

## ABOUT THREE ADMINISTRATIVE PROCEDURE RULES FROM A HUMAN RIGHTS PERSPECTIVE

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### ABSTRACT

*'Single case decision-making is at the heart of national systems of public law, in Europe and elsewhere', states the Introduction on Book III of the ReNEUAL Model Rules dealing with this subject. Some countries have adopted legislation on administrative procedures, others considered the general principles of law and jurisprudence as guiding milestones, even in a continental system of law. This approach may prove obsolete in times where private persons are more and more confronted with decisions of the administrative bodies, not only at a national level, but at the European one as well.*

*Romania has not yet adopted a Code or Act of administrative procedure, although a project had been launched in 2007. The article observes the Romanian legal rules and jurisprudence regarding some sensitive points. The right to information of persons adversely affected by a decision regarding another person, the burden of proof and the privilege against self-incrimination in investigative procedures, the withdrawal/revocation of the single-case decisions, are discussed from a human rights perspective.*

*A comparison is made, regarding such matters, with administrative procedure rules in European countries, looking for convergence points and differences.*

***Keywords:** administrative procedures, single-case decisions, access to information, investigative procedures, withdrawal*

*JEL [23], [38]*

### 1. Introduction

Public administration is exercising the executive power of the state. It organizes the implementation of laws and enforces the legal norms. In doing so, its whole activity is governed by the principle of legality, one the most powerful among the principles governing the public administration.

The principle of legality represents the obligation of all administrative bodies and public servants to act according to the competences given by law and apply the procedures provided by law in exercising their competences. As the major function of public law is the 'channeling and organizing of power', the bearers of

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public power should act according to the rules of the system (Kingsbury, 2009, pp. 23-57). A procedure consists of a number of steps, defined in advance for each type of task, with the aim of protecting both the public interest represented by the administration and the rights of the individuals, in order to ensure the right balance that is characteristic to a state of law (Rusch, 2009, p. 3).

The administrative procedures leading to acts with an external effect are the ones that imply the aforementioned balance, as it is expressly considered in German law (Schmitz, 2013, p. 1). Due to the lack of equality between the administration that is able to enforce its decisions as the bearer of the public power and the private persons, the administrative procedures were often subjected only to analysis concerning the respect of the fundamental rights of the citizens (Schmitz, 2013, p. 2).

The consequences for disregarding the procedural rules are not the same in all legal systems. In some cases the principle *in dubio pro actione* allows formal shortcomings to be corrected in order to keep the procedure alive (Rusch, 2009, p. 26), in other cases the disregard of procedure may lead easier to the withdrawal or annulment of the single-case decision.

Our study focuses on several procedure steps, considered to be important for a fair balance between the public interest and the interest of the individual, or between individuals with opposing interests, in the making of single-case decisions: transparency of the process and the right to information of the person adversely affected by a decision issued to another addressee, the burden of proof and the privilege against self-incrimination in investigative procedures, the withdrawal/revocation of the single-case decisions. Legislation of several European countries is compared with the Romanian rules. The ReNEUAL Model Rules<sup>1</sup> are observed too. All these problems have been selected as human rights are to be observed when choosing a solution.

Considering the fact that the term naming administrative acts that address to individuals, in different acts issued in European countries, has been translated in English using different terms, we will use the term 'single-case decisions' or 'decisions'.

## **2. The rights of persons adversely affected by a decision regarding another person**

In certain situations, single-case decisions issued at the request of an interested party, may have an adversely affect to a smaller or larger number of other persons. Building authorizations (e.g. a building authorization that does not respect the

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<sup>1</sup> The Research Network on EU Administrative Law - ReNEUAL is a research group that proposed a set of procedural rules for EU institutions, that may also be a model for national administrative procedures. The 2014 Online Version of the ReNEUAL Model Rules can be found on <http://www.reneual.eu/>, accessed at 5 May 2016.

distance between the neighboring buildings or the height set by the urbanism rules) or authorizations for setting a certain destination to buildings (e.g. the authorization to use a building as a funeral chapel or a crematory) may adversely affect the owners of the neighboring real estates. Environmental permits for different economic activities may affect a larger number of persons. This raises the questions upon the possibility of third parties to obtain information about the documents that founded the administrative decision and the possibility of the adversely affected third party to intervene in the administrative procedure in order to protect his rights, before the decision is concluded. The European Charter of Fundamental Rights of the European Union attached to the Treaty of Nice (2000), considers the adversarial principle mentioned in Art. 41 as forming part of the right to a good administration. This principle includes the obligation to hear the interested parties along the whole procedure and especially before producing the resolution (Rusch, 2009, p. 6).

In the Romanian legislation, generally the protection of the rights of third parties that may be adversely affected by a single-case decision addressed to another is ensured by the requirement of an express agreement that has to be attached to the application, usually in a notarized form, given by the person presumed to be adversely affected. The most common situation regards building permits, change of destination for real estate, authorizations or licenses for different activities, where the persons presumed to be adversely affected are the neighbors (e.g. Law 50/1990 regarding building authorization, point. 2.5.6. of Annex 1). No right is recognized for the adversely affected person who did not give such an agreement and believes the agreement should have been necessary, to have access to the procedure or the documents presented by the applicant. Such an attitude presents a real problem for the adversely affected person, as there is no way he can establish if the administrative authorization will be or has been issued with consideration to his rights or legal interests. He is forced to lodge a 'blind' administrative appeal and then a 'blind' action to court, contesting the administrative decision without actually knowing the reasons of unlawfulness. Once in court, it would be possible to ask the administrative authority to present all the documents that founded the administrative decision and prove that an agreement from the adversely affected person was necessary and has not been requested, or that the decision has been issued/adopted in breaching the law. The lack of provisions providing access to documents, without infringing the right to privacy or business secrecy, or to an adversarial procedure before concluding the procedure, may result in a lot of wasted effort from individuals, administrative authorities and courts. The project for an Administrative Code, drafted for the first time in 2007 and modified later after internal consultation<sup>2</sup>, mentions that any

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<sup>2</sup> The Project of the Romanian Code of Administrative Procedure may be found at [www.juridice.ro/wp-content/uploads/2012/12/Proiect-COD-procedura-administrativa.pdf](http://www.juridice.ro/wp-content/uploads/2012/12/Proiect-COD-procedura-administrativa.pdf), accessed on 4 May 2016.

person that is or might be affected by the result of a procedure has the right to be a part of the procedure, upon request or *ex officio*, the public authority being obliged to inform the persons that might be interested if they are known (Art. 30). The right of access to relevant documents of the participants to the procedure is also mentioned (Art. 60).

The general rules of administrative procedure in other European countries contain provisions for protecting the rights of the ones adversely affected by a procedure that will conclude with an administrative single-case decision following the application of another person.

The German Administrative Procedure Act (Verwaltungsverfahrensgesetz - VwVfG, 1976) contains more detailed provisions. According to Section 13 para. (1) the participants to an administrative procedure may be those making and opposing an application, and according to para. (2) of the same Section 'The authority may *ex officio* or upon request involve as participants those whose legal interests may be affected by the result of proceedings. Where such result has a legal effect for a third party, the latter may upon request be involved in the proceedings as a participant. If the authority is aware of such third parties, it shall inform them that proceedings have commenced'. The participation in the administrative procedure includes the possibility of the participants to inspect the documents connected with the proceedings where knowledge of their contents is necessary in order to assert or defend their legal interests, without impairing the right to secrecy with regard to private and business secrets. It also includes the right to be heard of the person that might be adversely affected. Until administrative proceedings have been concluded, the foregoing sentence shall not apply to draft decisions and work directly connected with their preparation (Section 29 para. (1)). Based on the inquisitorial principle, the administrative authority will establish the facts of the case *ex officio*, without being bound by submissions of the participants and motions to admit evidence, but it must take account of all relevant circumstances, including those favorable to the participants (Section 24). It has been showed that the rules of German administrative law permit the 'cure' of procedural flaws, as long as they are not really relevant for the decision-making process, and that such a view (especially in areas like planning and building) may result in the risk that the procedural rights of the citizen will not be taken seriously; in the case of those opposing a decision, if they are heard after the decision is taken, it will be a pure formal hearing with an insignificant chance to revert the decision (Schmitz, 2013, p. 8).

The Dutch General Administrative Law Act - GALA (*Algemene wet bestuursrecht*) states that an interested party - a person whose interest is directly affected by a decision - shall be able to participate in the procedure that will lead to the decision (Section 1:2(1) of the GALA). This is the case in the procedure that is prescribed for individual decisions too, according to Section 4:8 stating that 'Before giving a decision about which an interested party who has not applied for the

decision can be expected to have reservations, an administrative authority shall give that interested party the opportunity to make known his views if: (a) the decision is based on information about facts and interests relating to the applicant, and (b) this information was not supplied by the interested party himself in the matter.' According to the case law a person is considered to be interested in the decision if the interest affected is 'the person's own, personal, objectively determinable, current and directly affected interest' (Tolsma, et al., 2009, p. 313). This interpretation was found to be broader than in the German case law, but narrower than the French (Kleijne, 2009, p. 15). Comments upon these legal provisions showed that 'interested parties who did not file any application have the right to be heard only if the decision prepared is based on information that relates to them' and that usually full rights to a hearing for interested parties in respect to decisions issued following an application only exist if the interested parties will appeal the administrative decisions in court (Barkhuysen, et al., 2012). The rights of the interested parties are protected by the fact that although an administrative order may be considered valid even if infringements in the procedure have been found, this will not be the case if the infringement has prejudiced the interests of the interested parties (Kleijne, 2009, p. 12).

The Latvian Administrative Procedure Law mentions among the principles of the administrative procedure the principle of observance of the rights of private persons (Section 5). Section 24 of the Law mentions third parties among the participants to the administrative proceedings. According to Section 28 a private person whose rights or legal interests may be infringed by the relevant administrative decision may be a third party in administrative proceedings. Third parties may obtain information in connection with an administrative procedure, except for the restricted information under the law; part of the information may be provided, if its meaning is not lost or changed after the part not to be disclosed is removed (Section 54).

The Italian Administrative Procedure Act (Law 241/1990) states in Section 7 that in case a measure is capable of adversely affect identified or easily identifiable parties other than its direct addressees, the authority shall have the duty to inform them of the beginning of the procedure. If personal communication is impossible or particularly onerous on the account of the number of addressees, suitable forms of publicity may be used (Section 8). Any party having a private interest adversely affected by a measure shall have the right to intervene during the related procedure (Section 9). Such intervening parties have the right to inspect the procedure's documents and to present documents and written arguments; the authority has the duty to evaluate such documents if they are pertinent to the object of the procedure (Section 10).

In case a single-case decision making has a negative effect upon a larger number of persons, the meaning of 'interested party' is much more relaxed.

In the Czech Code of Administrative Procedure (Law 500/2004), an administrative body is obliged to enable all persons concerned, not just parties in the proceedings, to raise their legitimate interests; the participation of 'the public' in the decision-making process is dealt with only marginally (Staša & Tomášek, 2012, p. 67).

The Law on Administrative Procedure of Bosnia and Herzegovina (2002) shows that a 'party' is not only the person under whose request the procedure has been instigated, or against whom the procedure has been conducted, but also the person who has the right to participate in the procedure in order to protect his rights or legal interests (Section 41). According to Section 72, the parties have the right to inspect case files and transcribe necessary files at their expense, under the supervision of an official. This right is specifically granted to every person who makes probable his interest in doing this, as well as social organizations and associations of citizens, if there is a justified interest. Also, an interested party can participate in the examination procedure, give information and defend his rights and legally protected interests, can address questions to other parties, can get acquainted with the outcome of the furnishing evidence and provide his position on that (Section 134).

The 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters of The United Nations Economic Commission for Europe (UNECE), known as The Aarhus Convention, recognizes the right to participate to the decisional process, as well as the right to contestation of the administrative act to court. According to Art. 9 para. (2) of the Convention referring to the access to justice, an interested party is someone having a sufficient interest (letter a) or, alternatively, someone maintaining impairment of a right, where the administrative procedural law of a party requires this as a precondition (letter b). The sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law. Special provisions of Art. 9 para. (2) concern the non-governmental organizations promoting environmental protection and meeting the requirements set under national law, which are always considered to have a 'sufficient interest' and shall also be deemed to have rights capable of being impaired.

Interested parties have the right to receive environmental information that is held by public authorities, within one month of the request and without having to say why they require it, have the right to make comments that have to be taken into account in the decision-making process and the right to be provided on the final decisions and the reasons for it (Comission, 2016). Following the Aarhus Convention, in 2003 two Directives concerning the first and second 'pillars' of the Aarhus Convention were adopted; they were to be implemented in the national law of the EU Member States by 14 February and 25 June 2005 respectively: Directive 2003/4/EC of the European Parliament and of the Council of 28 January

2003 on public access to environmental information and repealing Council Directive 90/313/EEC and Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programs relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC. Member states have adopted special legislation in order to implement the Directives. A study searching for problems in the application of the Aarhus Convention in seven EU member states revealed that very often third parties may be affected by single-case decisions addressed to individuals, like permits for planning or developing activities issued to private persons. The study also found that in relation to the possibility of reviewing individual acts or their outcomes, the legal orders of the parties make insufficient provisions for meeting the specific requirements of Art. 9 para. (2). Romania ratified the Aarhus Convention by Law 86/2000. The G.E.O. no. 195/2005 provides the right of the public to be informed about activities that affect the environment, with the protection of the right to privacy and confidentiality according to the law, and the access to court in such matters. Non-governmental organizations that promote the environmental protection have a right to action in court in environmental matters (Lazăr, 2007, pp. 420, 424).

In the Netherlands, on the basis of Section 1:2, subsection 3 of the GALA non-governmental organizations, including environmental protection associations, have greater access to the courts than natural persons, as interested parties, since they can represent general interests, including environmental interests (Koeman, 2013, p. 1). A right to access to court should imply the fact that a right to ask and receive information from the administrative body, in the process of decision-making exists, as the statements of the interested party may lead the administrative authority to a lawful decision and may prevent the need for addressing the court in order to contest the administrative decision.

In Book III of the ReNEUAL Model Rules, dealing with single case decision-making, the notion of 'party' is defined as 'the addressee of the intended decision and other persons who are adversely affected by it and who request to be involved in the procedure' - Art. III-2, para. (3). Art. III-23 consecrates the right to be heard by persons adversely affected, stating that 'every party has the right to be heard by a public authority before a decision, which would affect him or her adversely, is taken' - para. (1). Further on, provisions regarding an adversarial procedure set the frame for the possibility of each party to defend its views on the matter and exercise its rights of defense. However, there are no possibilities provided for a third party that may be adversely affected by a decision issued following the application of another to have access to the case file. The provisions regarding the access to file show that 'every party has a right of access to *his or her file*' (Art. III-22, para. (1)), or that 'every party shall have the opportunity to examine all documents *in his or her file*, which may be relevant for its defense' (Art.

III-22, para. (3)). Thus, it will be difficult for an interested third party to establish if the decision that will be taken by the public authority following the application of another has the potential to infringe his or her rights. For example, in case of a building permit, or a permit for developing certain economic activities, the interested third party may be interested to see the project of the building, in order to verify if the planning rules are respected or if all the necessary documents that should be attached to the application have been filed or obtained. So, the finality of the possibilities for a person, who is adversely affected by a decision issued following the application of another, to be heard during the decision-making process, or to contest by an administrative recourse or in court the final decision of the administrative authority is incomplete as long as this party will not have access to information that does not contain private data, or business plans, but technical documents of the applicant. It will be difficult in these conditions to conclude if the act that is going to be concluded by the administrative authority, following a request of an applicant, will infringe or not rights or legitimate interests of a third interested party. It is difficult to defend one's rights or legitimate interest if one does not know if there is an infringement (but can only guess) and what exactly lead to the infringement. Any action, during the preparation of the administrative act or afterwards will be a shot in the dark, leading to a waste of time and money both for the state and the interested third party. We agree to the conclusion that the notion of interested party should be clearly regulated in a way consistent with the principle of administrative openness while, at the same time, protecting the privacy of individuals (Rusch, 2009, p. 9). That would mean that the access to a file regarding an administrative decision should be granted to every interested party, during the decision-making process or after the decision is concluded, with the aforementioned limitations, as is the case in national regulations.

Special provisions in the Model Rules consider the case when the decision may affect a large number of persons. In such cases an authority making the decision may give effect to the obligations in Art. 11 TEU by consultation of the 'interested public' (III-25).

The right to information is already consecrated as a human right and in relation with public authorities it is linked to democracy and transparent governance. In the first session in 1946, the UN General Assembly adopted Resolution 59(I), stating: "Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated." Under the Art. 10 of the European Convention of Human Rights, a right to information is recognized for protecting other rights, for example in connection with family life (*Gaskin v. UK*) or a safe environment (*Guerra v. Italy*). The UN Special Rapporteur on Freedom of Opinion and Expression has shown in successive annual reports to the UN Commission on Human Rights that the right to access information held by public authorities is protected by Art. 19 of the International Covenant on Civil and Political Rights (ICCPR) (Mendel, n.d.). We



conclude that in order to respect the right to information in the sense of a human right, the administrative procedure rules should permit the access to information in all cases a person is searching to protect another right belonging to the group of human rights.

### **3. The burden of proof and the privilege against self-incrimination in investigative procedures**

The autonomous concept of 'criminal charge' developed by the European Court of Human Rights (ECtHR), brought in the Romanian jurisprudence the topic of the presumption of innocence in case an administrative inspection/investigation is conducted or an administrative sanction is applied. Romanian jurisprudence embraced the conclusions of the *Slabiaku v. France* case, stating that the presumption of innocence is not an absolute one in the administrative procedure, as presumptions of facts or law operate in every legal system, which are not prohibited in principle by the European Convention of Human Rights (ECHR) as long as they respect certain limits and the rights of defense are not breached, in the sense that the administrative act is presumed legal but the offender has the possibility of proving otherwise (Fodor, 2010, pp. 73-74). The contesting procedure of administrative decisions in Romania is governed by the rules of civil procedure where the principle *onus probandi incumbit actori* attributes the burden of proof to the contestant. Case law relies mostly on the idea that the possibility of contesting the punitive sanction to court, where one may bring proof of one's innocence, enacts the presumption of innocence (Fodor & Buzdugan, 2013, pp. 503-504). There are no general rules concerning administrative investigation and inspection. Usually, special norms provide the obligation to provide information to the public authority, including statements, without considering a privilege against self-incrimination, even if the procedure may end with the application of an administrative sanction of a punitive nature, which is contrary to the provisions of Art. 6 of the ECHR in respect with the rights attached to the autonomous concept of 'criminal charge'. This is also the case in the Project of the Code of Administrative procedure (Chapters III-V). There are no rules regarding the use of information obtained with the breach of the investigative procedure, except for the one establishing that breaching the rules regarding hearing of the investigated party results in the nullity of the unfavorable decision concluding the procedure. The legal professional privilege is not mentioned either, although special dispositions may be found in the laws or statutes regulating different liberal professions, as is the case of Art. 228 of the Statute of Lawyers.

Looking into the administrative procedure of several European countries we can see that rules or interpretation of such matters depend on how close the criminal procedures are regarded in relation with the administrative ones that may result in punitive sanctions.

In Belgium law, a decision of the Constitutional Court stating that 'It is the administration's task to prove facts committed by the alleged infringer, not just when it imposes the fine, but also when its decision is appealed. [by forcing the addressee to initiate any appeal] the legislator did not intend to abandon the presumption of innocence' (Put & Andries, 2013, p. 141). Regarding the privilege against self-incrimination, although certain legal acts impose a duty to provide information in the case of supervision of fiscal or social matters, Belgian case law has ruled that the subject of any inquiry is not obliged to cooperate if this may lead to the imposition of administrative sanctions with punitive character; the right to remain silent against self-incrimination does not affect the power of the administration to examine potentially self-incriminating records, as the Court of Cassation did not consider the legal duty to hand over documents to be a violation of the principle of presumption of innocence or the privilege against self-incrimination (Put & Andries, 2013, pp. 143-144).

In the Austrian law, in the case of the administrative penal procedure (a procedure of directing certain behavior by punishments – mainly fines – as a part of the administrative law), considering the application of Art. 6 of ECHR, the accused must not be burdened with the *onus* to prove his innocence, remaining to the administrative authority to prove the physical and mental elements of the offence; it is not allowed to deduce guilt from lack of cooperation of the accused (Höpfel & Kert, 2013, pp. 36,62).

Usually, the inspection/investigation procedures contain provisions regarding the rights and duties of the authority and the ones being investigated. In German law the rights of the participants (as mentioned in Section 13 of VwVfG) include the right to bring in representatives and advisors (section 14), the right to advice and information by the public authority (section 25), the right to be heard (section 28) with the exceptions provided, the right of inspection of files (section 29) and the right to secrecy of the participants with regard to private and business secrets (section 30). Although there are no specific dispositions regarding the fact that the right to be heard also apply when the authority is intending to dismiss the application, we agree that it should be no difference with other situations, since the opinion of the interested party may change the decision of the authority (Schmitz, 2013, p. 6).

It has been showed that in German law, the participants have procedural rights but no procedural duties (Schmitz, 2013, p. 6), as the VwVfG uses the term 'shall' (*sollen*) in the sense of 'are expected' not 'must' when it describes the cooperation of the participants; it is a matter of responsibility, not a duty and if a participant refuses to cooperate by stating facts and evidence known to him he bears the risk of unfavorable decision but does not violate a legal obligation (Schmitz, 2013, p. 7). Section 26 para. (2) provides for a more extensive duty to assist in ascertaining the facts, and in particular to appear personally or make a statement, only where the law specifically requires it.

In Spanish administrative procedures, the principles of criminal law regarding investigations apply in full; it is considered that, as a consequence, the burden of proof rests with the administrative body. However, the case law is not clear in establishing if when contesting the punitive sanction in court the accused has to prove any exonerating and mitigating factors, or it is the administration that must prove the absence of such factors (Puig, et al., 2013, p. 536). It has been concluded that the presumption of innocence requires that the sanction eventually imposed should be grounded on however minimal evidence, obtained by valid means, which must be presented by the Administration, formally adduced and fairly evaluated (Puig, et al., 2013, p. 537). The right to refrain from self-incrimination allows the accused to remain silent and to decide on the content of any statement is considered compatible with the duty of information and cooperation with the administrative inspectorate in certain cases like the obligation to comply with an alcohol test, the requirement to provide information to fiscal authorities, the requirement to identify the person who was driving when the offence was committed, even though the information may be used to incriminate the accused (Puig, et al., 2013, p. 535).

The existence of a presumption of innocence in case of administrative inspections that may result in sanctions with a punitive character in the Netherlands is regarded as in Romanian jurisprudence. Parliamentary Preliminary Draft Proposals stated that in case of administrative infringements 'the administrative authority need not prove culpability, but may assume this if perpetration has been definitely established. (...) To avoid the imposition of a fine, the infringer will then have to appeal to the absence of all guilt, and make this absence convincing' (Jansen, 2013, p. 414). It has also been shown that the findings in Dutch criminal case law, that the fact that a suspect remains silent cannot be used as evidence, but this does not mean that the judge cannot value the lack of clarifying or disculpatory explanation from the suspect (following the ECtHR *Murray v. UK* case), should also apply in administrative law related to punitive sanctions (Jansen, 2013, p. 415).

The ReNEUAL Model Rules consecrate in Section III-14 (1) the privilege against self-incrimination and the legal professional privilege. Both rights are protected in case the inspection may lead to an administrative sanction. The protection is made effective by the fact that where these privileges have been violated in the course of gathering information, the information must not be used as evidence in procedures by public authorities if this violation could have had an impact on the content of the decision (section III-14 (2)). No provisions regarding the burden of proof are mentioned in the 2014 Version for online publication.

We conclude that rules in administrative investigation procedures should comply to the rights of defense consecrated by the ECHR.

#### 4. Withdrawal/revocation of the single-case decisions

Due to the large decision power of the administration, the possibility of withdrawing its own decisions is generally recognized. By withdrawing a single-case decision, the possibility of the issuing authority to terminate it for the future or with retroactive effects is understood. Usually withdrawal may occur, with retroactive effect, because the single-case decision breaches the law or, with prospective effect, because the circumstances considered at the issuing moment have altered or views have changed in such a way that they are opposing to the continuance of the effects of the decision.

Such possibilities are recognized by Romanian doctrine and jurisprudence. No time limit is set for the withdrawal of an unlawful decision. Exceptions from the possibility of withdrawal are considered the jurisdictional administrative decisions, the administrative single-case decisions that were used to obtain civil contracts (exception referred to in Art. 1 para. (6) of Law 554/2004), the administrative decisions considered as non-withdrawable by the law and the administrative decisions granting certain rights, which were fully executed. These exceptions do not exclude the possibility of the court to annul the decision, within the time-limit established by the law. The withdrawal of an unlawful single-case decision obtained by fraud is always possible (Petrescu, 2014, pp. 327-331). The withdrawal of an unlawful single-case decision usually has a retroactive effect, while the withdrawal of a lawful decision will only have effect for the future. A particular situation refers to authorizations. The ones legally issued by the administrative authorities in the exercise of their discretionary power, regarding continuous activities (licenses) may be withdrawn. The withdrawal does not give the right to financial compensation, as it is presumed that the beneficiary was aware of the possibility of withdrawal from the very beginning; compensation may only be granted if there is a special provision of the law, if the withdrawal decision is unlawful or unreasonable (an abuse of power) (Iorgovan, 2002, pp. 90-91).

Although the doctrine considers that the validity of a single-case administrative decision depends of the seriousness of the vice or the validity conditions imposed by the law (Fodor, 2012, p. 435), the recent case law shows that courts generally annul, as unlawful, the decisions issued/adopted with the omission of procedural requirements. The omission to request an opinion lead to the annulment of a Government Decision by the High Court of Cassation and Justice, despite the fact that the public authority was not bound by the conclusions of the opinion (Decision no. 2579/2008, Department of Administrative and Fiscal Litigation). The argument that the Government would have decided in the same way, regardless of the opinion of the Economic and Social Council was rejected by the court. The ruling prevents the possibility of omitting a requirement presumed necessary by the law. A series of court decisions have annulled the decisions of local councils that were adopted after the proposal for the decision was introduced

on the agenda of the meeting on grounds of emergency, when no emergency could be proved in front of the court. The argument that the same decision would have been adopted in another meeting, when the proposal would be properly introduced on the agenda was rejected, as the rule in Romanian jurisprudence is that the legality of an administrative single-case decision is established according to the conditions from the moment it was adopted or issued (Fodor, 2012, p. 435). The course of events proved many times that in another meeting, with time to think over and gather relevant information on the proposal, opinions of some of the councilors changed and the decision could not be adopted in legal conditions after the invalid one has been annulled.

The Project of the Code for Administrative procedure mentions that revocation (*revocarea*) dissolves the illegal administrative disposition with retroactive and prospective effect, for reasons that proceed, are concomitant or subsequent with the issuing/adopting the decision. The decision may be revoked only inside the time limit for legal challenge. The favorable decision that grants continuous advantages may be revoked only if the advantages are used in another purpose than the one they were granted for, or the beneficiary fails to comply with a condition related to the decision or fails to comply within the provided time limit. Jurisdictional decisions cannot be revoked, as well as other decisions according to law (Art. 141). In our opinion the provisions of the Project in this matter are a step back from the rules applied at this moment and even further from the European vision.

In Dutch law, there are no general rules for the withdrawal of unlawful administrative single-case decisions, owing to the wide variety of policy fields and situations that have to be covered. The GALA mentions the possibility of withdrawal in Section 4:48 and Section 4:49, regarding the granting of subsidies, the aforementioned sections showing that an administrative authority is empowered to withdraw its final decision to the detriment of the grant recipient if the decision is incorrect and the grant recipient should have known this, or the decision is based on incorrect information provided by the grant recipient and the authority would have taken a different decision if it had been supplied with the correct information (Kreveld, 2008, p. 5). The power to withdraw a single-case decision is implicitly assumed to exist if the case in question involved discretionary power, even if special Acts do not include provisions regarding this possibility (Graaf & Marseille, 2007, p. 88).

In the case of favorable unlawful final single-case decisions, the principle of legal certainty has to be considered in opposition with the principle of careful assessment of the interests concerned; the principle of legal certainty will generally prevail where the unlawful decision holds the granting of a license but will be weaker in the case of financial decisions (Kreveld, 2008, p. 6). The third party adversely affected by an unlawful single-case decision (an unlawful permit granted to the neighbor or an unlawful license granted to a competitor) has to

apply to the issuing authority demanding the withdrawal of the decision, before going to court. The administrative authority is obliged to re-examine the final decision only if the third party concerned has put forward a new fact that was not known when the decision was taken, but even in such a situation, the administrative authority will not lightly withdraw the decision, as it may have to pay compensation to the addressee (Kreveld, 2008, p. 7) due to the infringement of the principle of legal certainty.

It has been shown that when balancing the principle of legal certainty with the principle of lawfulness, the principle of proportionality, mentioned by Section 3:4(2) of the GALA, will give the answer, obliging the administrative authority to evaluate 'how important is the interest of redressing the erroneous decision in proportion to the interest of the parties involved being able to act in accordance with the legal status granted to them' (Graaf & Marseille, 2007, pp. 83-84). Relevant court cases in the matter of the obligation of the administrative authority to withdraw an unlawful decision are *Raad van State*, showing that the administrative authority's power may never lead to an obligation to grant request for reconsideration in spite of the absence of new facts that have emerged, and *Centrale Raad van Beroep* showing that, on the basis of equality before the law, the administrative authority has an obligation to grant a request for withdrawing the unlawful decision, even if it is not based on new facts or altered circumstances and even though the party involved let the time limit for lodging a legal remedy to expire (Graaf & Marseille, 2007, pp. 90-92). It has to be mentioned that the conclusions of the latter case were found to apply only if the administrative single-case decision was issued breaching a norm of the EU law.

The withdrawal may have retroactive effect in the case of unlawful or erroneous single-case decisions, or may have prospective effect in the case facts, circumstances or the law changed after the decision was made in such a way that it can no longer be upheld; the administrative authority will weigh each time the relevant interests against each other (Graaf & Marseille, 2007, p. 84).

In German law, VwVfG contains more detailed rules. An unlawful administrative act may, even after it has become non-appealable, be withdrawn (*Rücknahme*) retrospectively or with effect for the future, with some restrictions in the case the decision is advantageous for the addressee (Section 48). The time limit for the authority to withdraw the unlawful decision is one year from the date it gained knowledge of the facts justifying the withdrawal. The authority shall upon application make good the disadvantage to the person affected for breaching the principle of legal certainty. In case the decision was obtained by false pretenses, threat or bribery the time limit for withdrawal will not apply and the authority has no obligation to make good the disadvantage to the person affected.

Section 49 of the VwVfG sets the conditions for the revocation (*Widerruf*) of lawful administrative single-case decisions, distinguishing between the non-beneficial decision situation and the beneficial decision one. In the latter case,

situations that permit the revocation are the permission of law, reservations in the administrative decision itself, noncompliance of an obligation, change of circumstances in a way that failure to revoke the decision would be contrary to the public interest, change of law in a way that failure to revoke the decision would be contrary to the public interest and the beneficiary has not yet received any benefits derived from the decision, prevention or elimination of serious harm to the common good. The time-limit considerations from the case of the withdrawal of unlawful decisions also apply. The revocation will produce effects only for the future. In situations mentioned by Section 49 para. (6) the authority shall upon application make good disadvantage to the person affected, on the basis of the principle of legal certainty, to the extent that his reliance merits protection.

Section 48 and Section 49 refer to the situations where the authority itself becomes aware of the reasons that may lead to withdrawal or revocation. The reconsideration of a single-case decision at the request of an interested party is regulated in Section 51, which makes it a condition that 'new evidence is available which would have led to a decision that was more favorable for the party involved'. A time limit of three months from the date on which the party involved has received notice of the grounds for withdrawal is set for the request. It is assumed in the literature that the enumeration in Section 51 does not detract from the power of administrative authorities laid down in Sections 48 and 49 to withdraw previous made decisions, regardless of whether one of the situations referred by Section 51 has arisen or not, but in the first case the administrative authority has an obligation to reconsider, whereas in the second case it only has the power to do so (Graaf & Marseille, 2007, p. 92). Section 51 also mentions that the application for withdrawal shall only be acceptable when the person affected was, without grave fault on his part, unable to enforce the grounds for resumption in earlier proceedings, particularly by means of a legal remedy.

The German case-law of the Federal Administrative Court of Germany (*Bundesverwaltungsgericht*) emphasizes that the principles of 'substantive justice' and legal certainty have equal value; only in certain circumstances the interpretation may be that substantive justice takes precedence, 'without violating legislative freedom'; such special circumstances may be said to exist if the administrative authority has already reviewed its decision in similar cases, if holding to the original decision is absolutely unacceptable, or if the refusal to reconsider the legally incontestable decision will result in a violation of good faith and propriety (Graaf & Marseille, 2007, pp. 93-94). The opinion that such detailed rules and the views regarding the obligation of the administrative authority to withdraw, revoke or reconsider its decisions is not consistent with the possibility of 'curing' the 'formal defects' and 'procedural errors' by subsequent activities even during administrative or judicial review proceedings, together with the reticence of the courts to actually find special circumstances that should impose the reconsideration has been expressed (Graaf & Marseille, 2007, p. 94). Also, the fact

that the possibility to ask for the annulment of a single-case decision on grounds of infringement of procedure rules is not admissible if it is evident that this infringement has not influenced the decision on the matter, was considered to create the risk that the citizen is not taken seriously (Schmitz, 2013, p. 8). It is difficult to assess what would have been the decision of the administrative authority if certain steps of the procedure were not eluded, and we agree that if a procedural rule is set, it should not only be recommended but implemented and the formal defects sanctioned. But if we consider that an administrative single-case decision is unlawful if it contradicts juridical norms with a higher force or infringes severely someone's legal interests, than there is no contradiction between the rules regarding withdrawal and the possibility of curing formal defects.

The Italian Administrative Procedure Act also provides for the possibility of the administrative authority to annul (*annullamento d'ufficio*) an unlawful single-case decision. According to Section 21-*nonies*, this can be done when there are grounds in the public interest for so doing. The last part of para. (1) from the same section mentions that in taking the decision to annul *ex officio* the unlawful decision the authority must take account of the interests of the addressees and parties with conflicting interests. We conclude that not only the public interest may lead to the annulment, but breaching of legal interests of a third individual too. There is no fixed time limit for the possibility of annulment, the legal text only mentioning that it may be done 'within a reasonable timeframe'. In the Italian procedure too, the form or procedure infringements will not always lead to the voidability of the decision. According to para 2 of Section 21-*octies* a decision adopted in breach of rules governing procedure or the form of instruments shall not be voidable if it is evident that the provision it contains could have not been other than the one actually adopted. The same is valid for inspections, in case the authority failed to communicate the commencement of a procedure. In our opinion, it is difficult to presume that the result of an inspection would be the same, whether its commencement has been communicated or not. Such a presumption is, in our opinion, an infringement of the right to defense. Administrative decisions adopted in breach of the law or vitiated by excess of power or by lack of specific jurisdiction shall always be voidable. Also, para. (2) of Section 21-*nonies* states that where grounds in the public interest exist, the authority may validate the voidable decisions, within a reasonable timeframe. Mentioning the situations when a decision is voidable, the breaches that always result in the possibility of annulment and the ones that may be set aside with the consequence of maintaining the decision as valid contribute to legal certainty. The only uncertainty results from the 'reasonability' of the time limit, but, this is a consequence of the balance between the legality and legal certainty principles that can only be established for each particular situation.

The revocation (*la revoca*) of lawful single-case decisions having continuing effect is possible in case of subsequently arising reasons of public interest or in case



where concrete situations change, or the original public interest is re-assessed, according to Section 21-*quinquies*. The effects of revocation will be produced only for the future. The administration will have an obligation to compensate the parties adversely affected by revocation.

In the Czech law, the Code of Administrative procedure also balances the interests in remedying the defective situation with the interest in preserving the rights acquired in good faith when an unlawful decision is reviewed *ex officio*, the application of discretionary powers being limited by the excess of power. It has been shown that although procedural law is designated as one of the pillars of Czech administrative law, criticism has been manifested on the administrative as well as judicial practice that sometime excessively emphasized the procedural part of the issue; theories arguing for a need of simplification have neglected the issue of abuse of procedural rights especially in the field of land-use planning decision-making or building procedure; however, there are a great number of special laws in different fields (over one hundred), with specific rules on the matter (Staša & Tomášek, 2012, pp. 63, 67, 68).

According to the Law on Administrative Procedure of Bosnia-Hertzevovina, a lawful decision that has provided for a party, against which no appeal may be lodged or an administrative procedure instigated, may be revoked, cancelled or amended only in the cases provided by law. Detailed provisions establish situations when the procedure completed by a decision that is final in the administrative procedure may be reviewed (e.g. in case of new evidence, of decisions taken on basis of false information or party's allegations, of decisions based on prior issues when the competent authority subsequently resolved that issue in an essentially different manner, or in case the person who should have participated in the capacity of a party was not given the possibility to participate in the procedure without his fault – Sections 238 and 239). The review of the administrative procedure may be conducted *ex officio*, at the request of an interested party or of the Ombudsman acting within his responsibilities. A time limit is set for requesting a review or conducting one *ex officio*. A valid decision favorable to a party, may be cancelled if the authority considers that he substantive law was incorrectly applied, only if the party agrees and no third party is adversely affected (Section 254), except when cancelation is necessary for public interest situations mentioned in Section 255, with the obligation to award compensation to the party that has suffered damage. A valid unfavorable decision may be revoked.

The ReNEUAL Model Rules provide the possibility of withdrawal for both lawful and unlawful single-case decisions that adversely affect a party. The public authority may withdraw an unlawful administrative decision which adversely affects a party, *ex officio* or following a request of that party, with retroactive effect, outside the time-limits for legal challenge (Section III-35). The same rules apply for the withdrawal of a lawful administrative decision which adversely affects a party,

but with prospective effect. In both cases the public authority shall take into account the effect of the rectification or withdrawal on other parties and on third parties.

When a decision to withdraw an unlawful decision which is beneficial to a party is considered, the public authority shall take into account the extent to which a party has a legitimate expectation that the decision was lawful and the extent to which the party has relied on it. In respect to these factors, the public authority will decide whether it will exercise the power to withdraw the decision, the retroactive or prospective effect of the withdrawal. The withdrawal may be exercised *ex officio* or following a request of that party, outside the time-limits for legal challenge (Section III-36).

The public authority may withdraw a lawful decision that is beneficial to a party, *ex officio*, or following a request of another party. The power of withdrawal in such a case may be exercised outside the time-limits for legal challenge only if it is permitted by specific law, if the party has not complied with an obligation specified in the decision or has not done so within the time-limit set for compliance or in order to prevent serious harm. In the last case, upon application, the public authority shall make good the disadvantage to the party affected, to the extent that the reliance on the continued existence of the decision merits protection. The effect of the withdrawal on other parties and third parties should also be considered. The effect of the withdrawal of a lawful decision that is beneficial to a party shall be retroactive only if it occurs within a reasonable time.

The conception of the Model Rules underlines that the possibility to withdraw a decision calls for a balancing of the interest of the public with those of the beneficiary, considering the extent to which the illegality that besets the decision is obvious, whether the beneficiary had provoked the earlier decision through false or incomplete information and the extent to which the beneficiaries undertook irreversible investments because they relied on the decision (Anon., 2015, p. 93).

We conclude that in regulating the withdrawal/revocation of an administrative act, a fair balance should be made between the principle of legality, that is conducting the whole activity of the administration, and the principle of stability of legal relationships shaped by the ECtHR, as for example in the case of *Pădurariu v. Romania*. Even if it is possible to allow the public authorities to reestablish legality without time limit, if the withdrawal of an individual decision is severely impairing on the stability of legal relationships, in the absence of any guilt of the beneficiary of the administrative decision, the withdrawal should not be permitted.

## 5. Conclusions

Some of the rules for the procedure of issuing/adopting single-case decisions impose certain steps presumed necessary in order to lead the public authority to a correct conclusion. Other rules are meant for the protection of the beneficiaries of

the decisions and third parties. Although Acts and Codes establish such rules, if they are omitted in the issuing/adopting process of a single-case decision, that will not necessarily result in the possibility to dissolve the act. Interpretation of administrative procedure rules in different legal systems take into account that several principles have to be considered together with the principle of legality, such as legal certainty and legitimate expectations. The prevalence of one of the principles upon the others would be given in respect with the right or legal interest that is breached by the decision and the observance of human rights.

Romanian rules of administrative procedure proved to get close to the ones from other legal systems, in general. In the case of the rights of third parties that might be adversely affected by decisions issued to another person, there is no rule in the present to grant the third party the statute of party in the procedure, nor the right to access the case files, but the Project of the Code of Administrative procedure is willing to remedy this situation.

In the matter of the burden of proof, Romanian jurisprudence is consistent with the one of the ECtHR and the provisions from other legal systems. Yet, the privilege against self-incrimination is not recognized although most of the European legal systems do. The Model Rules go further and mention the legal professional privilege. Also, the impossibility to use proofs obtained with the infringement of procedure rules, in order to apply a punitive sanction, also found in the Model Rules, is very important for protecting one's rights and is consistent with the rights attached to the autonomous notion of 'criminal charge' of the ECtHR.

Regarding the withdrawal of single-case decisions, Romanian doctrine and jurisprudence is fairly consistent with the Model Rules, except for the fact that they do not consider balancing the interests of the parties or the interest of a party with a public interest, the legitimate expectations, the extent to which a party relied on the decision, or if the withdrawal occurs within reasonable time. In the legal systems where they are mentioned, such appreciations are at the discretion of public authorities. On the one hand, they should be, as numerous single-case decisions are issued/adopted and situations encountered are very different. On the other hand, public servants must be qualified to make such appreciations and willing to make them correctly, especially when the outcome may not be contested to court. In respect with the possibility of curing formal defects of a single-case decision, as long as the rules are presumed to set a fair balance between the rights of the parties involved in the procedure, they should be obeyed. It is difficult to appreciate if the conclusion would have been the same or different if a disregarded rule would have been followed. This is why, in our opinion, the breach of procedural rules should result in the illegality of the administrative decision. Provisions that mention the sanction for breaching a specific rule would also bring legal certainty, as both the public authority and the parties would know the consequence of breaching a procedure rule and would be able to appreciate how

much can they rely on the administrative decision. Real life showed that at different times and in different conditions the decisions may differ significantly and this is why procedural requirements should be clear and should be fulfilled. Principles like predictability of legal norms, the legitimate trust of citizens in the administrative bodies, legal safety, proportionality were created and promoted by the constant jurisprudence of the ECtHR and some were codified by the Treaty of Lisbon (Trăilescu, 2011, p. 108)

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