>11</sup> If – at the proposal of the party – the competent body does not initiate execution, the entitled person may request that an administrative act (decision) rejecting the proposal be issued.

### 2.3. Types of executory titles and executions

Execution is subject to specific procedural conditions, such as an executable executory title with an unfulfilled obligation for the obliged person as well as an administrative order allowing execution.<sup>12</sup> According to the GAPA, executory titles include decisions, orders, and records of settlement (agreement) between the parties with opposing interests (Articles 282 and 283). Moreover, the GAPA provides two additional possibilities of execution when there is a risk that the obligation will be difficult or impossible to fulfil: 1) the execution for securement – prior to the beginning of executability (the executory title has been issued but the period for fulfilment has not yet expired, Articles 301 and 302), and 2) temporary order for securing the performance of an obligation – prior to the beginning of proceedings as a guarantee of fulfilment (the executory title has not (yet) been issued, Articles 304 and 305). The Table 1 below (based on Jerovšek, Kovač, 2010: 233) shows the system of execution in Slovenia.

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<sup>11</sup> As indicated also by the Supreme Court of the former Socialist Republic of Slovenia (139/82-6), stating that accessory participants cannot be the proposers of execution even if their interests are affected and have participated in the proceeding, as the execution is (also) in public interest. For instance inspection measures must be executed *ex officio*, not following the proposal of an informer of liable party's wrongdoing, like neighbour informing construction inspection of illegal building. On the other hand the entitled proposer is for instance a neighbour, requiring from an investor after the building is finished to return the land on which it was built in prior state if so defined in advance in the building permit.

<sup>12</sup> Instead of such special order, the protection of public interest can be guaranteed by an executory clause contained in the initial executory title that has the same legal nature as an independent administrative act (cf. Art. 290/3 of the GAPA, most often in relation to Art. 236/2 of the GAPA). If the body issued an administrative act containing such executory clause, execution is initiated automatically upon serving the executory title to the party, i.e. upon completion of administrative proceedings.

Table 1. *Types of execution according to the GAPA*

Type of execution	Judicial execution	Administrative	execution lato sensu
		<i>Tax execution</i>	<i>Administrative execution</i>
<i>Type of obligation in executory title</i>	real estate or company share	pecuniary obligations	other obligations
<i>Body carrying out execution</i>	court (local or district)	tax authority (since 1.1. 2010 customs office) on behalf of all other bodies, <sup>1</sup> possibly also a bearer of public authority (e.g. RTV Slovenia or chambers for the collection of their fees)	1 <sup>st</sup> instance administrative body conducting basic proceeding (e.g. administrative unit, although the matter is executable only after the appeal)
<i>Basic law</i>	law on judicial (civil) execution <sup>2</sup>	law on tax procedure <sup>3</sup>	GAPA
<i>Measures</i>		distrainment of the debtor's pay, bank accounts, (im)movable property, and securities etc.	through other person, by fine of up to EUR 1,000, or physical constraint
<i>Methods</i>		execution for securement and temporary order securing the performance of an obligation	execution for securement and temporary order securing the performance of an obligation

## 2.4. Phases and measures of execution

Executions are carried out in the order of the matters i.e. their executability, and not based on the decision (not) to act in a certain part of the country or for selected parties. However, the authorities must also take account of proportionality. Thus, it is not sufficient that a measure is intended to

<sup>1</sup> The beginning of executability is to be established by the body issuing the executory title. If a different body is competent for execution, such body is not obliged to examine the accuracy of established executability (Supreme Court decision I Up 392/2002 of 26. 10. 2004, cf. Breznik et al., 2008: 794).

<sup>2</sup> Execution of Judgements in Civil Matters and Insurance of Claims Act (*Zakon o izvršbi in zavarovanju – ZIZ*), Official Gazette of the Republic of Slovenia No. 51/98 and amendments.

<sup>3</sup> Tax Procedure Act (*Zakon o davčnem postopku – ZDavP-2*), Official Gazette of the Republic of Slovenia No. 117/06 and amendments.

protect legitimate public interest but it must be recognised as necessary to achieve the goals of a certain legally provided policy. The principle of proportionality is based on both substantive law and procedural aspects (Kovač, Rakar, Remic, 2012: 319). It is therefore necessary to weigh between different interests and possible actions not only in the final decision but already as regards the manner in which proceedings are conducted, e.g. in an economic selection of the means of proof. The principle of proportionality applying to administrative proceedings is specified in Art. 7/3 of the GAPA; as regards the selection of the means of constraint and the carrying out of execution – considering that the GAPA provides for a number of means (Articles 296–299) – proportionality is specified in Art. 285/1.<sup>13</sup> The body must apply a measure that is effective and will force the obliged person to fulfil the obligation, yet it has the mildest effects on the obliged person. When several measures are possible, the body must select the mildest measure by which the purpose of execution can still be achieved (Androjna, Kerševan, 2006: 610). Furthermore, proportionality applies also to the degree of measures. Thus, for example, a lower fine can first be imposed and then raised in every following administrative order, or even replaced by a severer measure. Art. 292 of the GAPA explicitly provides that exceeding the suitable measure is by itself reason of appeal; appeal is in fact possible against an administrative order that does not impose the mildest possible manner or measure of execution that still achieves the purpose of execution (i.e. fulfilment of obligation).

Important for executability is the operative part of the order allowing execution which must contain: (1) the establishment of executability with the precise date of individual executory titles and the body's decision allowing execution; (2) the definition of the manner or measure of execution, including the time of execution, as a separate item of the operative part;<sup>14</sup> and (3) a note concerning the costs of proceeding and the clause of non-suspensiveness of appeal against the order. Appeal is possible against the order allowing execution, whereby different reasons may be stated,

<sup>13</sup> Cf. Pavčnik, 2007: 53; Jerovšek et al., 2004: 767–771. The status of the party may be infringed upon only when and inasmuch it is necessary to protect public interest or the rights of other affected parties, whereby the application of procedural rights of the party – e.g. by requesting extension or exclusion of an official – cannot be seen as a reproach to the obliged person and less so as a basis for excessive use of the state apparatus of power with unjustified assistance of the Police.

<sup>14</sup> It is not necessary that the manner of execution includes the date of execution through other person. In such case, the body that has issued the executory title (decision) must determine the date for the executor separately (Supreme Court decision VIIps 7/95-9).

such as objection against the beginning of executability (indirectly often objection concerning the performed or correct serving), the status of the obliged person, obligation already fulfilled, and appropriateness of the manner of execution proposed or actually carried out.<sup>15</sup> However, it is not possible to assess the correctness of the executory title. If such a proposal was presented, it would be rejected as inadmissible. In case of disputability in such sense, a renewal of proceedings or different measures should be considered rather than »solving« the unlawfulness of the executory title by means of delay or stay of execution. An execution that has been initiated can be stayed or delayed – also by means of an otherwise non-suspensive appeal – if the appellant proposes a temporary order in accordance with Art. 292/3 of the GAPA or if irreparable consequences would arise. Execution may also be discontinued *ex officio* if it is established that the obligation has already been fulfilled, if execution was not allowed, if execution was carried out against a person other than the obliged person, if the entitled person withdrew the proposal, or if the executory title was annulled or annulled ab initio (Art. 293 of the GAPA). An administrative act in the form of an order is issued by the executive body regarding the above acts.

### 3. Dilemmas of execution in contemporary Slovenian practice and case law

This chapter presents the outcomes of the analysis of approximately one hundred different cases from contemporary administrative practice and case law (mainly over the past five years).<sup>16</sup> The analysis is focused specifically on execution as a procedure and acts of the authority when there is a need to enforce it by state repressive apparatus. It is not the effectuation

<sup>15</sup> Cf. Jerovšek et al., 2004: 791–793. In the execution proceeding, the administrative body must examine the actual state of affairs regarding the serving of the decision that is being executed.

<sup>16</sup> Data relating to administrative practice are taken from various sources, such as questions frequently asked by administrative bodies and addressed on the ministry competent for public administration concerning the interpretation of the GAPA, as well as on the Faculty of Administration. Several examples are taken from the web portal [www.upravna-svetovalnica.si](http://www.upravna-svetovalnica.si) available since 2009. Acts issued by the courts are abbreviated as follows: »AC« for Administrative Court decisions, »HLSC« for Higher Labour and Social Court decisions, »SC« for Supreme Court decisions, and »CC« for Constitutional Court decisions. Examples from case law were retrieved from the public database of anonymous decisions at [www.sodisce.si](http://www.sodisce.si).

of the law and administrative decision in a broader sense, but we understand it narrower as a »forced« realisation of administrative-legal relation defined by an executable individual administrative act. Cases have been studied, underlined and categorised by individual institutions that represent the main dilemmas. These issues do not necessarily refer directly to institutions emphasized in the previous chapter, which leads us to conclusion that some relations are in practice unproblematic. Yet other issues arise with time and new societal circumstances. The analysis of these dilemmas therefore offers ground for adoption of new principles and rules in GAPA and its implementation.

### 3.1. The systemic role of execution in relation to other proceedings and relations

As expected, execution is most frequent in cases concerning building or environmental and construction inspections, which points to a high degree of collision between public and private interests as well as to the intertwining of administrative and civil law relations in such area. As regards the inspection, the most basic dilemma arises in current practice when supervisory administrative bodies misinterpret the relation between primary proceeding and execution and the minor offence powers in order to efficiently carry out their administrative authority (mainly inspectorates or the tax administration). Namely, the Slovenian legislator obliged these bodies to carry on administrative and from 2005 also minor offence proceedings against parties obliged. Inspections should be taken more seriously by parties and consequently act more effectively. But the relations among matters and types of proceedings and their basic characteristics have not been regulated clearly. Consequently, inspection bodies can – based on an issued and executable administrative act deciding on (imposing) a certain measure – either interpret execution as being a punishment for the obliged person rather than regulating the relation to the benefit of the wider community, or wrongly alternate the relevant measures. Thus, for example, they only conduct a minor offence proceeding even if they should carry out administrative proceedings in order to pursue public interest pursuant to substantive law. Or – since the obliged person has not fulfilled the obligation – fail to proceed with execution after the relevant act in primary administrative proceedings has been issued, and rather initiate a minor offence proceeding, assuming that this should be enough to force the obliged person to fulfil the obligation. However, the payment

of the fine as such does not necessarily mean that the obligation in public interest will actually be fulfilled. The rationale behind execution is in fact no less and no more than forcing the obliged person to sooner or later fulfil the imposed obligation (especially if such is in public interest), rather than sanctioning. The GAPA provides that the order allowing execution is issued to threaten the obliged persons that measures of coercion will be applied if the latter do not meet their obligations within the prescribed (additional) period of time. Such threat is a form of psychological coercion as well as an economic measure to encourage the obliged persons to fulfil the primary obligation set in the administrative act. The preferred method of execution before resorting to forcible execution is execution through other person, which to some extent guarantees that the obligation will de facto be fulfilled.<sup>17</sup> However, the prescribed measure of execution should not imply repression or criminal sanctions but should only be regarded as a means of prevention. Execution is not based on the obliged person's guilt or liability for not having fulfilled the obligation (Androjna, Kerševan, 2006: 614). Therefore, the order allowing execution should provide for an additional (short) time limit for the party to fulfil the obligation before execution through other person is completed.<sup>18</sup> A premature execution is illegal even if the party has been imposed an executable ob-

<sup>17</sup> Cf. Jerovšek et al, 2004: 767, criticising different case law. We share their view since the courts still – teleologically inconsistent with the GAPA or the principle of public interest – favour the threat of a fine (SC X Ips 1100/2005, 21. 5. 2009). The Court e.g. states that the administrative body carrying out execution first threatens the obliged person with a fine unless the latter meets the obligation within the set time limit. If the obliged person in the meantime does something that is contrary to the obligation, or if the prescribed time limit expires with no successful action, the fine is enforced immediately and the obliged person is given a new time limit to fulfil the obligation, together with the threat of a new, higher fine (Article 289 of the GAPA). Such, repeating and threatening procedures, are prescribed by GAPA rather in detail (cf. on theory and law in force in chapter 2), which seems (still) to be a heritage of development on this territory, firstly following Austrian regulation in the beginning of 20<sup>th</sup> century and later on former Yugoslavian socialism (with state being captured).

<sup>18</sup> It needs to be underlined that if the order allowing execution does not contain state that the decision has become executable, such cannot be fixed by a new order in a manner such that it would have effect from the day when the order allowing execution becomes effective. As this interferes with the status of the party, a certain degree of »formalism« seems necessary. In such case, a corrigendum is unfavourable for the party i.e. obliged person and may take effect only from the day of the serving of such order (AC U 3113/97-9). On the other hand, the order regarding execution is not illegal although it indicates a wrong date of executability, provided that execution was allowed when the decision was already executable (SC of the Socialist Republic of Slovenia, U 498/84-5, 1985), since this is a minor mistake that does not affect the legal status of the party.

ligation in public interest that has not yet been fulfilled. Another element of prevention and of the principle of proportionality is a warning issued to the obliged person that they might be forced to pay the costs related to execution, which is also a prerequisite for such costs being charged to their account (SC X Ips 865/2005, 22 Oct 2009).

If an unlawful situation is established and the relevant administrative act (decision on measures) has been issued and became executable, and execution has already been carried out in kind (e.g. demolition of illegal building), yet no actual order allowing execution exists, the GAPA does not regulate the actions to be taken by the administrative body. However, in such case it is indeed unlawful to opt for a »fake« legalisation of previously unlawful acts, as demonstrated by several examples from practice (e.g. building inspections). If there is an executable executory title in public interest and the obligation has already been fulfilled through forcible execution, yet the order allowing execution has not yet been issued or is unlawful and subsequently annulled, the body should establish – by an official note in the file – the actual state of affairs that does not call for execution (anymore). In execution, too, acts are issued in accordance with regulations and facts existing and applying at the time of decision (cf. Art. 6, 251, 252 and 238 of the GAPA for the primary administrative proceedings). If it is established that e.g. illegal building has already been removed, execution is not initiated at all. If execution was initiated, it should be stayed pursuant to Art. 293 of the GAPA since in real life there is no illegality (anymore) and thus no obligation and no facts justifying execution. Therefore, an order allowing execution issued for the fulfilment of an obligation that has already been fulfilled would be considered null according to Art. 279/1, third indent) and 2 of the GAPA, which implies that administrative proceedings have been severely violated.

Similarly wrong – particularly in proceedings conducted *ex officio*, such as inspection – is the belief that supervision over the same party, carried out on the same legal basis yet in consecutive periods of time, is considered the same administrative matter.<sup>19</sup> In such case, administrative bodies of-

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<sup>19</sup> Administrative practice reports an opposite yet wrongful reservation by the bodies to decide twice on the same matter contrary to Art. 129 of the GAPA, if a new decision was issued by the same body against the same party on the same legal basis, even if the actual state of affairs after e.g. a few months or years from the first inspection changed (several times). The general problem concerns the understanding of what makes the same administrative matter (cf. Androjna, Kerševan, 2006: 283, 582). In the above case, it was not the same administrative matter and thus a new decision should be issued (considering the first proceeding and the then issued act) and only later the execution could be carried out, pro-

ten (see *Upravna svetovalnica*) wrongfully issue a new administrative act (decision) in the same matter in which an act has already been issued, even if it concerns the same actual and legal state of affairs as the first, not yet executed act. This is not correct – a new administrative act should not be issued and is purposeless if it imposes the same obligation as the first one, or even unlawful and needs to be annulled in accordance with Art. 274/1 – second indent of the GAPA, if – based on the same facts and same sector-specific regulation – it imposes a different or stronger obligation than the first one. An order allowing execution should be issued instead, upon prior examination (within 30 days from the beginning of executability) whether the obligation is still unfulfilled. Execution as the proceeding following the primary administrative proceedings does not mean that the same matter is being decided twice. This is also the argument stated by the courts (cf. SC I Up 407/2008 of 30 Oct 2009 where the party claimed the execution through an authorised operator was an assault on their substantive right), since the order allowing execution does not decide on the party's legal entitlement or obligation and thus it does not infringe upon their legal interest. Execution through other persons is in fact carried out only as a measure of coercion following the primary administrative act, since the party failed to fulfil their obligation.

But the practice and case law should necessarily be supplemented. In fact, the order allowing execution does not mean that the same administrative matter is being decided as the one dealt with in the executory title, issued in primary administrative proceedings, although it interferes with the legal status of persons when it decides on the manner of coercion (which can be more or less (un)proportionate). Thus, it is also necessary to provide for the judicial protection of the parties although in execution decisions are taken in the form of orders which – according to the GAPA – are *prima facie* (merely) considered procedural acts. From the entering into force of the Administrative Dispute Act (*Zakon o upravnem sporu*, ZUS-1) on 1 January 2007 until 2009, a different position prevailed (Kobler, 2009: 165–172). The court argued that an order allowing execution did not constitute a meritorious decision on a right, legal interest or obligation, and

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vided that the new decision had not been implemented by the set deadline. For the same reason, it is impossible to combine the procedures of issuing two executory titles in order to »sum up« any unfulfilled obligations and eventually carry out one execution only. Art. 130 of the GAPA however provides for the possibility of combining several execution proceedings based on two or more decisions in different matters, even if they are carried out on the basis of the same regulation and against the same party (known as objective cumulation, cf. Kovač, Rakar, Remic, 2012: 324).



that administrative dispute was only allowed against procedural orders that complete, stay or renew the proceedings, rejecting any court action against such. Yet some earlier decisions by the Supreme Court indicate that even in the event of issuing an order allowing execution – even if such cannot, in principle, be subject to administrative dispute – one needs to consider whether the order interferes with the appellant's legal status. Lately there have been several examples of administrative acts issued in a more substantive way (cf. AC I U 999/2011, 14 Sep 2011) concerning the scope of work of agricultural inspection). Since the challenged order on execution does not only provide that execution is allowed but also defines forcible measures in case the party fails to meet the obligation, the Court decided to act against the order allowing execution, but only within appeal procedure not by extraordinary legal remedies (AC III U 190/2010, 26 Nov 2010).

### 3.2. Understanding executability and the obliged person's legitimacy

Recent Slovenian case law contains several examples where the court considered executability to be a procedural condition.<sup>20</sup> This is evident in situations where the administrative body responsible for execution began the execution too soon or acted unlawfully. In fact, as far as the beginning of execution is concerned, the body must first examine the overall state of affairs regarding the serving of the administrative act that is being executed. For such purpose, it needs to take into account a possible objection presented on grounds of incorrect serving (CC U 445/02). Serving is in fact one of the most frequent problems concerning executability (substantial errors excluded), since it is a precondition for arising of legal consequences of the administrative act which impose an obligation on the obliged person (more in Kovač, Rakar, Remic, 2012: 56, 186). A substantial error in serving leads to non-executability and thus non-existence of the conditions to initiate and carry out execution.

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<sup>20</sup> In addition to procedural conditions provided by the GAPA, sector-specific laws may define additional procedural conditions for the issuing of the relevant administrative act or carrying out execution. Thus, for example, the Administrative Court (I U 1648/2010, 12.9.2011) concluded that a decision concerning tax assessment issued pursuant to Art. 146/1 of the Tax Procedure Act could be considered an executory title only if accompanied by a confirmation of executability; the existence of the executory title was, in turn, a procedural condition for issuing the order allowing tax execution.

Another frequent dilemma concerns the transfer of the obliged person's legitimacy during the course of proceedings. The fact is that execution is also subject to general provisions of the GAPPA, including Art. 50 which provides that when a party dies or ceases to exist during the proceedings, the proceedings will continue if the subject matter of proceedings can be transferred to their legal successors (more in Androjna, Kerševan, 2006: 178). When the legitimacy for the fulfilment of an obligation is bound to e.g. ownership rights, the obligation passes onto the new owner automatically with the transfer of ownership rights. This derives from the very sense of execution, as only the new owner will actually be able to fulfil an obligation bound to ownership rights. Yet if the execution against the previous owner was already initiated, it needs – in the event of personal execution – to be discontinued (Art. 293 of the GAPPA) and a new proceeding should be initiated and carried out against the new owner. In the event of cessation of existence or death of a party or a similar transfer of ownership rights during the course of proceedings, the administrative body must bring such fact to the attention of the new party and enable them to participate in the execution proceeding until its completion. If, for example, forcible execution or execution through other persons has been carried out against person A and the obligation passes to person B during the course of proceedings, the latter are not discontinued and the new obliged person B enters the same execution proceeding to replace person A. This holds true even more if the obliged person is a legal entity that goes bankrupt but still exists. As regards passive legitimacy, the Administrative Court argued (I U 647/2009, 12 Nov 2009) that the inspection measure (i. e. demolishing illegal building or its legalisation) in the executory title was applied against the investor that was building without the legally required administrative permit, or even contrary thereto. As the purpose of inspection measures is to re-instate the state of affairs existing prior to the unauthorised building or bring it close to the state of affairs allowed by the administrative act, a change of ownership cannot be an obstacle to the abrogation of the illegal status. If an executable administrative act is issued and later on the obliged person changes or a bankruptcy procedure begins, etc., the execution – provided that the obligation is transferred to legal successors – is initiated and carried out against the legal successor. Legitimacy of execution is thus not necessarily determined by an illegal action by the obliged person but also by their predecessors, and does not relieve the successor from the fulfilment of the obligation, particularly if such is in public interest.

### 3.3. Types of executory title and execution

Not all administrative acts as executory titles can be executed forcibly, proves recent case law. For example, as states the theory (cf. sources and guidelines in chapter 2), it is not possible to execute a declaratory decision. An example thereof is supposed to be the annulment of the building permit for the legalisation of an asphalt plant and the subsequent establishment of nullity of the operating permit (SC I Up 442/200, 22 Oct 2009). The Court ruled properly yet, based on an erroneous statement of reasons since the operating permit actually confers a tangible right (use of the built facility). In this case, it would be appropriate to annul the operating permit by renewing the proceedings in accordance with the fifth indent of Art. 260 of the GAPA, since the sector-specific act binds the issuing of such permit to a previously independent procedure for issuing the building permit. It is, however, true that it is not possible to execute a decision which does not specify on whom the entitled person can address the request for execution since it does not provide legitimacy for execution. The order allowing execution based on such decision is therefore null (SC I Up 779/2004, 13 Sep 2006). Furthermore, the administrative practice and case law comply with the theory, that it is not possible to execute an order allowing the renewal of proceedings the effect of which is the initiation of renewed proceedings (SC I Up 33/98), or an order rejecting a claim (SC I Up 1270/2005, 10 Nov 2005, Androjna, Kerševan, 2006: 605).

In some cases, judicial execution is carried out based on an administrative executory title (cf. Art. 288/2 of the GAPA), but this does not apply to acts issued by administrative units although the subject of administrative act is related to a claim addressed on the entitled person based on a final court decision. This is not a matter of jurisdiction but rather of transferring the claim onto the parties as creditors since the executory title is an administrative act and not a decree of distribution, which is why administrative execution is carried out (SC III Cp 3104/2006, 14 June 2006). Similar applies with regard to the obligation of returning health care allowance, which is a matter of administrative and not judicial execution, and court action is rejected pursuant to Civil Procedure Act (HLSC Psp 651/2004, 13 Oct 2005). On the other hand, administrative and judicial execution can also act complementary to each other, such as in securing the performance of an obligation in tax execution (cf. Articles 301 and 304 of the GAPA, more in Kovač, Rakar, Remic, 2012: 345). If the tax authority had to wait until the proposal for securing the debt by entering a lien on the debtor's real estate (cf. SC III Ips 115/2005, 18 Sep 2007)

pending evidence that executions on other debtor's property failed, the institution of securement would in many cases lose sense.

### 3.4. Issuing acts according to phases of execution (initiation, realisation, suspension)

Based on the case law analysis there is a huge problem in Slovene practice how to conduct execution proceeding since its major characteristics differ significantly from basic administrative proceeding when imposing an obligation. The execution proceeding should always begin when execution is allowed, in accordance with a special order or execution clause in the primary executory title. It is not necessarily initiated even if there are grounds for that based on the executory title. If the party fulfils the obligation, although after the expiry of the set deadline, forcing them to do so is not necessary (anymore). Another difference is the conclusion of proceedings – the primary administrative proceeding always ends with an individual, concrete administrative act being issued, a decision or an order staying the proceeding (Kovač, Jerovšek, 2010: 184). As regards execution, after the order allowing execution has been issued, it is presumed that further actions and acts will not be necessary since the party will feel forced to fulfil the obligation. Thus, an order staying the execution pursuant to Art. 293 of the GAPA is issued only and exclusively when an initiated and running execution proceeding must be stayed since the obligation is (finally) fulfilled prior to claiming the prescribed fine or the actual fulfilment of the obligation in kind, e.g. through other persons. Moreover, it is wrong in practice (not) to distinguish between the powers of the issuers of executory titles and executive agencies when it comes to different institutions as prescribed by GAPA, e.g. in collecting receivable payments. Unfortunately, even courts (cf. I U 280/09 of 17 Nov 2010) often completely disregard this issue despite its weight for (il-) legality of authoritative action taken.

As regards execution as a tool to force the party to fulfil the obligation, another possibility to consider is to discontinue or stay the execution in accordance with Articles 292 and 293 of the GAPA. The (non)authorisation to stay execution or temporary decisions pursuant to the GAPA were often subject to decision by the Supreme Court, mainly in terms of interpretation of irreparable damage and suspension based thereon. In fact, damage cannot be grounded on the expected consequences deriving from a future, still non-issued administrative act, and based only on an

order to renew proceedings (AC U 1943/2002, 21 Oct 2002). A mere reference to pecuniary loss does not *per se* mean that hardly repairable damage has occurred since, in addition to the amount of loss, the party must provide evidence of other circumstances demonstrating that their business has been jeopardised (SC I Up 1111/2006, 20. 7. 2006). Likewise, the Court established (I 172/2010, 10 June 2010) that the administrative act ordering the discontinuation of building of the obliged person's storage facilities did not support the party's argument that severe damage had been caused by non-usage of the storage facility. Consequently that led to reduced turnover, since a non-grounded statement concerning the amount of expected loss was not sufficient to reliably evaluate the possible existence of consequences stated by the party. In another case (SC I U 844/2010, 12 July 2010), the party unsuccessfully claimed the occurrence of hardly repairable damage due to disturbances of public peace and order caused by a day/night bar during extended operating hours, as the party did not provide tangible evidence of being affected. Pursuant to Art. 293 of the GAPA, staying the execution is only possible after a legal remedy has been filed and hardly repairable or irreparable damage has been ascertained. Yet even if the latter is provided, the request must be annulled if the first condition is not met, too (SC I Up 323/2008, 28 Oct 2009). Mention needs to be made also of the position of the Administrative Court (I U 858/2010, 5 July 2010): the Court, while considering hardly repairable damage in the event of staying the distraint, established that the payment of taxes was an important budgetary source; therefore delay of execution was contrary to public interest and should be resumed. A further problem arises when an act defining a right or obligation for the party is amended after the decision has been issued, yet before the obligation has been fulfilled (cf. examples in Kovač, Rakar, Remic, 2012: 354-357). But as a general rule, the regulations to be taken into account are those applying at the time when the administrative decision is issued, not when such is challenged (cf. GAPA Art. 251). Although acting in line with the legislation in force is in public interest, original administrative acts cannot be challenged, regardless of whether the deadline for execution has expired or the acts have already been executed. However, it is possible that the obligation has not been fulfilled yet. The above mentioned may be quite often – according to rather frequent novelties of legislation in force (for instance construction act changed twice in 2012), but the GAPA presently does not regulate such a situation directly. Nevertheless, the administrative body cannot force the parties to fulfil the obligation to an extent that exceeds the scope provided by the valid law as

an expression of the principle of legality, since GAPA explicitly directs to ground individual administrative acts and actions on legislation in force. Previously issued and final administrative acts thus do not cease to apply, and the legislature must ensure consistency with the new legal framework when adopting a new regulation (Androjna, Kerševan, 2006: 448). But if the new regulation introduces heavier conditions or a stricter obligation than the previous one, the body must carry out new proceedings to protect public interest as currently regulated.

## 4. Conclusion

The study of contemporary Slovenian case law concerning execution as repressive realisation of set administrative relations offers several conclusions. Given the supremacy of public interest, specific obliged persons consider administrative relations to be extremely conflictual. Yet such conflicts need to be held under control if we wish to have a properly regulated society. The case studies analysed prove the initial hypothesis that legal regulation of execution pursuant to the GAPA enables a consistent protection of public interest and, consequently, an effective implementation of public policies. Simultaneously, constitutional and legal individual interests are adequately guaranteed. However, to develop good administration, there is room for more consensual confrontation of opposing interests on regulatory and implementation levels. Authoritative measures should not be *a priori* repressive and aggressive, but should be applied only if so required by public interest i.e. general social good. Even in evidently legitimate forcible actions of authorities against individuals, the latter must be provided a series of fundamental guarantees under international and constitutional law, in order to avoid administrative law serving merely as a tool to pursue partial political interests (Galligan et al., 1998: 19–25). In modern society, the classic guarantees of the *Rechtsstaat* should even be upgraded following the good administration doctrine, in order to avoid that conflicts within the society overpass the limits of legitimacy. Therefore, the principles and rules of administrative relations analysed herein, particularly those applying to forcible and thus more disputable administrative execution, should be regulated and implemented differently in the future. Thus, a holistic law or at least code of administrative proceedings should be adopted, defining the scope and extent of competences considering the degree of disputability of relations. Present GAPA is in this respect outdated, with no incentives to settle disputes amicably.

As regards execution, new approach would be less invasive and forced effectuation of law should be carried out less frequently. In other words: the necessary collisions between public and private interests should be regulated in a manner such that they are possibly solved even before measures of coercion become necessary. Only in such manner it will be possible to create a modern, effective, and democratic society.

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EXECUTION IN ADMINISTRATIVE MATTERS –  
CHALLENGES OF THE SLOVENIAN ADMINISTRATIVE  
PRACTICE AND CASE LAW

*Summary*

*Administrative relations regulate conflicts between the public and private interests. Crucial for the realisation of the public interest is the realisation of the administrative act, particularly when proceedings are conducted ex officio with the purpose of protecting the public interest. The study presents the main characteristics of execution as a special administrative proceeding in Slovenia when parties do not fulfil their obligation on voluntary basis and forced realisation of legal relation is required. Theoretical findings are supported by recent administrative practice and case law, which is followed by a critical evaluation. The execution is in practice found highly disputable in terms of interests' collision despite comprehensive and detailed provisions of the Slovenian General Administrative Procedure Act. The outcomes of the analysis serve as a basis to formulate the necessary guidelines for future implementation of public policies – to be more effective throughout the region where administrative relations are regulated following the Austrian-German model.*

Key words: *administrative proceedings, execution, public interest, case law, Slovenia*

## IZVRŠENJE U UPRAVNIM STVARIMA: IZAZOVI SLOVENSKE UPRAVNE I SUDSKE PRAKSE

### Sažetak

*Upravni odnosi uređuju sukobe između javnog i privatnog interesa. Od presudne važnosti za ostvarenje javnog interesa je izvršenje upravnog akta, osobito kada se postupak vodi po službenoj dužnosti, u cilju zaštite javnog interesa. Analiziraju se glavne karakteristike izvršenja kao posebnog upravnog postupka u Sloveniji koji se primjenjuje kada stranke dobrovoljno ne ispune svoju obvezu, a postoji potreba za prisilnom provedbom upravnog akta. Teorijski nalazi su poduprijeti novijom upravnom i sudskom praksom na koju se daje kritički osvrt. Bez obzira na opsežne i detaljne odredbe slovenskog Zakona o općem upravnom postupku koje ga uređuju, izvršenje se u praksi smatra vrlo upitnim zbog sukoba interesa do kojih ono dovodi. Rezultati analize služe kao osnova za formuliranje smjernica za buduću provedbu javnih politika – kako osigurati da izvršenje bude efikasnije u čitavoj regiji, tj. u zemljama koje svoje upravne odnose reguliraju slijedeći austrijsko-njemački model.*

*Ključne riječi: upravni postupak, izvršenje, javni interes, upravna i sudska praksa, Slovenija*