Slovenian Criteria on Top Public Officials Selection: Theory, Regulation, Implementation and Case Law 2003-2011

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Abstract: *The paper presents the procedures for the selection of top-ranking officials pursuant to the Civil Servants Act, applied in the work of the Officials Council of the Republic of Slovenia and its special competition commissions between 2003 and 2011. Seven years from the adoption of the Civil Servants Act and the first Standards of Professional Qualifications, Selection Criteria and Testing Methods, the Officials Council revised the Standards with due consideration of the development of human resource management, the experience in administration, and case law. The new Standards apply to all open competitions published since January 2011 and relate to both selection criteria and methods for the evaluation of candidates' eligibility, since a legitimate and most suitable recruitment is only possible based on a combination of both substantive and procedural law. The revised Standards redefine the elements of candidates' qualification for top positions, bringing professional knowledge of the field concerned and managerial experience or skills on an equal footing. The procedure is now more flexible and particular attention is paid to non-discrimination of candidates. The revision of the Standards contributes to meeting the constitutional objective of the selection of the best candidate for the performance of public tasks, while an amendment of the above Act will be necessary for any further development.*

Keywords: *top public officials, selection, civil servants, state administration.*

JEL: *H83; G38; D73.*

Introduction

By application of the Civil Servants Act[2], Slovenia has established since 2003 – following the EU and OECD Sigma[3] guidelines – an entirely new system

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[2] Official Gazette of the Republic of Slovenia No. 56/02, 110/02-ZDT-B, 2/04-ZDSS-1 (10/04-corrig.), 23/05, 35/05-UPB1, 62/05-CC decision, 113/05, 21/06-CC decision, 23/06-CC decision, 62/06-CC decision, 131/06-CC decision, 11/07-CC decision, 33/07, 63/07-UPB3, 65/08-CC decision, 69/08-ZTFI-A, 69/08-ZZavar-E, 74/09-CC decision. One of the main focuses of the Civil Servants Act was depoliticisation or professionalization of civil servants. As seen above, the Act was frequently amended or subject to constitutional review. The government's regulatory programme envisages an amendment to the Act also in 2011, postponed from 2010 to allow a joint discussion of the civil servants and wage systems. In such regard, in 2009 and 2010 the Officials Council proposed a modification of the procedure for the selection of candidates for top official positions, e.g. by means of a more detailed definition of the special selection procedure.

[3] More in the Sigma Papers, which provide analyses of data concerning civil servants, public finance, public procurement, regulation, organisation and governance of the public sector in individual countries since 1995. For data on the civil servants system see documents No. 1, 5, 12, 14, 16, 21, 23, 27, 38, and No. 44 on Sustainability of Civil Service Reform in Central and Eastern Europe Five Years After EU Accession (2009).

for the selection of top-ranking civil servants (more in Pirnat et al., 2004, pp. 64-67). This applies to positions specified by Article 60 of the Civil Servants Act, such as directors-general, principals of bodies and secretaries-general within ministries, principals of government offices, and principals of administrative units. All-together, the Act thus provides for around 280 official positions, while the state administration as a whole comprises around 34,000 official and administrative positions.[4]

Applied since mid 2003, the Civil Servants Act provides that in the procedures for selecting the holders of the highest official positions, a specific role is played by the Officials Council (OC), which is a body outside the government's domain. The Council is composed on a multipartite basis: three members are appointed by the President of the Republic from among experts in the public sector, three members are elected by high officials from their own ranks, two members are appointed by the trade unions of professions in the public administration, and four members are appointed by the government, as a general rule for a period of six years. The Chair of the Council is elected as *primus inter pares* by the members of the Council (Article 175 of the Civil Servants Act).[5] The Council's task and mission is to evaluate and define the criteria for the development and implementation of the principles of HR management in public administration, particularly in relation to the highest positions (Korade-Purg, 2004). The Council ensures that recruitment – at the very top of the ministries in particular – is not based merely on political interests, and highlights professionalism in the work and management of the administration, with due consideration of the significance of the political orientation of ministers and other functionaries as principals of the highest civil servants. The Council pursues such goal in the selection procedures mainly through its competences listed in Articles 174 and 178 of the Civil Servants Act, whereby the Council:

The latter highlights the importance of making top positions – the holders of which play a central role in the implementation of public tasks – professional, allowing political appointment for the highest positions only. With the reform of the Civil Servants Act, Slovenia successfully fulfilled such objective, contrary to e.g. Poland, Slovakia and Hungary. Estonia is the only country ranking even higher given the actual depth of depolitisation (Sigma, 2009, pp. 21, 33). Please note that some indications in the Paper are easily misunderstood – the Paper states, for example (pp. 33, 38 …), that the Officials Council falls under the Ministry of Public Administration, whereas the Civil Servants Act stipulates the opposite: the Ministry provides technical and administrative support to the Council; also, according to the Paper the Council is chaired by a Ministry representative – pursuant to the Act, only one third of the members are appointed by the Government, and the Chair is appointed from their own ranks; moreover, the Paper states that top positions are fixed-term appointments – the Act de facto provides for a temporary term of office, yet the candidate is permanently employed in state administration, etc.

[4] Ministry of Public Administration, 2011, http://www.mju.gov.si/si/delovna_razmerja_in_stipendiranje/zaposleni_v_upravi/ (retrieved in March 2011). Figures indicate that less than one per mille of all positions are considered top-ranking official positions (within a ministry, the director-general is the third highest position, following the minister and the state secretary as minister's deputy).

[5] Multipartiteness is by all means positive, both in principle and in the practice of the past years, while the actual ratio between members (e.g. the number of professionals, of government representatives, of trade union representatives) can be subject to debate or political decision (e.g. whether the representatives of officials are de facto autonomous or is it the same interest group as the government appointees). In such regard, particular mention needs to be made of the government's decision in 2008-2009 to appoint independent experts (professors from faculties, HR managers from enterprises) as »government« representatives.

- adopts the Standards of Professional Qualifications, Selection Criteria and the Methods of Qualification Testing for Position Officials in Public Administration (Standards), which – together with the rules of procedure for the work of special competition commissions – apply to all procedures as a general legal act issued on the basis of the law[6];
- appoints special competition commissions (SCC), which assess the fulfilment of (formal) conditions and (additional substantive) criteria by candidates in specific competitions; according to the Council's rules of procedure, the Chair of such commission is always a member of the Officials Council, which should contribute to the independence and unification of approaches adopted by the commissions.

The Standards were adopted at the Council's first meeting as early as June 2003 (Standards/03) and were amended through the Council's decisions only to adapt them to the needs in practice (mainly as regards the interpretation of criteria); therefore, considering the wide experience gained in administrative practice and case law over the period 2003-2009 (the Council's first term, cf. Civil Servants Act), it was time for a radical modification of the criteria and a review of the activity of the key players in the procedure. Thus, after months of preparation, expert consultations and coordination, the Council (almost entirely newly appointed in 2009) adopted new Standards in late 2010 (Standards/10), which apply to open competitions published since 1 January 2011.[7]

6 The legal nature of the Standards in terms of basis and subject matter is clear – it involves general and abstract derivative norms, meaning that the acts adopted by the Officials Council must comply with all regulations (cf. Article 153 and 160 of the Constitution of the Republic of Slovenia). In the case of judicial review No. 1196/2004-11, the Court ruled that the Standards were not applicable as they were only »a working tool«, which – considering the authorities' commitment to legality – was to be critically evaluated. The legal nature is the same in the rules of procedure of the Council and of special competition commissions, particularly where it concerns the *erga omnes* impact on participating candidates.

7 The 2003 Standards, the new 2010 Standards, the rules of procedure of the Council and the rules of procedure of special competition commissions (last amended in November 2010) as well as the annual reports on the work of the Council are available since 2003 at the Ministry's or Council's website, http://www.mju.gov.si/si/delovna_podrocja/uradniski_svet/. As for the amendments to Standards/03 following Council's decisions, such procedure is similar to the procedure for the adoption of the Standards and thus formally indisputable although it introduces – despite the fact that decisions are made public – a certain degree of non-transparency of the legal system among the addressees (candidates in competition procedures); for such reason, in 2009 the Council decided that the provisions of the Standards and of the rules of procedure can only be modified by amending the basic acts and adopting consolidated texts, although this could be nothing but a more detailed interpretation.

1. System of Selection of the (Best) Candidate – Between Theory and Practice

1.1 Theoretical and Legal Basis of the System of Selection of Top Public Officials

Pursuant to the Civil Servants Act (Articles 60-65 and related articles); the procedure for the appointment to the positions concerned is based on the combination of professional and objective criteria and a subjective selection at political discretion. The competition procedure is initiated by the principal of the future official, e.g. the minister of finance for the director-general of the tax administration, which is a body within such ministry, or the minister of public administration for the principal of an administrative unit. The competition is run publicly, which distinguishes it from appointments in the private sector[8] as well as from the employment of technical staff in public administration where the search involves not (necessarily) the best candidate but a candidate who meets the minimum requirements. The basis for such distinction is Article 122 of the Constitution, providing for an open competition for officials since it is in the public interest that vacancies are filled by the best candidates, and chances for such are much greater if the administration is open (cf. Šturm et al., 2002, Korade-Purg, 2004, p. 97). Officials in fact perform public tasks and have been conferred public authority to design public policies, while the users of administration indeed deserve an optimal level of service (to such end, the state can even provide for certain restrictions, contrary to the otherwise free movement of labour and other forced EU rules, cf. Bossaert and Demmke 2003, p. 81 – e.g. the requirement of Slovenian citizenship enshrined in the Civil Servants Act). The system for selecting the best candidate comprises two key elements, defined by the Officials Council within the scope of its statutory powers by means of the Standards. These elements are: a) the conditions, criteria and standards of professional qualification of the highest-ranking officials, and b) the procedures for the verification of fulfilment of the set criteria.

According to the Civil Servants Act, the Standards and the rules of procedure, following the proposal of a principal to initiate an open competition, the Officials Council appoints a special competition commission (SCC) which is heterogeneously structured and consists of at least three members (Article 178 of the Act). According to the SCC rules of procedure (official consolidated text of 8 November 2010, Article 6), commissions are formed for each competition *ad hoc*, from among 100 potential members from the state administration and about 70 outside experts, as follows:

- a member of the Officials Council as Chair of the special competition commission;

[8] Cf. Kerševan in Pirnat, 2004, introduction to the comments on the Civil Servants Act. Civil servants primarily act in public interest, professionally and apolitically, which needs to be guaranteed; moreover, they are financed from budgetary (public) funds and any possibility of corruption should be prevented. In such cases, the state acts both as regulator and employer. Considering the above, civil servants have special rights and duties.

- an official from a state administration body, possibly employed at the body that initiated the open competition;
- an expert in public administration, HR management or in the field in which the official will perform managerial tasks, possibly employed outside the state administration (if not, such person can be appointed as an expert, provided that he/she is not held responsible to the official holding the position for which the open competition is initiated, so that an independent expert assessment can be guaranteed).

The second indent is enshrined in the law and implies the legislature's request that the representative of the state body, following the instructions of the management, co-direct the selection, whereas with the first and third indents the Officials Council attempts to achieve – despite the impossibility of setting absolute selection criteria – a selection based predominantly on professional knowledge, independent from the political affiliation of the current principal (minister). According to the Act and the act concerning the system of positions in the relevant body, which is a composing part of the tender, candidates must first prove to meet the formal conditions, such as suitable education, after which selection is carried out by the SCC. The latter examines all candidates and – pursuant to Article 60 of the Civil Servants Act and with mutatis mutandis application of the General Administrative Procedure Act[9] – adopts a decision regarding the non/fulfilment of the conditions and un/suitability in terms of the Standards and their elements (sub standards). The Civil Servants Act originally provided that SCC issued decisions, whereas the 2008 amendments to the Act (version ZJU-D) refer to resolutions, which the Administrative Dispute Act (ZUS-1, Official Gazette of the Republic of Slovenia No. 105/06 with amendments) defines as an individual administrative act on the merits, subject to legal protection pursuant to the Civil Servants Act and the Administrative Dispute Act (ZUS-1, Article 2). The SCC resolution concerns both the principal and the government, which can appoint (for a period of five years) only a candidate who meets the conditions and has been assessed by SCC as

[9] Official Gazette of the Republic of Slovenia No. 80/99, 70/00, 52/02, 73/04, 119/05, 24/06-UPB2, 105/06-ZUS-1, 126/07, 65/08, 8/10. Critically about the application of the General Administrative Procedure Act following the 2005 amendments to the Civil Servants Act in Kovač (2006). The Civil Servants Act provides for a merely mutatis mutandis application of the General Administrative Procedure Act, the extent of which is unclear although the legislature seems to have wished to offer – owing to the non-administrative yet public nature of recruitment – the possibility to apply soft approaches based on professional criteria. Moreover, the Civil Servants Act relativises the application of the General Administrative Procedure Act as regards oral hearings, serving and handling of submissions (Article 60(2) of the Civil Servants Act). Therefore, differing interpretations appear in practice, as to e.g. whether the selection procedure is to be introduced at all if a candidate fails to meet formal requirements (this is made possible by Article 61(2) of the Civil Servants Act, since the line between formal and substantive completeness of an application is rather dim considering the possibility of suspending the procedure or implementing a procedure to establish and prove the relevant circumstances (cf. Androjna and Kerševan, 2006). For such reason, the procedures should be defined more specifically for civil servants (e.g. the legal nature of a joint decision, the course and duration of the period for filing an suit to the court). This would also solve the issue of formal legality since the procedures are (for the moment) merely subject to the provisions of the Council's acts, although according to Article 158 of the Constitution this is *materia legis*. Thus, the regulation of the activity of the Council should consider the possibility of simplification in order to allow balance between purpose and costs of procedures.

suitable. Thus, neither the commission nor the Council selects a candidate but rather carries out a preliminary selection while the final, discretionary and politically supported decision is reserved to the government. According to the Civil Servants Act, non-selected candidates are informed of their not being selected by letter rather than by a contestable act[10], while the selected candidate is appointed and given the title by decision, on which also the employment contract is based (Article 82). The act concerning non-selection is not an administrative act and cannot be subject to judicial review as it is issued at political discretion (cf. Breznik and Kerševan, 2008, p. 30 and following). If only objective criteria were considered in the appointment of position officials, the appointment could actually be carried out by the Officials Council; however, since it is in the public interest that the political will expressed at elections be manifested through the work of the respective government, the selection of position officials, based on political discretion as an expression of governance or exercise of power, falls within the competence of the minister, with due consideration also of personal compliance and thus greater efficiency of work, as stated by the Supreme Court (Case U 220/2008-14 of 2 December 2009, cf. U 1448/2004 of 24 January 2005 prior to the entering into force of the Administrative Dispute Act ZUS-1). As in such event the minister violates the constitutional principle of e.g. equality, such procedure is deemed unconstitutional pursuant to Article 66 of the Administrative Dispute Act, yet nevertheless decisions are neither annulled nor annulled *ab initio*.

1.2 Analysis of Open Competitions, 2003-2010

The procedure for testing candidates' qualifications has been almost the same since 2003. With regard to the implementation of the provisions of the Constitution and of the Civil Servants Act, some statistical data on competitions conducted between 2003 and 2010 are provided below. Though statistical indicators and interpretations given – mostly - incorporate sums and averages for the period of 2003-2009 since this is the first mandate of OC. Nevertheless the year 2010 data is streamlining with the previous figures, but simultaneously decreasing, namely stabilising the relations. So the 2010 data would kind of hide the characteristic of the processes, so they are not included in some of the sums for calculation of the final indicators in tables below.

[10] Article 64 of the Civil Servants Act: »*The competition commission shall issue a decision ... The competition commission shall submit the list of candidates that are held to be suitable for the position in view of their professional qualifications to the functionary to whom the official in the position is held responsible. The functionary ... shall among these candidates select the candidate that he believes to be the most suitable. The functionary ... shall not be obliged to state the grounds for the decision. No decision shall be issued on the selection; the select candidate and candidates not selected shall be notified of the decision*.«

Table 1: Indicators of competition procedures and Council activities for top official positions in the state administration, 2003-2010

Indicators	2003	2004	2005	2006	2007	2008	2009	2010	Total 2003-10	Yearly average 2003-10
No. of OC meetings: regular + by correspondence[11]	5 4+1	13 5+8	24 4+20	15 5+10	19 2+17	15 2+13	20 6+14	17 9+8	128	16
No. of open competitions	39	23	96	40	64	35	77	43	417	52 (53 without 2010)
No. of open + internal competitions, of which repeated	39+0 0	20+3 2	80+16 23+3	39+1 16	64+0 15	35+0 1	77+0 0	43+0 0		
No. of SCC meetings	22	56	128	44	79	32	91	50	502	63 (65 without 2010)
No. of candidates	N/A	N/A	426	166	349	120	315	192	1568	261 (275 without 2010)
No. of suits to Administrative Court	0	3	0	5	2	6	2	2	20	3.3

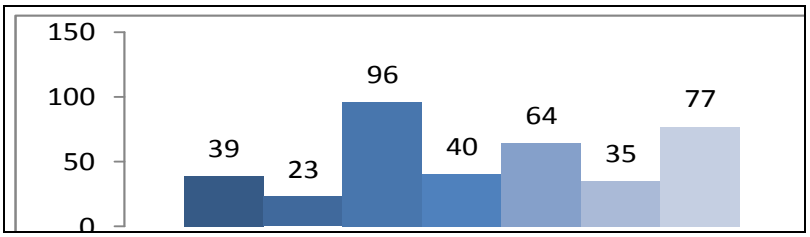
Source: data from OC annual reports for 2003-2010 and databases of the Ministry of Public Administration (MPA, 2011).

The number of OC meetings and competitions clearly reflects the developments in the government's recruitment policy. As expected, most meetings took place as a result of a significant increase of competitions in the years following parliamentary elections and change of government (end of 2004 and end of 2008). In these two cases, not only the staff structure but also the political orientation of the government changed: in 2004 the government turned from rather left-central to right-central (under Prime Minister Janša's coalition), to turn left-central again in 2008 under the coalition headed by Prime Minister Pahor. The

[11] As a general rule, the OC should meet at regular meetings (cf. Article 11 of the OC rules of procedure – official consolidated text of 8 November 2010); however, given the growing amount of competitions, only the number of meetings by correspondence increased over the years, which prevailed until mid 2009 when the OC decided to terminate such practice. It can be assumed that also due to a seemingly banal nature of drafting materials for meetings by correspondence, the initiative of the Ministry of Public Administration prevailed, making daily newspapers (Dnevnik, Finance) often speak of the »government Officials Council«.

number of competitions (and, consequently, the number of SCC meetings) is extremely high in 2005 compared to other years, exceeding the average by 80 %; a rise can be observed also in 2009, with 45 % of competitions more than the annual average, even in 2003-2009 (without 2010). Another peak is recorded in 2008 (20 % above the average), when the term of office of principals of administrative units expired and around 40 competitions were launched for such positions only.

Diagram 1: Number of competitions for top official positions, 2003-2009



Data on the number of competitions (and meetings) indicate that the Civil Servants Act – by applying a mixed, objective/subjective approach – could not and did not have the intention to marginalise recruitment from the social developments of the moment, whereby the purpose of the Act, the Standards and the OC was to ensure that in the event of a change at top official positions, the newly appointed officials would first meet professional conditions and criteria, and only after that the candidate's political likeability could be considered and the candidate selected by the principal at the ministry (Pirnat et al., 2004, p. 64). Nevertheless it can be concluded that the Sigma assessment (2009, p. 33) of the actual gap in the level of politicisation of administrative structures compared to the regulatory is (still) accurate, particularly as regards 2004/2005 and slightly less for 2008/2009 (cf. note concerning appointment of »government representatives« to the OC in 2009-2011). According to statistics, 2005 also shows a significant number of internal competitions (one sixth of all competitions) as a statutory exception to the principle of open competitions advocated by the Constitution. Likewise, this same year records a considerable amount of repeated competitions when no candidate was assessed as suitable (Article 61a of the Civil Servants Act) or when among otherwise suitable candidates the principal did not appoint any (»his own candidate«). Over the past few years, the upward trends in competitions following parliamentary elections, internal selection, repeated procedures, etc. seem to be slowing down despite new political changes, which points to the maturation of the administrative and political apparatus in Slovenia.

For a better insight into the actual implementation of the goals of the Civil Servants Act, we provide selected data on candidates, particularly on candidates' shares in terms of fulfilment of conditions and assessment of suitability and origin (whether or not before participating in the open competition they had been employed in the state administration). Hypotheses can be drawn considering the

outcomes of the analyses for Central and Eastern European countries, particularly Slovenia (Bossaert and Demmke, 2003, Korade-Purg, 2005, and Sigma, 2009):

1. The number of candidates is directly proportional to the number of competitions and successful candidates (those who meet the conditions and are considered suitable), whereby a higher number of candidates (per competition) also means a higher number of successful candidates. Considering critical mass, quantity could serve as an indicator of quality. Such hypothesis is proven by the correlation between the number of candidates per competition and the share of successful candidates.
2. A large or even prevailing share of candidates originates (given the internal orientation of criteria according to Standars/03) from the state administration, whereby indicators vary over time, showing a decisive influence of the election years and, as years go by, a gradually more open administration. This hypothesis is proven with the indicator of origin of candidates on a timeline.

It may be concluded that some sub/hypotheses can be entirely confirmed while some can be confirmed only in part. The connection between the number of candidates and the number of competitions is obvious, which logically brings to a relatively stable average number of candidates per competition (slightly above four). Somewhat different are the figures for 2007, when the number of candidates per competition – for no apparent reason – was 5.5 (30% above the average), and 2008 with only 3.4 candidates per competition owing to the forthcoming expiry of the term of the government; in the latter case, candidates probably had less interest participating since the new principal is allowed by Article 83 of the Civil Servants Act to replace an official within one year with the purpose of personal political compatibility (critically thereon in Pirnat et al., 2004). As seen above, a significant increase in the number of competitions is recorded in the (post)election years (2005 and 2009), yet the relevant figures in Table 2 suggest inverse rather than direct proportionality between quantity and successful candidates (quality); in those two years the share of candidates assessed as suitable was below the average and in 2009 reached, for example, only 40% compared to the average 60%. According to sporadic personal perceptions by OC members holding the chair of SCC, the decreasing share of eligible candidates and of those eligible candidates who were assessed as suitable (in 2009 only 70% eligible candidates compared to the average 80% in 2005-2009, and only 40 % suitable candidates compared to the average 60%) was an expression of the economic downturn and the increased offer of the unemployed less qualified for work in the administration. This is indirectly confirmed also by the analysis of candidates' origin – 40% of the candidates not only had previous employment within the state administration but even worked for the same body occupying lower official or administrative-technical positions. The conclusion is supported by 2010 data as well, since despite even 74% of candidates is from the same organisation, only 75% are found eligible on even formal grounds. About 40% of the candidates come from outside the state administration and only 20% from other state bodies; since in the latter case the employer is the

same (the state), another goal of the Civil Servants Act – namely greater mobility on the internal labour market – was achieved (Pirnat et al., 2004). Combined with social reality, the Standards/03 thus largely failed to contribute to the goals of the Constitution, administrative reforms (cf. Peters and Pierre, 2005, Sigma, 2009), and the same Civil Servants Act. Greater openness of the administration and the theoretically better quality resulting from greater competitiveness among the candidates therefore remains a (constitutional) myth to be overcome by the government as representative of the employer by taking up a proactive role in the recruitment cycle (see Standards/10, p. 4), starting with promotion of the administration and the possibility of self-actualisation (with decent reward) in working for the public good.

Table 2: Share of candidates at competitions in terms of fulfilment of conditions, criteria and origin

Indicators	2005	2006	2007	2008	2009	2010	Yearly average 2005-2010
No. of competitions	96	40	64	35	77	43	59 (62 without 2010)
No. of candidates	426	166	349	120	315	192	215 (275 without 2010)
Average number of candidates per competition	4.4	4.2	5.5	3.4	4.1	4.5	4.3
Share of all candidates by origin outside state administration	43 % (among other candidates: 37 % from the same body)	40 % (among other candidates: 43 % from the same body)	41 % (among other candidates: 26 % from the same body)	30 % (among other candidates: 56 % from the same body)	46 % (no data on candidates from state adm.)	48 % (among other candidates: 74 % from the same body)	41 % (40 % without 2010)
Share of eligible candidates among all applicants	82 %	76 %	84 %	83 %	70 %	75 %	78 % (80 % without 2010)
Share of suitable candidates among all eligible (excl. withdrawals)	59 %	67 %	61 %	69 %	40 %	63 %	60 %

Source: OC annual reports 2005-2010 (MPA, 2011, rounded data).

1.3 Case Law Regarding Selection Criteria and Procedures, 2003-2010

The overview of OC and SCC past experience discloses the importance of legal protection of (non-selected) candidates, both in the sense of democratic protection of their right to access to top positions and in terms of implementing the constitutional safeguard of selection of the best possible candidates for top positions in the state administration as a precondition for its professional and efficient work. In such regard, the Civil Servants Act should be supplemented with due consideration of the opinions of the Administrative and Supreme Courts. This applies in particular to the issue of interrelation of decisions in the sense of a »joint decision« (on types of decisions cf. Androjna and Kerševan, 2006), since the recognition of legal interest of a specific candidate or the assessment of competitors' suitability affect the status of other candidates.[12]

As regards the verification of the fulfilment of conditions and suitability, some systematic issues appear both in theory and case law as well as in the direct experience of the SCC, including the above discussed non/appropriateness of the (mutatis mutandis) application of the General Administrative Procedure Act and other acts that are (or are not) subject to legal protection, as well as contesting reasons, extent and type of assessment, and impacts of court decisions. Pursuant to Article 65 of the Civil Servants Act, the non-selected candidate can request that the SCC resolution be subject to judicial review for the following reasons: a) if the selected candidate fails to satisfy the competition conditions, b) if significant procedural errors have been committed (cf. Article 237 of the General Administrative Procedure Act), or c) if the SCC has established that the candidate is not suitable but the candidate believes to be suitable. Also the selected candidate may file an suit if he/she meets the competition conditions but has not been given the opportunity to participate in the procedure (cf. Articles 22 and 23 of the Constitution and Article 9 of the General Administrative Procedure Act). Nevertheless, the SCC resolution is final and no appeal is allowed, which according to the ruling of the Constitutional Court (Case U-I-68/04 of 6 April 2006) is not contrary to Article 25 of the Constitution on effective legal remedies, since protection is possible in administrative dispute. Here, a particular problem is the demonstration of legal interest to initiate administrative dispute, since the appellant should demonstrate that a successful legal remedy would improve his/her legal position, which in practical terms means that despite the establishment of e.g.

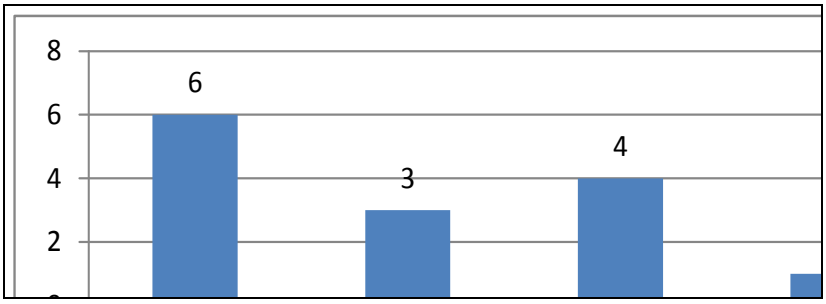
12 Cf. Case U 255/2005-10 of 18 April 2006. For such reason, for example, the deadline for suit does not start with the serving of the SCC resolution but with a review of the entire tender documentation, since it is the only way for a non-selected candidate to verify the existence of one of the reasons for suit provided by Article 65 of the Civil Servants Act, i.e. appointment of a candidate who does not satisfy the conditions or is unsuitable (Case U 1556/2006-27 of 13 October 2008). Likewise, when the above reason is contested the court logically integrates the relevant suits to simultaneously discuss the SCC resolution and the consequent decision on appointment (e.g. Case U 539/2008-24); given that establishing suitability is a precondition for appointment. If the SCC resolution is annulled, also the government decision must be annulled and the procedure renewed (in the specific case and for the third time in just over two years, due to non-compliance with the directives of the court regarding full interpretation that would allow testing).

significant procedural error (e.g. Case U 1196/2004-11 of 18 November 2005, when the SCC resolution was dated before the day of the interview and the deadline for submitting evidence) the candidate only wins a Pyrrhic victory since the contested competition procedure has been completed and the suitable counter candidate lawfully appointed months ago, or over the years the term has already expired. Reconsideration would thus make no sense since the new resolution would have no legal effects for either the candidate or other participants. The SCC should in fact assess the situation at the time of the competition, and is bound – in terms of substance – by the findings of the court, i.e. that the candidate actually met all the conditions and criteria of the competition.

The overview of case law indicates a rather small share of contested SCC decisions and even less acts on appointment; between 2003 and 2010, legal protection was claimed by 20 suits, i.e. in 0.5 % of all procedures, for only 16 vacancies. Given such modest critical mass, the gathered statistical data (CO, MPA and published cases, http://www.sodisce.si/, 2011) are most probably irrelevant. Nevertheless, some data reveal interesting facts, e.g. concerning the type of the contested position – in 2003-2009 in nine cases (64 %) they involve positions at ministries, particularly the Ministry of Finance (36 % of all cases), while the shares of other ministries are less accentuated.

Diagram 2: Number of suits filed in administrative dispute against SCC acts by type of position, 2003-2009*

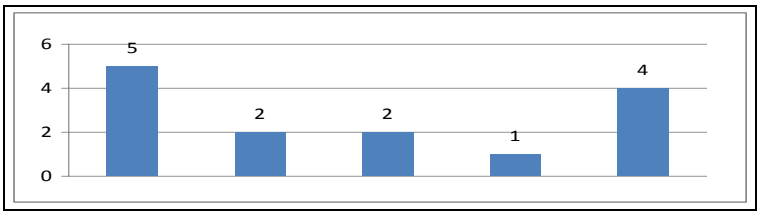
(Columns: director general in ministry, head of agency in ministry, head of administrative unit, director of public agency)



*Note: The Civil Servants Act is applied and the procedure conducted through the Officials Council, if so provided by a special act, not only for managerial positions in the state administration but also for directors of agencies, such as the agencies for the securities market or energy.*And additionally 2 in 2010.*

Diagram 3: Number of suits in administrative dispute against SCC acts by ministry, 2003-2009*

(Columns: ministry of finance, economy, agriculture, culture, public administration (heads of AUs))



**The suits filed in 2010 are each from other field/ministry compared to 2003-2009.*

The deadline for a decision from the court varies – over the years; it took from 2 to 19 months to proceed from the filing of the suit to the issue of a judgment or decision. In about 15% of the cases the procedure ended for procedural reasons (delayed suit or withdrawal thereof), while in the remaining 85% of the cases the suit was either granted or dismissed (same shares), which considering the hitherto methods of work means that the possibility of success is about 50%. However, the alleged errors at the level of SCC are only seldom repeated as SCC continuously learn and adapt to the positions of the court, primarily as regards non-discrimination in the conduct of procedure and completeness of decision interpretation. In about a third of the contested cases, legal remedies (appeal or revision) were sought at the Supreme Court (once by the state as the defendant, in other cases by the candidates). Court statistics thus suggests the following anecdotes:

- ✓ the number of cases is – as expected – proportional to the number of competitions, although the connection between them is less evident since the absolute number of suits is very low, probably also because of the questionable outcome for the appellant despite a successful expert argumentation;
- ✓ the most contested are the positions of director-general and principal of a body within ministry, whereas the less contested are the positions of the principal of an administrative unit or other positions/bodies, suggesting a (very) weak inversely proportional correlation between the degree of professionalism (non-politically) of evaluation and selection criteria and the number of suits;
- ✓ the main problems observed in hitherto cases are procedural discrimination of candidates by narrowing their participation in evidence evaluation procedure and/or for bad argumentation.

As regards significant procedural errors, in the case of 14 competitions in 2003-2009 the court almost regularly established insufficient reasoning. This makes the verification of legality impossible since the authority (SCC) must explain the assessment criteria and the main elements on which it actually bases the

assessment, provide arguments that led it to specific conclusions, i.e. include everything from the request of the party to established evidence and the decisive reasons for its decision, etc. in accordance with the General Administrative Procedure Act, and not merely list general standards and conclusive marks (cf. Case U 2031/2008-43 of 5 November 2009). Lump or lacking reasoning cannot be replaced by a supplementary decision or a reply to the suit. The more the act infringes upon the rights of the party, the more convincing must be the reasoning (cf. Case U 225/2005-10 of 29 September 2005). The lack of an adequate reasoning is a violation of the right to effective legal remedies (Article 25 of the Constitution, cf. Šturm et al., 2002, more on the importance of reasoning in Harlow & Rawlings, 1997, Jerovšek and Kovač, 2010). On the other hand, the court did not consider the following to be procedural errors (although the same errors or any other errors could be regarded as significant in different circumstances!):

- SCC composition (whether there was a three-member quorum pursuant to the Rules of Procedure),
- communication among the parties, i.e. the manner of writing the minutes or serving the invitation;
- selection of criteria assessment methods;
- lack of legal instruction on the right to insight into the entire competition documentation;
- nor did it consider an act to be unlawful when not all the competitors in the same case (several candidates in the same competition) were included – such acts were deemed parts of the same decision.

Despite the fact that SCC are bound by the law, owing to professional criteria that are not fully objectified, in assessing the legality of SCC acts the approach of the court is rather reserved and in accordance with the arguments of the Case U 568/2004-34 of 10 December 2004. The strictness of judicial assessment can in fact vary depending on the type of the public matter; it is milder in the event of criteria that are not specifically defined or objectified by regulations. In such cases – which also include competitions for leading officials – the court establishes illegality only if the decision is clearly unreasonable, as the decision-making body needs to have broad discretionary powers in assessing the suitability of candidates based on competition conditions in order to guarantee efficiency of the administrative system. In the event of established illegality – in about 40% of all suits during 2003-2009 – the court annulled the SCC resolution (and if the candidate whose assessment is annulled has already been appointed, also the decision on appointment) *ex nunc* pursuant to Article 65 of the Civil Servants Act.[13]

13 Differently from Article 64 of the Administrative Dispute Act which authorises annulment *ab initio*. Cf. Breznik and Kerševan, 2008, pp. 369-391. In practice, in all personnel issues (outside the Civil Servants Act or prior to its definition of annulment powers), the Administrative Court annuls illegal acts although it is allowed by the Administrative Dispute Act only to annul ab initio. Such conduct is grounded by the fact that annulment *ex tunc* would cause unsolvable consequences (a return in time is not possible, the course of the terms is unclear, questions are raised as to the legality of acts issued by the appointee if his/her appointment was illegal,

2. Revisions of the Standards – New Criteria and Procedure since 2011

The hitherto Standards/03 comprise(d) three sets of standards with 12 elements ranging from a) to l):

1. experience – two elements: work and leadership experience;
2. knowledge – seven elements: knowledge of problems in the field concerned, personal professional standing, knowledge of the legal regulation in the field concerned, of principles and development orientations in the state administration, of resource planning and use, of the functioning of the EU, and foreign language;
3. managerial skills – three elements: managerial, leadership and communication skills.

Such list is neither substantively balanced nor in compliance with the contemporary definition of work of the state administration in terms of management and development and not merely in terms of administration or pure implementation of solutions at government level. More so, given such list of elements and their weight, experience showed that the impact achieved was contrary to the purpose of the legislature (cf. Korade-Purg, 2004), heavily restricting rather than facilitating the possibility of access to managers or candidates from outside the state administration since the criteria concerning knowledge of the system with the required internal information had the highest weight in assessing candidates' suitability (see Table 2). In order to ensure a forward-looking state administration, a redesign and a redefinition of the standards were urgent, both in terms of substantive law and procedure. Here, too, the experience of administrative and judicial practice showed that SCC had considerable problems understanding the criteria and separating experience from skills (e.g. in administration and management), and mixed the concepts of criteria and evidence. For such reason, the appellants contesting SCC acts almost always succeeded since the commissions were unable to prove decisive facts or state the reasons of their decisions, which pursuant to Article 214 of the General Administrative Procedure Act form a composing part of the reasoning of a decision which allow testing its legality.

Therefore, the Officials Council adopted a different model with only two sets of balanced and equal criteria, taking into account that occasionally empirical data deviate from the goals set (see Tables 1 and 2), as follows (Standards/10, pp. 8-12, see Figure below):

1. the first set is composed of three criteria concerning management experience and skills: a) quality of work, leadership and management experience, b) professional reasoning and usefulness of priorities and development vision of the body, and c) leadership skills (more in Stare, 2010);

the damage liability by the state, etc.). It is interesting, however, that court judgments (e.g. U 2031/2008-43) refer to the comments to the law while the latter refer to established case law …

2. the second set comprises three criteria concerning professional knowledge in the field of work of the body at which the candidate is running for a leading position: a) understanding the body's mission and role in the system, b) knowledge of problems in the body's field of work, and c) knowledge of resource planning and use (budget, personnel, etc.).

The structure of the Standards is thus more transparent, balanced and coherent, as well as adapted to the goals of the Civil Servants Act deemed to be a pillar of modernisation with a newly defined role of the state and its administration in compliance with the modern theories of good governance (Bevir, 2011).

The Standards aim at balancing the expected experience, skills and knowledge of candidates by combining individual elements which are indivisibly related, and abolish the reliability on mere administrative fulfilment of hitherto criteria and methods. Compared to Standards/03, the revised Standards no longer differentiate the criteria by type of position, since practical experience show that there is no reasonable sense in such (e.g. also the principal of an administrative unit should prove knowledge of a foreign language, not only officials at a ministry); moreover, SCC do not know them or they use them inconsistently. If a specific position requires certain qualities, these should be defined directly in the body's act on the system of positions or in the respective tender (cf. Šturm, 2002, comment to Article 14 and 22 of the Constitution). All categories of position officials must meet the standards of professional qualifications according to the sets below and within an individual set according to elements, in line with the set criteria and conditions. SCC therefore take into account the nature of the position and of the institution or organisational unit headed by the position official, in particular its role in the administrative system, its mission, method of operation and size (Standards/10, p. 2).

Figure 1: Extract from the evaluation sheet in the Standards/10

	ELEMENT		ASSESSMENT	
			suitable	unsuitable
SET 1: EXPERIENCE AND MANAGEMENT SKILLS	**a) Quality of work, leadership and management experience**	**Work experience.**		
		Leadership experience.		
		Management skills, i.e. planning, resource management, organisational skills and monitoring the effects of work.		
	b) Value of development vision of a body	**Professional reasoning of the vision** based on an analysis of the situation and needs in the field under the responsibility of a body for the head post of which the candidate is applying.		
		Usefulness and feasibility of the vision based on a comparison of		

		goals, tasks and available resources, requirements and restrictions of regulations applicable in the field concerned and social reality.		
	c) Leadership skills	**Work flexibility** (communication, implementation and optimisation of procedures, actual implementation).		
		Development of an organisational climate, particularly the key elements concerning the approach to *improve interpersonal relations in the body* and establish *good relationships with clients.*		
	č) Understanding the body's mission and its role in the system	**Understanding the body's mission within the public administration system or authority** in the context of *independence and networking* and a coordinated action together with related or networked bodies and organisations at national and EU levels, in particular an understanding of the body's mission in terms of the *public interest*, and demonstrating an understanding of the concept of *social responsibility* and its implementation through the body's operations.		
		Personal professional standing and recognition in the field concerned, which the candidate demonstrates by way of a potential professional bibliography in the field concerned, references from distinguished persons or institutions, leadership or participation in major projects in the field of the body's work or a related field, and similar.		
	d) Knowledge of problems in the body's field of work	**Knowledge of the powers of the body pursuant to the legislation in the field concerned**, in particular knowledge of the *prescribed scope of work* and basic tasks in the field concerned, *connections* with other bodies and institutions or stakeholders, and an understanding of *national and EU legislation* in this field.		

		Knowledge of the development orientation of the state administration with an emphasis on the nature of tasks and the placement of the body, in which the candidate is applying for the head post, in the system, whereby a *user-centred approach, openness and transparency, and efficiency at work* are primarily taken into consideration; this is verified through knowledge of the development strategy of the state administration, progress achieved in recent years, personal views on the development of the state administration and the body, and similar.		
	e) Knowledge of resource planning and use	**Knowledge of the regulations and procedures which govern the planning of human resources policies and staffing** (i.e. employment, promotion, remuneration, annual interviews, evaluation, training, etc.) in the context of the systems of civil servant and wages in the public sector.		
		Knowledge of the regulations and procedures which govern the planning of budgetary funds and the lawful and efficient use of these funds.		
		Understanding the significance and use of other resources (i.e. knowledge, ICT equipment, premises, etc.).		

Source: Officials Council, Standards/10, Appendix.

The Officials Council has indeed taken into account that the Standards should act in support of SCC in the procedure of selecting the best staff. Moreover, the Standards provide for a uniform selection approach and ensure that the selection procedure is conducted in a highly professional manner. Raising the professional competence of the competing group leads to higher expertise of selection. Professionalism and impartiality of the procedure and its outcomes can only be achieved through clear, previously set criteria and methods. Attention has

been paid also to separating the definition of criteria as tools to assess suitability (»what« to assess) on one side, and the methods for testing the professional qualifications of candidates in terms of procedure (»how« to assess; more in Jerovšek and Kovač, 2010) on the other.

In general, in the selection procedure more liability should be placed on the government as the holder of public policies, in a manner such that the employer first defines the expected professional competences for a specific leading official position, based thereon determines the conditions and criteria of selection for individual positions, and at its own discretion carries out the evaluation of the selected candidate or of specific competences and criteria, which serves as a basis for employment in the following term (cf. step by step in Standards/10, pp. 4-5). In doing so, the government should follow the changes occurring in the society, from adapting and taking a proactive approach in times of the global economic crisis to modifying the doctrines about the role of the state, of the authorities and of the administration in the sense of good governance.[14] A targeted selection is of utmost importance, allowing the principal who initiated the open competition to expect that the best candidates will apply and will be selected.

The procedure should be adapted as appropriate; it should remain *lex artis* and allow sufficient flexibility. In order to prevent abuse of power, legislation provides procedural rights, among which equality before the law and employee participation as elements of democracy.[15] After all, in all public law matters there is a weighting between procedure efficiency and fair outcome. Here, it is particularly important to provide the relevant procedural safeguards in advance – pursuant to the General Administrative Procedure Act, regardless of the nature of procedure, the weight of the case, the objectivity of criteria, and degree of contestability – to avoid (unnecessary) waste of time and resources and restriction of flexibility in achieving the goal of the procedure, i.e. selection of the best candidate (in Harlow & Rawlings, 1997, p. 523; in such sense, even the withdrawal of a candidate during

[14] Schuppert (in Bevir, 2011, p. 289) even distinguishes between two systems of power, namely the government with firmly established public law, exclusively public law regulators, a state-central democratic system and parliamentary hierarchically conducted reforms on one side, and a system of governance based on soft, private yet equal law, adopted by public and private entities together, where democratic reforms are deemed socially justified and are carried out by means of networking and open structures, on the other. In such context, public law would be co-regulated by the bodies involved and would allow for a harmonisation of possible diverging interests. In a system of good governance, the state i.e. government (only) exercises power (and protection of general social interest) and is not an exclusive or primary holder thereof.

[15] Lat. *audi alteram partem; nemo iudex in causa sua* (Craig in Peters and Pierre, 2005, p. 271). Cf. Šturm et al. (2002, p. 507) on non-discrimination in personnel issues, particularly Article 49 of the Constitution. See Case U 220/2008-10 of 23 March 2009, confirmed by Supreme Court Judgment U 220/2008-14 of 2 December 2009, concerning the status of the principal of the administrative unit. In such case the courts granted the suit against the notification of non-selection! (which according to the Civil Servants Act is not contestable) on grounds of violation of a constitutional right pursuant to Article 4 of the Administrative Dispute Act. It is ruled so since no other legal remedy is provided against such act, while the minister of public administration – according to the courts – unnecessarily and non-proportionately infringed upon the right of equal access to employment. The reason for granting the suit was therefore not the failure to state the grounds for non-selection (as explicitly allowed by Article 64 of the Civil Servants Act) but rather the minister's simultaneous public appearances in which he stated objective criteria of selection (e.g. administrative statistics of the administrative unit) which he obviously did not pursue in practice.

the procedure is possible, if the candidate does not respond or a lack of qualification has been mutually established in accordance with Articles 9 and 12 of the SCC rules of procedure, official consolidated text of 8 November 2010). To such end, the Standards/10 (p. 7) introduce a simplified assessment, where each of the six elements is assessed either as suitable or unsuitable, although a candidate must be suitable in all categories to qualify.[16]

To ensure equality, in December 2010 the Officials Council organized for all SCC members a special convention on the revised Standards and is currently engaged in promoting the Standards by issuing brochures, organising public presentations and providing scientific discussions of the key dimensions in the field concerned, as well as by monitoring the implementation and identifying possible improvements (e.g. in the SCC in charge of carrying out the first competitions in 2011, the same member of the Council will be present, and the Council will eventually carry out an analytical evaluation).

Conclusions

In terms of ensuring (minimum) professional criteria for employment at top positions in the Slovenian public administration, a key role is played by the Officials Council providing that personnel-related decisions are not merely political or made without the candidates demonstrating knowledge of the field concerned and the relevant managerial skills. Similarly to the Constitutional Court which assesses the constitutionality and legality of regulations and is thus known as a »negative legislature«, the Officials Council acts in relation to the activity of special competition commissions as a »negative employer«. Yet the primary task of the Council is to promote co-creation of the selection system, which is also the aim of the new Standards. An adequate model of criteria of professional qualifications with a targeted procedural regulation of candidates' selection is therefore of utmost importance. It is both a legally correct framework and a development potential, (possibly) serving as an instrument for developing administrative culture, raise the level of professionalism in the management of state administration, and introduce the understanding and practical implementation of the concept of social responsibility into individual bodies and public administration as a whole, which should also be the common objective of professionals and (a forward-looking) government. For greater interventions in the system, for further professionalization, depolitisation and transparency as well as for a quality public administration, an overall revision of the entire legal framework is necessary, i.e. a new Civil Servants Act based on the concept of competences and including the design of special personnel procedural rules.

[16] Standards/03 provided for a three-stage ranking (unsuitable, suitable, excellent), and several exceptions were allowed for the final assessment of suitability where the candidate with excellent results replaced unsuitable ones. This brings into question the purpose of the mark »excellent« (or exceeding the requirements and expectations?), since the employer does not even need employees who are over-qualified.

References

1. **ANDROJNA, V.,** & **KERŠEVAN, E.** (2006). *Upravno procesno pravo*. Ljubljana: GV Založba.
2. **BEVIR, M.** (ed.) et al. (2011). *The SAGE Handbook of Governance*. Los Angeles, London, New Delhi, Singapore, Washington DC: Sage.
3. **BREZNIK, J.**, & **KERŠEVAN, E.** (rev.) et al. (2008). *Zakon o upravnem sporu (ZUS-1) s komentarjem* [Administrative Dispute Act with comments]. Ljubljana: GV Založba.
4. **BOSSAERT, D.,** & **DEMMKE, C.** (2003). *Civil Services in the Accession States: New Trends and the Impact of the Integration Process*. Maastricht: EIPA.
5. **HARLOW, C.**, & **RAWLINGS, R.** (1997). *Law and Administration*. London, Edinburgh, Dublin: Butterworths.
6. **JEROVŠEK, T.,** & **KOVAČ, P.** (2010). *Upravni postopek in upravni spor* [Administrative Procedure and Administrative Dispute]. Ljubljana: Faculty of Administration.
7. **KORADE-PURG, Š.** (2004). Sistemske predpostavke nove upravne kulture: spremembe v položaju in vlogi javnih uslužbencev [System Suppositions of the New Administrative Culture: Changes in the Status and Role of Civil Servants]. In: *Upravna kultura* [Administrative Culture] (ed. Brezovšek, M., and Haček., M.), pp. 97-127. Ljubljana: Faculty of Social Sciences.
8. **KORADE-PURG, Š.** (2005). Standardi strokovne usposobljenosti in delo uradniškega sveta: pomen kadrovskih virov pri doseganju ciljev reforme slovenske državne uprave [Standards of Professional Qualifications and Work of the Official's Council: Importance of Human Resources in Achieving the Goals of the Reform of the Slovenian Public Administration]. In: *HRM*, 8, pp. 24-27.
9. **KOVAČ, P.** (2006). Nekaj (postopkovnih) novosti zadnje novele Zakona o javnih uslužbencih (ZJU-B) [Some (Procedural) Aspects of the Recent Amendment to the Civil Servants Act]. In: *Kadrovski forum javne uprave* [Human Resources Forum of the Public Administration], seminar papers (February 2006). Ljubljana: GV Planet.
10. **PIRNAT, R.** (ed.) et al. (2004). *Komentar zakonov s področja uprave (ZJU, ZDU-1, ZSPJS, ZJA, ZIN)* [Comments on Public Administration Acts]. Ljubljana: Inštitut za javno upravo pri Pravni fakulteti [Institute of Public Administration at the Faculty of Law of Ljubljana].
11. **PETERS, B. G.,** & **PIERRE, J.** (ed.) et al. (2005). *Handbook of Public Administration*. London, Thousand Oaks, New Delhi: Sage.
12. Ministry of Public Administration, http://www.mju.gov.si/ (accessed March 2011).
13. Sigma, http://www.sigmaweb.org/ (accessed 15 January 2011).

14. **STARE, J.** (2010). Razvoj kompetenc v javni upravi [Development of Competences in Public Administration]. In: *Javna uprava 1/2* [Public Administration], pp. 367-383.
15. **ŠTURM, L.** (ed.) et al. (2002). *Komentar Ustave RS* [Comments on the Constitution of the Republic of Slovenia]. Brdo pri Kranju: Faculty for State and European Studies.
16. Officials Council, http://www.mju.gov.si/si/delovna_podrocja/uradniski_svet/ (accessed March 2011).
17. Supreme Court of the Republic of Slovenia, http://www.sodisce.si/ (accessed March 2011).