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# **Legal Commentary by SIGMA**

## **on**

# **the Code of Administrative Procedures of the Republic of Albania**

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## INTRODUCTION

On 30 April 2015, the Assembly of the Republic of Albania adopted a new Code on Administrative Procedures (CAP), which created a comprehensive and practical set of rules, often referred to in EU Member States as “The Constitution of Public Administration”.

In accordance with the Continental-European culture and tradition of democratic public administration, which goes back to the early twentieth century, such a regulatory framework governs comprehensively what a public administration should do and how it should be done in the relation to the citizen. It provides principles and rules that apply to all authorities of the public sector and thus constitutes - together with the institution of the Ombudsman - one of the four pillar that an administrative system (based on the Rule of Law) is built on. The other three pillars of a Rule-of-Law-based public administration are: a clearly structured organisation of the public administration and its bodies in all policy areas and territorial levels; a professional, competent and independent personnel; and a system of effective judicial control of administrative actions. These four pillars, together, support the overall system that aims at both protecting individuals’ rights and interests as well as safeguarding the public interest.

According to the European Commission’s assessment the new Albanian CAP is in line with EU Law and the requirements of the European principles of good administration, as well as international standards of good administrative practice. Thus, it helps individual citizens to understand and obtain their rights, and promotes the public interest in an open, efficient, and citizen-oriented public administration. The Code helps citizens to understand what administrative standards they are entitled to expect from public bodies. It also serves as a binding guide for public officials in any dealings with the citizen and the general public. By making the principles of good administration more concrete, the Code helps to encourage the highest standards of administration.<sup>1</sup>

SIGMA - a joint initiative of the OECD and the EU, principally financed by the EU - provided support to the drafting process of the new CAP by the Albanian law drafting institutions, in particular the Ministry of Justice and the Assembly’s Commission for Legal Affairs, Public Administration and Human Rights.

During the final legislative phase, SIGMA was asked by the Albanian authorities to continue its support in the first phase of implementing the new and, by its nature, very substantial and complex piece of legislation. For this purpose, it was agreed to develop a tool that, on the one hand, allows citizens to comprehend their rights and obligations when dealing with public bodies and, on the other, provides explanatory guidelines for the public sector to put the spirit, principles and rules of the new legislation into every day administrative practice.

As a result, SIGMA developed this **Commentary on the Code of Administrative Procedures**<sup>2</sup>. With regard to its structure, content and extent, this practical tool was inspired by models which are an integral part of the legal and administrative practice in various EU Member States (in particular in Austria, Germany, and Italy), with which Albania shares the principles and values of its legal and administrative system. Accordingly, the Commentary provides, for every article, an explanatory introduction to its regulatory purpose followed by comments on how to interpret each legal concept, with a view to their relevance for administrative decision making in an individual case.

Target groups of this Commentary should firstly be the two “parties”, who directly participate in an administrative procedure, namely the citizens and the administrative practitioners in administrative bodies. However, other professionals will also benefit from this instrument, such as judges of administrative courts, members of the bar, teaching staff of law faculties, trainers of civil servants, law students and journalists.

The development of this Commentary was led by Primož Vehar of the SIGMA Programme, with substantial expert contribution from: Manfred Möller; Ulrich Ramsauer; Wolfgang Rusch; Zhani Shapo; Jan Skrobotz and Ilir Rusmalli. Thanks also go to the Albanian Ministry of Justice, in particular the Legal Codification Department.

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<sup>1</sup> See also the Introduction to the European Code of Good Administrative Behaviour <https://www.ombudsman.europa.eu/en/resources/code.faces#/page/1>

<sup>2</sup> The English version of the **Code of Administrative Procedures** in the Commentary is a SIGMA translation.

# **PART ONE**

## **GENERAL PROVISIONS**

## PART ONE GENERAL PROVISIONS

### **CHAPTER I PURPOSE, SCOPE AND DEFINITIONS**

#### *Article 1 Purpose of the law*

The purpose of this Code is to ensure the effective realisation of the public function to the service of the persons, and the protection of their legal rights and interests, in the realization of these functions, applying the principle of due process of law.

#### A. General Introduction

##### I. Purpose and content of art. 1

Art. 1 describes the purposes of the whole CAP in order to give a kind of guideline to the public bodies and other public entities how to apply administrative law and how to proceed in administrative matters within the scope of the CAP as defined in art. 2. The purposes are not enumerated clearly and entirely and must be amended by the constitutional principles which provide guidelines for all entities exercising public power in Albania. As stated in art. 4 para. 3 of the Albanian Constitution its principles are applicably directly. Moreover, the purposes must be seen on the background of European principles concerning administration.

##### 1. Rule of Law, Legality Principle

As stated in art. 4 para. 1 of the Albanian Constitution and in art. 4 as well the law constitutes the basis and the boundaries of all activities of the state which means all activities of public bodies and other entities. That means that

- all activities of public entities, especially public bodies must be in alignment with the law
- the provisions of the law must be executed in order to fulfil the legal requirements
- all affections of subjective rights or legal interests must be based on the law (art. 4 para. 2).

##### 2. Protection of subjective rights and legal interests

As stated in art. 1 the protection of the legal rights and interests of persons is one of the main principles and purposes of the CAP. As defined in art. 3 para. 7 lit. 8 person is any natural person, legal entity or subject of law under the legislation in force. The administrative procedures must be conducted in a way that subjective rights and legal interests of all persons involved are respected and protected. The rights and legal interests comprises the fundamental human rights and freedoms as stipulated in art. 15 ff. of the Albanian Constitution and moreover all rights and legal interests granted by special law.

##### 3. Effective fulfilment of administrative functions

Art. 1 emphasizes the purpose of effective realisation of the administrative functions. These functions can be derived primarily from the rule of law: The precise and complete execution of the requirements and provisions of the law must be seen as the most important function of the administrative organs. Moreover it belongs to the function to protect and promote both the public interests and the subjective rights and legal interests of the persons. To promote and protect these interests mean to fulfil and execute the legal duties in an efficient, economical, fair and proper way as fast as possible.

##### 4. Principle of due legal process

It is a main purpose of the CAP to implement the requirements of the rule of law by providing legal procedures to ensure the impartial execution and application of the law, the participation of the persons affected, transparency of the decision processes and to fight tendencies of corruption. These aims must be pursued not

only by executing material law but also by providing specific procedural requirements and by providing effective remedies to protect the individual rights and legal interests of affected persons.

## II. Constitution and EU-Law

As already mentioned before, the principles stated in art. 1 are entirely based on the Albanian Constitution which comprises the principles mentioned before. As most important principles must be emphasized the rule of law and the protection of the rights and legal interests of the persons.

Art. 41 of the European Charter of fundamental rights comprises the right to good administration which comprises all principles listed in art. 1 and all others mentioned before. It must be seen as a main element of the *acquis communautaire* to have implemented procedural regulations in order to achieve the purposes of good administration.

## III. Scope of the norm

The purpose stated in art. 1 is of relevance for the implementation of the entire CAP. The scope of the CAP is legally defined in art. 2.

## IV. Relation to previous CAP

It must be assumed that the same purposes have been pursued even by the previous CAP.

### *Article 2 Scope of application*

1. This Code shall apply in cases where a public body, during the exercise of the administrative powers regulated by administrative law:

a) decides on the rights, duties and legal interest of persons, and in any other case, when the law explicitly provides for the issuance of an administrative act;

b) concludes an administrative contract or performs another administrative action, which concerns the rights, duties and legal interests of persons.

2. The provisions of this Code shall also apply in cases where:

a) public or private legal entities exercising self-regulatory functions in the area of regulated professions, established by law, or being conferred the right to exercise such functions, in line with letter a) of paragraph 1 of this Article, as per the legislation in force;

b) private persons who are conferred the right to exercise public functions, duties, or competencies, decide in line with letter a) of paragraph 1 of this Article;

c) public or private legal entities, which provide public services, decide on the rights and duties of the service users.

In cases provided in paragraph 2 of this Article, every provision of this Code related to the public body shall apply also to the public or private entity or person.

3. The principles stipulated in this Code shall apply as appropriate also to the normative sub-legal acts.

## A. General Introduction

### I. Purpose and content of art. 2

This article describes the scope of the whole law and is therefore most importance. No regulation of the CAP must be applied unless the case is comprised by the scope of the law in accordance with art. 2. While the scope of para. 1 is classical the extension stipulated in para. 2 is without models. The latter is to extent the scope of the CAP to specific activities of entities which do not fulfil the preconditions of para. 1 either because they are no public bodies or because they don't exercise public law.

## II. Relation to previous CAP

An innovation is that according to para. 2 the CAP shall be applied also to private or public entities providing specific public functions and public services.

### B. The scope in details

#### I. The scope prescribed in para. 1

According to para. 1 the scope of the CAP comprises all administrative actions as defined in art. 3 para. 10.

##### 1. Public Body

A precondition of the application of the CAP in accordance with para. 1 is the activity of a public body. This precondition refers to art. 3 para. 6 which determines the term “public body”.

##### 2. Exercising administrative power governed by administrative law

According to para. 1 the provisions of the CAP shall apply only to the exercising of administrative power by a public body, if regulated by public law. This precondition means that activities of public bodies are subjected to the provisions of the CAP only if “regulated by administrative law”. All activities of public bodies regulated by administrative law must be seen as exercising administrative power.

###### a) Public law

The CAP contains no definition of the term “administrative law”. Even the Albanian Constitution does not give a definition. Therefore the term must be interpreted and understood by analyzing the constitutional and legal system of Albania. Administrative law is part of public law. Public law is the entirety of all laws which establishes a relationship between two or more persons and in which at least one person is necessarily a public body. This can be seen as the essential difference to private law which establishes legal relationships between persons regardless they are private or public ones.

###### b) Administrative law

As a rule public law can be divided in constitutional, international and administrative law. The latter can be described as the law which belongs neither to the constitutional nor to international law.

##### 3. Issuing and providing for the issuance of an administrative act (para. 1 lit. a)

Para. 1 lit. a) provides the applicability of the CAP to all “decisions on rights, duties or legal interest of persons, and in any other case, when the law explicitly provides for the issuance of an administrative act. This quite unclear provision must be understood that the CAP shall be applied to activities directed to the issuance of administrative acts. The issuance of an administrative act is normally required if a decision on rights, duties or legal interests of a person must be taken but also in other cases when the law “explicitly provides for the issuance of an administrative act. The term “administrative act” is legally defined in art. 3 para. 1 and 2. Specific regulations for the issuance of administrative act are stipulated in art. 98 ff.

##### 4. Concluding an administrative contract

Activities which are directed to the conclusion of an administrative contract are also comprised by the scope of the CAP. The term “administrative contract” is legally defined in art. 3 para. 4. Specific provisions for the conclusion of administrative contracts are stipulated in art. 119 ff.

##### 5. Performing “other administrative actions” concerning rights, duties or interests of persons

As regulated in para. 1 lit. b) the CAP shall also be applied to other administrative actions “which concerns rights, duties or legal interests of persons. The term “other administrative action” is legally defined in art. 3 para. 11.

## II. Entities exercising public functions and public services (para. 2)

As mentioned above already para. 2 aims to comprise specific activities of particular public interest in the scope of the CAP in order to protect individual rights on these fields.

### 1. Legal entities exercising self-regulatory functions concerning professions (lit. a)

The aim of this regulation is to ensure that exercising self-regulatory functions on the field of professions are included in the scope of the CAP, because there may be existing entities on this field which don't meet the preconditions of para. 1.

Exercising self-regulatory functions means the performance of activities which have regulatory character. Associations, groups or federations which are working on a voluntary basis are not comprised even if they are founded to promote professionals or companies providing professional services.

### 2. Private persons who are conferred the right to exercise public functions (lit. b)

Para. 2 lit. b) makes sure that the CAP is applicable to the activities of private persons exercising public functions when these persons are conferred the power to act like a public body on a special field. This rule applies for instance to entrepreneurs which are publicly appointed to exercise specific public functions instead of public bodies in the sense of art. 3 para. 6.

### 3. Public or private entities providing public services (lit. c)

It is difficult to define the scope of para. 2 lit. c) because it needs the definition of public services. Since the provision of many private services (i.e. repair services, transport services etc.) may be seen as public ones it is of high importance to restrict the applicability of para. 2 lit. c) to classic services as the delivery of energy as electric currency or gas and the delivery of water supply and the provision of wastewater sewer, waste disposal and similar services which are "public" in this sense.

### III. Normative sub-legal acts (para. 3)

Para. 3 stipulates that the "principles" of the CAP shall apply to normative sub-legal acts "as appropriate". The principles referred to in para. 3 are determined in art. 4 – 21. The other articles of the CAP are not applicable, at least not directly.

#### Article 3 para. 1 Definitions of "administrative act"

1. In this Code the following terms shall have the following meanings:

1. The "administrative act":

a) An "individual administrative act" is every expression of will by a public body, in the exercise of its public function towards one or more individually determined subjects of law, which establishes, modifies or terminates a specific legal relationship.

b) A "collective administrative act" is an expression of will by a public body, in the exercise of its public function, addressed to a group of subjects, whose members are or can be individually determined, on the basis of general characteristics and, which establishes, modifies or terminates a specific legal relationship.

c) An "act of assurance" is an act, through which the public body, if provided by a special law, may assure in advance that it will issue or refrain from issuing a certain administrative act at a later date.

#### A. General Introduction

"Administrative act" has been the core concept in continental European administrative law for more than 200 years. It covers the majority of the actions of the administration, by which it affects the legal interests of an individual.

The concept of administrative act has its roots in the French concept of "*acte administratif*". The German jurists borrowed it from the French law and developed it from 1826 onwards. Later the concept was integrated into national administrative law of many other European countries. Among the first of those countries, where a definition of the administrative act found its expression in legislation, were - in the twenties of the last century - Austria and the Kingdom of Yugoslavia. In Albania administrative act was introduced into the administrative legislation by the first Code of Administrative Procedures of the year 1999.

Derived from the administrative act - the traditional and still central element of the system of administrative activities - various other forms of administrative actions have developed in Europe during the second half of the twentieth century in order with the aim to enable public administration to adequate response to changing needs of citizens of today. Therefore this Code does not only regulate the administrative act but completes the system of forms of administrative activities by providing rules on administrative contract (PART FIVE, CHAPTER II), other administrative actions (PART V, CHAPTER III), and indirect provision of public services (PART FIVE, CHAPTER IV).

## I. Purpose and content of the concept administrative act

### 1. Functions of the concept administrative act

The importance of the legal institute of the administrative act arises from its functions. They describe the *ratio legis* of the concept "administrative act" as defined in para. 1 of art. 3. These functions have to be taken into consideration when for the question, whether or not an administrative action fulfils the criteria of an administrative act, one or more of the elements of the definition need interpretation.

The functions of the concept administrative act for the administrative practice can be systemized as follows:

#### a) Putting law into concrete terms

The administrative act has the task to individualise rights and duties, stipulated in a general and abstract way by law (legislative act), in a specific concrete case. For this case the administrative act prescribes bindingly what is legal for both the citizen and public body. That means, although not being a legal norm, the administrative act has normative effect, i.e. is source of law in an individual case. In this respect an administrative act may be the legal basis of a citizen's claim against a public body (e.g. *administrative act granting a subsidy*) or – vice versa – legal basis for a public authority's claim against the citizen (e.g. *repayment claim*).

#### b) Legal protection

Legal remedies like administrative appeal (art. 130, para. 1) or dispute before the Administrative Court (art. 129, para. 1) and also the suspensory effect of a legal remedy (para. 1 of art. 133) have as precondition that an administrative act was either issued or applied for. In this way the administrative act opens the door for effective legal protection against a certain form of administrative actions.

#### c) Administrative finality

When the deadline of a legal remedy has expired, as a rule the citizen cannot assert any longer unlawfulness of the administrative act, no matter whether or not it is lawful. Thus, the administrative act aims at achieving administrative finality (in case of an Administrative Court decision: legal force).

#### d) Linkage to procedural legal provisions

The administrative act is point of linkage to numerous procedural provisions of the CAP. The use of this type of administrative action determines which procedural law is to be applied, in other words, which procedural steps the public authority has to undertake. The compliance with procedural regulations ensures equality of treatment of citizens within state administration.

#### e) Legal prerequisite for administrative execution

Apart from the case of immediate execution (art. 179) realisation of non-financial obligations or financial claims by administrative execution requires (among others) that the obligation be prescribed by an administrative act (Art 164, para. 1).

### 2. Classification of administrative acts

For the understanding of the concept administrative act and its implementation in administrative practice it is a good aid to classify the various types of administrative acts beyond the definitions provided in para. 1 and 2 of this article. Such classification may be made on the following lines:

#### a) According to the subject-matter: commanding, structuring, or declaratory acts

On the basis of their subject-matter administrative acts may be divided into commanding, structuring, and declaratory acts. A commanding administrative act consists of commands or prohibition and compels a definite behaviour such as police directions or traffic signs. A structuring act establishes changes or removes a concrete legal relationship such as appointment to a post in the civil service or conferment of graduation. A declaratory

administrative act declares a legally important attribute of a person such as declaration of citizenship or of monetary help such as scholarship or subvention.

b) According to the consequences: beneficial or onerous acts

According to its legal consequences on the concerned person an administrative act may be either beneficial (see art. 102) or onerous.

A beneficial act establishes, upholds or confirms a legal or legally important advantage such as grant of a fellowship or permission to construct a house while an onerous act causes a disadvantage to the affected person either by interfering with his/her rights or rejecting a request for some favour of benefit such as denial of a grant or dismissal from a job as civil servant. All commanding or prohibiting acts fall within the category of onerous acts. An administrative act may sometimes also be both beneficial as well as onerous as, for example, giving a grant subject to certain obligations or partial acceptance of a request for some benefit.

An administrative act may also affect persons other than those to whom it is addressed. Such act is called an administrative act affecting third parties. The classical example of such an act is grant of permission to a person to construct a house or a plant, which affects the legal interests of the neighbouring residents.

c) According to the legal limits on the competent public body: mandatory (non-discretionary) or discretionary acts

From this point of view an administrative act may be either mandatory (non-discretionary) or discretionary. A mandatory administrative act is one, which can be taken or not taken only if the pre-conditions laid down in the law exists. Discretionary acts are those, with respect to which the law leaves the discretion to the competent public body.

### 3. Material character of the concept administrative act

In art. 3 the concept administrative act is defined by objective, material-legal criteria. Accordingly, the character of an administrative action does neither depend on the competent public body's designation (use of the words "administrative act") nor on the body's subjective legal interpretation. If the pre-conditions of the legal definition exist, the action is administrative act irrespective of the fact how the issuing public body calls it.

## II. Constitution and EU-Law

EU Law does not use the concept "administrative act". The "decision", however, provided by para. 4 of article 288 TFEU is an instrument for the direct application of EU Law that can to largest extent be compared with the administrative act: it requires notification for becoming legally effective (article 297, para. 2 TFEU); it determines bindingly what is legal; requires reasoning (article 296 TFEU); is executable (article 299 TFEU); can become non-appealable with the consequence that its content can be valid independently of its lawfulness (article 263, para. 6 and article 277). The direct implication through EU executive bodies is the exception of application of EU law. Acc. to article 105 TFEU competition matters form one of the exceptional areas.

As a rule EU Law is indirectly applied through national executive bodies. In this area, within which EU Member States have the autonomy to use the instruments provided by national administrative law, the administrative act is recognized as one of the admissible forms of administrative actions.

## III. Legal consequences of the administrative act

### 1. Coming into effect

An administrative act comes into effect as soon as it is brought to the notice of the person concerned and continues to remain so until it is annulled or repealed by the public body (art. 113) or by the court or is otherwise cancelled or expires for reasons of time or for any other reason. An absolutely invalid act (art. 108), however, never comes into effect.

### 2. Finality

As soon as an administrative act comes into effect it becomes binding not only for the parties but also on the administrative authority. In this respect it is as good as a judicial decision. It is final and conclusive like a court decision. The finality may be either formal or material.

a) Formal finality

Formal finality means that the administrative act is beyond challenge through regular remedies of appeal before the competent public body (art. 130) or through an action in the administrative court. It is equivalent to unreviewability of the act. Formal finality happens if either time limit for legal remedy expires, or the concerned addressee waves his/her right to remedy, or the remedy has already been exhausted.

b) Material finality

Material finality means *res judicata*, i.e. the administrative act is obligatory binding on the concerned addressee as well as the public body, which has issued it, and furthermore on all state authorities and organs.

However, binding on the public body, which has issued it, is restricted, because under certain conditions it can abrogate the act either by annulment or repeal (art. 113 et sequ.) or by revision (art. 144 et sequ.) An addressee does not have any such option. He/she can only request the public body to consider the possibility of exercising its power of annulment, repeal or revision.

### 3. No retrospective effect

As a matter of rule an administrative act has only prospective effect. However, exceptionally it may have retrospective effect, if

- such effect is expressly provided by law,
- an administrative act legally replaces an earlier act from the time of its inception,
- the public body reverses it on the appeal of the addressee,
- the addressee agrees to the retrospective operation of the act in the admissible manner, or
- the contents of a declaratory act refer to the past matters or events.

Retrospective effect of an administrative act will, however, be unlawful, if the law excludes it, or if the administrative act refers to a period prior to the coming into force of the law, under which it has been taken, or if it commands or prohibits a transaction of the past.

## IV. Relation to previous CAP

The previous CAP operated with the concept administrative act in a similar way as the new code does. Its definition in the previous art. 105, however, was on the one hand less precise than the definition of this Code, on the other hand the previous CAP did neither provide any definition of the collective act nor of the act of assurance.

## V. Scope of application

The concept administrative act as defined in art. 3 applies to all administrative procedures regulated by this code.

## B. Definition of the administrative act in details

Para. 1 of art. 3 provides in lit. a) – c) three definitions related to the administrative act. Basis and general starting point for the qualification of an action as administrative act is always the definition of lit. a) whilst lit. b) provides a clarification related to the addressees concerned and lit. c) deals with an act of special content.

### I. Individual administrative act, para. 1 lit. a)

Lit. a) defines the individual administrative act by providing 5 elements in order to distinguish it from other forms of administrative actions provided by this code.

#### 1. Public body

Public body is any body as defined in para. 6 of art. 3, in other words any body performing the tasks of public administration, be it a monolithic or collective body. The reference to administrative functions in para. 6 separates administrative actions (for which this code applies) from measures of the government, the legislature, and the judiciary. The government organs, legislative bodies, and the courts as such are not public bodies in the meaning of this definition, although the presidents of the legislative bodies or courts may sometimes be

exceptionally acting as administrative bodies (*Examples for administrative functions: The president of a court executes his/her domiciliary rights in the courthouse. The President of Parliament exercises his/her competence as superior of the administrative staff of the parliament.*)

## 2. Exercising public function

Consequence of this criterion is to distinguish between actions of a public body that fall under private law and those regulated by public law. Only the latter category of actions is carried out in the exercise of public functions, while for activities ruled by private law the administrative act is the wrong instrument.

The dichotomy of public and private law has not merely a theoretical base but also an important practical significance: i) The public law disputes are assigned to the jurisdiction of the administrative courts, while the private law disputes are assigned to the ordinary courts; ii) the Code on Administrative Proceedings applies only to the public law administrative activities of a public body (see art. 2, para. 1); iii) different law applies to the execution of public law based administrative judgments (see PART EIGHT of this code).

So, the answer to the question whether or not an action fell under exercising public function depends on the character of the legal provision, on which the action was based.

For the administrative practice the distinction between private and public law can be done with respect to the difference of the subjects of allocation, i.e. the bodies or persons to whom the rights and duties are given. Private law norms are those that may authorize or oblige anyone. Thus, such measure of the public body as the cancellation of tenancy or the conclusion of a contract on the procurement of office equipment are not administrative acts because they are based on private law.

The public law, in contrast, is the sum of those legal rules whose subject of allocation is exclusively a holder of sovereign public authority. Further, for the interpretation of “exercising public function” in the context of the definition of the administrative act, it is not enough that the sovereign action of the public body must be in the domain of public law, it must also fall within the domain of administrative law (see the requirement “administrative power” para. 1 of art. 2). Accordingly, actions falling within the domain of constitutional law, international law or criminal law are not administrative acts, though these laws also belong to the category of public law. In this regard the domain of law not the person, who takes a measure, is decisive. (*Example: The president of the parliament, for example, when chairing parliamentary sessions exercises public function, but this does not fall within the domain of administrative law but is regulated by constitutional law. On the other side she/he performs an administrative public function, when he/she dismisses a civil servant working in the parliament administration.*)

## 3. Expression of will

Expression of will is any objective and purpose-oriented behaviour attributable to a natural or legal person or other persons, who can be party of an administrative procedure acc. to art. 33. The will needs not be expressed in words, spoken or written. It may also be expressed through signs (*e.g. red traffic-light, no-parking traffic sign*) or movements of body (*e.g. hand signal of a police officer*) or through any other means including the form given to it by the mechanism of automation (for details see below explanation on art. 98 and 99).

The mere silence of a public body to the request of a citizen to issue an administrative act is to be seen as implied expression of will only, if special legislation has opened the application of the silent consent rule of art. 97 (*for details see below explanation on art. 97*).

## 4. Directed to one or more individually determined subjects of law

The definitional element “one or more individually determined subjects of law” provides the differentiation to the collective administrative act defined in lit. b) (see section B. II. of this explanation).

It firstly indicates that - as a rule – an administrative act is addressed to one single natural or legal person. But it can also be addressed to a multitude of persons, whereas for this case the definition does not provide any limitation of the number of addressees.

Decisive for the characterization of an act as “individual” is that each addressee is “individually determined”. Usually, determination of an individual in written administrative acts means to indicate in the document name, address, and in cases of doubt, - i.e. in order to avoid mixing up equally named persons – the date of birth of an addressee.

However, as para. 2 of art 99 under sub-paragraph ii does not mention the name of the party as formal requirement of a written administrative (in contrast to sub-paragraph i) that requires the name of the public body), other forms of individual determination are possible, as long as the other form makes it undoubtedly clear for any objective person involved in a concrete administrative procedure, who is meant, unless special legislation requires explicitly the naming of name and/or address. (*Example for an admissible other form of individual determination: administrative act not indicating the addressee's name or address but addressed "to the registered owner of the vehicle with the registration number ..." or "to the cooperation operating the factory under the industrial licencing number...."*).

If the will is expressed orally or by using signs or by body movements, it is considered to be directed to individually determined persons, when every person present at the situation can undoubtedly understand, to whom the will is expressed.

## 5. Establishing, modifying or ceasing a specific legal relation

The element "establishes, modifies or terminates a specific legal relationship" is important to differentiate the administrative act from both the administrative contract (art. 119 et sequ.) as well as other administrative actions (art. 126). It describes the objective, which the public body pursues by issuing the administrative act and comprises the following components:

### a) Legal relation

The administrative act differs from "other administrative actions" (art. 126) by its intended impact. The administrative act expresses the public body's will (in other words: the body's intention or goal) to directly affect the legal position of the addressee, whilst other administrative actions are those, whose declaratory content does not aim at triggering an immediate legal consequence for the addressee but pursues a different purpose, such as providing information or advice, making recommendations, delivering warnings, issuing press releases, giving lessons at universities.

Essentially there are seven kinds of legal consequence that could be caused by an administrative act:

- prohibition            public body requires from the addressee an inaction (e.g. prohibition of continuing the operation of a factory, whose manufacturing process emits harmful gases, dust, and smoke)
- order                    public body imposes an obligation to undertake an action (e.g. order to remove a car that blocks a fire rescue access)
- granting a right        public body grants a permission or another advantageous legal position or gives the right to claim performance (e.g. issuance of a driving licence)
- rejection                public body denies to grant a right the address applied for (e.g. rejection of an applied construction permit)
- modifying a right      public body modifies an existing legal relationship, i.e. through revocation or repeal of a right (e.g. withdrawal of a pension entitlement that was issued on the basis of false data provided by the applicant)
- declaratory act        public body confirms with legally binding effect the existence of a legal situation (e.g. appointment or dismissal or retirement of a civil servant)
- act in rem                public body decides on the public-law status of a movable or immovable good (e.g. registration of a building as state protected document)

### b) Specific relation

Object of an administrative act is a specific relationship between the public body and the addressee resp. addressees. Within the here relevant context a relationship between the public body and one or more individually determined addressees (see above section 4) is always "specific" if it is based on a concrete case, i.e. on a case, which is fixed by time, place and other circumstances in a way that it occurs only once.

Further, a case is also considered "specific" if the case is related to one or more individually determined addressees and described by abstract criteria. The determination of a specific case by abstract criteria is necessary, if the occurrence of such case is in the future and uncertain. (*Example: In accordance with a special-*

*law provision the public body issues an administrative act imposing the obligation on an industrial operator to report any case of malfunction of the factory's waste-air purification filter within 24 hours.)*

A measure, however, which is aimed at indeterminate persons with respect to indeterminate state of affairs (general-abstract measure) is not an administrative act but a legislative act (*e.g. issuance of secondary legislation or bylaws*).

c) Unilaterally establishing, modifying or ceasing measure

Establishing means creating a new specific legal relationship (*e.g. issuing a new driving licence*), whilst modifying measures (*e.g. subsequently imposed obligations related to the use of the driving licence*) as well as terminating measures (*e.g. repeal of the driving licence*) deal with an existing legal relationship.

Important consideration is that the measure must be a unilateral (sovereign) measure, i.e. it must be taken with reference to the relationship of "sovereign and subject" or "supreme authority and subordinate addressee". Thus, conclusion of a public law contract (art. 119 et sequ.) is not a sovereign measure because it is based not on the unilateral "sovereign - subordinate relationship" but on the bilateral relationship between the contracting parties.

II. Collective administrative act, para. 1 lit. b)

As explained above under B. I. 4 an administrative act is also considered "individual" if it is addressed to group of a definite number of individually determined persons. The collective administrative act (para. 1 lit. b) is also addressed to a group of persons. But it differs from the individual act through the indefiniteness of the number of persons that belong to the group, whilst all the other criteria of an individual administrative act are met as well (i.e.. the administrative measure aims at establishing, modifying or terminating a specific legal relationship, in other words aims at a determinate state of affairs in point of time or place).

This Code speaks of a collective administrative act, if – despite of the indefiniteness of the number of members belonging to the group - each member is or at least can be "individually determined on the basis of general characteristics" (wording of the legal text) or, in other words, the number of addressees is ascertainable through their common characteristics to which the administrative measure refers.

*Examples of a collective administrative act:*

*The competent body issues an order asking the people, who find themselves in a certain area of the town, not to use a specific street because of danger of explosion.*

*Cases of head lice have occurred in a school. Parents of children, who live in a definite residential area where the school is located and whose children are infected with lice, are from a definite date under an obligation not to send their children to school but undertake suitable measures for lice removal at their costs.*

*The competent body prohibits the sale of a particular salad in a definite area where that salad has been the cause of an infection in that area.*

An administrative act may also be in the form of a collective act if it regulates the public law aspect of a matter (administrative act "in rem"), e.g. the use of public property or thing by the public at large. It follows from this that traffic signs are administrative measures in the nature of an administrative act.

*Further examples of a collective act: Opening or closing of a public street; determination of water conservation area; entry of an area in the register of natural monuments.*

### III. Criteria of differentiation between administrative act and legislative act

On the basis of the previous explanation provided above under I. and II. the following criteria related to the addressee and the case can be used for a quick differentiation between administrative acts and legislative acts:

	Addressee	Situation	Legal nature
Measure is	individual (one or more persons)	specific (concrete)	administrative act
	individual (one or more persons)	abstract	
	collective (general; in rem)	specific (concrete)	
	general	abstract	legislative act

### IV. Act of assurance, para. 1 lit. c)

The act of assurance is an administrative act, by which the public body regulates with legally binding effect its future behaviour. The special legal requirements of such measure – in addition to those explained above for the individual resp. collective act are specified by the definition in para. 1 lit. c as follows:

#### 1. Provision by special law

Due to its exceptional character the issuance of the act of assurance requires the explicit authorization through special law. This should be interpreted *stricto sensu* as referring to a primary law only (law approved by Parliament) excluding the possibility to provide its application by secondary legislation.

#### 2. Assurance

Assurance is the public body's expression of will vis-à-vis the party that an objective recipient must understand as the body's clear and explicit legally binding commitment to perform at a later date a certain administrative measure.

#### Examples

*The explicit will of the public body to bindingly commit itself does not exist in cases such as i) the body's general announcement of intention; ii) explanation of legal matters that sound favourable for the recipient; iii) the public official's promise to support the request of the applicant; iv) political statement of the government even if it could rise reasonable expectations with respect to future administrative practice of public bodies.*

#### 3. Issuance of a certain administrative act or refrain from issuing such act

Object of the commitment undertaken through an assurance must be to issue or not to issue in the future a certain administrative act. The assurance must specify the subject matter (*e.g. construction permit for a concrete project*) that will be regulated by administrative act resp. the measure that will not be undertaken (*e.g. omission of the order to demolish a certain illegal building*). However, it is not necessary that all details of the future act that shall be issued or refrained from are already put into concrete terms.

#### Article 3 para. 2 Definition of "normative sub-legal act".

1. A "normative sub-legal act" is any expression of the will by a public body in the exercise of its public function, which regulates one or several legal relations, establishing general rules of behaviour, and which is not exhaustive in its application.

Acc. to Article 118 of the Constitution normative sub-legal acts are legislative acts issued by the executive power (government, ministry, self-governing bodies). In contrast to administrative acts (see above explanation on art. 3 para. 1) sub-legal acts provide general and abstract regulations. Acc. to art. 2 confining the scope of application of this Code to administrative acts, administrative contracts, and other administrative actions, this Code does not provide any regulation dealing with normative sub-legal acts beyond this definition in art, 3 para. 2. The purpose of including it in the art. 3 of this Code can be seen in that it makes the principles of this Code applicable acc. to

art. 2 para. 3 and furthermore might be an aid to clearly differentiate the concept of administrative act, in particular the collective act, from legislative acts.

*Article 3 para. 3 Definition of “discretion of the public body”*

1. “Discretion of the public body” is the right of the latter to exercise public authority to achieve a lawful purpose, in cases where the law partially provides for the modalities to achieve this, giving discretion on choices to the public body.

A. General Introduction

I. Purpose and content of the concept of strict provisions and discretion

The Definition of discretion contains one of the most important principles of the Albanian legal system: As a rule the public bodies implementing the law by conducting administrative procedures are not entitled to decide by discretion. On the contrary: The public bodies and all other legal entities within the scope of the CAP have to execute the provisions of the law strictly. In general, the preconditions of the law provide no space for different decisions. That means that the competent courts are entitled to review the decisions taken by the public bodies if these decisions cannot be seen in alignment with the law. Only if the law allows the public body to decide on a case by discretion the body shall have the choice between different options to decide. But it is not the normal case that the law is granting discretionary power to the public body. It is on the contrary an exemption which must be found out by analysing the provisions of the law.

II. Discretion as the choice between options by two or more aims which are difficult to reconcile

If the law grants discretionary power to the public body it opens – in general – two or more options to decide on the case. The public body must assess which option it shall prefer and which decision should be taken accordingly. This assessment must not be seen as a free decision. The public body must decide by assessing and balancing the interests affected and must take a decision which is in alignment with the principle of proportionality. The public body must give the reasons by explaining why the discretion was used in the determined way (see art. 100 para. lit. d).

B. Explanation in detail

I. Preconditions of discretionary power

As explained below to art. 11 the discretionary power must be granted to the public authority by law. As a rule, the provisions of the law must be seen as strictly. Therefore implementing the law doesn't leave discretionary room for the public authorities to decide. Whether or not discretionary power is granted to public authorities must be discovered by interpretation of the law. If the legal consequences of a specific law open the possibility to make a choice between several different options this choice has to be made by discretion.

II. Preconditions for using discretionary power

It is of high importance to point out that the public authority is not free to use the discretionary power. There are on the contrary strict preconditions for filling the margin of discretion. Firstly, the boundaries of the discretion margin must be observed. Secondly the purposes of the law must be respected as guidelines for using the discretion. The preconditions to be met by using the discretionary power are defined and described in art. 11 (see commentary on art. 11).

*Article 3 para. 4 Definition of “administrative contract”*

1. An “administrative contract” is an agreement which establishes, modifies, or terminates a concrete relationship under public law, and in which, at least one of the contracting parties is a public body.

## A. General Introduction

### I. Purpose and content of the definition

Although art. 119 provides regulations concerning the requirements and conditions of an administrative contract art. 3 para. 4 contains a general and unfortunately unspecific definition of the term “administrative contract.” The definition differentiates between contracts under private law and contracts under public law but fails to differentiate between administrative and other contracts under public law and between agreements without the specific contractual binding effect and genuine contracts containing rights and duties which can be enforced.

## B. The Regulation in Detail

As stated above an administrative contract is an agreement between a public body and another person which establishes, modifies or terminates rights and duties of the contracting parties on the field of administrative law with binding effects. Since the scope of the CAP comprises the exercising of administrative law only (see art. 2 para. 1), agreements concerning other kinds of public law (constitutional, international, pp.) cannot be seen as administrative contracts.

Moreover, it is essential that an administrative contract contains regulations which are enforceable. Agreements during administrative procedures in order to promote the procedure or to coordinate actions usually are not legally binding and must not be seen as administrative contracts.

### *Article 3 para. 5 Definition of “administrative competence”*

**1. An “administrative competence” is the set of subject-matter and territorial competence of the public body, as laid down by law and sub-legal acts.**

## A. General Introduction

### I. Purpose and content of the concept administrative competence

It is a fundamental part of the principle of legality as stated in art. 4 and 7 of the Albanian Constitution and of the European rule of law as well that all entities exercising executive power must keep the boundaries of their competence as provided by law and sub-legal acts. This most important principle is the reason for the competence concept of the CAP stated in art. 3 para. 5 and in art. 22 ff.

### II. Kinds of competence

Art. 3 para. 5 defines only the subject-matter and the territorial competence. Even art. 22 ff. contain provisions only for using the subject-matter and the territorial competence, not for the institutional competence and not to differentiate between the competence of the first and the second instance public bodies as necessary in remedy issues. The latter must be regulated in the organizational law because it is not a procedural but organizational issue.

A public body is entitled to act in a specific field of administration and to use the power to implement the law only if the provisions of all kinds of competence are met. An administrative act issued without competence is unlawful (art. 109 para. 1 lit. a).

#### 1. Subject-matter jurisdiction

Subject matter jurisdiction describes the competence of public bodies to decide on special legal issues. If the law assigns the power to decide on certain issues to special public bodies only the assigned bodies have the right to decide the issues comprised. It is up to special law and sub-legal acts to assign the competence for using the power the law has conferred to the public administration.

#### 2. Territorial jurisdiction

Territorial jurisdiction is of importance if the law restricts the competence to act on specific fields of administration to regional or local public bodies.

### 3. Delegation of jurisdiction

As a rule, the public bodies are not entitled to delegate their subject-matter or territory competence to other public bodies or legal entities. The preconditions of a delegation are stated in art. 22 para. 3 and in art. 28, 29.

#### *Article 3 para. 6 Definition of “public body”*

1. A “public body” is any central government body, performing administrative functions, any public entity body, to the extent it performs administrative functions; any local government body performing administrative functions; any Armed Forces body, to the extent they perform administrative functions, as well as any natural person or legal entity, which under the law, sub-legal act or any other form provided for by the legislation in force, is conferred the right to exercise public functions.

#### A. General Introduction

The term “public body” is one of the central and essential terms of the CAP and therefore a definition of this term is of high importance since art. 2 refers to the activities of public bodies defining the scope of the law.

##### I. Purpose and content of the public body concept

###### 1. “Public”: Administrative function

The definition of the term “public body” is mainly based on the administrative function which a public entity has been assigned to. As to administrative functions they can be described as all functions to be exercised by implementing the public law. To the term “public law” see commentary of art. 1 and art. 2. Administrative functions are all functions to be exercised by implementing the law in the scope of the CAP, especially by conducting administrative procedures in order to issue an administrative act (para. 1, 2), to conclude an administrative contract (para. 4) or to perform other administrative action (para. 11) and finally an administrative activity (para. 12).

###### 2. “Body” as a kind of entity or person

The term “body” has a wide extent: It comprises not only organizational entities of the central, local government or of the armed forces but also “any natural person or legal entity which is entitled by the law (or by sub-legal acts) to exercise administrative functions. But the entities acting for the central or local government or the armed forces can be seen as public bodies only if they are equipped with special competence to act in the field of public law. Therefore, public entities, legal private entities as well as natural persons can act as public bodies only if they are entitled to exercise administrative power.

#### B. Commentary in Detail

It is up to the organizational law and the organizational decisions of the central and the local governments and the armed forces to define public bodies to act on the fields of administrative matters. It must be seen as a part of the organizational autonomy of the central and the local governments to install public entities as public bodies and to refer to them special competence in alignment with the law and sublegal acts.

On the contrary, private persons or legal entities can act as public bodies only if they are conferred the right to exercise public functions, duties or powers under the legislation in force (art. 2 para. 2 lit. b).

*Article 3 para. 7 Definition of “party”*

1. A “party” is:

a) Any natural person or legal entity, who has a right or direct legitimate interest in an administrative procedure, as specified in Article 33, Paragraph 1 of this Code.

b) A party, which does have a right or direct legitimate interest in an administrative procedure, as defined in Article 33, Paragraphs 2 and 3 of this Code, but whose rights or legitimate interests may be affected by the outcome of the procedure.

A. General Introduction

I. Purpose and content of the party-concept of the CAP

The party is a central element of the procedural concept of the CAP. Therefore, the definition of the term “party” is of high importance. A more concrete definition of the term is contained in art. 33 which classifies 3 different types of parties. The first type stipulated in art. 33 para. 1 is even defined in the definition in lit. a), the second and the third ones stipulated in art. 33 para. 2, 3 are included in the definition in lit. b).

II. Actors in an administrative procedure

Administrative procedures are conducted by public bodies (para. 6) through their officials or employees. These bodies cannot be seen as parties in the same procedure. Consequently, A public or private entity or natural person which is acting as a public body in accordance with para. 6 cannot act as a party (para. 7) in the same procedure. This makes clear that the public body and the parties must not be seen as opponents or enemies. They have to contribute to the administrative procedure in their different functions in order to achieve a proper implementation of the law (see art. 10).

B. Explanation in Detail

I. Party in accordance with lit. a)

Persons (para. 8) involved in an administrative procedure are defined as a party. Involvement takes place in the cases specified in art. 33 para. 1 if an administrative procedure is initiated by the request of the person (art. 33 para. 1 lit. a) or if an administrative procedure has been started against the person, or if an administrative act has been or shall be addressed against the person (art. 33 para. 1 lit. b) or if an administrative contract has been concluded or is intended to be concluded with the person. In these cases stipulated in lit a) persons involved must be seen as a party due to their procedural position regardless their material rights or legal interests because persons in the procedural rules defined in lit. a) are at least bearer of procedural rights or legal interests regarding the proper conducting of the procedure in alignment with the procedural rights granted by the CAP. Therefore they must be seen as being a party in the procedure whether or not their material rights or legal interests are affected.

II. Parties defined in lit. b)

Parties defined in lit. b) are persons which are involved in an administrative procedure not because they are holding a procedural position as described in art. 33 para. 1 but because they are holder of public or collective interests described in art. 33 para. 2 or bearer of subjective rights or legal interests which might be affected by the administrative procedure (art. 33 para. 3). But as explained in art. 33 the position as a party shall not emerge automatically but must be granted by the public body conducting the procedure.

*Article 3 para. 8 Definition of “person”*

1. Person is any natural person, legal entity or subject of law, according to the legislation in force.

## A. General Introduction

### I. Purpose and content of the concept person

The definition in para. 8 comprises natural persons and legal entities or subjects to the extent the law recognizes them as potential bearers of subjective rights or legal interests. Natural persons are human beings after their birth and until their death regardless of their ability to act or to decide personally in legal issues. Legal persons or entities are institutions or organisations which are granted subjective rights or legal interests by special law regardless their internal structures.

### II. Legal consequences

Only persons in accordance with para. 8 can get the status of a party as defined in para. 7. This is made clear in art. 33 para. 1 (a party ... shall be any person...). Natural persons shall have the status of a party generally different to legal entities which can bear subjective rights or legal interests only to the extent given by special law.

## B. Explanation in Detail

### I. Natural persons

Natural persons are “persons” in the sense of para. 8 under the legislation in force. That means the law might exclude or comprise natural persons in accordance with the Albanian Constitution which confirms in art. 15 the human rights to all persons.

### II. Legal entities

Para. 8 doesn't make a difference between legal persons based on private law and legal persons based on public law. It leaves the regulation of legal entities to special law in accordance with the Albanian Constitution.

### *Article 3 para. 9 Definition of “administrative procedure”*

1. "Administrative procedure" is the activity of a public body, with the purpose of preparing and adopting concrete administrative actions, their execution and review with administrative legal remedies.

## A. General Introduction

### I. Purpose and content of the concept administrative procedure

The definition of administrative procedure comprises all activities of public bodies “with the purpose of preparing or adopting concrete administrative actions”. Comprised are also the execution of actions and legal remedies. It is connected to the definition of “administrative activity” in para. 12 and of “administrative action” in para. 10. The purpose is to comprise all activities of public bodies within the scope of art. 2. Therefore, the definition is very wide.

### II. Legal consequences

Since most regulations of the CAP are related to administrative procedures the definition is of high importance. Only if an activity in the scope of art. 2 can be identified as an administrative procedure its regulations are applicable.

## B. Explanation in Detail

### I. Preparing, adopting, executing activities of a public body

The definition of administrative activities is stipulated in para. 12. Despite the broad frame of the definition not all kinds of preparing, adopting or executing activities of a public body are covered. Precondition is that the activities have an actual relation to the rights or legal interests of the parties in the administrative procedure.

Excluded are activities of internal character which could not have any effect of the procedural rights or interests of the parties in an administrative procedure (see para. 12).

## II. Administrative actions, remedies

Since the definition of administrative action is very broad covering not only the administrative acts and contracts but also any other administrative action (para. 10) the definition refers to the actions comprised in the regulations in Part V of the CAP. Comprised are actions related to the preparation, adoption or execution of administrative actions (para. 10) and remedy procedures regulated in art. 128 ff.

### *Article 3 para. 10 Definition of “administrative action”*

**1. “Administrative action” is the administrative act, administrative contract and any other administrative action.**

#### A. General Introduction

The definition of para. 10 makes clear that administrative actions in the scope of art. 2 are not only administrative acts (para. 1) and contracts (para. 4) but also other administrative actions. The term “other administrative actions” is legally defined in para. 11.

#### B. Explanation in Detail

The term administrative act comprises both individual and collective administrative acts. According to the wording even administrative acts of assurance (para. 1 lit. c) must be seen as comprised. Specific regulations of administrative acts are stipulated in art. 98 ff., of administrative contracts in art. 119 ff.

For details concerning other administrative actions see para. 11 below.

### *Article 3 para. 11 Definition of “other administrative action”*

**1. “Other administrative action” is any unilateral form of the activity of the public body in the exercise of its public functions, which does not meet the criteria for qualifying as an administrative act or administrative contract, and which brings legal effects on subjective rights and legitimate interests.**

#### A. General Introduction

While the terms “administrative act and contract” are properly defined (para. 1, 4) the other administrative action is not to define in a similar manner because of the wide scope of phenomena. The CAP comprises other actions in the scope of art. 2 in order to comprise all activities related to public functions of the administration.

#### B. Explanation in Detail

The term “other administrative action” is defined in art. 126 in a more concrete manner (see commentary to art. 126).

### *Article 3 para. 12 Definition of “administrative activity”*

**1. “Administrative activity” is the set of acts and actions, which constitute and express the will of the public administration, and the execution of the will.**

#### A. General Introduction

The purpose of para. 12 is to comprise all administrative activities that are designed to have an effect on the conduct of administrative procedures or on the subjective rights and interests of parties. The precondition “which constitute and express the will” is not only related to administrative acts or contracts but also to other administrative actions defined in para. 11.

Despite the broad frame of the definition not all kinds of activities which express the will of a public body are comprised. Precondition is that the activities have an actual relation to the rights or legal interests of the parties in the administrative procedure. Excluded are activities of completely internal character because they could not have any effect of the procedural rights or interests of the parties in an administrative procedure (see para. 11).

#### B. Explanation in Detail

“Actions which constitute and express the will” of the public body are all actions a public body performs by exercising its public functions within the scope of art. 2. As mentioned above the actions must have a possibly effect on the procedural or material rights or interests of persons.

## **CHAPTER II GENERAL PRINCIPLES**

### *Article 4      Legality principle*

1. Public bodies shall exercise their activity in line with the Constitution of the Republic of Albania, international agreements ratified by the Republic of Albania, and applicable legislation in the Republic of Albania, within the boundaries of their competencies, and in conformity with the purpose, for which these competencies were conferred to them.
2. The lawful rights or interests of a party may be affected by the administrative action only when provided for by law, and in compliance with the due process of law.

#### **A.      Rule of Law**

Art. 4 contains the rule of law as the most important basic principle for conducting administrative procedures. It makes clear that not only the applicable legislation of the Republic of Albania but also the Constitution and ratified international agreements are to observe. Moreover, in accordance with art. 116 ff. of the Albanian Constitution, even other normative acts which acquire legal effect (see art. 117 ff. of the Constitution) are to observe by public bodies. Concerning administrative acts the consequences of the principle of legality are specified and substantiated in art. 107 ff.

As already stated above (see art. 1), art. 4 para. 1 of the Albanian Constitution and art. 4 of this Code the law (normative acts) constitute the basis and the boundaries of all activities of the state which means all activities of public bodies and other entities. That means that

- all activities of public entities, especially public bodies must be in alignment with the law
- the provisions of the law must be executed in order to fulfil the legal requirements
- affection of subjective rights or legal interests must be based on the law (art. 4 para. 2).

#### **B.      Conformity of the purpose of the law**

Art. 4 requires that the public bodies shall exercise their activities “in conformity with the purpose, for which these competencies were conferred to them”. This means only that the law must be interpreted and implemented properly by all professional judicial methods including the legal objectives which must be found out by interpretation and by analysing the legislative process. Purposes as such cannot justify the exercising of activities regardless the provisions and preconditions of the law which is to be implemented and applied.

#### **C.      Protection of lawful rights and interests (para. 2)**

In art. 4 para. 2 the importance of the protection of lawful rights and interests of the parties is emphasized. The affection must be based on the law and by complying with the due process the law provides. This means that the requirements of the administrative procedures as regulated in the CAP must be met.

### *Article 5      Transparency principle*

1. The public bodies shall exercise the administrative activity in a transparent way and in close cooperation with natural and legal persons involved in it.

#### **A.      General Introduction**

According to the principle of transparency and cooperation all administrative activities must be conducted in a way transparent to the person involved and as much as possible in cooperation with the person involved.

## B. Explanation in Detail

### I. Transparency principle

The provisions of the CAP must be seen as a concretion of the transparency principle already because they require the right to be heard, the right to inspect files and the right to get informed properly. Therefore the effects of the transparency principle shall be in the field of organizing the procedures and of using procedural discretionary power.

### II. Cooperation principle

As a rule the procedures regulated in the CAP shall be conducted as much as possible in cooperation with the persons involved. This principle is implemented already in several specific articles of the CAP, for instance in art. 6 (information principle), in art. 10 (providing assistance) and in art. 87 ff. (right to be heard). Moreover, the principle of cooperation can be found in several conditions concerning the issuing of administrative acts or the conclusion of administrative contracts. Furthermore, the principle must be observed when conducting the administrative procedures in detail by using the procedural discretionary power.

## Article 6 *Information principle*

1. Every person is entitled to ask for public information, which is related to the activity of the public body, without being obliged to explain the motives, in line with the legislation in force governing the right to information.

2. In cases where the requested information is refused, the public body shall issue a reasoned decision in writing, which shall contain also instructions on the exercise of the right to appeal, and shall be immediately notified to the parties in the process.

## A. General Introduction

### I. Content and purpose of art. 6

In accordance with art. 23 of the Albanian Constitution art. 6 confirms the right of persons to seek public information concerning the activities of public bodies and provides the procedural regulation to be observed when persons request information. But the right to seek information is granted only "in line with the legislation in force governing the right to information". That is to make clear that the right to seek information might be substantiated by special law.

### II. Scope of the norm

The obligations stated in art. 6 are not restricted to administrative procedures but extended to all activities of the public bodies, if not otherwise stipulated by the legislation in force governing the right to information.

## B. Explanation in Detail

### I. The right to information (para. 1)

Para. 1 repeats the right to information as granted in art. 12 of the Albanian Constitution and puts it in more concrete terms. The right to information is directed on the activity of public bodies (art. 3 para. 6) in line with the legislation in force governing the right to information. This regulation makes clear that the concrete and special regulation of the right to information must be found in special law. Para. 1 has the purpose to preserve the procedural basis of this right. Restrictions are left to special law.

### II. Procedural regulations (para. 2)

Para. 2 provides regulations for the case the request of information would be refused. The rejection of the request must be seen as an administrative act which has to be issued in writing. According to para. 2 the rejecting decision must contain the reasons and instructions on the exercise of the right to appeal. These provisions are repetitions of the regulations in art. 98 ff. They don't contain modifications of the general

regulation in Part V of the CAP. Therefore, the general formal and procedural provisions for administrative acts are applicable.

#### *Article 7 Principle of state secret protection*

1. Any public official, as well as any person who participates or who is called to participate in an administrative procedure shall be obliged not to disclose any information made known to him/her during an administrative procedure, when it constitutes "State secret" as per the legislation in force.

##### A. General Introduction

Art. 7 contains the principle of the protection of "state secrets" without defining the term "state secret" itself. It requires confidentiality respective secrecy to all information concerning "state secrets". Not only public officials but as well any other person who participates or who is called to participate in an administrative procedure must not disclose any information which is made known during the procedure if this information is a "state secret". Art. 7 must be seen in connection with art. 9 (data protection) which provides regulations concerning personal and commercial information.

##### B. Explanation of art. 7 in Detail

Art. 7 left the definition of state secrets to the special law. It extends the obligation to keep secret state secrets to all persons who participate or are called to participate in administrative procedures if the information in question has been made known during an administrative procedure. The procedural role of the persons is of no importance.

#### *Article 8 Protection of confidentiality principle*

1. Participants in an administrative procedure shall have the right to request that their personal and confidential data be treated in accordance with the legislation in force.

##### A. General Introduction

###### I. Content and purpose of art. 8

The protection of confidentiality principle contains the right of persons that their personal and confidential data must not be given to the public, to other public bodies or to other persons unless it is in alignment with the law. This principle is applicable to all data public authorities get or collect during their administrative activities in the scope of the CAP. This principle must be seen in connection with the data protection principle in art. 9. While art. 8 contains the main principle and the right of all participants of administrative procedures, not only parties, art. 9 contains material regulations for how to deal with personal and confidential data.

###### II. Scope of art. 8

The terms "personal and confidential data" are not defined in art. 8. These terms are used in the same way as in art. 9. Comprised are personal data and other confidential data, especially related to commercial or professional activities. Precondition is that these data are confidential which means that they are not common or publicly known. Concretion and substantiation of the scope of the protected data are up to special data protection law which also provides the ways and means of data protection.

##### B. Explanation of art. 8 in Detail

###### I. Provisions of the principle

Treatment under the legislation in force means that public authorities must meet all legal requirements concerning the protection of personal and confidential data when conducting administrative procedures. The

provisions of art. 8 make sure that all participants in an administrative procedure are entitled to request that the legal provisions regarding their personal and confidential data are observed.

## II. Legal Consequences

In case of infringement of legal provisions concerning the protection of personal and confidential data by a procedural action stated in art. 130 para. 3 the participants in this action are entitled to lodge an administrative appeal in the sense of art. 130 para. 2. art. 8 must be seen as an expressly provision of the law to lodge an appeal against an administrative action. The participants of the procedures are entitled to request even the fulfilment of the provisions stated in art. 9.

Moreover, in connection with and under the preconditions of special law the parties and other participants shall have the right to get compensation if the infringement has led to a material damage.

### *Article 9 Principle of data protection*

1. The public organ during the lawful processing of personal data, data related to commercial or professional activity, on which it becomes aware during the administrative procedure and, which are protected under the legislation in force on the personal data protection, shall have the duty to adopt measures on their protection, safeguard, non-disclosure, and confidentiality.
2. The protection, safeguard, non-disclosure and confidentiality duties shall extend also to public officials during and after their stay in office.

## A. General Introduction

Art. 9 contains in connection with art. 8 not only the principle of data protection in common but also concrete provisions concerning data protection regarding administrative procedures. It protects personal data and data related to commercial or professional activity so far they are “protected under the legislation in force” and which a public body has got to know during the administrative procedure.

## B. Explanation in Detail

### I. Protection and safeguarding measures (para. 1)

In addition to art. 8 the public body has not only the duty to keep confidentiality but also the duty to take measures to protect and safeguard personal, commercial or professional data so far they are protected under the legislation in force. These measures might be procedural or organisational. It is up to the public body to take appropriate measures and to decide which measures are suitable. The party shall have the right to appeal if the measures are not sufficient to protect the data (art. 130 para. 2).

### II. Covering the official during and after ending the procedure

Para. 2 makes clear that the public body has to ensure that the principle of confidentiality is kept by the public officials even when their job and public function is finished.

### *Article 10 Principle of providing active assistance*

1. The public body shall ensure that all parties and other persons involved in the procedure are able to follow and protect their rights and legal interests in as much effective and simple way possible. It shall inform the parties on their rights and duties, including all information regarding the procedure and shall warn them on the legal effects of their actions or omissions.
2. The public body shall promote the possibility of the party to access the public authority electronically. This possibility shall not be linked to any duty of the party to use electronic communication means.
3. The public body, conducting the administrative procedure, shall ensure that the ignorance of the party does not lead to deterioration of the protection of the rights and interests that the party enjoys by law.

## A. General Introduction

### I. Purpose and content of the law

Art. 10 describes a principle which marks a central characteristic of modern administration. The party must not be seen as an opponent or enemy to the public body but a kind of partner which the public body has to cooperate with by implementing the law. Therefore, the public body must provide assistance to the party if needed. Especially the provision of information is required to compensate any lack of knowledge according the administrative procedure. That requires not only a service-oriented behaviour of the public employees but also conducting the procedures “as effective and as simple as possible”. In addition to these requirements the public bodies have to take measures to open access to the public body by electronic means in order to alleviate the communication for the citizen.

### II. Legal consequences

The provisions of art. 10 must be seen as a core part of “good administration”. But they are principles which are abstract and cannot provide rights to the parties. The principles of art. 10 shall guide the use of procedural as well as organizational discretion of the public bodies. The influence of the requirements is directed on a proper and modern conducting the administrative procedures. Decisions in these procedures are procedural actions as defined in art. 130 para. 3. Therefore, an appeal can only be lodged if provided for in special law.

## B. Explanation in Detail

### I. Assistance to the party (para. 1, 3)

The public body “shall ensure” that the parties will be given all assistance, especially all information needed to “follow and protect” their rights and legal interests. Neither para. 1 nor para. 3 provide a concrete procedural right to be assisted as prescribed in para. 1, 3. Since these regulations are principles only they have to be substantiated by using the procedural and organisational discretion while conducting the administrative procedures.

### II. Electronic access to the public body (para. 2)

Para. 2 requires that the public body “shall promote” the possibility of an electronic access to the public body and makes clear that the party itself shall not be obliged to use electronic means communicating with the public body. “Promoting” means that the public bodies shall make all possible efforts to establish electronic means of communication. There is no strict obligation stated to do so because the possibility is up to financial sources and technical organisations.

## Article 11 *Principle of lawful exercise of discretion*

### 1. Discretion shall be lawfully exercised when it is in line with the following conditions:

- a) it has been provided by law;
- b) it does not go beyond the limits of the law;
- c) the choice of the public body was made only to achieve the objective, for which the discretion is was allowed, and is in line with the general principles of this Code; and
- ç) the choice does not constitute an unjustified departure of previous decisions as made by the same body in identical or similar cases.

## A. General Introduction

Art. 11 contains provisions for exercising the discretion. They apply if the applicable law authorizes the public body to decide by using discretion. This precondition for using discretion is already stated in art. 3 para. 3 and repeated in para. 1 lit. a). As mentioned already in the commentary of art. 3 para. 3 the law opens a space for decisional options to public bodies by exemption only. If the public body is authorized to choose between two or more lawful options when implementing the law in a special case it must comply with the provisions stated in

art. 11 (for more detailed explanation of the exercise of discretion see also below the explanation of art. 102 under B.I. 3 and art. 109 under B.V. In a lawsuit the competent court shall control only whether or not the preconditions of art. 11 are fully met. Otherwise the decision must be seen as unlawful and the administrative act might be annulled by the courts decision.

## B. Preconditions for exercising discretion

In art. 11 only 5 preconditions for exercising discretion are listed. The numeration is not complete and must be amended by the principle of proportionality (art. 12), equality and non-discrimination principle (art. 17), fairness and impartiality principle (art. 13), objectivity principle (art. 14) and the entire procedural preconditions of the law applicable in the specific case (i.e. reasoning of the act, art. 100).

### I. Discretion provided by law (lit. a)

Actually, the provision stated in lit. a) of art. 11 does not concern the exercising of the discretion as such but the precondition for granting the discretion power at all. The norm applicable must be analyzed whether or not it provided discretion. In most cases, the wording of the law indicates the decision. If the legal consequences of a specific norm shall not be implemented strictly but are up to an assessment of the public body which shall have the choice between several solutions the norm provides discretion.

### II. Requirements for using discretionary power

#### 1. Not going exceeding the limits (lit. b)

The provision stated in lit. b) is to ensure the public body will take its discretionary decision within the boundaries of the legal consequences of the law. If, for instance, the law provides to raise a charge from 100 to 200 the public body must not determine a tax of 300 because the decision options are limited to the space between 100 and 200.

#### 2. Not exceeding the legal objectives (lit. c)

The provision stated in lit. c) is the actual precondition for exercising the discretion. The public body must take into account the legal objectives of the discretionary law and must orientate the decision towards these objectives. By doing so the public authority must assess the importance of the objectives in the special case and take into consideration to what extent the objectives can be achieved by the options given. It is up to special law which objectives must be pursued by implementing the norm.

#### 3. No divergence to identical or similar cases (lit. ç)

It is due to the principle of equality as stated in art. 18 of the Albanian Constitution and as well in art. 17 of this code that the public body must not use its discretionary power to treat persons different without substantial reasons. If for instance the public body has raised a charge of 100 in specific cases it must present valid reasons to raise a charge of 200 in identical or similar cases.

#### 4. Proportionality and other preconditions

As mentioned already above there are several additional preconditions to meet by exercising discretionary power. The decision must be in alignment with the principle of proportionality (art. 12), fairness and impartiality (art. 13), objectivity (art. 14) and non-discrimination principle (art. 17).

#### 5. Procedural preconditions

Finally, a discretionary decision can be seen as lawful only if all procedural preconditions applicable to the administrative act or another action are fully met.

*Article 12 Proportionality principle*

1. Any administrative action, which, for reasons of protection of the public interest or the rights of others, may restrict an individual right, or may his/her affect legitimate interest, shall be conducted in line with the proportionality principle.
2. An administrative action shall be in line with the principle of proportionality only when such action is:
  - a) necessary to attain the purpose set out in the law, and does so with means and measures, that the least affect the rights or legitimate interests of the party;
  - b) suitable to achieve the purpose set out in the law;
  - c) in right proportion to the need that has dictated it.

A. General Introduction

Art. 12 contains the principle of proportionality in accordance with art. 17 of the Albanian Constitution. Therefore, the principle of proportionality has constitutional level. In the frame of the CAP the principle of proportionality must be complied with in all decisions the law let space for different options. The principle of proportionality is no justification for not to implement the law. More details on how to apply the principle of proportionality can also be found below in the explanation of art. 109 under B. VI.

B. Explanation in detail

I. Applicability of the Principle of Proportionality (para. 1)

The principle of proportionality is applicable to any administrative action (art. 3 para. 10) which may restrict an individual right or a legitimate interest. It shall be carried out in line with the principle. Since the public bodies are not authorized to alter the law or to refuse its execution the proportionality principle must be carried out within the space the law opens for discretionary decisions of the administration.

II. Content of the principle of Proportionality (para. 2)

In accordance with the common understanding para. 2 states that there are three elements to be distinguished by analysing the principle of proportionality. An action can be seen in alignment with the principle only if the requirements of all of them are met. The requirements of these elements must be examined in a specific order: Firstly the suitability (lit. b), secondly the necessity (lit. a) and thirdly the adequacy (lit. c).

1. Suitability

An action or decision is suitable if it can lead to the purpose the action is taken for. It is not necessary that the most suitable action is taken. To meet the requirements of the principle of proportionality it is sufficient that the action is one step on the way to achieve the aim or purpose the action is directed to. It is unlawful to choose an action which is unsuitable at all.

2. Necessity

The sub-principle of necessity of an action is met if there is no other action which is on one hand suitable in the same way but which is on the other hand less onerous to the affected party. If the public body have two or more options to achieve a specific purpose to the same extent it must choose the option which has the smallest impact on the rights or legal interests of the affected party.

3. Proportionality

On the third level the principle of proportionality requires a comparison and balance between the goals or aims of an action on one hand and the onerous affection of the party in question on the other hand. The importance of the affected or involved rights or interests on one side and the rights or public interests to be achieved on the other side must be considered properly if the law had left space to choose two or more options.

*Article 13 Fairness and impartiality principle*

1. In the exercise of its functions, the public body shall fairly and impartially treat all subjects, with which it enters into relations.

Art. 13 contains both the principle of fairness and the principle of impartiality. The latter requires that the public body must not prefer or discriminate one of the parties involved but has to treat them in an unbiased and impartial manner. While the content of the principle of impartiality is easy to describe the principle of fairness is more difficult to explain. It means that the public body must behave not only impartial and objective and in line with the law but also open minded and non-bureaucratically and with a sense of what is fair and proper.

*Article 14 Objectivity principle*

1. When exercising their administrative activity, the public bodies shall take into consideration and give the right importance to all conditions, information and evidence related to the administrative procedure.

A. General Introduction

Art. 14 makes clear that the public bodies conducting administrative procedures must by implementing and executing the legislation in force take into account all circumstances, all information and relevant facts regardless whether they are in favour of the state, regional or local government or in favour of the parties involved in the procedures. Conducting administrative procedures means that the activities are both in common as well as in private interest.

B. Explanation in detail

According to the objectivity principle it is necessary to consider all relevant facts and circumstances of the case precisely and carefully regardless whether or not they are in favour of the administration, the state or the community. All elements relevant to the decision must be taken into account and in consideration. There must not be any preference or advantage to a specific interest.

The public body is – as a rule – obliged to investigate all facts relevant to the procedure objectively and ex officio and to seek evidence if necessary to take a final decision. The public body is authorized to weigh and balance the interests involved in a case so far the law gives space for different options. But it is not authorized to assess special interests higher than other without an objective reason.

*Article 15 Liability principle*

1. When carrying out an administrative procedure, public bodies and their employees shall be held responsible for the damage caused to private parties, in line with the relevant legislation.

A. General Introduction

I. Purpose of the law

Art. 15 makes clear that both public bodies as well as their employees are responsible for damages caused to private parties by conducting administrative procedures. That is to make sure that neither public bodies nor their employees are free of responsibilities due to the fact that they have to conduct administrative procedures under public law.

II. Legal consequences

Art. 15 contains a principle only. It doesn't provide a legal basis for requesting compensation for damages caused by activities in administrative procedures. The concrete preconditions to receive compensation must be found in the relevant legislation

## B. Explanation in Detail

Compensation for damages in accordance with art. 15 can be requested only if activities of the public body must be seen as unlawful. So far concerning the compensation of damages two situations must be differentiated: Firstly damages caused by unlawful administrative acts. Primarily the party must lodge an appeal against the administrative act within the time period stated in art. 132. If the party fails to lodge an appeal the administrative act cannot be controlled by the competent court (art. 129) and it is problematic to claim for unlawfulness of the administrative act.

Secondly: If damages caused by other activities lawsuits may be filed directly in accordance with the relevant legislation.

### *Article 16 The Decision-making principle*

1. Under the provisions of this Code, a public body shall make decisions on all issues raised by one party, which are under its competence.

## A. General Introduction

As mentioned already in commentary to art. 4 it is an element of the principle of legality that a public body must not refuse to decide on cases and issues under its competence or avoid to decide on requests submitted by parties if these requests are in its competence

## B. Legal consequences

If a public body refuses or avoids to decide on administrative procedures under its competence the party is entitled to lodge an appeal (art. 130) if the time limits stated for taking a final decision are expired and the silent consent rule is not applicable.

### *Article 17 Equality and non-discrimination principle*

1. A public body shall exercise its activity in compliance with the principle of equality.

2. Parties, which are at the same objective situations, shall be treated equally. In specific cases, where a differentiated treatment is made, such treatment should be justified only by the objective characteristics, which are related to the specific case.

3. When exercising its activity, the public body shall avoid any discrimination on grounds of gender, race, colour, ethnicity, citizenship, language, gender identity, sexual orientation, political, religious or philosophical beliefs, economic, education or social situation, pregnancy, parental belonging, parental responsibility, age, family or marriage situation, civil status, place of residence, health situation, genetic predispositions, disability, belonging to a special group or any other ground.

## A. General Introduction

### I. Art. 17 as a constitutional principle

Art. 17 repeats and substantiates the preconditions of art. 18 of the Albanian Constitution in order to implement it in administrative procedures.

### II. Art. 17 and its relation to art. 4

Public bodies must implement and execute the legislation in force (art. 4) due to the constitutional rule of law. Public bodies are not authorized to refuse the implementation of the law by reasons of art. 17. It is up to the constitutional court to decide on the compatibility of a law with the provisions of the Albanian Constitution (see

art. 131 of the Constitution). Public bodies must execute the law in force so far even if they assume that it is not in line with the Constitution.

Therefore art. 17 must be obliged in all cases the legislation in force let space to different options by implementing and executing the law, regardless by granting discretion or other forms of decisional options. All decisions of public bodies must be in alignment with the legislation in force.

## B. Explanation in Detail

### I. The principle of Equality (para. 1, 2)

#### 1. General remarks

The constitutional principle of equality binds the activities of public bodies in the frame of the legislation in force to deal with cases in the same manner and to treat them equally if their substantive elements are equal and vice versa to treat cases differently if their substantive elements are different. As stated in para. 2 sent.1 parties which are in the same objective situations shall be treated equally. Different treatments must be justified.

Since no case is completely the same as another case it is of importance to decide which elements of the cases are relevant to treat them equally or different. According to para. 2 sent. 2 only objective characteristics shall justify different treatments. As stated in para. 3 it is forbidden to discriminate persons due to the grounds listed. In addition further indications for the importance of characteristics of cases must be found in the current law. As a rule it is up to the legislation in force to decide which elements of cases are relevant and therefore substantive. If for instance a public body has to decide on a building permit only the building law is relevant. The public body must not make differences due to the position of the owner.

#### 2. Binding of current practice

If a public body has treated specific cases in a specific way recently it is obliged to treat new cases in the future in the same way unless it has good reasons to alter the practice and treat new cases different. This applies at least if the current practice is in alignment with the legislation in force. As a rule: If the public bodies have treated specific cases in the past in an unlawful way they are not authorized to treat new cases in the same way unlawful due to the principle of equality. As mentioned already above the principle of equality authorized public bodies only to act in alignment with the legislation in force.

### I. Non-discrimination principle (para. 3)

In para. 3 are grounds listed which – as a rule – cannot justify different treatments of cases in the frame given by the legislation in force. Forbidden is only the discrimination not any different treatment due to substantial and objective differences. It is for instance forbidden to treat persons different only due to their health situation. But it is not forbidden to prefer a person with good health by choosing new personal to employ in civil service. Therefore, discrimination means that there are no objective reasons for different treatment but only the grounds forbidden by para. 3.

## Article 18 *De-bureaucratization and efficiency principle*

1. An administrative procedure shall not be subject to any specific form, unless otherwise provided by law.
2. The administrative procedure shall be conducted as expeditiously as possible, but no later than the deadline provided for by law for that type of procedure, with as less costs for the public body and parties as possible, in order to achieve what is necessary for a lawful outcome.

## A. General Introduction

### I. Content and purpose of art. 18

Art. 18 postulates efficient and expeditious administrative proceedings without loss of lawfulness.

## II. Constitution and EU-Law

De-bureaucratization and efficiency of public administration are major concerns of the EU (cf. Services Directive).

## III. Legal consequence of art. 18

Art. 18 is a principle without direct regulation, but guideline for all administrative structures and activities and thus more than a mere appeal.

## IV. Relation to previous CAP

Art. 18 specifies the more general rule of art. 16 of previous CAP.

## V. Scope of application

Art. 18 appeals to the acting civil servants conducting administrative proceedings, and even more to those politicians and higher civil servants who conceive by-laws and other regulations on administrative proceedings, including other administrative actions in the sense of art. 126 and indirect provision of public services (art. 127).

### B. De-bureaucratization and efficiency principle in details

#### I. No formalism (para. 1)

As a rule, an administrative proceeding shall be carried out without strict formal prescriptions and not be bound to a specific form, to ensure and support an uncomplicated, appropriate and timely action of the public administration. Strict formalities should be reserved for specific administrative procedures where law prescribes a more formalised procedure like written form, e.g. in space planning and similar cases.

The provisions regarding the administrative proceedings in the previous CAP were partly very detailed and formalistic. If administrative procedures are regulated in a too formalistic and detailed manner, there is a danger that procedures are not carried out as swiftly and as simply as possible. Such regulations are often a reason for the applicants in the administration to think and act only in a very formalistic and bureaucratic way.

To attain the reduction of formalism, this Code offers a lot of instruments, like the verbal administrative act (art. 98 para. 2) the verbal request ( art. 58 para. 1 lit b), the waiver of personal appearance of the party (art. 78 para. 3), the principal possibility to present statements verbally (art. 78 para. 3), the silent consent (art. 97), the principle of ex-officio investigation (art. 77, especially the waiver of requesting documents from the party that are already under the administration of public bodies, para. 3 ).

#### II. Expeditious and efficient proceedings (para. 2)

Paragraph 2 in fact stipulates the so-called principle of the “proportionality of the proceeding”. These principles complement the principles of non-formality stated by para. 1. The administration should aim at a final action which is “lawful” and based on “the merits” and should make everything necessary and proportional for achieving the later goal. The proceeding itself should be dominated by informality and has to be carried out with simplicity, less possible costs and expediency and in proportion with what is needed to achieve the above mentioned goal. This principle is a guiding principle of this Code and it is reflected in the shaping of the most part of its concrete provisions. The importance of speedy and efficient administrative proceedings for the economic development of the Republic of Albania to encourage investments must not be underestimated.

Examples to attain these objectives are the prescription of deadlines to the public body as well as to the party for numerous procedural steps to accelerate administrative proceedings. Of special importance are the general deadline for administrative proceedings (art. 91) and the deadline for silent consent (art. 97). Besides, deadlines to speed up proceedings are provided in art. 44 para. 2 (to fill gaps in requests and for further actions of the public body), 49 para. 5 (for issuing copies), 62 para. 2 (for the correction of requests), 67 para. 3 (for performing interim measures), 70 para. 3 (within joint decisions), 87 para. 2 (for hearings), 117 (for annulment and repeal of administrative acts), 132 (for lodging an administrative appeal) 140 (for deciding on an administrative appeal), 142 (for lodging an administrative objection), 143 (for deciding on an administrative objection), 145 (for lodging a revision), 150 (for nominating a joint representative), 162 (for public notification) and 169 (for voluntary execution).

Another important instrument to accelerate administrative proceedings is the One-stop-shop (art. 74 et seq.).

It adds to the effectiveness and efficiency of administrative proceed that administrative bodies are granted greater flexibility in choosing forms of administrative actions. The unilateral administrative act as typical form of an administrative action is supplemented by the administrative contract (art. 119 et seq.) and other administrative actions (art. 126).

An appropriate tool for an efficient public administration is also the legal institute of “administrative assistance” (art. 71). It ensures non-bureaucratic cooperation and mutual help and support of public authorities.

Expeditious and efficient proceedings are also fostered by the improved delegation of decision-making competence within a given administrative body (art. 28, 29). Overloading the top of an organisation with any, big or small, administrative decisions creates bottlenecks that are inimical to both efficiency and quality in administrative According to the rule of good administrative practice, decisions shall be delegated and entrusted as far as possible to well-trained civil servants who are familiar with the subject matter, without eliminating the possibility of control by the heads of public units.

Of course the principle of speed and effectiveness does not exclude the existence of certain substantial procedural steps which might be more or less formal (for instance the communication to the party of the result of the investigation and parties right to present their comments in accordance with art. 87 - 88), when necessary to guarantee the lawfulness and the merits of the final action, in accordance with the administrative principles of the European administrative space. The rule of Law (c.f. art. 4) is the predominant principle for all administrative actions.

#### *Article 19 Principle of non-payment in administrative procedure*

1. The administrative procedure shall be free of charge unless otherwise provided for by the law.
2. The fee for conducting of an administrative procedure may not be higher than the average cost necessary for the conduct of the procedure, unless otherwise explicitly provide for by law.
3. The public body, which conducts the procedure, shall not seek any payment of fees even in cases where this is provided for by law, when the parties are unable to pay. The categories of inability to pay, shall be determined by Decision of the Council of Ministers.

#### A. General Introduction

##### I. Content and purpose of art. 19

Art. 19 regulates that in general administrative proceedings shall be free of charge.

##### II. Constitution and European Law

Art. 19 is in line with art. 16 of the Code of good administration of the Council of Europe which demands “fair and reasonable” fees.

##### III. Legal consequence of art. 19

Art. 19 represents an appeal to the legislator to create adequate laws and by-laws about administrative fees and – in para. 3 - to the competent civil servant to apply these complaisantly according to the special circumstances of the individual case.

##### IV. Relation to previous CAP

Art. 19 corresponds to art. 17 of the previous CAP.

##### V. Scope of application

Art. 19 addresses politicians and higher civil servants who conceive by-laws and other regulations on administrative fees, including for other administrative actions in the sense of art. 126 and indirect provision of public services (art. 127) and the civil servants who decide on administrative fees.

## B. Non-payment principle in administrative procedure in details

### I. General rule of freedom of charges (para. 1)

Para. 1 stipulates an important principle of administrative proceeding, the principle of “free service”. The stipulation of such principle is a corner stone in a welfare state. The activity of public administration is financed by the general taxes. That is why free service should be the rule in the administrative proceedings. Anyway, the same paragraphs allow to provide for payment of a charge, through a special law. In other terms the legislator is allowed to provide a certain tariff when reasonable, by special law only.

### II. Limits to the amount of fees (para. 2)

Para. 2 concretises the authorisation of para. 1 that exceptionally by law fees may be provided. It sets limits to the legislator for the amount of such fees. Such fees must not be higher than the average costs necessary for the conducting of the proceeding. By this rule is prevented that the public body achieves profits by fees.

But para. 2 allows an exception from this rule and authorises the legislator in special cases to stipulate fees that are higher than the administration costs, e.g. as prohibitive fees to regulate grievances. So, a high fee for the registration of dangerous dogs would be admissible to diminish the number of such dogs.

### III. Reduction of fees in special cases (para. 3)

Para. 3 gives the possibility to the public body to waive the payment of the fees where lack of financial resources has been proven. The decision to exempt is – like the decision to set fees - an administrative act and could be granted upon application. Para. 3 sentence 2 demands that the criteria, when a person is unable to pay fees, must be defined by Decision of the Council of Ministers.

## Article 20 *Language and translation in an administrative procedure*

1. Unless otherwise provided by law, the administrative procedure shall be conducted in Albanian language and script.

2. If the party is to submit a request within the deadline, and does so in a foreign language, the public body shall notify the party on the duty to submit the request in the Albanian language and script. If for technical reasons the party fails to provide the translation within the date of expiry of the due deadline for the submission of the request, the public body shall set an additional appropriate deadline, within which a translation of the request and of all necessary documents should be provided.

3. The deadline set forth in Paragraph 2, first sentence of this Article shall be deemed as met only, if the public body receives the translation within the additional deadline as set and notified by the public body.

4. If the requests, which define the commencement of the deadline, within which the public body should act, are received in a foreign language, the deadline shall commence on the date when the public body is provided with a translated version of them.

5. If the public body fails to set a deadline and to notify the party an additional deadline for the translation and legal effects under Paragraph 2, second sentence of this Article, the request in a foreign language shall be deemed as submitted within the deadline.

## A. General Introduction

### I. Content and purpose of art. 20

Art. 20 stipulates the use of the Albanian language and script in administrative proceedings and describes thoroughly how to deal with a request submitted in a foreign language.

### II. Constitution and EU-Law

Art. 20 implements art. 14 Para. 1 of the Constitution of the Republic of Albania.

### III. Legal consequence of art. 20

Requests have to be dealt with in the Albanian language and script. A request in foreign language must be treated as stipulated by art. 20 para. 2 – 5.

### IV. Relation to previous CAP

The previous CAP contained no comparable regulation.

### V. Scope of application

Art. 20 is applicable for all administrative proceedings and especially for the handling of requests in foreign language.

## B. Language and translation in an administrative procedure in details

### I. General rule of para. 1

According to the Constitution of the Albanian Republic the Albanian language is the official language (see art. 14 of Constitution), which thus has to be used by all public organs in all administrative proceedings.

### II. Proceeding of a request in foreign language which must keep a deadline (para. 2 and 3)

Paragraphs 2 - 5 establish procedural rules to create a balance between the interests of public bodies to deal with requests only in the Albanian language as stipulated in art. 14 para. 1 of the Constitution and art. 20 para. 1 of this Code and the interests of a submitter, who by any reason does not submit his request in Albanian language, but within the relevant deadline for such a request. The solution is that requests in foreign language must be translated, and further administrative proceedings must be observed, too.

Para. 2 stipulates that the public body shall notify the submitter about the obligation to provide a translation. As a rule, this translation must be submitted within the current deadline. If the submitter does not keep the deadline, but makes plausible that this did not happen because of negligence on his side, but because of technical reasons (e.g. the translator did not send the translation in time), the public body shall set an additional appropriate deadline by administrative act for the submission of the translated request and the related documents. Additionally, as para. 5 shows, the public body shall inform the submitter about the legal consequences of para. 2.

Para. 2 is *lex specialis* to art. 62.

Para. 3 underlines that in this case the original deadline is deemed as being kept if the translation is offered within the additional deadline.

If the public body fails to set the additional deadline or notify the submitter thereof, para. 5 applies.

### III. Proceeding when the request triggers the commencement of a deadline for the public body and is submitted in foreign language (para. 4)

According to para. 4, deadlines running for the public organ shall start, as rule, when the submission received in a foreign language is translated. This is appropriate regarding the legal protection of the party and the efficient public administration.

### IV. Proceeding, when no additional deadline was set (para. 5)

When in the case of para. 2 the public body does not set an additional deadline for the submission of the translation and does not notify the submitter of the request thereof and of the legal consequences of para. 2, the submission is considered to be done within the deadline, despite its foreign language. Thus a fair compromise between the public interests and the interests of the submitter is reached.

*Article 21 Control principle*

**1. Administrative activity shall be subject to the following:**

- a) Administrative control, under the provisions of this Code on the administrative remedies and legislation in force;**
- b) Court control, under the legislation in force; and/or**
- c) Any other controls as provided for by the legislation in force.**

**A. General Introduction**

**I. Content and purpose of art. 21**

Art. 21 enumerates the different levels of control to which administrative activities are subject.

**II. Constitution and EU-Law**

Art. 21 refers to and is in line with the rule of law (art. 4 para. And 15. Para. 2 of the Constitution of the Republic of Albania) and the separation of powers (art. 7 of the Constitution). These are also predominant principles of the EU-Law.

**III. Legal consequence of art. 21**

Art. 21 is a description of the legal system.

**IV. Relation to previous CAP**

Art. 21 is a slightly altered adoption of art. 18 of previous CAP.

**V. Scope of application**

Art. 21 concerns all administrative activities of public bodies.

**B. Control principle in details**

Art. 21 distinguishes between 3 categories of control of administrative activities:

**I. Internal administrative control**

Administrative remedies, what means remedies lodged by the party and decided on by administrative bodies, are vital for the internal monitoring of internal decision-making standards. The public body which decided on the case and the supervisory body of the next instance, have not only the opportunity to realise possible legal errors and have to rectify the outcome of the particular case, but also have the possibility to guard against continuation of a systemic mistake and to improve the administrative practice in general concerning similar cases. So administrative control provides an additional system of protection, proof and correction. As a rule, decisions on the remedy against an administrative action shall not be taken by the same administrative body that carried out the initial administrative procedure, although exceptions to this rule are also possible in order to allow the relevant public body to reconsider its previous decision.

Internal control by administrative bodies does by no means substitute control by administrative courts. The preceding control by administrative public bodies lightens the burdens of administrative courts by settling cases within the internal legal remedy proceedings. Thus, this Code regulates a system of internal legal administrative remedy procedures to be conducted prior to the parties to appeal to administrative courts.

All administrative public bodies are to conduct their tasks under the rule of law, no matter which form of action has been taken. Therefore this Code grants the right to legal remedy not only against administrative acts or omissions of administrative acts (see art. 130 et seq.), but also against any other administrative actions (see art. 141 et seq.) and makes available a complex system of internal control within the administrative bodies. This is of high importance because administrative activities are not confined to administrative acts.

## II. Court control

Legal control of administrative actions belongs primarily to the administrative courts. Such external control of administrative actions by independent judges is crucial in democratic states under the rule of law. Legal remedies to court are the strongest instruments in the hands of the citizen to defend his rights versus an administrative body (cf. Law No 49/2012 on the organisation and functioning of administrative courts and the adjudication of administrative disputes).

## III. Other controls provided by law

The Constitution of the Republic of Albania provides further institutions which exert control over administrative activities, as the People's Advocate (art. 60) and the High State Control (art. 162 et seq.), the latter on financial and economic matters.

## IV. Informal control

Not mentioned in the Code, but by no means to be underestimated is the control function of the free media like press, radio, TV, as far as they are not under direct state control, and of the so-called social media.

# **PART TWO**

# **COMPETENCE**

## PART TWO COMPETENCE, DELEGATION AND SUBSTITUTION

### **CHAPTER I JURISDICTION AND COMPETENCE**

#### *Article 22 Determining jurisdiction and competence*

1. The scope of activity and set of competencies of public bodies, governed by the legislation in force, shall constitute the administrative jurisdiction.
2. The competencies of public bodies shall be defined by law, by sub-legal acts, as well as by administrative actions, which are issued pursuant to them. Their exercise shall be obligatory.
3. The delegation or substitution of competencies may be done only if:
  - a) It is explicitly provided for by law;
  - b) The law has specified the substituting body or official, to which the delegation or substitution is addressed.

#### A. General Introduction

##### I. Content and purpose of art. 22

Art. 22 stipulates the legal framework of the jurisdiction and competence of public bodies and the conditions for delegation and substitution of competencies.

##### II. Constitution and EU-Law

Art. 22 - 27 are in line with the Constitution of the Republic of Albania. EU-legislation is not touched.

##### III. Legal consequence of art. 22

Art. 22 stipulates binding rules of administrative competence.

##### IV. Relation to previous CAP

Para. 2 and 3 adopt the regulation of art. 21 para. 1 of previous CAP. Additionally art. 27 – 34 of previous CAP stipulate details of delegation and substitution.

##### V. Scope of application

Art. 22 – 27 regulate and limit the jurisdiction and competence of public bodies. A decision of a public body beyond these limits is unlawful.

#### B. Determining of jurisdiction and competence in details

##### I. Definition of “administrative jurisdiction” (para. 1)

Para. 1 has pure educational purposes and serves to streamline the terminology to the one of the current Code of Civil Procedures, it stipulates that the totality of the competencies of the public organ under the administrative law regime compose the so-called “administrative jurisdiction”.

##### II. Definition of the competence of public bodies (para. 2)

According to the equally constitutional principle of separation of powers, the public administration has its own, exclusive authority, which includes both making administrative decisions and their enforcement. The Albanian constitution stipulates in article 95 that the political responsibility of administration is fulfilled by the council of ministers and ministers at the central level and by the executive powers of local and regional levels.

The rule of law (cf. art. 4 of the Constitution of the Republic of Albania), which in the context of administrative decision-making means “administration through law”, comprises amongst others the principles of legality. A clear legal definition and delimitation of responsibilities or competences of administrative authorities is, besides objective administrative procedures that are stipulated in this Code, a basic requirement of the rule of law. This requirement is complied with by para. 2, which demands that competencies of public bodies must be defined by law, by by-law or by administrative actions which are based on the latter and conform to them.

### III. Conditions for delegation of substitution of competencies (para. 3)

In consequence to the rules defined by para. 2, also delegation and substitution need a legal basis.

## Article 23 Verification of competence

1. With the initiation of the administrative procedure, the public body shall verify whether it has the subject-matter or territorial competence or not, to make a decision on the matter subject to consideration.

2. Any later legal or sub-legal amendments of competence shall have no effect, except for cases where the body where the procedure has started does not exist anymore, or when otherwise provided for by new legislation.

## A. General Introduction

### I. Content and purpose of art. 23

Art. 23 specifies the general rules on competence.

### II. Constitution and EU-Law

Art. 22 - 27 are in line with the Constitution of the Republic of Albania. EU-legislation is not touched.

### III. Legal consequence of art. 23

A decision of a public body beyond the limits of competence as defined in art. 22 – 27 is unlawful.

### IV. Relation to previous CAP

Para. 1 adopts art. 25 para. 1 of previous CAP, para. 2 contains elements of art. 22 para. 2 of previous CAP.

### V. Scope of application

Art. 22 – 27 regulate and limit the competence of public bodies.

## B. Verification of competence in details

### I. Obligation to verify competence (para. 1)

As a logical consequence of the rule of law, a public body may only work on fields for which it has subject-matter and territorial competence. Thus the verification of the competence before instituting an administrative proceeding (as well as when requested) is (at least theoretically) a prerequisite for ensuring the principle of legality. The provision is rather a reminder.

### II. Subsequent changes of competence (para. 2)

Para 2 reflects a major procedural principle that in general the competence is determined at the moment when the administrative proceeding begins. This original competence of the pending proceeding remains untouched so that the continuation and conclusion of the proceeding is not affected, even when the legal framework for competence changes. Only if it is no longer objectively possible to continue the proceeding from the same public body – e.g. the body where the proceeding started is wound up -, or if a new legislation stipulates a transition to another body, the competence changes.

*Article 24 Lack of competence*

1. In cases where the public body receives an application for a matter, which it considers out of its competence, it shall send the request immediately and, at any case no later than 2 days upon its receipt, to the competent public body and notify the sender for this.
2. The deadlines for the applicant shall be deemed respected if the application was submitted on time to the non-competent body, whereas the respective deadlines for the competent public body shall start to run from the date when the application was received.
3. The parties may not define or change by agreement the competence of the public body.

A. General Introduction

I. Content and purpose of art. 24

Art. 24 stipulates the consequences of a request submitted to a public body that considers to be not competent for the matter.

II. Constitution and EU-Law

Art. 22- 27 are in line with the Constitution of the Republic of Albania. EU-legislation is not touched.

III. Legal consequence of art. 24

A decision of a public body beyond the limits of competence as defined in art. 22 – 27 is unlawful.

IV. Relation to previous CAP

Art. 24 is a simplified version of art. 26 of previous CAP:

V. Scope of application

Art. 22 – 27 regulate and limit the competence and power of public bodies.

B. Lack of competence in details

I. Forwarding to the competent public body (para. 1)

When a public body receives a request which it considers as beyond its own competence, it must not treat it as irrelevant. Since the party sometimes is not aware of the competence – and must not be –, the public body has the obligation to forward the request to the public body that it considers as competent. To avoid delays, the forwarding must be done immediately, in any case not later than 2 days upon the receipt of the request. Additionally, the requester must be notified about the transfer. The obligation to the public organ is provided in order to facilitate the protection of the rights of the party.

II. Handling of relevant deadlines (para. 2)

The forwarding of a request from a public organ to another can endanger the keeping of relevant deadlines. To avoid detriments for the applicant as well for the competent public body, para. 2 gives a balanced solution.

When the request is submitted within the deadline to the incompetent public body, the deadline for the applicant shall be deemed as kept, even if the request is received by the competent body only after it has expired.

On the other hand, a possible deadline for the competent public body, e.g. to decide on the request, is triggered only by the date of receipt at this body.

III. No parties' agreement on competence (para. 3)

Para. 3 stipulates the general rule that competence is established by legislation and cannot be changed by the will of the parties involved. It stresses that even consent of the parties may not alter competence. Nobody should be entitled, or be in a position, to choose his/her administrator. In order to secure clear borderlines and prevent arbitrary or interested changes of competence, the article stipulates that exercise of competence is *ex officio*.

*Article 25 Prohibition to waive competence*

1. Every administrative act or other action, by which a public body aims to waive the right to exercise its legal competence, shall be considered invalid.

2. The obligation to exercise the subject-matter and territorial competence and the provision of Paragraph 1 of this Article shall not exclude the right of the public body to delegate its legal powers in favour of other bodies of the administration, in accordance with the procedures as provided for by this Code.

A. General Introduction

I. Content and purpose of art. 25

Art. 25 prohibits public bodies to waive its competence but does not exclude the possibility to delegate.

II. Constitution and EU-Law

Art. 22- 27 are in line with the Constitution of the Republic of Albania. EU-legislation is not touched.

III. Legal consequence of art. 25

A decision of a public body beyond the limits of competence as defined in art. 22 – 27 is unlawful.

IV. Relation to previous CAP

Art. 25 adopts the regulation of art. 21 para. 2 of previous CAP.

V. Scope of application

Art. 22 – 27 regulate and limit the competence and power of public bodies.

B. Prohibition to waive competence in details

Art. 25 emphasizes and partly concretises the general rules of art. 22 about the legal base of competence.

I. No waiver on competence (para. 1)

Because, as art. 22 para. 2 states, the competence of public organs shall be defined by law, by by-law and by administrative actions based on these two, no public body is allowed to deny or waive its legal competence. Any action aiming so is illegal.

II. Competence of delegation (para. 2)

Para. 2 states that public bodies may delegate its subject-matter as well as territorial competence to other public bodies. This is a mere reference, as the conditions therefore are stipulated in art. 22 para. 3.

*Article 26 Competence in urgent cases*

1. If the public competent body may not act or act immediately for avoiding a serious and irreparable damage that might be caused to the public interests or to rights or interests of third parties, the Prefect at local level, and the Prime Minister at central level, shall, either ex officio or based on a request, shall take measures in order to avoid the damage. In these cases the competent public body shall be immediately informed on the measures adopted.

A. General Introduction

I. Content and purpose of art. 26

Art. 27 stipulates the competence in urgent cases, if the competent body cannot act in time.

II. Constitution and EU-Law

Art. 22- 27 are in line with the Constitution of the Republic of Albania. EU-legislation is not touched.

### III. Legal consequence of art. 26

A decision of a public body beyond the limits of competence as defined in art. 22 – 27 is unlawful.

### IV. Relation to previous CAP

The previous CAP does not contain a comparable regulation.

### V. Scope of application

Art. 22 – 27 regulate and limit the competence and power of public bodies.

## B. Competence in urgent cases in details

Situations are imaginable where the competent public body is unable to act at all or in time to prevent serious and irreparable damages to public or private interests, e.g. in case of natural catastrophes, when human or technical resources are insufficient or not at hand. In these cases the Prefect at local level and the Prime Minister at central level are entitled - and regarding the dimension of danger even obliged – to act instead of the competent body. This may happen ex officio or on request. An error in evaluating the situation is weighing less than an omission to act. The competent public body must be informed immediately about this intervention in its competence, also to avoid interfering measures.

### *Article 27 Disputes over competence*

1. Unless otherwise provided by law, the conflict of competence between two or more public bodies shall be resolved by written agreement between them.
2. In case they fail to reach an agreement, the conflict shall be resolved by:
  - a) the Prime Minister in case of conflict among various ministries,
  - b) The minister or head of the central or supervisory institution for subordinated institutions.
  - c) the Administrative Court for all other cases, for which it is competent;
3. The settlement of the conflict may be requested by each of the bodies involved upon receiving notice on the conflict
4. The conflict under Subparagraphs “a” and “b” of Paragraph 2 of this Article shall be resolved within 10 (ten) days from the day of the lodging of the request.

## A. General Introduction

### I. Content and purpose of art. 27

Art. 27 is conceived to solve disputes between public bodies about competence.

### II. Constitution and EU-Law

Art. 22- 27 are in line with the Constitution of the Republic of Albania. EU-legislation is not touched.

### III. Legal consequence of art. 27

A decision of a public body beyond the limits of competence as defined in art. 22 – 27 is unlawful.

### IV. Relation to previous CAP

Art. 27 adopts in general art. 35 and 36 of previous CAP.

### V. Scope of application

Art. 22 – 27 regulate and limit the competence and power of public bodies.

## B. Disputes over competence in details

### I. Form of conflict resolution (para. 1)

An unanimous agreement between the concurrent public organs to resolve the conflict on competence should be striven for. The resolution shall be in written, for reasons of clearness and to avoid misunderstandings.

### II. The arbitrating organ (para. 2)

When an agreement cannot be achieved, in principle the conflict shall be resolved by the common authority which has control or supervising authority upon the organs in conflict. This is detailed in lit. a) – the conflict among various ministries shall be resolved by the Prime minister – and b) – the minister or head of the central or supervisory institution shall resolve the conflict between subordinated institutions - . In case the concurrent public organs have no common superior, acc. to lit. c) the conflict shall be resolved by the Administrative Court, as far as it is competent.

### III. Initiator of the conflict resolution (para. 3)

The resolution of the conflict of competences may be requested by each of the organs involved upon taking cognizance of the latter.

### IV. Deadline for the resolution (para. 4)

A conflict on competence between public organs tends to paralyse administrative activities. Therefore para. 4 demands a resolution within 10 days from the day of the request for resolution, except when the Administrative Court is involved.

## **CHAPTER II**

### **DELEGATION AND SUBSTITUTION OF COMPETENCIES**

The following articles 28 and 29 are dealing with delegation and substitution of powers from a superior body to the subordinated body. This regulatory matter is neither covered by the scope of this Code as determined by art. 2 nor included in the definition of the administrative procedure provided by para. 10 of art. 3. The articles 28 and 29 are dealing, instead, with a matter that belongs to the regulatory framework on organization and functioning of public administration. It does not regulate the legal relationship between the public body and the parties of an administrative procedure. For the legal relationships within an administrative procedure, in other words for the legal status of a party vis-à-vis the acting public body and the protection of the party's administrative procedural rights the legal framework on such administration-internal organization is not relevant. Important as a legal precondition for the administrative procedure is only the fact of the acting public body's competence as such, as it is stipulated in art. 22 to 27, but not the legislative or administrative process by which the competence was conferred to it.

Therefore, as the articles 28 and 29 will never be applied during the conduct of an administrative procedure, it is unnecessary to comment here their content in detail. Further explanation would be inappropriate and could rather be a source of confusion.

#### *Article 28 Delegation of powers*

1. The competent public bodies may delegate their competencies to another public body.
2. The competent public bodies may delegate their competencies provided to them by means of law or bylaws to their subordinated bodies.
3. The collegial bodies of the public administration may not delegate their competencies to their heads.
4. The delegated body shall be prohibited to sub-delegate to a third body the competencies, which it has obtained through delegation,
5. Any decision of the delegating body, the aim of which is to authorize the delegated body to sub-delegate the sub-delegated competencies, shall be invalid.

#### *Article 29 Delegation procedure*

1. When permitted by law, the delegation of competencies shall be made at any case upon a decision of the delegating body to the bodies under its subordination, and upon a decision or agreement in those cases where the delegated body is not under the subordination of the delegating body.
2. The act of delegation shall define the following:
  - a) The delegated competencies;
  - b) The financing of the delegated tasks;
  - c) The institution assigned with the supervision, as well as the scope and supervisory instruments;
  - ç) The criteria of interruption and mechanisms for the performance of delegated tasks in case of interruption of delegation;
  - d) The starting date of exercising the delegated competencies.
3. The delegation of competencies shall be published in the "Official Journal" or in the public announcement bulletins. In the case of local administration, the delegation shall be published in the journal of the local government unit or in the official bulletins of the local government units acts, and when such a bulletin does not exist, the respective notification shall be displayed in public places.

# **PART THREE**

# **IMPARTIALITY**

## PART THREE

### ENSURING IMPARTIALITY OF THE PUBLIC ADMINISTRATION

#### Article 30 *Legal impediments*

1. The public official or the member of a collegial body shall not be involved in a decision-making administrative procedure in the following cases:

- a) He has a direct or indirect personal interest in the decision-making in question;
- b) His spouse, cohabitant or relatives up to the second degree, have a direct or indirect interest in the decision-making in question;
- c) The public official or the member of the collegial body, as well as persons referred to in Sub-paragraph "b)" of this Article, have a direct or indirect interest in a case objectively the same and with the same legal circumstances as the matter in question;
- ç) The public official or the member of a collegial body has participated as expert, adviser, private representative or advocate in the case in question;
- d) Persons referred to in Sub-paragraph "b)" of this Article have participated as expert, representative, advisor or advocate in the matter in question;
- dh) A court process has been initiated by the parties of the administrative procedure in question against the public official or persons referred to in Sub-paragraph "b)" of this article;
- e) The case in question is an appeal against a decision made by the public official or by persons referred to in Sub-paragraph "b)" of this article;
- ë) The public official or the member of a collegial body, or persons referred to in Sub-paragraph "b)" of this article are debtors or creditors of interested parties of the administrative procedure in question;
- f) The public official or the member of the collegial body or persons referred to in Sub-paragraph "b)" of this Article have received gifts from the parties before or after the start of the administrative procedure in question.
- g) The public official or the member of the collegial body or persons referred to in Sub-paragraph "b)" of this article have such relationships, which, based on the concrete circumstances, are considered to constitute a serious ground for partiality towards the interested parties of the administrative procedure in question;
- gj) The public official or member of a collegial body or persons referred to in Sub-paragraph "b)" of this article, have been involved in any way in the following:
  - ii. Possible negotiations for future employment on the side of the official or persons referred to in Sub-paragraph "b)", while exercising the function, or negotiations for any other form of relations of private interest after leaving the service as conducted during the exercise of the duty;
  - ii. Engagement in private profit activities for profit purposes, or any type of activity that generates income, as well as engagement in profit and non-profit organizations, trade unions or professional, political, government organizations or any other organizations.
- k) In any case when it is provided for by the legislation in force.

#### A. General Introduction

##### I. Purpose and content of the law

Art. 30 contains regulation to ensure the objectivity (art. 12) and impartiality (art. 13) of the administrative procedures and to fight against nepotism and corruption. Therefore it stipulates a number of legal impediments. Public officials and members of collegial bodies must not be involved in administrative procedures if there are specific relations to the parties of the administrative procedure which justify doubts that they will comply with the principles of impartiality or objectivity.

If one of the provisions listed in art. 30 are met an official of the public body or a member of the collegial body must be excluded from any kind of involvement in the specific procedure. It is not necessary to prove evidence whether or not the very person (official or member of collegial body) will act in favour of a party due to unlawful reasons. The exclusion takes place if one of the provisions is met because the possibility of acting against the principles of impartiality and objectivity is sufficient.

## II. Constitution and European law

The principles of impartiality and objectivity of public bodies conducting administrative procedures must be seen as based on constitutional principles and follow the principles of good administration as laid down in art. 41 of the GRCharta.

## III. Scope of the law

Art. 30 is applicable to all administrative procedures (art. 3 para. 9) within the scope of the CAP (art. 2). There are no exemptions provided.

## IV. Legal consequences

If an official or a member of a collegial body is “involved” although he might be excluded by law he has to notify the facts constituting an impediment immediately to the superior official (art. 31 para. 1). Even other officials are obliged to notify these facts to the superior official if they are aware of the conflict of interest (art. 31 para. 2). Finally the parties are entitled to require the exclusion of the official involved (art. 31 para. 3). The very person itself must be suspended until the final decision on the exclusion (art. 31 para. 4).

An administrative act issued in violation of the requirements of art. 30 is unlawful (art. 109) or even invalid (art. 108) regardless whether or not the involvement of the excluded person has led to a factual impact on the procedure. For details see art. 32).

## B. Explanation in Detail

### I. General provisions for the exemption

#### 1. Officials and Members of Collegial Bodies

According to art. 30 the exemption of officials and members of collegial bodies takes place if the provisions stated in lit. a) – k) are met. An official is any person who acts in an administrative procedure in an official function. It is not necessary that the person is entitled to decide on issues related to the administrative procedure. It is sufficient when they are “involved” in the procedure. The same applies to members of collegial bodies involved within the procedure. Involvement means that they have a position or function which might have any effect or impact on the procedure. Comprised are for instance secretaries, interpreters, experts, advisors, representatives, procedural managers and other insiders which are involved personally in the procedures.

#### 2. Relatives (lit. b)

Not only the personal involvement of officials or members of collegial bodies shall lead to the exclusion due one of the conflict cases. A conflict can also arise due to relatives of the officials or the members of collegial bodies defined in lit. b). Comprised are spouses, cohabitants and relatives up to the second degree. The latter are children, grandchildren, parents, grandparents and siblings, but not the relatives of the latter.

## II. The conflict cases in detail

### 1. Direct or indirect personal interest (lit. a), b)

Excluded are officials and members of collegial bodies as well as their relatives defined in lit. b) if they have direct or indirect personal interest in the decision-making, which means in the result of the administrative procedure and the outcome or impact. The interest must not be a material or economical one. Other forms of “personal” interest are sufficient. Emotional, political or ethical interests are not sufficient.

### 2. Parallel cases (lit. c)

According to lit. c) officials and members are excluded even if they or their relatives (lit. b) have personal interest in administrative procedures which must be seen as parallel due to the same constellation and the same legal

circumstances. The reference case must show the same elements and it must be obvious that the parallel case might be decided in the same manner.

### 3. Previous involvements (lit. cc) and d)

According to lit. cc) and d) officials and members of collegial bodies are excluded if they personally or their relatives (lit. b) have been participated in the very administrative procedure before as experts, advisers, private representatives or advocate. Participation means that they have played an active role in one of the functions mentioned. Other involvements are not comprised. The reason is that the previous involvement might justify doubts that the further actions in the same procedure will be conducted in an objective and impartial manner.

### 4. Court process against official or member

An official or member is excluded if a party of the administrative procedure has initiated a court process against him or against his relatives (lit. b). The legal proceedings must be conducted "against" the person or member the relatives which means either a civil or a criminal process. Administrative procedures against the persons mentioned are not sufficient. It doesn't matter whether or not the legal proceedings are still pending or concluded already.

### 5. Exclusion in Appeal procedures

Lit. e) excludes officials to be involved in an appeal process against their own decision. By this regulation all officials and their relatives (lit. b) shall be excluded in appeal procedures against administrative act or procedural actions they have decided on. The exclusion comprises due to the wording not only the appeal procedure of the superior body but also the appeal procedure of the competent body itself. It is not quite clear why the members of collegial bodies are not included. But due to the wording it is not possible to comprise these persons *mutatis mutandis*.

### 6. Exclusion due to financial relations (lit ee)

According to lit. ee) an exclusion shall take place if the official or the member of the collegial body or their relatives (lit. b) have financial relations to one of the parties involved in the administrative procedure.

### 7. Exclusions due to receiving gifts

It is quite clear that neither officials nor members of collegial bodies must accept gifts from parties. The acceptance of gifts shall lead to an impediment because doubts are justified that the person will not act in accordance with the principles of objectivity and impartiality.

### 8. Other relationships causing reasonable suspicion (lit. g)

Lit. g) comprises as a general clause all cases of reasonable suspicion that the conduction of the administrative procedure will not be in alignment with the principles of objectivity and impartiality.

### 9. Special involvements (lit. gj)

In lit. gj) are some cases of special involvement of the official or the member of collegial bodies listed which lead to an impediment.

## Article 31 *Self-declaration of legal impediments and request for exclusion*

1. If the public official or the member of the collegial body of the public body identifies one of the impediments provided for in Article 30 of this Code, he shall immediately notify in writing his superior.

2. Any other official who is aware on the cases of conflict of interest, under Article 30 of this Code, shall make notifications as per Paragraph 1 of this Article.

3. The party may ask for the exclusion from participation of the official or of a member of the collegial body up to the point when a decision is made by presenting the reasons why such exclusion is requested. The request shall be made in writing, addressed to the superior and it shall contain all possible evidence where it is based.

4. At any case, until the superior makes a final decision, the official shall be suspended from the decision – making process.

## A. General Introduction

### I. Purpose and content of the norm

Art. 31 para. 1 contains obligations of the official or member of the collegial body to notify an impediment listed in art. 30 immediately to the superior official in order to initiate the decision-making process provided for in art. 32. Art. 31 para. 2 extends this obligation to “any other official” who “is aware” of the cases of conflict of interest. Art. 31 para. 3 entitles the parties to require the exclusion of the respective person. Finally, art. 31 para. 4 provides a suspension of the person in the cases of para. 1 – 3.

## B. Explanation in Detail

### I. Notifying the superior (para. 1)

The obligation to notify the superior official takes place if the official “identifies” one of the impediments. This obligation comprises not only cases the provisions of the impediment are clearly met but also all cases it is obvious that an impediment might be fulfilled. If a member of the collegial body “identifies” one of the impediments it has to notify the collegial body. Although para. 1 lacks a specific provision the regulation in art. 32 para. 1 makes clear that the member of a collegial body has to notify the body. If a chairman of the body is elected or appointed, the notification has to submit to him. If the chairman himself is affected he must notify his deputy.

### II. Notifying the superior by other officials (para. 2)

Even other officials must notify a case of impediment to the superior official if they are aware of facts which may lead to an impediment. This obligation comprises not only cases of clear impediments but also cases an impediment is obvious.

### III. Request for the exclusion (para. 3)

The parties of the administrative procedure are entitled to request the exclusion of an official or a member of a collegial body if the preconditions of an impediment are obvious. The formal requirements provided for in para. 3 must be fulfilled. The request must be in writing, addressed to the superior and contain the reasons and evidence for the impediment.

### IV. Suspension of the official (para. 4)

If either the official, the member of the collegial body or any other official has notified the superior of facts which may constitute an impediment the person concerned shall be suspended from the decision-making process until the final decision of the superior is notified. That means that the person concerned must not take any action within the administrative procedure. The suspension starts in the very moment of the notifying. The same applies if a party requests the conclusion in accordance with para. 3 which means that the preconditions of para. 3 must be met. If the request is lodged without plausible reasons no suspension shall take place.

## Article 32 *Decision-making and effects of exclusion*

1. The superior or the collegial body, notified as per Article 31 of this Code, shall make a decision on either to exclude or confirm the official, within 5 (five) days from the receipt of notification or the request of the parties.
2. In cases where the superior decides to exclude the official, the decision for the exclusion shall also designate the substituting official. If the collegial body excludes a member and the law does not provide for substituting members, the administrative procedure shall continue without the replacement of the excluded member.
3. In cases where due to law or the specific situation, it is ascertained that the substitution of an official with another one is not feasible, the decision-making by the public official shall be allowed.
4. In cases of exclusion and impossibility of substitution, the body shall operate as such without the participation of the excluded member.

## A. General Introduction

### I. Purpose and content of the norm

Art. 32 stipulates the procedure and the effect of the decision of the superior or the collegial body if an impediment has been notified or a party has required that a person shall be excluded due to an impediment. The procedure can lead to a suspension or to a confirmation of the person affected. Art. 32 para. 1 – 4 contains provisions for how to deal in case of exclusion of a person due to impediments. Art. 32 doesn't provide a regulation concerning remedies against the decision of the superior or the collegial body. Therefore the common regulation shall apply (see below B).

### II. Lack of regulation

Unfortunately, the regulation of the decision procedure in cases of art. 31 is incomplete concerning the right of the parties to be heard and the extension of the deadline stated in para. 1.

## B. Regulation in Detail

### I. Decision on cases stipulated in art. 32 para. 1

#### 1. Decision as a procedural action

If a superior is notified of facts that might constitute an impediment as stipulated in art. 30 it has to take a decision within 5 days from the receipt of notification. The same applies if a party requests the exclusion due to impediments. If a member of a collegial body is affected the notification must be made to the chairman or the deputy of the chairman (see above art. 31). The decision provided for in para. 1 is a procedural action in the sense of art. 130 para. 3. The superior or the collegial body must decide whether to exclude the person affected or to confirm the person. If the official or the member is confirmed the administrative procedure must continue with involvement of the person. If the official or the member is excluded the regulation of para. 2 – 4 shall apply.

#### 2. Right to be heard

Art. 32 para. 1 doesn't provide expressly a hearing of the parties involved. The right to be heard stipulated in art. 87 is not applicable because it grants this right only "before a final decision is made". The decision stipulated in para. 1 must not be seen as a final decision in the sense of art. 87. Nevertheless, the superior must give the parties the opportunity to give comments on the issue before the decision of the superior or the collegial body is taken. This is an obligation which derives from the principle of transparency (art. 5) and of fairness and impartiality (art. 13). The right to be heard in cases of para. 1 must not only take place if a party requests for an exclusion but also if the official or the member of the collegial body has notified facts which may lead to an impediment.

Moreover it is an obligation of good administration as stated in the EU law (art. 41 GrCharta) that the parties must have the opportunity to be notified of a procedure stated in art. 31 and art. 32 and to comment it in order to inform the superior or the collegial body of their opinion. The problem is that a decision must be taken within only 5 days. Since the parties must have enough time to submit their opinion on the issue the time might be exceeded if necessary.

#### 3. No remedy against the decision, Unlawfulness

Since the decision of the superior or the collegial body is not a final decision in an administrative procedure it must be seen as a procedural action in the sense of art. 130 para. 3. That means that against a decision stipulated in para. 1 no objection can be lodged by the parties. Even an appeal is not admissible because due to art. 130 para. 2 a procedural action can be appealed only if expressly provided for by law. But there remains the possibility to appeal against the final decision if a person which must have been excluded due to impediments has been involved in the procedure. If the provisions of the procedure provided for in art. 31, 32 are met the final decision is not invalid in the sense of art. 108 because there is not an open and flagrant contradiction with an ordering provision. But the involvement of a person which must have been excluded due to an impediment stated in art. 30 may lead to unlawfulness because the final decision may be an outcome of the infringements of procedural provisions (art. 109 para. 1 lit. b).

II. Substituting the affected person (para. 2 - 4)

1. Substituting an official (para. 2 sent.1, para. 3)

If the superior decides to exclude the official the decision shall also designate the substituting official in order to continue the administrative procedure. Only in cases provided for in para. 3 the excluded official is authorized to continue his involvement in the procedure. But precondition is that it is ascertained that the substitution with another official is not possible or feasible. This exemption must be seen as a very last option.

2. Substituting a member of a collegial body (para. 2 Sent.2, para. 4)

If the collegial body decides that a member shall be excluded there are two options: If the law provides for substituting members the collegial body shall continue its work with the substitute (para. 2 sent.2). If the law doesn't provide substituting members the collegial body has to proceed as such without the participation of the excluded member.

# **PART FOUR**

# **ADMINISTRATIVE PROCEDURE**

## PART FOUR ADMINISTRATIVE PROCEDURE

### CHAPTER I PARTICIPATION IN THE ADMINISTRATIVE PROCEDURE

#### Article 33 Parties in administrative procedure

1. A party to the administrative procedure, save for what is provided for in Article 3 of this Code, shall be any person:
  - a) upon whose request an administrative procedure has been initiated;
  - b) against whom an administrative procedure has started, or to whom the decision of the administrative procedure is addressed or intended to be addressed; or
  - c) With whom the public body intends to conclude or has already concluded an administrative contract.
2. Parties to the administrative procedure are also the holders of public interests authorized by law, as well as holders of collective interests or of broad interests of the public in case these interests might be affected by the outcome of the administrative procedure.
3. The public body conducting the administrative procedure, shall either *ex officio* or upon request, include as a party to the administrative procedure any other person defined or easily definable, other than what is provided for by paragraph 1 and 2 of this article, whose lawful rights or interests might be affected by the outcome of the administrative procedure.

#### A. General introduction

##### I. Content and Purpose of art. 33

This article contains a specification of the definition of the term “party” as dealt with in art. 3 para. 7 by determining, which persons participate in an administrative procedure. In this Code a Person participating in the procedure is referred to as a party. Only persons holding the status of a party can be bearer of the procedural rights and duties regulated in the Code. For this reason it is of fundamental relevance whether or not a person holds the status of a party.

While the scope of public bodies and other entities which are entitled to conduct administrative procedures is regulated in art. 2, the scope of persons who hold the status of a party in an administrative procedure is regulated in art. 33.

The purpose of art. 33 is that all persons whose rights and legitimate interests might be affected by an administrative procedure or even its outcome (art. 3 para. 7) should be granted the status of a party in that procedure in order to give them the procedural rights (e.g. the right of being heard, the right to check files etc...) but even the duties and burdens provided for in the code (e.g. to be bound by administrative decisions).

Furthermore, the involvement of citizens in the decision-making process that is related to their affairs is also in the public interest, because it broadens and improves the basis of decisions and thus contributes to finding a result of the procedure adequate to both the public and the individual interest of the parties. Additionally, the purpose of art. 33 para. 2 is to improve administrative procedures by involving entities, which are holders of public, collective and broad interests of the public and as well to improve the protection of these interests in administrative procedures.

As mentioned above, art. 33 substantiates the definition of the term “party” in art. 3 para. 7. According to art. 33 there must be distinguished at least 3 groups of (natural or legal) persons which can become a party of an administrative procedure:

- Persons who bear the status of a party automatically because of their specific role in the procedure as requesting person, as intended addressee or as intended contract partner (para. 1). For this group of persons no decision of the public body is needed to grant the status of a party to them.

- Persons, which are included as a party by a decision of the conducting public authority, because their lawful rights or interests might be affected by the outcome of the administrative procedure (para. 3). The public body's decision might be triggered ex officio or upon request.
- Persons which are holders of either public interests authorized by law, or collective or broad interests of the public in case these interests might be affected by the outcome of the procedure (para. 2). These persons are also included as a party by a decision of the conducting public authority, but this time the decision is triggered only upon their request.

## II. Constitution and EU Law

The scope of the definitions of the term “party” is partly related to the fundamental rights of participation. The right of the citizen to participate in administrative procedures that could affect their individual rights or legitimate interests is a vital achievement of a modern state where the rule of law is maintained. This achievement has found its specification in art. 48 of the Constitution “Everyone, by himself or together with others, may address requests, complaints or comments to the public bodies, which are obliged to answer within the time periods and under the conditions set by law”, by entitling the party to initiate an administrative procedure, though submission of a request. These requirements are fulfilled by the regulation in art. 33 para. 1. It is also a requirement of the constitutional rights that other persons whose rights or legal interests might be affected by the outcome must be involved as a party in the procedure, as regulated in art. 33 para. 3.

Corresponding, it is also a basic demand of art. 41 para. 2 of the EU Charter of Fundamental Rights that persons whose legal rights or interests are affected are entitled to participate in administrative procedures and therefore to be granted the status of a party in the respective administrative procedure.

## III. Legal consequences of art. 33

By holding or being granted the status of a party in accordance to art. 33 a person is automatically bearer of procedural rights and duties notwithstanding whether or not the person is bearer of material rights or legal interests. It is the procedural status as a party itself that provides the person with procedural rights and duties in the administrative procedure as long as it lasts. A large number of procedural rights and obligations are tied to the position as a party in an administrative procedure, such as art. 42 (communication with parties), art. 45 (right of inspection of the files), art. 47 (right to submit opinions and explanations), art. 58, 59 (requirements for submission of a request), art. 78 (parties' duty to cooperate), art. 82 (burden of proof), art. 87 and 88 (right to be heard), and art. 128 ff. (right to lodge legal remedies).

Granting the status of a party does not mean automatically that the party is bearer of material rights, neither in cases of art. 33 para. 1 nor in cases of para. 2 or 3. Including persons in the administrative procedure as a party in accordance with para. 2 or 3 must not be seen as granting material rights, not even recognizing material rights. Whether or not material rights or legal interests of a party do exist is up to the material decisions to be taken in the administrative procedures and the judicial processes.

## IV. Relation to previous CAP

Art. 33 covers in a similar way the substantial content of para. 1 of art 44 and art. 45 of the previous CAP.

## V. Scope of application of the norm

Art. 33 applies to any type of administrative procedures within the scope of the code as defined in art. 3 para. 9, preparing and adopting any kind of administrative actions as defined in art. 3 para. 10 notwithstanding whether the procedure is aiming to the issuing of an administrative act or other administrative actions or the conclusion of an administrative contract. It furthermore covers execution measures as well as to the review of an administrative action by administrative legal remedies.

B. The content of art. 33 in details

I. Status of a Party for formal reasons (para. 1)

Para. 1 regulates the so called “formal connecting factor”, in accordance to which a party is a person (of public or private law) upon whose request an administrative procedure has been initiated (called active party) or against whom an administrative procedure is in progress (called passive party).

3. A party to the administrative procedure shall be any person

According to art. 33 para. 1 persons do have the status of a party automatically due to their specific role, position or function in the administrative procedure, regardless whether or not they are bearer of material rights or legal interests. A decision of the public body conducting the procedure to include these persons is not required. As a rule, a person who initiates an administrative procedure in the sense of art. 3 para. 9 and art. 41 by submitting a request to a public body becomes a party automatically regardless of the prospects and whether or not the request is likely to be successful. The same applies to the other cases regulated in para. 1, when an administrative procedure has been started ex-officio with the intension to address a certain person or to conclude an administrative contract. As a rule, in all these cases regulated in art. 33 para. 1 an examination or investigation whether or not there might be material rights or legal interests is not required, not even admitted. The reason is that the procedure will be initiated in accordance with art. 41 to prove the legal situation in order to take an explicit decision at the very end.

4. Person upon whose request a procedure was initiated: active party in a procedure initiated upon request, para. 1, lit. a)

a) Person, upon whose request

Persons the article is referring to are – according to Art 3 para. 8 – both natural persons and legal entities or subjects of law, under the legislation in force. Request is the expression of a person’s will, by which the person asks a public body for undertaking an administrative action as defined in para. 10 of art. 3 and which is in compliance with the requirements of art. 58. Examples: With a request the requester may apply for a permit, licence, subsidy or any other kind of a beneficial administrative act, aim at the conclusion of an administrative contract or seek any other administrative action such as the retraction of a damaging statement published by a public body. According to art. 61 other deliveries such as opinions, explanations, comments, statements or documents submitted in the framework of an administrative procedure are not requests within the meaning of para. 1, lit. a) of art. 33. For submission of the request the rules of art. 59 shall apply.

As mentioned above, the requester becomes a party regardless of the question whether or not the request is likely to be successful. As a role, even a person whose request can be seen as unsuccessful at a first glance will become a party. The reason is that even requests of this kind must lead to an administrative procedure and require a final decision (i.e.by rejecting the request).

Upon the only fact of submitting a request the submitter subject becomes a party in that concrete administrative procedure whilst the legal standing (a person has the legal standing when he/she is the “holder” of the subjective right or legitimate interest which he/she aims to whether; i) satisfy by requiring the exercise of the administrative power through a positive administrative action (preventive character), e.g. the issuance of a permit, or ii) defended from the exercise of the administrative power (defensive character/ *ad opponendum*) is not relevant for the status of the party at this moment.

Instead the legitimation becomes relevant and important for continuing the procedure and conclude it with an explicit - eventually - final decision; that is why the public body has the obligation to verify the legitimation (along with other admissibility conditions, such as for instance the procedural capacity) in accordance with art. 44, before it further continues the administrative procedure with the administrative investigation<sup>3</sup> in the substance of the case.

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<sup>3</sup> This does not mean that the verification of legal standing excludes any investigation activity - some time the verification of the legal standing is a rather complex issue- its verification might require in depth investigation and be part of the decision on the substance of the case.

b) An administrative procedure has been initiated

According to art. 41 para. 3, lit. b) in connection with art. 59 the administrative procedure shall be deemed initiated upon submission of the request. As to the determination of the exact time of the submission, i.e. of the start of the procedure, see below the explanation on art. 41 para. 3 lit. b), under section B. III. 2.

5. Parties in cases of ex-officio initiation, para. 1, lit. b)

a) Person against whom an administrative procedure has started

According to art. 33 para. 1 lit. b) a person becomes a party in the moment an administrative procedure has been started against it. An initiation in a formal sense is not required. As stated in art. 41 para. 3, lit. a), an administrative procedure starts with the first procedural action undertaken. A procedural action (see art. 41 para. 3, lit. a) may be any action with an external effect, e. g. hearing of the person, investigation measures or the inclusion of other persons in accordance to para. 3. It is not required that the procedural action has been notified to the person against the procedure has been started. But merely internal preparatory operations such as internal consultative staff meetings, preparing files or the technical creation of a new record are not sufficient for initiation.

Only persons get the status of a party against whose external procedural actions have been taken. This provision requires that the public body expresses either explicitly or implicitly the will that the procedure is directed against one or more clearly identified persons. In the cases of lit. b two different interpretation might be both justifiable: it could either be said: i) that the factual ex-officio start of the procedures implies a preliminary verification/decision, by the initiating public body, on the party's legal standing, or ii) that the same as in the case of para. 1 a), in ex-officio procedures there is no space at all for function and purpose (i.e.. application) of the concept of legal standing: the person against whom the procedure has started; the person to whom the decision of the administrative procedure is addressed or intended to be addressed obtains automatically, upon the first procedural action, the status of the party and is entitled to all the procedural rights related to this status. However, both dogmatic reasoning lead in practice to the same consequence, namely that in the ex-officio-initiated cases of lit. b the public body decides always with an "explicit" decision.

b) Person to whom the decision of the procedure is addressed

It must be seen as quite clear that a person to whom a decision of an administrative procedure is addressed becomes a party at least in the moment of notification of the decision. But these cases must be exceptional because, as a rule, according to art. 87 the public body has to notify the party before a final decision is made. Only in cases regulated in art. 89 a final decision without prior notifying and hearing of the party is admitted.

c) Person which is attended to being addressed

Regularly, when a public body intends to address the decision to a person it initiates the procedure against this person according to alternative a). But it may happen that by conducting a procedure against one person the public body comes to the conclusion that the final decision must in addition be addressed also to further persons. In this case the further persons become the status of a party when the first procedural action is taken against these persons. Because of the right of being heard before the decision is taken (para. 1 of art. 87) these further persons must be notified of their right to be heard as early as possible.

6. Partner of an administrative contract, para. 1, lit. c)

Usually, the administrative contract is the result of an administrative procedure, that could have been initiated either upon request of the party (para. 1, lit. a) or ex-officio (para. 1 lit. b). Therefore, the alternative of para. 1, lit. c) would cover very rare cases only. One area of applicability of para. 1, lit. c) comprises cases, when during the contractual negotiations in the framework of an on-going administrative procedure with one or more partners an additional partner of the contract shall be included in the negotiation process. As to the final alternative "or has already concluded an administrative contract", it is hard to imagine that it could become relevant in administrative practice, because this would require the conclusion of the contract without any prior negotiations.

II. Status of a party for substantial reasons: additional affected parties ( para. 3)

Para. 1 regulates the so called substantial connecting factor, in accordance to which a party is any person whose subjective right or legitimate interests are/might be affected/touched by the proceeding. It takes in account that an administrative action, which is directly addressed to a person, which has the status of a party in accordance with para. 1, can affect rights and legal interests of other persons. (e.g.: The building permit a party applied for could have a negative effect to the right of the owner of a neighbouring property, if it allowed the applicant to construct a house,

the dimensions of which would impair the utilisation of the adjacent piece of land.) Para. 3 provides legal protection also to those persons by including them in the procedure as a party in addition to the parties in accordance with para. 1.

The legal requirements for the inclusion of additional, indirectly affected persons in an administrative procedure are the following:

1. Additional person is not involved in an administrative procedure already initiated according to para. 1

The inclusion of indirectly affected parties requires firstly, that there is an administrative procedure that was initiated according to art. 41 and para. 1, - either upon request of a directly involved party or ex officio by the public body - and not concluded by a final decision and there is an additional person that has not become a party according to para. 1, because he/she has neither requested to initiate the procedure (e.g. by applying for an administrative action), nor has the public body started the procedure ex officio or intends to start the procedure against him/her.

2. A subjective right or legitimate interest of the additional person is possibly affected by the outcome of the procedure

Para. 3 requires that the additional person's own ("its") lawful rights or interest might be affected by the outcome of the procedure. Outcome of the procedure is the final administrative decision-making on the case in the meaning of para. 1 of art. 90.

a) A person with own lawful rights or interests

According to para. 3 the inclusion of other persons is allowed only, if lawful rights or interests might be affected by the outcome of the procedure. The term "lawful rights and interests" comprises all subjective rights of a person which are granted by the constitution, by law and bylaw and even by international regulations if applicable. The provision requires that the person has the legal standing i.e. is the "holder" of the subjective right or legitimate interest which he/she aims to defend from the exercise of the administrative power through its participation in the procedure. For its involvement as a party it is not necessary that the person or the public body establishes beyond doubt that he is holder of the right/interest possible affected (this is a matter of the second phase of the decision-making process when considering and deciding on substance of the case). It is enough if he claims (in case of inclusion upon request) or if the public body ex officio considers (in case of ex officio inclusion) out a plausible case of being the holder.

b) Rights and interests which might be affected by the outcome of the procedure

The public body conducting the procedure has to assume if lawful rights or interests of a person might be affected by the outcome of the pending procedure. The wording "might be affected" makes clear that a possibility of affection is sufficient to include the person. It must be at least likely that the rights or interests will be affected if the final decision will be taken in one possible way. It is sufficient that – in the view of the public body – the possibility of an affection is given. It is sufficient that the other person "claims" or the public body ex officio considers a possible effect on his/her lawful right or interest.

3. Inclusion in the procedure either ex officio or upon request

The decision to include further persons in the procedure must be taken by the public body conducting the procedure. If the preconditions of para. 3 explained above under II, point 1 and 2 are met the public body is obliged to include the person as a party. The decision can be taken upon request or ex officio. It must be seen as an administrative act of the public body which might be controlled by legal remedies.

a) Inclusion ex officio

As the first alternative, the provision requires an ex officio action taken by the public body. The public body is obliged to include, as a party in an ongoing procedure any additional person if this person is "determinate or "easily determinable". The provision operates with the term "determinate" or "easily determinable". E.g. think about the owners of neighbour properties to one that the owner has requested the issuance of a building permit. In such a case the immediate/adjacent owners are easily identifiable as affectable by the procedure and thus are referred to as "determinable". Other persons e.g. non-adjacent neighbours situated at a certain distance might also be negatively affected by the issuance of the permit, but the latter category might be rather difficult to determine<sup>4</sup> as potentially

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<sup>4</sup> Into similar cases, the Italian jurisprudence, has stated that "the individualization of all the interested neighbourhood owners on an administrative proceeding for the issuance of an building permit, would not be possible , because it is rather difficult

suffering the consequence of the administrative procedure. That is why the provisions configures a sort of “obligation of diligence” for the public body to identify only additional persons which are determinable or easily determinable (the Italian APA operates with the term easily “identifiable”) as possibly being affected by the procedure. Anyway it should be noted that in case such subjects are identified and identifiable and fulfil the preconditions explained under II, points 1 and 2 above, the public body has the obligation to introduce ex officio the subject in the procedure, by communicating to it the initiation of the procedure in accordance with art. 41 or by analogy with the latter. Whether in a concrete case an additional person is determinable or easily determinable as potentially being affected by the output of the procedure should be decided based on the objective criteria and common sense.

#### b) Inclusion upon request

As the second alternative, the person, who is interested in the inclusion as a party may submit a request aiming to being included as an additional party. The request should be rectified by reasons which make plausible the possibility that his/her rights or legal interests might be affected by the outcome of the procedure if one possible final decision is taken. As already explained the submitter needs not establish conclusively or beyond any doubt that his/her rights have been infringed.

The public body should verify whether the preconditions explained under II, points 1 and 2 above fulfilled. In case the result is positive, he is obliged to include the requestor as a party in the procedure. The public body’s’ positive decision on the request as well as its denial must be seen as an administrative act.

### III. Party for reasons of special interests (para. 2)

#### 1. A new Concept of Participation

As already mentioned above art. 33 para. 2 configures a new concept, which is known as that of the “ for a special interest”. The norm covers three additional categories of parties, holders of public interest, holders of collective interest and holders of broad interest of the public. The provision is a novelty because firstly, the subjects comprised by para. 2 may intervene in the procedure not in order to protect their own personal interest, but for the protection of a public, collective or broad interest of the public. Secondly, it constitutes the legislator’s cognizance of the “multiplicity of public interests”<sup>5</sup> and of the subjects that are the holders of such an interest.

It is quite clear that art. 33 para. 2 applies only when there is an administrative procedure that was initiated according to para. 1, - either upon request of a directly involved party or ex officio by the public body - and when the intervenient has not become already a party in accordance with para. 1.

#### 2. Inclusion either ex-officio or upon request?

The provision of para. 2 does not expressly set the procedural requirements for the inclusion of the subjects in an administrative procedure. A formal decision for inclusion is required. Otherwise it would be unclear at any stage of the procedure which persons do have rights and duties and must be treated as a party by the conducting public body. Therefore the procedure of involvement must be derived from art. 33 para. 3 which requires a decision of the public body. The question is, if – as stipulated for the cases of para. 3 – the participation of an intervenient can result either from a request of the potential intervenient or also, from an ex-officio initiative of the public body. But in any case the holders of the interests comprised by para. 2 have the right to be included in the procedure as a party if the preconditions are met.

#### a) Inclusion upon request

In the case when the holder requests (by submitting a special request in this sense) to be involved in an administrative procedure, it is sufficient if it “claims” it is the “holder” of the respective interest and a possible effect on that “interest”. For its involvement as a party it is not necessary that the holder establishes beyond doubt that it is the “holder” of the respective interest and that its interest is affected (both are a matter of the second phase of the decision-making process when considering and deciding on merits). “To claim” means here to make out a plausible case that the holder’s legally protected position would be better if the public body undertakes the requested action or

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to establish to what eventual distance of the interested area, it continues to be relevant for other properties” Caranta, Roberta ; Ferraris, Laura; Rodriques, Simona, *Participation in the Administrative Proceeding*, Second edition, Giuffrè Editore, p. 120.

<sup>5</sup> Caranta, Roberta; Ferraris, Laura; Rodriques, Simona, *Participation in the Administrative Proceeding*, Second edition, Giuffrè Editore, p. 172.

non-action. In case of such a request, the public body should verify the fulfilment of both preconditions and decide on its inclusion or not. The public body's positive decision on the request as well as its denial must be seen as an administrative act.

b) Inclusion ex officio

The question is whether or not the public body has an obligation to include persons defined in art. 33 para. 2 in an administrative procedure even ex officio. The answer depends on whether the provisions of art. 33 para. 3 shall apply to the cases stipulated in para. 2 strictly or mutatis mutandis. The latter must be seen as more plausible because an intervenient cannot be forced to intervene and the public body cannot be supposed to identify such possible intervenient. It should express the willing to intervene through a special request in this sense.

3. Three categories of holders of special interests

a) Holder of public interest authorised by special law

Holders of public interest authorized by law are public authorities and/or legal persons that might or might not be established by law, but of whose the law has recognized an authority of representation with regard to the specific public interest that might be affected by the initiated administrative procedure. Holders of public interests are no substitutes of other parties to the administrative procedure, neither do they act upon power of attorney. Their authority derives from the law, just like their limitations have to be set by the law itself. In some cases the law describes their quality as interlocutors for the public body, in other cases it regulates even the procedure for their involvement. An example of such a legal authorisation is Art. 13 para. 3 of the Law no.8454, dated 04.02.1999 "On the People's Advocate". The so-called Ombudsman Law recognises the right of the Ombudsman "to initiate and to participate in an administrative procedure, in compliance with the terms of the CAP, in order to protect the interests of a broader community". Holders of public interest authorised by law are identified since the moment the specific law enters into force.

In this case the interest which might be affected by the result of that procedure is not personal but public, which means that in order to be hold legally as the holder of such an interest, the public body should have an authorisation by law assigning to him to serve/protect such an interest (meaning the legal standing), so it becomes the holder of such an interest. Authorisation by law means the right conveyed by special legislation to intervene in an administrative procedure.

b) Holder of collective interests

Unlike the personal interest which is individual, a collective interest has a super-individual nature, it is not the sum of the individual interests of a collective of persons but rather the homogenous interest<sup>6</sup> of an organized group of people, as part of a larger collective or of the general community. The collective interest is substantially differentiated to the personal interests of the members of the respective collectively, in the sense that could be said it belongs to a collective identifiable subject thereof belong to a rather "organised/institutionalised group" (not an occasional one) based on membership than to a simple plurality of individuals. The concept of holder of collective interests refers, usually to professional orders (in case of regulated professions), trade unions and business associations or to any other kind of associations having a membership character and which objective and reason of existence is the protection of certain collective interest.

In case of a request to intervene in an already initiated administrative procedure the public body, should investigate all the involved aspects (before taking the decision to include them in the procedure). Differently from the holders of public interest authorised by law, where the authorisation is out of question (being implied by the legal authorisation), in this case the "credentials" of the holder of collective interests are to be verified the moment they become parties to the procedure, because are subject to judicial review. These credentials are: i) their quality as the holder of the respective collective interest and ii) the procedural capacity.

In verifying the quality of the holder of a collective interest (or the legal standing) the public body should start by concentrating first on the identification of the represented interest and then on the way of its representation.

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<sup>6</sup> Giannini, M.S, Diritto Amministrativo, Milano, Giuffre 199, pp. 48 and 50

- i) Holders of collective interest can be party to the administrative procedure as far as the reach of the interest they represent, but not beyond that. In order such an organization is deemed to be “the holder” of a given collective interest, and per consequence have the legal standing, it is required both i) a sufficient connection between the organization’s mandate (object of activity) and the collective interest involved in administrative issue in question: the administrative issue of a concrete administrative procedure shall be directly connected to the sphere of the mandate and tasks of the holder of collective interest (e.g. the task of a holder to protect members of the association’s collective interests) and b) a sufficient grade of representation of the collective interest in question. This obligation derives not only from the formulation of art. 33 para. 2 that has stated as a precondition for the represented interest to be affected by the administrative procedure, but also by analogy from the jurisprudence of the Albanian courts (especially Constitutional Court) that requires the proof of correlation between affected collective interest and contested act (see for example Constitutional Court Decision no. 35, dated 10.10.2007).
- ii) In addition the holder should have the procedural capacity: Although the holders of collective interests can be identified more based on the common interest of people, rather than the organisational aspect of their representation, in order to participate in an administrative procedures those organisations require legal capacity according to art. 34, established in accordance with the Albanian legislation (for more details see the explanation on art. 34).

c) Holder of broad interest of the public

An interest can be defined as “broad”, if it is of the same content shared by a plurality of persons and distinguishable from the individual interests of those persons. Typical examples are the interest in protecting the environment, protecting consumer affairs or the interest to prevent the construction of a noise-generating airport.

Unlike the collective interests, the broad interests are common (belong to) of individuals of a social formation unorganised and not autonomously identifiable or individuatable. Whilst the collective interests are attributable to a particular body/organisation, the broad interests are in a fluid state and requiring an aggregation process<sup>7</sup> through the activity of organisations or of a structured plurality of individuals, whose aim is to protect those interests. Usually, the fluid nature of a broad interest is aggregated through the activity of organisations like not-for-profit organisations having their protection in the object of activity and having legal personality.

The same as in case of holder of a collective interest, before taking the decision to include them in the procedure (base on the submitted request), their “credentials” should be verified by the public body: : i) their claimed quality as the holder of the respective broad interest and ii) the procedural capacity:

i) the quality of the holder of a collective interest (or the legal standing) - in order an organisation or structured plurality of individuals is deemed to be the holder of a given broad interest, and per consequence have the legal standing, it is required both: a) a sufficient connection between their objective of activity and the broad interest involved in administrative issue in question; b) a sufficient organisation, and c) a sufficient grade of representation of such an broad interest.

ii) the legal capacity - in regarding the legal capacity there might be two possible interpretation: a) the holder should have the legal capacity according to art. 34, or b) not only legal persons or organisations endowed in general (i.e.. on a permanent basis) with procedural capacity according to art. 34, para. 2 but also other pluralities of persons that could as a group hold material rights if this group has got common goals and a certain level of organisational structure and cooperation. A firm and sustained organisational structure conceived on a permanent basis, is not required for the organisation: it is sufficient that the organisation has got a minimum of organisation allowing at least a decent level of representation by one or a few individual members. However, a quickly and coincidentally accrued group of persons, (such as crowds of people arising from a road accident or a demonstration) cannot be seen as holders of collective or broad interests. We are of the opinion the first interpretation is more likely because of the explicit character of art. 34.

#### 4. Interests which might be affected by the outcome of the procedure

An inclusion of persons in accordance with para. 2 is required only if the interests represented by the persons/subjects might be affected by the outcome of the procedure. It must be seen as sufficient when an affection of interests might be likely.

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<sup>7</sup> Gabrielli, Cfr. Appunti su dirriri soggettivi, interessi Legittimi, interessi collettivi, in *Revista trimestrale Processuale civile* 1984, p. 969.

*Article 34 Capacity to act in the administrative procedure*

1. A public body or entity, party to an administrative procedure shall act through the legal representative as defined according to the law or through the head, when no legal representative is assigned.
2. The capacity of other persons to act in an administrative procedure shall be regulated according to the legislation in force.

A. General Introduction

I. Content and purpose of Art. 34

Art. 34 provides regulations concerning the capacity to act in an administrative procedure. "Capacity to act" means the capacity to assert all rights of persons to become a party or to act as a party, for instance the capacity to submit requests to initiate a procedure (art. 44), to submit opinions and explanations (art. 47), to assert procedural rights as the right to check the files (art. 45), to require for and to receive information and assistance (art. 10, 76), the exercise the right to be heard (87 ff) etc...

While para. 1 deals with public bodies or entities para. 2 concerns the capacity of all other persons. Since many different kinds or persons can be involved in administrative procedures, para. 2 doesn't provide special regulations but refers to the applicable legislation in force.

II. Scope of application of the norm

Para. 1 regulates the capacity of public bodies or entities to act in administrative procedures. According to the wording it appears that para. 1 comprises public bodies or entities only when involved in an administrative procedure "as a party". Since public bodies or entities are defined in art. 3 para. 6 as government bodies or other persons or legal entities which perform administrative functions they normally don't act as a party in administrative procedures but as competent authorities. Therefore, it is not clear whether or not the scope of para. 1 is restricted to public bodies or entities which are involved in an administrative procedure as a party in the sense of art. 3 para. 7 or comprise even public bodies and entities acting as public body in the sense of art. 3 para. 6.

Despite the wording of para. 1 it must be assumed that para. 1 comprises public bodies or entities not only if they are involved as a party but all other public bodies acting in administrative procedures. There is no reason why to make a difference between public bodies and entities involved as a party or the same public bodies involved in official public functions.

A. Capacity to act in the administrative procedure in details

I. Capacity of public entities to act, para. 1

1. Public body or entity

The term "public body" is legally defined in art. 3 para. 6 and comprises all government bodies which perform administrative functions and, in addition, Armed Forces bodies and any other persons or legal entities so far they are exercising administrative functions in accordance with the law. The term "public entity" doesn't extend the scope of para. 1 but refers to the definition of art. 3 para. 6 which comprises public entities so far they are entitled to perform public functions.

"Performing public functions" means that the public body or entity is acting in an administrative procedure not as a party but as a competent authority. Nevertheless, it is possible that a public body or entity may be involved in an administrative procedure not as a competent authority but as a party (art. 3 para. 7). Para. 1 makes clear that the regulation comprises the capacity to act as a party as well.

2. Shall act through the legal representative

Para. 1 makes clear that a public body or entity shall act through the legal representative as defined in accordance with the law. This regulation refers to special law so far it contains an assignment of a legal representative of a public body or entity. As made clear in art. 3 para. 6 the assignment of legal representatives is not only up to the special law but also to secondary legislation or any other form provided for by legislation in force.

### 3. Acting through the head of the body or entity

If no legal representative is defined by the legislation in force (including bylaws etc...) a public body or entity shall act through its head. That means that the very person appointed by the government or the other public authority which is responsible for the body to act as the head of a public body is entitled to act for this body in administrative procedures.

It is to assume that the head of a public body or entity is entitled to delegate the right to act for the body or entity to special persons of the staff if not otherwise provided for by law.

#### I. Capacity of other persons, para. 2

Para. 2 leaves the regulation of the capacity of other persons to act as a party to the legislation in force. Since there are many kinds and types of other persons which can be involved in an administrative procedure as a party it is reasonable to refer to special law only.

#### II. Legal consequences

If in an administrative procedure a person conducts an action without the capacity to act in accordance with art. 34 or special law, the administrative action is considered unlawful acc. to art. 109, no matter whether the person acts on behalf of a public body or party.

For a further legal consequence, It is necessary to make a difference: If a public or private person or entity is acting through a person without capacity to act as a party, the person, which holds the capacity to act, must have the possibility to approve the action afterwards within due time and thus make the action lawful.

If a public body or entity, however, is acting as the competent authority, the principle of legality of public administration derived from the rule of would hardly allow the possibility to approve the action afterwards. Instead, the action should be taken again by the very person with the capacity to act.

#### *Article 35 Party representation*

1. The party may perform all procedural actions personally, or through a representative, under the provisions of this Code.
2. In case where the party acts through representation, the public body shall perform procedural actions with the representative.
3. The public body may request the conduct of one or more procedural actions directly by the party, if this is explicitly provided in the law. In this case, the public body shall also notify the representative.

#### A. General Introduction

##### I. Content and purpose of Art. 35

Art. 35 para. 1 makes clear that the party is entitled to perform all procedural actions personally or through a representative if not otherwise provided for by special law. That means that a party – as a rule – cannot be forced to appoint a representative but is free to do so. As stated in para. 2 the public body must perform all procedural action with the representative so far the party has appointed a representative and there is no exception in accordance with para. 3.

Art. 35 doesn't modify the regulation in art. 34 dealing with the capacity to act in an administrative procedure. It presupposes that the person acting for the party has the capacity to act in the procedure. The capacity to act comprises the right to appoint a representative.

##### II. Scope of application of the norm

Art. 35 shall be applicable to all actions of parties in administrative procedures if not otherwise provided for by special law.

## B. Capacity to act in the administrative procedure in details

### I. Performing personally or through a representative, para. 1

Para. 1 makes clear that the parties of an administrative procedure have the free choice whether to perform actions personally or through a representative. The appointment of a representative is regulated in art. 38, the other regulations concerning representatives can be found in art. 36 et sequ. Art. 38 para. 1 contains the right of a party to perform procedural actions partly through a representative and partly personally.

### II. Duty to communicate with the representative, para. 2

Para. 2 contains the duty of the public body to perform all procedural actions with the representative so far the party has appointed a representative. The public body is not allowed to perform these actions directly with the person which has the capacity to act for the party but must perform all actions with the representative, unless it is otherwise provided for by special law or in cases stipulated in para. 3.

A direct communication with the party personally is not strictly inhibited but cannot meet the requirements of para. 2. That means the public body must perform the procedural actions with the representative even if it has communicated with the party personally. For this reason, procedural actions must be notified the representative. If the public body has notified a decision to the party directly a deadline cannot start before the notification of the representative.

### III. Exceptions. para. 3

Para. 3 provides conditions for exceptions of the rule stated in para. 2. In cases provided for by law the public body is entitled to request the performing of one or more procedural actions by the party personally. This is necessary if the public body must get a personal impression of the person itself or of personal statements of a party especially during the administrative investigation (art. 77 ff.).

## Article 36 *Ex officio appointed representative*

1. The public body conducting the procedure shall suspend the procedure and ask the competent authority according to the law, to appoint the legal representative or as appropriate substitute him/her, respectively, when it ascertains that no legal representatives has been appointed yet for the party with no capacity or limited capacity to act or, it has conflict of interests with the represented party.

2. In the case provided in Paragraph 1 of this Article, if it is urgent and if the interest of the party so requires, the public body shall appoint a temporary representative to perform a specific procedural action, or till the appointment or substitution of a legal representative.

3. The public body conducting the administrative procedure may appoint a representative according to the provisions of Paragraph 2 of this Article in the following instances:

a) the identity of a party is unknown;

b) although the identity of the party is known, its notification is not possible;

c) the party is objectively unable to look after its interests and has failed to choose a representative;

ç) the party has no residence in Albania and has failed to choose a representative within the deadline set by the public body.

4. The public body shall immediately notify the party regarding the appointment of the representative. In the cases provided for in Sub-paragraphs "a" and "b" of Paragraph 3 of this Article, the public body shall notify the appointment of the representative through a public announcement under the provisions of this Code.

5. The representative appointed ex-officio, as per Paragraph 2 and 3 of this Article, shall participate and represent the party in the entire administrative procedure, or only in the procedural action, for which it has been appointed, until the appearance of the party or of the representative appointed by the party.

## A. General introduction

### I. Content and purpose of Art. 36

Article 36 is a complex and multiple purpose norm, in general it could be said that it regulates the obligation of the public body to ensure proper legal representation of the party in the course of an administrative procedure. Para. 1 regulates the obligation of the public body to suspend the procedure in case of complete lack or inappropriate legal representation of a physical person with no full procedural capacity. Para. 2 stipulates the obligation of the public body to appoint a temporary legal representative for a physical person with no full procedural capacity in order to get the administrative procedure concluded without substantial delay, in case the latter might affect the persons rights or interests. While para. 1 and 2 deals with cases of impediments arising from legal reasons and related only to physical person with no full procedural capacity, Para. 3, deals with public body's, entitlement to appoint a temporary representative of a party with the procedural capacity if there is an impediment resulting from specific factual circumstances connected to the person.

The purpose of the normative content of art. 36 is to protect – by means of proper representation - such persons' subjective rights or legitimated interests that could be either positively or negatively affected by an administrative procedure because of their lack of ability to act themselves. It aims to make sure the party is given the opportunity to participate –through proper representation/representation- in the administrative procedure and exercise its procedural rights even in case of legal or factual impediments.

Relation to other CAP provisions: The article can partly be seen as a concretization of the principle of providing active assistance (art. 10). It should be noted that para. 1 and 2 of art. 36 deals with legal representatives. It is important to see the strict difference between legal representatives in art. 36 and the representation of a party as regulated in art. 35, 37, 38. Legal representatives are only required when a person has not the capacity to act (art. 34) or cannot act for itself by other reasons stipulated in art. 36, while it is up to any party to choose a representative (a lawyer or another assisting person).

### II. Constitution and EU Law

The obligation of the public body to decide on an ex-officio appointment of a representative for the party in one of the cases covered by Article 36 is derived from the principle of the rule of law, according to which such cases must not lead to a party's disadvantages for the pursuance of his/her rights in an administrative procedure; furthermore it derives also from para. 2 of rt. 41 of the EUCHFR as well as from Article 16 of ECGAB, which requires the participation of the party in the administrative procedure.

### III. Legal consequences of art. 36

Para 1 and 2: The public body conducting the proceeding, is obliged, to suspend the procedure and ask the competent authority to either appoint a legal representative if no such representative exists for the incapable party or to substitute a legal representative by another one, if the existing one has a conflict of interest with the incapable party. If it is urgent and in the interest of the party, the public body is obliged to ex-officio appoint a temporary representative.

Para. 3: In case of person are hindered to participate in an administrative procedure because of a factual impediment and if in the interest of the party/public interest the public body may, on its discretion, appoint also a temporary representative to perform a specific procedural action in the procedure.

### IV. Relation to previous CAP

There are no similar provisions in the previous CAP.

### V. Scope of application

Art. 36 applies to any type of administrative procedure and covers any stage of such procedure including enforcement measures as well as the review of an administrative action by administrative legal remedies.

## B. Ex officio representative in detail

### I. Suspension of the administrative procedure in case of lack or improper representation (para. 1)

Para. 1 stipulates the obligation of the public body to suspend an ongoing administrative procedure (legal consequence) with the aim of giving the opportunity to the "competent authority" to appoint a legal representative

for the party or substitute an already appointed legal representative. It also regulates the legal precondition upon which fulfilment such an obligation becomes effective.

## 1. Legal preconditions

- a) Party has no capacity or has only limited capacity to act in an administrative procedure

For the explanation of the procedural capacity in an administrative procedure see above the comments on para. 2 of art. 34.

- b) Party has no legal representative

The provision refers to physical persons only, meaning to minors or to persons with special conditions. Usually, legal representatives of minors are their parents. The situation of minors not having legal representatives could occur for example, when parents (or other legal representatives) died or were deprived of their guardianship over a minor and the competent authority did not yet appoint a new legal representative. Another situation fulfilling this legal requirement is the loss of the (full) capacity to act in an administrative procedure due to the special conditions that is not only of temporary but of permanent nature, and a legal representative was not appointed yet or when the one appointed has died.

- c) Existing legal representative is in conflict of interest with the represented person:

Alternative to the b) condition, there might be cases when a person with no procedural capacity has a legal representative but the latter has conflicting interest with the former in the respective administrative case. The provision goes in line with the Code of Family (art. 2748 and pp): in cases of conflict of interest between the tutor and the represented person the Court should assign a special tutor, to legal represent the person only in the situations, related to which the conflict of interest exists.

Neither does para. 1 of art. 36 define the concept of conflict of interest, nor can the list of legal impediments in art. 30 be used as interpretative guide for the understanding of this concept. However, the objective possibility of a direct or indirect personal interest of the legal representative in a certain outcome of the on-going procedure disadvantageous to the represented party could at least be an indicator for the public body to take a conflict of interest into consideration (*Examples: i) A is the son and legal representative of his mentally ill father B. In previous times B has appointed his daughter C as heir of his piece of land. The public body initiated an administrative procedure with the aim to impose a construction ban on B's piece of land. A owns and lives in the house built on the adjacent piece of land. So far A has been using B's piece of land as a playground for his young children and a horse paddock for two ponies. ii) The legal representative and the represented party are competitors in an administrative procedure related to subsidies or a licence applied for.*)

In addition to an objective possibility for the existence of a conflict of interest, if it results that the legal representative repeatedly acts, on the course of the procedure, to the disadvantage of the represented person, the existence of conflict of interests can be reasonably assumed. On the other hand, a single failure of the legal representative might be a signal to be further investigated by the responsible official, but would not yet suffice to regard this single occurrence as evidence for a conflict of interest.

In the end it is left to a case-by-case appreciation of the public body (meaning of the "responsible official" – see art. 43). In his/her appreciation, the responsible official should take into account the major protective purpose of this regulation, namely to provide proper protection of the interests of the incapable person in the on-going procedure.

## 2. Legal consequences of para. 1

- a) Obligation of the public body to suspend the procedure and request the appointment of a legal representative.

The fulfilment of the legal preconditions triggers the obligation of the public body conducting the proceeding to suspend it and ask the competent authority to either appoint a legal representative if no such representative exists for the incapable party or to substitute a legal representative by another one, if the existing one has a conflict of interest with the incapable party. The decision to suspend the procedure and request the appointment of a legal

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8 Art. 276 of the CoF stipulates: The court should assign a special guardian when: a) there is a conflict of interest between the minor and the parents or between the minor and their guardian when they are involved in legal transactions between themselves; b) there is a conflict of interest between the minor brothers and sisters who have the same guardian or when they are involved in legal transaction between themselves.

representative arises from a circumscribed power and is not a matter of the public body's discretion. The wording ("shall suspend and request") is imperative and clearly denotes an obligation.

In addition para. 1, makes clear that the public body has no competence to appoint a legal representative itself. It is up to the special law (which in this case is the Code of Family for both minors and the adults to whom it is removed or limited the ability to act<sup>9</sup>) which authority has competence to do so.

The request can be either a request in the sense of art. 58 in case the assignment of the legal representative is under the competence of an administrative organ<sup>10</sup> or a request according to art. 275 of the Code of Family given the fact the competence to assign the legal representative or substitute him/her with a special guardian/tutor is under the competence of the court of law. It should be noted that the special tutor substituting the existing legal representative is entitled to represent the interest of the incapable persons only in the specific procedure (art. 278/1 of CF)

The public body's request in accordance with para. 1 is to be seen as a special case (or *lex specialis*) of application of art. 66, para. 1 (Preliminary issues). Ensuring proper representation of the not (fully) capable persons is a "preliminary issue" under the competence of another public body or court of law, which resolution is a precondition for the continuation of the administrative procedure. Thus, the suspension of the administrative procedure can be decided on immediately upon the initiation of the proceeding, but the measure might also be undertaken at any stage of it when one of the grounds appears (and preconditions fulfilled).

b) Duration of suspension and its impact on the deadline for the conclusion of the administrative procedure

Given that art. 36 does not regulate explicitly the duration of suspension, per consequence the *lex generalis*, which in this case are the provisions of art. 66 shall apply. According to the latter (art. 66, para. 1) the suspension shall last till the ground that triggered it shall disappear, meaning till the decision of appointing a legal representative becomes definitive and notified to the public body conducting the administrative procedure.

The Code does not regulate either the case, when the requested authority (administrative body or court) does not react within an acceptable period of time. This situation could block the whole procedure to the detriment of both the individual interests of the parties and the public interest. In cases of extraordinary urgency para. 2 become applicable.

c) Further consequences/sanctions of non-compliance with the obligation by the public body.

The failure of the public body to suspend the procedure is a procedural defect that leads to unlawfulness of the final result of the procedure, because the procedure was initiated by a person lacking the capacity to act in the procedure or because it was conducted with the participation of a person lacking the capacity to act or improperly represented in the procedure.

## II. Ex officio appointment of a temporary representative (para. 2)

Para. 2 stipulates an exception of para. 1. Whilst according to para. 1 the public body conducting the procedure shall involve the authority usually competent for appointing legal representatives (be it an administrative body or a court), para. 2 stipulates, by way of exception, that in cases of urgency and if it is in favour of the party the public body itself is obliged (nota bene: the wording "shall appoint" is imperative: denoting the obligation) to appoint, ex officio, a temporary representative, in order to safeguard the interest of the not (fully) capable. The legal preconditions of para. 2 are as follows: 1) application of para. 1 and 2) Urgency and the interest of the party.

### 1. In the case described in para. 1

By reference to the "cases in para. 1" the application of para. 2 requires the existence of the following same preconditions as per the application of para. 1, meaning the following:

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<sup>9</sup> It should also be noted that in accordance to art. 308 of CF, the provisions for minors (of the CF) shall also applied for the guardianship of persons (adults) to whom the capacity to act is removed or limited (by a court decision).

<sup>10</sup> In accordance with art. 271 of the Code of Family, the Guardianship of a minor that has no relatives willing or able to exercise custody duty may be awarded, by the court, to a public or private institution licensed for the care of children. In this case the director of the institution shall delegate to one of its employees the right to exercise guardianship of the minor. Given this provision is might be possible for the public body to conduct the procedure, to request to the respective public body (to the director of the institution) the temporary substitution on the Guardian or the assignment of an special guardian (another employee) for to legal represent the minor in the specific administrative procedure.

- a) The party has no capacity or only limited capacity to act in an administrative procedure (see above B/I.1.a).
- b) The party has no legal representative or the existing legal representative is in conflict of interest with the represented person (see above B/I.1.b and B/I.2.c).
- c) The public body previously or concomitantly should have or should suspend the procedure and request to the competent authority the appointment or substitution of the legal representative

This precondition results from the explicit reference to para. 1 as well as the wording of para. 2 itself “*till the appointment or substitution of a legal representative*”. Both denote the legislator’s assumption that para. 2 with its exceptional character applies only in parallel to the rule of para. 1.; otherwise the public body could easily and always circumvent the regulation of para. 1 by appointing only temporary representatives.

## 2. If urgent and in the interest of the party

Urgency and the interest of the party are worded as cumulative preconditions. Urgency of a procedural action is deemed to exist, when the measure does not tolerate being delayed without the probable consequence that a relevant damage for the party will occur. The possible danger that could occur to the party in case of a delay of the procedural action can be of legal as well as of factual nature, but needs to be of certain seriousness. The establishment of the interest of the party is always to be done in the light of the specific need of legal protection of a (not) fully capable person.

## 3. Temporary representative

The representative shall be given only temporary powers. The power can be defined either: a) by determining one (or more) specific procedural action(s) (the wording does not exclude any special action) or b) for the entire procedure.

It should be noted that the public body has no discretion to opt between alternative a) and b). Alternative b) is compulsory if required so by urgency and interest of the party. In addition in the case a) the appointment terminates automatically with the performance of the specified procedural acts and or action. Furthermore in both cases a) and b) the appointment terminates automatically upon the assignment or substitution of the legal representative, by the competent authority.

## 4. Legal consequences of para. 2

That legal consequence of para. 2 is that the public body is obliged to *ex-officio* appoint a temporary representative, if the legal preconditions are fulfilled.

The Code does not explicitly specify how a temporary representative shall be identified and assigned. Given the situation, from other countries experiences, the following solutions may be suitable and in line with the normative purpose of art. 36:

- For the task of a temporary representative the public body may identify either a volunteering relative or any other suitable private person, if necessary on the basis of an administrative contract regulating among other details for the task the reimbursement of expenses associated with carrying out the task. For an administrative act imposing an obligation on a private person as temporary representative there wouldn’t be an authorisation by law as required according to para. 2 of art. 4 in connection with art. 109, para. 1, lit. ç).
- As a last resort and in cases when the urgency of the case does not allow a longer period of time for identifying a private person, the public body may commit a civil servant from the body to act as temporary representative when the impartiality of the civil servant is ensured to act fully in the interest of the party.

## III. Ex officio appointment of a temporary representative in special cases of factual impediment to participate in the procedure (para. 3)

### 1. The cases of para. 3.

Para. 3 covers additional powers of the public body, which differ from those according to para. 2. The power to *ex officio* appoint a temporary representative in the case of para. 3 does not constitute an obligation, but rather a prerogative. In addition it does not concern persons with no or limited capacity to act, or whose legal representatives are in conflict of interest, rather persons different from them. The powers of the public body have one thing in common with the powers according to para. 2: the fact that they may be exercised upon conditions of urgency and if the interest of the party so requires.

The group of persons of para. 3 are parties that cannot participate in an administrative procedure, be it temporarily or even during the whole procedure because of a factual impediment (whether objective or not). The provision distinguishes the following four different case groups:

- a) The identity of the party is unknown (lit. "a")

There might be cases the identity of the party is not known and there is an urgent need to initiate, continue or conclude an administrative procedure. Example: A private building left unmaintained constitutes a serious risk for people or neighbouring buildings and it is not possible to identify the owner for initiating an administrative procedure with the aim to obligate him/her to undertake the necessary technical safeguards.

- b) The identity of the party is known but the communication with the party is impossible (lit. "b")

This provision is of practical relevance if the address of the party's permanent or temporary residence is impossible to be found out. The concept "impossible" requires more than some inconvenience or efforts on the part of the public body. On the contrary, "impossibility" shall be established only after carrying out considerable investigation, unless investigation measure would be unacceptably expensive and time consuming.

- c) The party is objectively prevented from procedural action and has not appointed timely a representative (lit. "c")

This would be for example the case, when the party is in hospital and laying on the operation table or fallen in coma.

- d) The party resides outside Albania and has not appointed a representative within the deadline established by the public body (lit. "ç")

The case provided by lit. "ç" is different from the previous cases. Here the party is identified, the public body can communicate with him/her and has requested the assignment of a (temporary) representative (for instance to perform an urgent procedural action), but the party has not assigned such a representative within the set deadline.

## 2. Legal consequences of para. 3

For the legal consequences para. 3 refers to para. 2 (*"may appoint a representative according to the provisions of Paragraph 2 of this Article"*). Per consequence, it results the following: a) the representative could be appointed for one/more determined procedural actions or for the entire procedure; b) the representative powers should be temporary, meaning limited in time to the performance of the action (s) or appearance of the party or its appointed representative (para. 5), and c) the measure is at the lawful discretion of the public body. Here, not only the interest of the party but also the public interest in conducting the procedure is of relevance for the exercise of discretion.

The power of ex officio appointment of a temporary representative does not constitute an alternative to the obligation of the public body to notify parties about the procedure that it is conducting. The public body is obliged to take all necessary steps, unless they are unacceptably expensive and time consuming, to identify and/or to communicate with the parties about the procedure. In case the notification and/or participation of the party to the procedure is not possible for the reasons enumerated in para. 3, the public body has to take into consideration the possibility of conducting the procedure as provided for in para. 3. Para. 3 requires from the public to demonstrate why the party falls within one of its categories, why the case constitutes a matter of urgency and why it is in the interest of the party to continue the procedure by appointing an ex officio temporary representative. On the other side, it seems logical from the wording of para. 3, that the public body, while using this discretionary power, has to legally base even its decision not to opt for the appointment of an ex officio temporary representative.

## IV. Notification of appointment of an ex officio representative (para. 4)

Para. 4 is applicable to any measure taken by the public body in accordance to para. 1 to 3, i.e. the party is to be notified about the suspension of the procedure and the request to appoint a legal representative (para. 1) and the appointment of a temporary representative (para. 2 and 3) respectively.

For the form of notification the rules/procedure Part VII of this Code applies. By way of exception in the cases foreseen by para. 3, lit. a) and lit. b), because of specific circumstances, implied by the impossibility of communication, the provision obliges the use of a specific form of notification "the public delivery" regulated by art. 162, which is more appropriate in these circumstances (rather an assumption of notification).

## V. Limitation powers of the ex officio representative (para. 5)

Para. 5 clarifies that the ex officio appointed representative shall be given only temporary powers. The power can be defined either: a) by determining one (or more) specific procedural action or b) for the entire procedure. In both cases the appointment automatically ends upon when a) the representative is appointed or substituted by competent

authority (in case of para. 2)11 or b) once the party him/herself or the representative appointed by the party actively participates in the procedure (in case of para. 3

#### Article 37 Joint representative

1. Unless otherwise provided for by law, two or more parties may jointly participate in the same administrative procedure. In such a case, the parties may choose one of them to be their joint representative or may choose another joint representative, as per the provisions of Article 38 of this Code.
2. Even when they choose one of them as a joint representative, each of the parties may personally participate in the administrative procedure and may submit statements and exercise the appeal remedies independently.

#### A. General Introduction

##### I. Content and purpose of art. 37

Art. 37 regulates the possibility of two or more parties with the same identical interests, in one unique administrative procedure to be represented through one common/joint representative, which could be one of them or an appointed representative (proxy).

Art. 37 is part of the institute of voluntarily (not-legal) representation which is stipulated under art. 38 and it is a concretisation of the latter in the specific cases of parties appearing jointly in a procedure.

##### II. Legal consequence of art. 37

The legal consequences of art. 37 are in fact the legal consequences of the fact the party is being represented in the procedure and are stipulated by para. 2 of art. 35. "In case where the party acts through representation, the public body shall perform the procedural actions with the representative", unless of course: i) in accordance with a special law the party is requested to conduct personally a certain procedural action (art. 35, para. 3), or ii) the party chooses to do so (art. 37, para. 2).

##### III. Relation to previous CAP

There are no provisions with the same or similar regulatory content in the former CAP.

##### IV. Scope of application

Article 37 applies throughout the administrative procedure including all of its phases.

#### B. Joint representative in details

##### I. The joint representative (para. 1)

First sentence of para. 1, is in fact an introduction to the rest of the paragraph (second sentence) in the sense that it stipulates the preconditions for the application of the latter. It recognises the possibility of two or more parties to appear jointly in an administrative procedure. The above-mentioned possibility requires three preconditions:

- it should be about one unique administrative procedure;
- a special law should not hinder the joint appearance, and
- although not explicitly stipulated, the overall wording of art. 37, implies parties having the same identical interests (ex: imagine for instance the inheritors of deceased politically ex-convicted and prosecuted person, submitting a request for compensation).

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11 The reference to para. 2 seems somehow erroneous because the powers of the ex officio appointed temporary representative in case of para. 2 are defined in the last part of the paragraph itself and an additional regulation would be superflue; the reference to the "appearance of the party or of the appointed representative" does not apply in case of para. 2.

The second sentence, stipulates that (if these preconditions are fulfilled) the parties have the right to appoint a joint representative (see art. 38 below), which could be whether: i) one of them or ii) a third external person. The provision aims the procedural economy (for both sides, the party and for the public body conducting the procedure).

The reference to art. 38, in the second sentence, should be read as a reference not only to the applicable “form” of proxy of the authorised representative but as reference to the respective rules on the authorised representative stipulated across the art. 38 which equally applies in case of a joint representative.

## II. The position of the party represented by a joint representative (para. 2)

Paragraph 2, clarifies the position of party in the proceeding in the case they are represented by a joint representative. Each party preserves the right to participate personally in the proceeding, to submit statements and of course to exercise his right to administrative remedies separately.

### Article 38 *Appointed representative*

1. The party may appoint one representative in order to perform some or all procedural actions of the administrative procedure, except where it is required that the party personally gives a statement or performs another procedural action.

2. The appointment of the representative under Paragraph 1 of this Article shall be done in writing and be verbally declared before the public body and it shall be registered by the latter, or in any other appropriate form.

3. The appointment of the representative shall be valid if it is done in the form specified in Paragraph 1 and 2 of this Article. This form shall be applied also in case of appointing a joint representative for the parties, under the provision of Article 37 of this Code.

4. The party, when it deems necessary, may personally perform procedural actions or give statements, although it has appointed a representative. The party, which is present when the representative gives a verbal statement may, immediately, modify or revoke that statement.

## A. General Introduction

### I. Content and purpose of art. 38

Article 38 stipulates the general principle of freedom of representation in the administrative procedure and the general rules applicable to proxy representation, in particular it regulates the following:

- the type of representation by proxy (general or special representation);
- the form of the proxy, as well as
- the rights reserved to represented party during the procedure.

### II. Legal consequence of art. 38

The legal consequences of art. 38 are in fact the legal consequences of the fact the party is being represented in the procedure and are stipulated by art. 35, para. 1 and 2. “In case the party acts through representation, the public body shall perform the procedural actions with the representative”, unless of course: i) in accordance with a special law the party is requested to conduct personally a certain procedural action (art. 35, para. 3) or ii) the party chooses to do so (art. 38, para. 4).

### III. Relation to previous CAP

There are no provisions with the same or similar regulatory content in the former CAP.

### IV. Scope of application

Article 38 applies throughout the administrative procedures including all of its phases.

## A. Representation by proxy in details

### I. The freedom to choose and the types of proxy representation (para. 1)

Para. 1, stipulates, in accordance with the general principle of freedom of representation, that a party (meaning: with legal capacity or its legal representative) has the right (*nota bene*: not the obligation – it reads: “may”) to be represented in a given administrative procedure by a consensual representative appointed for this purpose.

The provisions also envisages the two possible forms of appointing a proxy, it could be:

- specific: meaning for one or more determinate procedural actions in a given administrative procedure, or
- general: meaning for the entirety of that given administrative procedure.

The provision, also includes a reminder of art. 35, para. 3 that, because of specific public interest, a special laws might request certain procedural actions (example: submission of a declaration or any other procedural action) to be performed by the party in persona only.

### II. The form of proxy (para. 2)

Para. 2 deals with the form of the appointment of the representative. The regulation is rather flexible and liberal (in line with the rest of this Code), it stipulates that the act of appointment (the proxy) might be made in written or declared verbally in front of the public or through any appropriate mean. The provision is an application by analogy of the approach taken already by art. 58 of this Code.

It should, also, be noted that the same rules shall also apply for the termination or withdrawal of the proxy: it could be done in writing, verbally declared in front of the public body conducting the procedure or in any other appropriate form which clearly denotes the will of the party to terminate the proxy.

### III. The form of proxy in case of a joint representative (para. 3)

Para. 3, basically extends the application of para. 2 to the appointment of the joint representative (regulated by art. 37) by stipulating that the same rules on the form of the proxy are also applicable to the appointment of the joint representative.

### IV. The rights reserved to the party represented by proxy (para. 4)

Para 4 consists in two sentences which are both concretisation of the general principle of freedom of representation: the representative never has the status of a party, being a voluntarily instrument the representation is “at the disposal of the party” which means that the party even though represented reserves full right to conduct the procedure as it likes. Para. 4 stipulates two exemplificative forms of such reservation:

- the party is free to perform personally any kind of procedural actions it deems necessary, and
- the party, if present, could withdraw and revoke any verbal declaration of the representative.

First sentence, confirms the right of the party to appear personally in the course of the proceeding, when deemed necessary but it, by performing personally the required procedural actions.

Second sentence, stipulates the “general right of the party to contradict” the verbal declarations of his representative, which brings along the obligation of the public body conducting the procedure to take into account the declarations of the party instead of that of its representative in these cases.

It should be noted that the two above-regulated forms should be read as exemplificative and not exhaustive, the principle of freedom of representation also implies the party has other available instruments to “dispose” or “contradict” the actions of the representative to which should correspond the obligation of the public body conducting the procedure to take into account the actions of the party instead of the one of its representative.

### V. Other aspects of representation

Art. 38 does not comprehensively regulate the representation, it focus only on regulating its specifics in the administrative procedures. The rules of art. 38 shall be completed with the respective rules of representation in acc. to the Civil Code, unless of course the letter or the spirit of art. 38 provide otherwise.

Article 39 Assistant

1. A party may come to the public body in a hearing session accompanied by an assistant, who assists him/her in specific matters, necessary for the administrative procedure.
2. Any statement of the assistant shall be deemed as made by the party, when this is expressly requested by him/her. At any case, the party may object the statement of the assistant on the spot.

A. General Introduction

I. Content and purpose of art. 39

Art. 39 stipulates the possibility of a party to appear in a verbal hearing accompanied with an expert assistant.

It regulates for the first time in the Albanian legislation the possibility of a party to appear in a verbal hearing with an expert assistant. In different special administrative procedure the party might need to be assisted, during a meeting with the public body, by an specialised expert which could assist him in expressing professionally his point of view (for example an accountant during a hearing by the tax administration, an architect during the procedure related to a construction permit, or else).

II. Legal consequence of art. 39

The public body is obliged to allow the party is accompanied and assisted and consider the declaration of the assistant as done by the party, except when contradicted on spot by the latter.

III. Relation to previous CAP

There are no provisions with the same or similar regulatory content in the former CAP.

IV. Scope of application

Article 39 applies through the administrative procedures including all of its phases.

B. The assistant in details

I. Assistance in a hearing session (para. 1)

Para. 1 one recognised the right of party to be accompanied in a verbal hearing with an assistant. First it should be noted the term "hearing session" should be interpreted in a broader prospective, it should be understood as referring to any kind of face-to-face contact of the party with the public body and not only to the exercise of the right of being heard (in acc. to art. 87-89). Secondly, the assistant only assists the party in that specific contact and has no any further additional representation powers.

II. The role and powers of the assistant (para. 2)

Para. 2 defines the role of the assistant, which is not the same as the one of the representatives. Unlike the appointed representative the assistant/expert cannot set procedural actions but may give substantial expertise (during the hearing), by making declaration (ex: presenting facts, giving explanation in issues of facts or law, etc.) which shall be deemed to have been put by the party itself.

The same as in the case of representation, the party reserves the "general right to contradict" the verbal declarations of the assistant, which comes along the obligation of the public body, conducting the procedure, to take into account the declarations of the party instead of its assistant in these cases.

Article 40 Capacity for being representative or assistant

Every person who enjoys full legal capacity to act, under the Civil Code, may act as representative or assistant, save for cases the law has provided for otherwise.

A. General Introduction

I. Content and purpose of art. 40

Art. 40 regulates the capacity of being representative or assistant. The requirements on the capacity aim to ensure the party is “properly” represented and assisted during the administrative procedures, by excluding the possibility of representation and/or assistance by the subjects that do not fulfil the minimal condition of “full capacity”.

II. Legal consequence of art. 40

Art. 40 does not explicitly stipulate any sanction for the cases of representation/assistance by subjects that do not fulfil the condition of full capacity. Though, in accordance with the general rules the actions of representation/assistance by such subjects should not be taken into account in the respective administrative procedure: in accordance with the general principle of “active assistance” (art. 10), the public body conducted the administrative procedure should at least inform the party (art. 10, para. 1) in case of representation by subjects that do not fulfil the condition and in addition should ensure that party’s ignorance - which is denoted by such event does-, not deteriorate its right and interests (art. 10, para. 3).

III. Relation to previous CAP

There are no provisions with the same or similar regulatory content in the former CAP.

IV. Scope of application

Article 40 applies to any kind of representation whether *ex officio* appointed representation (in acc. to art. 36) or representation by proxy (in acc. to art. 38 and 37). In addition it applies to the assistants (art. 39).

B. The capacity to be a representative or assistant in details

Art. 40 explicitly provides that any person having full legal capacity to act may act as a representative or expert assistant of the party. The regulation of the normative substance of “full legal capacity” is, instead, resolved with an explicit reference to the *lex generalis* on this subject matter which is the Civil Code.

In accordance with the latter, a natural person acquires the full legal capacity to act at becoming 18 years old (art. 6/1); there are two exception to this rule: i) by way of exception the full capacity to act is acquired through marriage by a woman under the age of 18 (para. 2 of art. 6 of CC) and ii) an adult full capacity to act might be restrained or limited (under the conditions of art. 10 of CC) by a court decision.

In addition, the representative could also be a legal person, in this case, the Civil Code (art. 29) provides that a legal persons acquires the capacity to act, with is incorporation, whilst in case the law provides the obligation of registration - from the moment of such registration.

Finally it should be noted that the representant and/or the assistant could be a moral person other than Albanian citizen or a legal person lawfully established in accordance with a foreign law.

## **CHAPTER II**

### **GENERAL PROVISIONS ON THE ADMINISTRATIVE PROCEDURE**

#### *Article 41 Initiation of the administrative procedure*

1. An administrative procedure shall be initiated either ex-officio or based on a request.
2. The ex-officio initiation of a procedure rests with the discretion of the public body. The public body shall be obliged to ex-officio initiate an administrative procedure in cases where:
  - a) a law or secondary legislation has provided for the initiation of the procedure,
  - b) the factual situation is such that requires the public body to initiate the administrative procedure for the protection of public interest.
3. The administrative procedure shall be deemed initiated:
  - a) with the performance of any procedural action by the public body in case of an ex-officio initiated procedure,
  - b) upon the submission of a request before the public body, in case of a procedure initiated upon request.

#### A. General introduction

##### I. Content and purpose of Art. 41

Art. 41 regulates the start of an administrative procedure in two aspects. On the one hand it stipulates how an administrative procedure can be initiated; for this art. 41 provides two alternatives: One alternative is the initiation ex officio, which means that a public body undertakes a purposeful administrative action on its own initiative, whereby the decision on the initiation is – as a rule - at the discretion of the public body, but in cases provided in para. 2 the body is obliged to do so. The other alternative is that a person having capacity to act acc. to para. 2 of art. 34 contacts a public body with the intention to request the organ's administrative action. On the other hand art. 41 also regulates the exact time, at which the procedure is deemed to have started.

The purpose of art. 41 corresponds to these two normative aspects. With the start of the administrative procedure an administrative law relationship is established between the public body and a concrete natural or legal person, in other words a person obtains the legal status of a party as defined in art. 33. As from this moment, either side of the relationship holds the procedural rights and obligations stipulated in this Code; the party for example obtains the right to inspect files (art. 45) or the right to be heard (art. 87) whilst the public body is set out the obligation to provide active assistance (art. 10).

The exact date and time of the start is also relevant for the calculation of deadlines. Example: According to para. 2 of Art. 91 in connection with para. 2 of Art. 56, the day of submission of the request is the day of the event triggering the starting of the deadline for the conclusion of an administrative procedure running against the public body begins.

##### II. Constitution and EU Law

The provision is a contribution to the concrete implementation of art. 48 of the Constitution "Everyone, by himself or together with others, may address requests, complaints or comments to the public bodies, which are obliged to answer within the time periods and under the conditions set by law, by entitling the party to initiate an administrative procedure, though submission of an request."

With the start of the procedure the party acquires also the Right to Good Administration stipulated in art. 41 of the ECHR. In particular, para. 4 of art. 41 of the ECHR presupposes the individual right of the citizen to initiate an administrative legal relationship.

##### III. Legal consequences

With the start of the administrative procedure (upon submission or alternatively upon performance of any procedural action by the public body) an administrative law relationship is established between the public body and a concrete natural or legal person.

This means - on the one hand – that the natural or legal person obtains the legal status of a party as defined in art. 31, i.e. from this moment holds the procedural rights and obligations stipulated in this Code.

On the other hand the public body is obliged to continue (or to “proceed”) the initiated procedure and finalise it by taking a decision on the “objective” of the request as the principle of decision-making (art. 16) stipulates.

If the public body does not act accordingly, i.e.. in case of inaction, the requesting party, upon expiration of the deadline for the conclusion of the administrative procedure, benefits from the silent-consent rule (art. 97) or is legitimated to appeal against the administrative silence (art. 138).

The rules of art. 56 and 57 apply for the calculation of deadlines only; they are not applicable to determine the exact moment of the beginning of the procedure. It follows from this that the submission of the request at the post office in case of para. 1 lit a. of art. 57 has deadline adherence effect in order to protect the party, whenever the compliance with deadline becomes legally relevant for the party-public body relationship. The procedure, however, starts no earlier than at the moment when the request reaches the public body’s letter-box or internal mailroom.

In case of non-compliance with the obligation to initiate a procedure ex officio or to perform a procedure initiated by request, the public body resp. the responsible official of the public body might be liable on criminal (misdemeanour), disciplinary and extra-contractual grounds (compensation of damages).

#### IV. Relation to previous CAP

The content of art. 41 deals with the same subject matter as art. 46 of the previous CAP did, but the new regulatory content is wider and the specification of the legal preconditions more precise. Para. 1 of the new art. 41 is almost identical with the wording of the previous CAP art. 46, whilst the para. 2 and 3 of the art. 41 are novelties.

#### V. Scope of application of the norm

The norm applies only to the first instance administrative procedure only.

#### B. Initiation of the administrative procedure in details

##### I. Initiation ex-officio or upon request (para. 1)

##### 1. Ex-officio initiation of an administrative procedure (1st alternative of para. 1)

Ex-officio initiation means that it is solely for the public body to initiate the administrative procedure, resulting from an internal administrative decision-making process. The right resp. obligation of a public body (see below under II.) to ex-officio initiation of a procedure is based on the principle of legality of public administration (art. 4). In cases of ex-officio initiated procedures the responsibility of the executive power to safeguard public interests is of primary importance, which is the reason why in these cases the body’s decision on the initiation is taken completely independently from the will of (future) parties. In this respect the ex-officio administrative procedure is distinguished from the administrative dispute, since the initiation of court proceedings is subject to the “principle of party disposition”.

##### 2. Initiation upon request of an administrative procedure (2nd alternative of para. 1)

The CAP does not explicitly define the request, whilst using this concept in numerous articles. However, a systematic interpretation based in particular on art. 58 – 65 (art. 61 – for example - clarifies, that some actions of communication undertaken by a natural person or legal entity such as “submission of opinions, explanations, comments, statements and submission of documents” are not requests in this sense) leads to the following interpretative elements:

A request in the meaning of art. 41 is:

- the expression of a certain demand of an individual natural person or legal entity,
- submitted to a public body
- with the content to ask the body for undertaking an administrative action,
- which is not yet subject matter of an on-going administrative procedure, and
- for which the requester claims to have the individual right or legitimate interest.

Typical requests triggering the obligation of the public body to deal with and decide on in an administrative procedure are the application for an authorisation or a licence or the application to get registered in the university.

As a rule, a request is of both material-legal as well as procedural-legal nature. Of course, primarily the request is directed to the issuance of an administrative act, conclusion of an administrative contract or performance of any other

administrative action; as such the request has got material-legal character. But any request always includes also the party's will that her/his request shall be dealt with through an administrative procedure, in other words includes also the expression of the intention to initiate a procedure, even if the party is not aware thereof.

The request defines the "object" of the procedure and thus determines, which legal provisions are applicable for the requested administrative action.

The public body is not permitted to modify the request, in contrast to the party, who is entitled to amend or withdraw the request until the issue of the first instance final decision (art. 64).

The legal character of a request and its effect of triggering an administrative procedure does not depend on the request's compliance with formal or material legal requirements. Whenever the expression of a will indicates the citizen's intention of submitting a request to the public body, in other words whenever an action of a natural person or legal entity can, with reasonable acknowledgement of all circumstances, be understood as the express of the intention of submitting a request, the public body shall respond to it by applying the procedural rules of this Code, even though it can be easily recognised that the request is legally inadmissible or unfounded be it for formal or material reasons.

The request is to be distinguished from a citizen's submission of information or complaints (denouncing's) about concrete facts or general circumstances, for which he/she suggests the public body's intervention. Those submissions cannot be seen as a request that opens an administrative procedure, unless the submitter claims to have a specific individual right or an individualized interest against the public body to be protected against the described situation.

A request opens an administrative procedure by law, in other words "automatically". The public body has no choice but is obliged to proceed, i.e. carry out a procedure in response to a request and come out with an explicit decision.

But even if a submission does not have the legal quality of a request, the submitter shall always be responded by the public body. This obligation directly derives from art. 48 of the Constitution. In addition the Code itself stipulates that at least the submitter shall be responded by the information about the reception of the submission (art. 60). In art. 10 is regulated whether or not the public body is obliged to give to the requester further assistance.

A submission that does not have the legal effect of initiating a procedure "upon request" might trigger the public body's legal obligation to ex officio initiate a procedure. (*Example: art. 25 para. 2 of the Law 10433/2011 "On the Inspection in the Republic of Albania" stipulates that "a non-planned inspection could be authorised on the basis of a petition or information received by third parties, if it creates (n.a: to the public body) a reasonable doubt for the breach of the legal requirements by a subject". However, the third petitioner does not become "a party" of the procedure. Art. 25 para. 3 of the Law 10433/2011 stipulates that such a person "...does not become party of the procedures"..., but nevertheless "...he should be informed on the results" of the procedure.*)

## II. Legal requirements of initiating an administrative procedure ex officio (para. 2)

Paragraph 2, is a complex norm, specifying the legal elements of an initiation of the administrative procedure ex officio. It establishes both: in the first sentence the general rule and in the second sentence two exceptions from this rule.

### 1. The rule: discretionary decision to initiate (1st sentence of para. 2)

As a general rule the initiation of a proceeding is at the discretion of the public body (on the lawful exercise of discretion see explanation on art. 11, above). The rationale is clear. On the one hand, the public body has the responsibility to safeguard the public interest and therefore is vested with administrative powers to satisfy this duty. On the other hand, occasions and grounds for administrative actions are so numerous, different and unpredictable that the legislator – as a rule - empowers the public body to decide in a concrete situation whether, when and how to intervene for the best protection of such an interest.

For the exercise of the discretion art. 11 establishes general legal limits, which apply directly to the discretionary decision stated in the 1<sup>st</sup> sentence of para 2. Furthermore, a systematic interpretation of art. 41, in particular of its para 1, leads to the special limitation that there is no space for an ex-officio initiation, if an administrative procedure requires the request of the party (*argumentum e contrario*). Finally, a discretionary initiation is also not admissible, if it is neither in a public interest, which to safeguard falls under the public body's field of competence, nor in a third party's interest, which the public body is obliged to attend to.

### 2. Two exceptions: compulsory initiation (2nd sentence of para. 2)

The second sentence establishes two exceptions from the rule.

a) Legally specified obligation

According to lit. a) the public body does not have the power of discretion, when material law, be it formal law or secondary legislation, explicitly provides legal preconditions, whose fulfilment obliges the public body to act.

b) Factual Requirement

Lit. b) obliges the public body to initiate an administrative procedure, whenever the factual situation requires the intervention of the public body for the protection of a certain public interest. In the latter case the space for discretion is reduced to only one decision/choice.

- Public interest is here the defined by those interests, which to serve fall in the scope of competence of the respective public body
- Factual situation is a situation that could lead to a disadvantage for the public interest, if the public body would not take action to change the situation.
- The legal term “requires” needs to be understood in a restrictive way, so that the exceptional character of this norm remains preserved. Therefore, not any kind of factual situation as well as not any public interest can oblige the public body to open a procedure, otherwise the public body would never have the power of discretion. It follows from this that the legal precondition “requires” is satisfied only if:
  - the public interest is of certain relevance, i.e. the potential disadvantage is not only of marginal effect, and
  - the factual circumstances make it seem very likely that the disadvantage will occur.

III. The determination of the moment when the administrative procedure starts (para. 3)

Para. 3, establishes for two alternative cases the rules to help defining the triggering moment of the start of the proceeding (for the relevance of the exact moment see explanations above under A. 1.).

3. Performance of any procedural action by the public body (lit. a) of para. 3)

a) Ex-officio initiated procedure

The procedure is initiated as a result of an internal, independent decision-making process of the public body (details see above B. I. 1.).

b) Performance of any procedural action

Procedural action is beyond any doubt the explicit decision of the responsible official recorded in a file note (art. 43) on the start of a concrete procedure. But the expressly uttered will to initiate a procedure is not required. The will can also be revealed by implication, when the responsible official carries out the first concrete step of the procedure with external effect, such as notification on the right to be heard (art. 87), inclusion of a third party (art. 33 para. 3), request of administrative assistance (art. 71) and gathering a statement of a witness (art. 80 para. 1 lit.a). A preparatory review of the legal frame work potentially applicable to a certain situation, internal meetings and discussions within the public body, or collecting information needed for the decision on whether or not a procedure is to be initiated related to a concrete situation do not meet the requirements of a procedural action because they lack any external effect.

4. Submission of the request (lit. b) para. 3)

Para. 3, lit. b) Stipulates that in case of a proceeding instituted upon request the moment of the submission of the request is the moment from which the administrative procedure starts. The term “submission” should be read in accordance with art. 59, however the exact timing of when the request is deemed as submitted is not explicitly stipulated in art. 59. Here the general rules on the receipt of declarations apply. Accordingly a request is received in the moment, once it has reached the sphere of control of the public body.

This means for verbal requests, that it is received in the moment, when it is uttered vis-à-vis an official, who acc. to art. 63 is in charge of registering the request. This will usually be the responsible official (art. 43), unless the public body has established a special contact point (office or person) for receiving verbal requests (see explanation on art. 63).

A written request has reached the public body’s sphere of control in the moment, when it was

- during office hours

- either deposited in the public body's letter-box
- or any other place determined by the body to collect documents
- or handed over to the responsible official (art. 43) or any other official of the public body in charge of receiving written requests.

A written request that was deposited after office hours reaches the public body's sphere of control with the beginning of the following working day's office hours.

A request that is sent electronically has reached the public body's sphere of control in the moment it is registered by the respective device for receiving messages, see art. 57 para 1 lit. d). The same applies for a written request that is sent by fax.

#### Article 42 Communication with parties

1. In cases when the administrative procedure is initiated by the public body, the latter shall notify all parties to the process on the initiation of the actions.
2. The notification under Paragraph 1 of this Article shall be made in writing or by a meeting with the party and it shall contain the following data:
  - a) e-mail and postal addresses of the public body, conducting the procedure and the official responsible for it;
  - b) information regarding the competence of the public body, the purpose of the procedure and the matters on which decisions will be made;
  - c) parties to the administrative procedure;
  - ç) information on the right to inspect the file and office or place where the file may be inspected;
  - d) information on the right of the party to be heard, manners and deadline for the exercise of such right;
  - dh) the date of starting the procedure and the deadline, within which the final decision will be made and notified, in case such a deadline is applied;
3. In cases where the notification is made through a meeting, the public body shall keep a record to document the action performed.
4. The public body shall have no obligation to communicate with the interested parties in cases where the case is a "state secret", according to the classifications made by law or, when in conditions of state of extraordinary situation, the communication may affect the effectiveness of the administrative procedure.

#### A. General introduction

##### I. Content and purpose of Art. 42

As explained, in accordance with art 41, one of the ways to initiate an administrative procedure, is the initiation ex officio by the public body. Accordingly, one of the first steps the public body should perform, upon the initiation of an administrative proceeding, is the identification of all the parties, specifically of the necessary parties and communicate to them the initiation of the proceeding, providing with the "necessary" information that would enable the party to properly participate in the administrative proceeding and to exercise the involved rights (such inspection of files, submission of opinions and explanation, the right of hearing, etc..).

Para. 1, regulates, the obligation of communication of initiation of an ex officio procedure to all the involved parties. Para. 2 and 3 regulates the form and the content of such a notification: such notification could be done through a written communication or in a summoned meeting with the party and should include all the necessary elements to enable the proper participation of the party in the procedure. Whilst para. 3 provides, as an exception, the cases of waiving such an obligation when the case involves information classified as state secret or under the conditions of expediency in case of extraordinary situations.

Purpose and relation to other CAP provisions: The communication of the initiation is the triggering action to ensure the participation of the parties in the administrative proceeding. It aims to alert the party on the initiation, by the administration, of an administrative procedure which (final result) might affect it in his rights and/or legitimated

interests as well as to inform such a party on its procedural right in the procedure and per consequence enables it to participate in the procedure with the aim of protecting such rights/legitimate interests.

## II. Constitution and EU Law

With the start of the procedure the party acquires also the Right to Good Administration stipulated in art. 41 of the ECHR, that finds its expression also in the principle of transparency stipulated in the ECGAB.

## III. Legal consequences

Immediate consequences for public body and party: In any administrative procedure initiated ex officio the public body is obliged to notify to the parties the initiation of the procedure.

- Upon receiving of such notification, the notified subject is formally recognised the position of the party and is entitled to participate in the procedure and exercise the involved rights (inspect the files of the procedure, submit comments and explanation and to be heard, etc.).
- The notification should be comprehensive and include at least all the information explicitly mentioned in para. 2.
- The obligation of the notification could be waived only in two cases explicitly regulated by para. 4.

Further consequences/sanctions of non-compliance with the obligation of notification: In case the public body does not comply with the obligation the administrative procedure is defective (the rules on the procedure are not observed) and per consequence it might lead to the unlawfulness of the output of such defective procedure. An incomplete notification would, also, equal as the lack of the communication (as the case might be) and might have the same sanction.

## IV. Relation to previous CAP

The regulatory content of art. 42 is very similar with art. 47 of former CAP. The obligation of notification and the exceptions from this obligation are regulated in very similar way, while the form and the content of the notification, is regulated in much wider and comprehensive way in the new provision.

## V. Scope of application of the norm

Art. 42 applies to the first instance administrative procedures and in regard to the administrative procedures initiated ex officio only. It also applies in the case of the procedure of annulment and repeal (regulated by Chapter Part V, Chapter I, section 4)

### B. Communication to the parties in details

#### I. Obligation of notification of initiation of an ex officio procedure (para. 1)

Para. 1, stipulates the obligation of the public body to communicate (notify) the initiation of an administrative procedure to all the parties in the procedure. The preconditions for the obligation of communication are two: i) an administrative procedure already initiated ex officio and ii) the obligation of notification is not excluded in the presence of one of the grounds foreseen by para. 4.

##### 1. An administrative procedure was initiated by the public body

The wording used by the legislator: “when the administrative procedure is initiated by the public body” suggest that the provision is applicable only in case of an administrative procedure initiated ex officio (see the comment on art. 41, first alternative of para. 1). Such procedure shall be deemed as instituted upon performance of any (first) procedural action of the public body that has no a mere internal preparatory character (for details see the commentary on art. 41, para. 3).

##### 2. The obligation of notification is not excluded in the presence of one of the grounds for exception (negative precondition)

The administrative procedure in question should not be such as to involve an “extraordinary situation” or “state secret” foreseen by para. 4, which might exclude the obligation of notification (see the commentary on para. 4).

##### 3. Notification to all the parties

The public body is obliged to notify to all the parties of the procedure. For more detail on the concept of the party pls. refer to the commentary of the art. 33.

#### 4. Responsibility and timing for notification of initiation

In addition it should also be noted that the obligation of communication of the initiation of the procedure, should be performed as soon as possible upon the initiation of the procedure (with no delay after the public body has checked this competence and identified the necessary parties of such procedure). The duty to perform the notification relies to the “responsible official”, which in accordance with art. 43, para. 4 is the one responsible to conduct the entire procedure.

#### 5. Immediate consequences for public body and party

In the presence of the above preconditions the public body has the obligation to notify to the parties the initiation of the procedure. Upon receiving of such notification, the notified subject is formally recognised the position of the party and can participate in the procedure and exercise the involved rights (submit comments and explanation, inspect the files of the procedure, etc.).

### II. Form and content of the communication (para. 2)

Para. 2, regulates the form and the content of the communication of initiation of an ex officio procedure.

#### 1. Form of the communication

The notification might be performed in written form communication (notified accordingly) or orally in a meeting convened with the parties. In choosing the form (among the two identified) of communication the public body should be led by the principles of de-burocratization and efficiency (art. 18).

#### 2. Content of communication

The aim of the communication, is not just to alert the party of the initiation of a proceeding of its interest, but in same time to provide it with a set of necessary information to enable him to easily understand and exercise its procedural rights during the course of the proceeding (in other words to give to the party the opportunity to effectively participate in the procedure). Para. 2 includes a comprehensive set of information needed by the party to participate in the proceeding, in a succinct presentation these information are:

- What is the initiated procedure about? (Information on the objective of the procedure and issues to be decided litt. “b”);
- Who is in charge of conducting the procedure and why? (Information on the identification of the public body, the responsible official, information on the competence, respective contacts litt. a and b);
- Whom else is involved in the procedure? (information on other parties litt “c”);
- The rights of the party and how can they be exercised? (information on the right to inspect the files, and the place to do that; the right to be heard and the manners and deadline for its exercise as well as the respective contacts, lit “d”) and
- When can the party expect a final decision? (Information on the initiation of the procedure and the deadline for its normal conclusion, if applicable lit “dh”).

#### 3. Immediate consequences for public body and party

The public body is obliged to communicate the initiation in the above mentioned form and with the above mentioned content. An incomplete notification would be the same as the lack of the communication and might affect the lawfulness of the administrative act.

### III. Communication in a meeting (para. 3)

Para. 3, stipulates that in case of verbal communication via a meeting, the procedural action of communication should be documented in the respective minutes (the minutes of the meeting)

#### 1. Documentation of the verbal communication

Para. 3, stipulates that in case of verbal communication in a meeting summoned on purpose, the procedural action of communication should be recorded accordingly in the respective minutes. The provision is necessary to ensure the completeness of the proceeding’s files, in case of an eventual legal remedy (administrative of judicial).

## 2. Legal consequences

The public is obliged to keep the minutes of the communication

### IV. Exceptions from the obligation of communication (para. 4)

Para. 4, regulates two exceptional cases in which the public body is not obliged to notify to the parties the institution of an ex officio procedures.

#### 1. The issue is “state secret”

The wording “issue” is rather indeterminate, it suggests that the information involved in the administrative procedure should have been classified as state secret and contains an almost explicit reference to the special legislation (Law no.8457, date 11.02.1999 “on the information classified state secret” and its secondary legislation). In accordance with the latter (art. 2) “state secret, means information classified in accordance with this law, which unauthorized exposure can threaten the national interest” . The precondition for waiving the obligation of communication in this case are the following: i) the administrative procedures in question should involve certain sensitive information ii) such information should be of the kind that the authorised exposure can threaten the national interest, and iii) such information should have been previously classified as state secret by the competent organs and in accordance with the procedures laid down in the respective law.

#### 2. Under the conditions of “extraordinary situation”, the communication may affect the effectiveness of the administrative procedure

The application of the second ground involves to be accumulatively fulfilled the following preconditions: i) the presence of an “extraordinary situation” and ii) the possibility that the communication could affect the “effectivity” of the proceeding.

The mentioning of the “extraordinary situation”, makes the provision very restrictive and applicable exclusively in case of an “extraordinary situation” proclaimed by law in accordance with art. 81/2/dh of the Constitution. In addition to an officially proclaimed extraordinary situation the communication should be assessed as to be able to affect the “effectivity” of the administrative procedure. The wording “effectivity” suggest not only the urgency of the public body to proceed with the procedure and the respective administrative action, but in the same time that the performance of notification should be able to affect/impede the desired effect of the procedure.

#### 3. Discretionary decision to waive the communication

The wording of para. 4 (first alternative) “The public body is not obliged to communicate to the parties” is rather vague and seems to suggest (in a per a contrario interpretation) the existence of the discretion of the public body on waving of such an obligation even in the presence of one of the above-mentioned grounds. It should be noted, that these wording is rather problematic and needs a restricted interpretation in relation to issues classified as “state secret”: CAP also explicitly foresees the principle of protection of state secrete (art. 7), which corresponds to the obligation of the public body to protect such information. The wording should be read as an application of the principle of proportionality and lawful exercise of the discretion, meaning that the notification could be waived only if and to the respective extent strictly necessary for the protection of the involved state secret.

#### 4. Additional

Although not explicitly mentioned in the provision, it is important to note, that in both cases the decision of waiving the obligation of communication should be accordingly motivated and included in the files of the respective procedures for sake of the proper documentation in case of legal remedies.

#### 5. Immediate consequences for public body and party

The public body is not obliged/may waive the communication of the proceeding in two specific cases.

### C. Proposal of *lege ferenda*

In accordance with art. 42, the obligation to communicate the initiation of the procedures is stipulated only in relation to those administrative procedures initiated ex officio. In fact it should have been provided to all the administrative procedures, including the one initiated upon request: firstly, it should be noted that an administrative procedure instituted upon request might also involve parties with opposite interests with the one based on which request such procedure was initiated. In accordance with art. 33/3, the public body has the obligation to include in the proceeding

every other person (if easily identifiable) whose right or legitimate interest might be effected by the result of a proceedings initiated by other party's request. Such parties with opposite interests are necessary parties in the proceedings and as such they should be given the opportunity to participate in the proceedings and protect their opposite interest, by firstly communicating the initiation of such proceeding; secondly, the party itself upon whose request a procedure was instituted should also be communicated the initiation of the procedure: the set of information to be communicated to the party, as provided by para. 2, are much wider than what the submitter is supposed to know and are meant to enable a proper participation of that initiator too.

Would be advisable, through a legal amendment in the future to extent the scope of application of art. 42 to any kind of administrative procedure despite the initiative for its initiation.

#### Article 43 *Responsible unit and responsible official*

1. In an administrative procedure, initiated according to the provisions of Article 41 of this Code, the public body shall act through the responsible official as designated under the rules of this article.
2. Unless otherwise provided for by law or secondary legislation, the head of the public body shall preliminary designate a responsible unit for each type of administrative procedure under the competence of the body, in accordance with the internal rules on its activity. This decision shall be made public by any suitable means.
3. The head of the responsible unit, as designated as per Paragraph 2 of this Article, shall assume himself/herself or assign by a written act the responsible official for the conduct of the administrative procedure. The responsible official shall conduct the administrative procedure, and, at the end, it shall propose in writing a final decision, while the decision is adopted and signed by the person assigned by law or secondary legislation. If the decision is different from the proposed one, it should be justified with the respective reasoning.
4. In cases provided for by the law, the responsible official, after conducting the administrative procedure, shall make a decision on the matter by a final decision and shall sign it, save for cases where the law has provided otherwise.
5. A collegial body may assign one of its members to perform administrative procedural actions. In such a case, the assigned member shall inform the collegial body on the results of the administrative procedure, which shall make a decision on the case.

#### A. General Introduction

##### I. Content and purpose of art. 43

Art. 43, regulates: i) the duty of the public body to assign a concrete official of the institution as the official responsible (named "responsible official") for managing (conducting) each individual administrative procedure;

- the procedural *iter* and the conditions for assigning such a responsible official;
- role of the responsible official in the ambit of an administrative procedure; as well as
- the possibility of collegial organs to assign one of its members the duty of conducting certain procedural actions in an administrative procedure.

Art. 43 includes an innovative provision influenced from the Italian APA<sup>12</sup>. The purpose of this provision is twofold: at one side it aims the efficiency of the administrative activity by potentiating the delegation for conducting of the procedure at the lower level in the hierarchy of the public body, to avoid the dilution of responsibilities that may occur when no particular person is formally denoted as responsible for management of the procedure and hence to promote a better management of the procedure and clear accountability. Whilst at the other side it aims to strengthen procedural transparency and a stronger protection of the parties' procedural rights. The responsible official is the visible "face" of the procedure and the contact person (the interlocutor) of the parties throughout the

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12 Legge 7 agosto 1990 n. 241, Nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi (pubblicata nella Gazzetta Ufficiale del 18 agosto 1990 n. 192), Arts 4-6.

procedure. It should be noted that the rationale of this provision is not to grant the separation between the managing of the procedure and the adoption of the final decision and hence to reinforce the impartiality of the deciding body<sup>13</sup>.

The provision, among others, is a concretisation of the principle of transparency (art. 5). In a broader perspective all the obligations referred to, by CAP, as obligation of the proceeding public body are in fact duties for the responsible official, for instance art. 43 it is directly related to the art. 42 (the duty to communicate relies on the responsible official and the information on the identity of the responsible official should be notified to the party as part of the communication of the initiation of the procedure). Art. 42 is also directly related to art. 30, 31 and 32 (the responsible official as well as the person authorised to take the final decision (if different from the first) should be free of any conflict of interest in the case).

## II. Constitution and EU law

The core of the provision is related to the Right of Good Administration (art. 41 of ECHFR), whilst the necessity for assigning a responsible official for each administrative matter might be seen as deriving from Art 14(2) of ECGAB, which stipulates the “2. *The reply or acknowledgement of receipt shall indicate the name and the telephone number of the official who is dealing with the matter, as well as the service to which he or she belongs.*”

## III. Legal consequence of art. 43

Immediate consequences for public body and party: Any public body/institution is obliged to identify and authorise a concrete “responsible official” to deal with conduct each individual administrative procedure under its remit of competence and to act throughout the procedure through the responsible official. As a rule the responsible official is responsible for conducting the procedure and proposing the final decision, which is taken by another official authorised by the legislation. In exceptional cases, when provided by law, even the final decision-making is under the responsibility of the public body. In the case of a collegial public body the entire procedure should be conducted by the collegial body in its entirety, except specific procedural actions that might be explicitly delegated to members of the organ.

Further consequences/sanctions of non-compliance with a procedural rule: The non-authorisation/identification of a responsible official from the beginning of the procedure might be seen as a mere irregularity without any legal consequence on the lawfulness of the final administrative act. In case the responsible unit is assigned then the head of the unit is presumed as the responsible official. In addition the breach of the procedures on the identification of the responsible official and the division of the roles when applicable might also be seen as a mere irregularity.

## IV. Relation to previous CAP

The provision is innovative, though the para. 3 second sentence of art. 43 is very similar in terms of substance and normative content with art. 98 of the previous CAP. Whilst the para. 5 of art. 43 (related to the collegial bodies), is very similar with the para. 4 of art. 80 of the previous CAP, which in addition to what provided actually, used to recognise the possibility of a collegial public body to delegate the conduction of the entire administrative investigation and in addition, to a subordinated body too. Scope of application The provision applies to the all the phases of the administrative procedure including the administrative legal remedies procedure as well as to the ex officio revision of administrative acts.

## B. Responsible unit and responsible official in details

### I. One responsible official for each individual administrative procedure (para. 1)

Para. 1 stipulates the general obligation that in any individual administrative procedure the public authority should act through an authorised and identified responsible official. In addition para. 1 has an introductory character to the rest of the provisions of the same article (in particular para. 2 and para 3) which establish the procedural *iter* for the assignment/authorisation of the responsible official.

The preconditions triggering such an obligation are two: i) the existence of an initiated procedure, and ii) it should be about a monocratic public body.

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<sup>13</sup> The ECJ has rejected a general duty of separation between both functions, even in administrative penalty procedures, see for example Case 100/80 *Musique Diffusion Française v Commission* [1983] ECR 1825, paras 6-7.

## 1. An individual initiated administrative procedure

The reference to art. 41 (Initiation of the Administrative Procedure) denotes the necessity to have an authorised official for any individual procedure immediately after or with no delay from the theoretical moment of initiation (whether upon submission of the request or upon the performance of any action of the public body) of an such an individual given procedure

## 2. Monocratic public body

The obligation applies only in case of a monocratic public body. In case the public body consists in a collegial body, the special rules stipulated by para. 5 shall apply.

## II. The obligation to assign a responsible unit for each type of administrative procedure (para. 2)

Para. 2 stipulates the obligation of the head of the public body to, firstly, assign in advance “a unit” as the responsible one for each type of administrative proceeding under its competence. The precondition triggering such an obligation is only one: the law or the secondary legislation should have not defined, within the institution, the unit responsible for a certain type of administrative procedure. In addition para. 2 stipulates the procedure and the conditions for the assignment of the responsible unit which is the first step of the procedural *iter* for the authorisation/identification of the responsible official.

### 1. Assigns in advance a responsible unit

In cases there is not a given unit already assigned by special legislation, the provision empowers and in the same time obliges (legal consequence) the head of the public body to shift the power for conducting of the procedures to a competent “responsible unit” within his body. The assignment should not be made case by case upon receiving of a concrete request, it should be done in advance, as a rule immediately after the public body receives/gains the competence for that type of the procedure or for instance upon the occasion of structural changes in the public body. The objective of such in advance assignment is to avoid a case by case approach (for given individual administrative procedures) and enhance the stability in the allocation of the competences within the public body.

### 2. Responsible unit for each type of administrative proceeding

The wording denotes the obligation that a certain type of administrative proceedings (within the competence of a public body) should be assigned to be dealt with by one responsible unit and is aimed to enhance the specialisation. The term “unit” is meant to be a general one in order to allow a certain degree of flexibility and adaptability with the inner organisation of the public body: a unit could be a department, a directorate, a sector or an office of the body, it might also be a collegial body (for instance a committee especially established for dealing with a certain type of licence or authorisation, consisting in members of other permanent administrative structures of the public body).

### 3. The procedure for the assignment of the responsible unit

The provisions also stipulates that assignment should be done “*in accordance with the rules of activity of the body*”. The scope of this elbowroom is defined by the rules of the internal organisation of the public body. Each institution has, as a rule a sublegal act on its organisation and functioning, an approved organogram as well as internal regulation, which should shape the assignment of the responsible unit to the logic of internal organisation and functioning of the institution. The existence and the reference to such instruments serve to somehow restrain the discretion of the head of the public body to choose the responsible unit.

The act of individualisation of the responsible unit for each type of administrative proceeding has an internal regulatory nature with no exterior impact on the parties. Though for the sake of transparency, openness and public information it should be made public and accessible to the public. The responsible unit could for instance made public through the official web-site of the institution. In accordance with the legislation into force (law no. 119/2014 “On the right to information” such information (on the individualisation of the responsible unit) should be party of the body’s transparency program which should made public ex officio, meaning should be accessible in their internet website and preliminary available to be disclosed to the public.

## III. The authorization/individualization of the responsible official (para. 3, first sentence)

Para. 3, sentence 1, stipulates the second step of the procedural *iter* for the individualisation of the responsible official. It gives two choices to the head of the responsible unit (determined by legislation directly or by the head of the public body in accordance with para. 2):

- he/she could conduct personally an individual procedure under the responsibility of the respective unit, or

- he/she could delegate it (assign it) to another official of that unit. The precondition for the application of the provision is one of negative character: the special legislation should have not directly identified the responsible official.

#### 4. The choice of the head of the responsible unit

The choice of the head of the responsible unit is a discretionary one in both prospective: i) whether to retain or delegate and ii) to whom to delegate (with the condition that is delegated within the unit, see below under B. III.2). The aim of allowing the discretion relates to management purposes aiming to make possible a fair distribution of the work load within the responsible unit. For the sake of legal certainty, although not explicitly, the wording of the provision denotes a legal presumption (of a *juris tantum* character), in accordance with each the head of the responsible unit is presumed to be the responsible official, unless/till when he explicitly assigns another responsible official to deal with the proceeding.

#### 5. The responsible official should be identified among the officials of the competent responsible unit

In the second alternative (the case the head of the responsible official chooses not to keep/assume himself the responsibility), he could delegate it. In relation to the latter one condition, explicitly foreseen by para. 2 first sentence, applies: the responsible official should be chosen among the officials of the respective responsible unit. The aim is clear to protect the separation of functions/specialisation of the responsible unit in order to ensure the consistency and predictability of the administrative procedure.

#### 6. The responsible official should be identified for each individual administrative proceeding

Differently from the assignment/identification of the responsible unit which should be done in advance and for each type of procedure (*en block*) under the competence of the public body, this time the assignment of a responsible official is done for a specific and given administrative procedure (nota bene: the use of *singular* “for conducting of the administrative procedure”). The provision aims, also, to ensure flexibility with the work load of the responsible unit and its management by the management level.

#### 7. The delegation should be done by an explicit written act

In addition, the provision stipulates that the assignment to the other official should be i) explicit and done ii) in written, denoting the need of documentation of such “delegation”. In case such written act does not exist the above mentioned presumption applies (the head of unit itself is presumed to have assumed himself the responsibility for conducting the proceeding). The assignment of another official is an act of management but also a procedural act in the sense of this Code. In practice the written form is fulfilled by any written act of the head of the unit and might also considered as fulfilled by a hand written note on the cover page of a request submitted by the party, which clearly identifies the official assigned with the duty to conduct that individual administrative procedure.

#### 8. Other concerns

The responsible official is subject of application of the provisions on the legal impediments (Part III) which constitute a direct concretisation of the principle of Fairness and Impartiality (art. 13). On one hand, in the identification of the responsible official the head of the responsible unit should observe the legal impediments that might exist in the concrete administrative case. On the other hand, the assigned responsible official himself bears the duty of self-declare and to restrain from the proceeding in case of an impediment. Finally the head of the responsible unit is the “superior” in the sense of art 31 and 32 competent to decide on the exclusion of the given official from the proceeding and its substitution accordingly. For more details pls. refer to the commentary on Part III.

### IV. The role (powers) of the responsible official (para. 3, second sentence and para. 4)

#### 1. Relation between para. 3 second sentence and para. 4

As already preannounced in the general part the responsible official may be the person who adopts the final decision or the latter might be a different official. Art. 43 foresees both options but whilst para. 3 denotes the rule (conducting the procedure and decision-making relies on different officials), paragraph 4 denotes the exception from the rule (the responsible official conducts the procedure and takes the final decision) applicable only when explicitly foreseen by an explicit legal provision.

#### 2. The rule: A responsible official with limited role (para. 3, second sentence and para. 4)

Para. 3, sentence 2, defines the role of the responsible official and its relation to the decision-making phase of an administrative procedure. It provides for a separation between the duty to “conduct the procedure” (understood as

the preparatory phase of the procedure) and that of the “decision making” and allocates the related responsibilities to different officials. In poor words it stipulates that as a rule (unless otherwise provided by law, see para. 4) the responsible official is only responsible for the preparatory phase of the administrative procedure (limiting its role to the phase of initiation and of the administrative investigation). He is responsible to prepare and conduct the administrative investigation and propose the final decision (which includes a sort of pre decision-making phase), whilst the decision-making (final decision) itself shall belong to another official authorised by law or secondary legislation.

Sentence 2, also, stipulates that the responsible official, upon conclusion of the investigation shall “propose in written the final decision”, meaning that he/she even though not competent to take the final decision, should conclude investigation and present the final decision to the official responsible for the decision-making, in other terms he/she should actually elaborate in written the final administrative act (which should be in accordance with art. 98 and 99 of the CAP) and/or at least a skeleton of the latter.

### 3. The duties of the responsible official in general

The CAP does not include a single article with the detailed duties/responsibilities of the responsible persons (it rather defines the general role) as for instance the article. 6 “*Compiti del responsabile del procedimento*” of APA its Italian equivalent<sup>14</sup> does. Instead the detailed “duties” of the responsible official are implicitly scattered in different of its provisions. As already preannounced in the general part of the comment to this article, as a rule all the obligations referred to, by CAP, as obligations of the proceeding public body are in fact duties for the responsible official. In broad sense, the responsible official implies a threefold function:

- he/she should ensure a normal and smooth conduction of the proceeding with the view of adopting a final administrative action;
- he/she should actively promote and make possible the procedural rights of the party as listed in CAP, are observed and exercised, and
- he/she is also responsible for keeping an adequate file containing records of all information and documents produced during the procedure, which is crucial to ensure transparency and administrative efficiency, to allow the parties to exercise their rights of defence and to enable judicial review.

In simpler word the responsible official is responsible for all the procedural actions of the public body preparing the final decision making (even beyond that), including a broad range of duties: from the duty to communicate the initiation of the proceeding (art. 42), the duty to asses, the conditions of admissibility and of legal standing (art. 44 and art. 62), the duty to deal and decide on the preliminary issues (art. 66), including the reinstatement in the original term (art. 54-55); the duty to guarantee the exercise of the procedural rights by the party (the right of inspection of the file of the case (art. 45); the information of the party on the right to be heard (art. 87) and the hearing of the party (art. 88)); the duty to conduct the entire administrative investigation including the verification of the conditions for the adoption of the administrative act, meaning the verification of all the elements of fact and law necessary for the adoption of the final action; to the duty to ensure the notification of the parties with the final decision (Part IX). In other words he/she is fully responsible for every procedural action in the proceeding except the one explicitly given by law, to other officials, as for instance the final decision-making (when under para. 3) or adoption of an interim decision (under art. 67).

### 4. The role (powers) of the official authorized for the decision–making (para. 3, third sentence)

The legal consequence, of sentence 2 (beside the separation of the two roles) is that the person authorised by legislation (primary or secondary legislation) to take the final decision could not take such a decision without such a written proposal of the responsible official (in the form of a written administrative act). Any such decision would be unlawful. In continuation, *Sentence 3* provides that the official authorised to take the decision is not bound by the “proposal of the responsible official”. He/she could take a decision different from that one proposed by latter. In this case, he should elaborate and motivate himself the act (or guide its elaboration) and sign it accordingly and in addition should specifically reason its dissociating from the initial proposal. Another indirect consequence of sentence 3 is the clarification on the extra contractual liability of the official that took the decision/or did not in case of action in regress of the public body for the damages caused to the party (based on the Law no. 8510 date 15.07.1999 “On the extra-contractual liability of the state administration organs). In case the official takes the decision proposed by the

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14 Legge 7 agosto 1990 n. 241, Nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi (pubblicata nella Gazzetta Ufficiale del 18 Agosto 1990 n. 192) as amended by art. 21 of Lege. 11 Febbraio 2005, n.15.

responsible official the liability is somehow divided among the two of them, whilst in case he dissociates from the proposal of the responsible official the liability relies on him only.

Finally it should be noted that the official authorised to take the final decision is, also, subject of application of the provisions on the legal impediments to be involved in the administrative procedure (Part III). For more details pls. refer to the commentary on Part III.

#### V. The exception: A full-fledged responsible official (para. 4)

Para. 4, constitutes the exception from the rule foreseen by para. 3 second sentence, it regulates a “full-fledged” responsible official, which is responsible for the entire administrative procedure including the adoption of the final decision (understood as taking the decision and signing it accordingly). It should be emphasised, that such responsible official with full responsibilities over the procedure, should be applicable only when provided by law. One should note that the wording “*when provided by law*” is restrictive, differently from that of the other provisions of the same article referring to primary and secondary legislation, it seems that the legislator opted to make applicable the exception only when explicitly foreseen by primary legislation.

#### VI. Special rules for collegial organs (para. 5)

Para. 5 regulates the possibility of delegation in the special case of the collegial bodies. The collegiate decision-making and the establishment of collegial bodies of public administration is usually due to the fact that the decision has to balance different interests or different point of view represented by the members of the body. Per consequence the legislator has decided that the conducting of administrative procedure (the preparation phase) as well as the decision-making phase itself, because of such specificity, should be both under the responsibility of the collegial body in its entirety and as a rule should not be delegated to the individual members or to the supporting administration. The provisions only opens the door (nota bene: the wording “may” denotes the possibility or the discretion and it is completely different from the wording of para. 1-3 which denotes an obligation) to delegate the performance of certain determined procedural actions in the course of the procedure. The provision, being an exception is well restricted, it includes two preconditions: i) it could be delegated only the performance of determined procedural actions of the administrative procedure (excluding, of course, the adoption of the final decision) to be explicitly established in the act of delegation, and ii) it could be delegated only toward one of the members of the collegial organ. In addition it provides that after the performance of the delegated action, the member that carried the delegation should inform accordingly the collegial organ.

It should be also noted that para. 5 shall apply as a general rule, when not otherwise provided by special law. Indeed there are special law that provide the possibility the administrative investigation is under the responsibility of the supporting administration and only the final decision making relies in the collegial body, (example: the procedure of the Competition Authority, in accordance with law no. 9121, date 28.07.2003 foresees that the administrative investigation is under the responsibility of the administration (the secretariat of the Authority).

#### C. Proposals of *lege ferenda*

The entire article presents some novelties in function of transparency, though its contribution in the delegation of the decision-making at the level when the administrative procedure take place is only partial (only when explicitly provided by law). The practice in Albania but in other countries shows a high concentration of the decision making for the individual administrative cases to the top of the hierarchy of the institutions. The current hierarchical structure of decision making processes contradicts the very spirit of the modern administration of public functions, and has the following disadvantages, for the public body and citizen:

- it leads to overburdening of the heads of public bodies and prevent them from concentration on really managerial tasks like strategic management, supervision and control;
- it negatively affects the quality of decisions, as nobody within a public body can be familiar with every detail of a subject matter so that many decisions, taken in a strictly centralized and hierarchical process, do inevitably suffer from lack of substantial competence;
- finally it negatively affects the accountability at the lower level of the administration that deals directly with the subject matter.

The possibility of delegation of the decision-making is no contradiction to the principle of hierarchy, which is still regarded as an indispensable element of public administration and is directly connected to the constitutional rule of law, nor does it diminish the scope of responsibility of the heads of public bodies for the acting of their public body.

But this responsibility can be concentrated and intensified on managerial tasks, comprising supervision of the staff, enabling modern concepts of administrative management.

In this, framework, it would be advisable to consider, in the future, giving, as a rule, full responsibility to the responsible official to conduct the entire procedure, meaning not only to conduct the administrative investigation but also to take the final decision. Of course in special cases (when explicitly provided by legislation), of special importance the decisions making could be divided and assigned to the officials at the top of the hierarchy. A full-fledged responsible official, in particular competent to take the final decision and to sign it, which means in other words to appear towards the party and the institution as the responsible person, is according to administrative experience in other countries an important factor in motivating staff and strengthening the accountability in public administration activity.

#### Article 44 *Initiation of the administrative procedure upon request*

1. In cases where the administrative procedure is initiated upon the request of the party, the public body should take the necessary measures for the best possible preparation of the case.

2. The public body shall preliminary examine the request as regards the meeting of the legal formal criteria, such as the competence of the public body, legal standing, deadline, form and any other criteria as provided for in the law, and at the end it shall:

a) notify in writing the requesting party that the request has been accepted for the continuation of the procedure;

b) notify the requesting party in writing for recovering the gaps with regard to the meeting of the legal formal criteria by means of setting a reasonable deadline for that. In such a case the public body shall actively assist the party for the fulfilment of the identified gaps. Failure to fulfil the gaps within the set deadline shall constitute a ground for rejection of the request. The party may appeal against this decision under the procedure provide for in this Code.

c) notify the requesting party that further administrative actions are necessary before it makes a decision on the acceptance or rejection of the request. In such a case the body shall set a reasonable deadline for the performance of further actions.

#### A. General introduction

##### I. Content and purpose of Art. 44

Art. 44 regulates: i) the immediate preparatory actions the public body has to perform, upon receiving a request for the institution of an administrative procedures, in order to ensure its smooth and normal continuation, which consist in the verification/examination of its “competency” and the so called “conditions of admissibility” of the request;

- the procedure, it has to follow, to deal with defective requests in terms of admissibility conditions - the public body is obliged to notify the submitter on the gaps of the request and stipulate a reasonable time limit for the recovering of such gaps, as well as
- the legal effect, the success or respectively the failure of the party to recover the gaps, within a reasonable time-limit, has on the course of the procedure.

Article 44 is a logical continuation of art. 41 (the institution of administrative procedure) in the case of a procedure initiated upon request. The submission of a request, produces the legal consequence of automatic institution of the procedure, to which corresponds on the side of the public body “the obligation to proceed” in regard of taking an explicit decision as required by the principle of decision-making (art. 16). In order to proceed further with the procedure the public body should first be competent and secondly the request should be “admissible” in terms of formal legal criteria. The purpose of the norm is to ensure the public body verifies these legal requirements and to the party is given the opportunity to correct the eventual gaps, before deciding on the continuation of the proceeding and taking an explicit decision accordingly.

*Relations to other provisions of the CAP.* Art. 44 relates also to art. 62 (Inaccuracies of the initial request) and to art. 65 (preliminary verification). Actually art. 44 and 62 regulate the same subject matter and procedure, whilst article 65 regulates the same subject matter by the perspective of the public body.

## II. Constitution and EU Law

The provision is a contribution to the concrete implementation of art. 48 of the Constitution “Everyone, by himself or together with others, may address requests, complaints or comments to the public bodies, which are obliged to answer within the time periods and under the conditions set by law, by entitling the party to initiate an administrative procedure, though submission of an request.”

With the start of the procedure the party acquires also the Right to Good Administration stipulated in art. 41 of the EUCHFR, that finds its expression also in art. 17 of ECGAB dealing with reasonable time-limits for taking administrative decisions and in the principle of citizen-orientation as stipulated in art. 12 of this European Code.

## III. Legal consequences of art. 44

The public body is obliged to verify the competence and the admissibility conditions of the request/requestor before proceeding further. In addition to the party should be given the opportunity to recover the gaps (if any) within a reasonable time limit. An administrative procedure continued and concluded without giving to the party the opportunity to recover the gaps (without notifying the party thereof or when giving a party an unreasonable deadline) is a procedure conducted in contradiction with the rules on the administrative procedure and per consequence might cause the unlawfulness of the final result of the administrative procedure.

In case the party, after being properly informed by the public organ, fails to recover the gaps, within the given deadline, the procedure shall be declared concluded in accordance with art. 90/3. The declaration of conclusion is an administrative act and could be appealed accordingly. While in case the party recovers the gaps the procedure shall continue and concluded through an explicit decision. If the submission was restricted by a deadline and the party succeeds to recover the gaps within the deadline prescribed by the public body the time of first submission shall be taken into account shall be relevant for the submission deadline.

## IV. Relation to previous CAP.

Article 44 is very similar with art. 75 of the old CAP although its content is slightly wider covering, also, the verification of the form and other formal criteria of the initial request and the procedure the public body has to follow for the completion of the request.

## V. Scope of application of the norm

Article 44 applies to the administrative procedures instituted upon request and also to legal remedy administrative procedures, the latter as far as special rules of Part VI of this Code do not apply.

## B. Initiation of the administrative procedure upon request in details

### I. The obligation to take the necessary measures for the preparation of the case (para. 1)

Para. 1 stipulates the general obligation of the public body to take “all the necessary measures” in order to ensure a smooth and normal continuation of the procedure and it is a concretisation of the general principle of decision making stipulated by art. 16 and further on enshrined in the art. 90 (conclusion of the administrative proceeding). The only precondition for this general obligation (meaning for the entire article) is the existence of an administrative procedure instituted upon request (i.e.. the submission of a request). In other terms: Art. 44 requires that party has submitted a document that despite some defectiveness is – on the basis of a reasonable assessment of the circumstances - to be understood, as a request to initiate an administrative procedure (here in after referred to as “initial request”). In addition art. 44 applies to written or verbal initial requests.

In fact para. 1 has a rather introductory character to the rest of the provisions of the same article: whilst para. 1 stipulates the general obligation, the other provision (para. 2), explains the remit (addition preconditions) and stipulates the procedure to actually fulfil the obligation.

The implementation of such an obligation to take the necessary measures is, also, guided by two other CAP principles: the principles of de-bureaucratization and efficiency enshrined by art. 18 and the principle of active assistance enshrined by art. 10, which concretisation is regulated by para. 2.

## II. The obligation to preliminary examine the request on terms of competency and admissibility conditions (para. 2, first sentence)

Para. 2 stipulates the obligation of the public body to “preliminary examine” the submitted request in view of verifying its competence and the fulfilment (by the request/requestor) of the admissibility conditions. It also gives an exemplificative and opened list of admissibility conditions.

### 1. Preliminary examination of the request

The preliminary examination of the request is the obviously first step upon its submission (actually from its reception by the proceeding organ). First of all the public body should obviously try to understand the objective of the request and to identify the submitter. Understanding of objective of the request is in simpler words the clarification of what is requested by the applicant, it is the first preparatory step in order to subsequently check the competence, the admissibility conditions as well as to establish the scope of the future administrative investigation. The identification of the requestor is, also, crucial because it is related to admissibility conditions as the legal standing, the capacity to act in the proceeding as all as the eventual observance of the rules on representation. The examination and the understating of the request is, also, relevant to conditions on the content of the request which is, also, separately dealt by art. 62. For further clarification on inaccuracies related to the content of the request pls. refer to the commentary on art. 62.

### 2. Examination of the competence

The examination of the competence is the subsequent action to be undertaken by the public body before proceeding further. The provision is actually a reminder of art. 23 (Verification of the competence). Although the check of competence is quite obvious to a professional civil servant, the legislator has opted to emphasise the need to verify the competence at the initiation of the proceeding. The competence is one of the crucial elements of lawfulness (art. 4 “Principles of Lawfulness”) and the failure to properly do that might lead to a procedure conducted by a non-competent organ, having a direct impact on the lawfulness of the final results of the proceeding. It should be noted that in fact the public body should verify the competence in the beginning and all across the course of the proceeding in case there are doubts on regard. In case, during the course of the proceeding, there are legal changes regarding the competence the rules established by art. 23/2 shall apply. In case the public body considers the request is not within its competence the application of art. 24 shall take precedence over the provision of art. 44 and apply accordingly, obliging the public body to forward the request to the public body and notify accordingly the submitter (in acc. to para. 1 of art. 24).

### 3. Admissibility conditions

Para. 2, refers to the “*formal legal criteria foreseen by the law*”. It should be noted that the explicit reference to the “legal standing”, “the deadline”, “the form”, is just exemplificative and opened to include “any other criteria foreseen by law”. These formal criteria are known in the administrative law doctrine as “admissibility conditions”. This Code does not include an explicit list of admissibility criteria under one single article, though these are explicitly or implicitly found in different its articles or could eventually derive from special legislation. Such admissibility conditions, broadly, are the following:

- a) The request should fulfil: i) the conditions on the form (art. 58); ii) conditions on the content of the request (art. 58); iii) conditions on the way of submission (art. 59) – for more details pls. see the commentary on art. 62;
- b) The party should have the legitimation (for more details pls. see the commentary on art. 33);
- c) The party should have the capacity to act in the administrative proceeding or be properly represented by a legal representative (for more details pls. see the commentary on art. 34 and the following);
- d) In case submitter is an appointed representative (not the party), he/she should fulfil the representation conditions (for more details pls. see the commentary on art. 33 and 38);
- e) The request should be submitted within the applicable deadline (if such a deadline is provided by special law) - although very rare in the practice, a special law might provide a certain time limit for submission a request, for example the request for the compensation for property (e.g. art. 27 (1) of the law No. 133/2015 “On the treatment of property and the conclusion of the property compensation process” foresees that the parties could apply for the recognition of the property within a “preclusive deadline of 90 days” from the entry into the force of the law. In this case the deadline is a one of “decadence”/peremptory character, and the subjective right/ interest of the party cannot be satisfied after the expiration of the deadline. Of course, the provisions on the reinstatement into the lost deadline (art. 54 and 55) shall apply, if not explicitly waived by legislation (e.g. law No. 133/2015 “On the treatment of property

and the conclusion of the property compensation process” foresees “such a deadline shall not be extended or restored from the court or any other administrative organ”).

f) Other admissibility conditions might be foreseen explicitly by special legislation – for instance the party could be required to pay the cost of the procedure (example the cost of inspection in case of an application for a permit or authorisation) etc.

### III. Submission of request within the competence and that fulfils the admissibility conditions (para. 2 “a”)

Para. 2 “a” stipulates the obligation of the public body to inform the submitter, if after the verification finds the request admissible and within its competence. The preconditions for the obligation of information is that the request is both: a) within public body’s competence and b) it fulfils (in entirety) all the admissibility conditions.

The provision requires the information to be done in written form (on the written form pls. see the commentary on art. 58). It does not include any requirement on the content of the notification. It would be advisable the notification includes, by analogy, part of information foreseen by art. 42, such as for instance the information on the: i) right of inspection of files and the place/office to exercise such a right; ii) responsible official; ii) the day of the initiation of the procedure as well as the deadline for the notification of the final administrative act, and else. The provision of such data would be in conformity with the principle of Active Assistance (art. 10) and principle of transparency (art. 5) and would help the party to understand its procedural rights and exercise them accordingly.

Upon notification of the admissibility of the request, the administrative procedure shall continue and concluded in a regular manner. In this case the applicant is entitled to correct or amend the request during the entire procedure until it is concluded by the final decision. The same legal consequence is valid when the public body does not notify at all in accordance with lit. “a” or the subsequent lit. “b”.

### IV. Dealing with a request for each the public body is not competent or of a non-admissible request (para. 2 lit. “b”, first and second sentence)

Para. 2 “b” regulates how the public body shall deal with non-admissible requests by stipulating the obligation to inform in writing to the party and require it to recover the gaps. The precondition for the obligation are the request is whether: i) it is not - within public body’s competence or alternatively ii) it does not fulfil one of the admissibility conditions. In the first case (lack of competence) we think the application of art. 24 shall take precedence over the application of actual art. 44 and per consequence the public body shall be obliged to forward the request to the competent public body (para. 1 of art. 24) and notify the submitter. The conditions of para. 2 of art. 44 shall apply only in relation to the form of the notification (which should be in written) because of the silence of art. 24 in regard.

In the second case (defects in the admissibility conditions) para. 2 “b” obliges the public body to take the following procedural actions:

- inform the party requiring “to recover the gaps;
- establish a reasonable procedural deadline for recovering the gaps;
- provide active assistance to the party for the recovering of the gaps.

#### 1. Form, content and timing of informing the party

Para. 2 “b” stipulates explicitly one requirement on the form and two on the content in relation to the information of the party.

##### a) In terms of form:

The notification should be in writing and should be notified in accordance with the rule of notification of written documents established by Part VII.

##### b) In terms of content

The notification should: i) should identify precisely what should be recovered and ii) should contain a “reasonable deadline” for the recovering of the gaps. In addition the obligation of active advice implies that the notification includes also instructions on what it is understood meeting the formal requirements.

c) The deadline for the notification:

Para. 2/b does not explicitly stipulate a given deadline within each the public body should inform the party on the gaps of the request. Given the intrinsic relation with art. 62, the deadline of 7 days from the registration of the request stipulated by art. 62/2 should be also applied. In poor words the public body should notify the party on the non-fulfilment of formal criteria as soon as possible but not later than from 7 days upon the registration of the request (the registration in accordance with art. 60).

2. A reasonable deadline for recovering the gaps

The deadline for recovering the gaps by the party is a “procedural deadline” to be established by the public body and the provisions on the procedural deadlines stipulated by art. 53 (establishment and extension of the procedural deadlines) shall apply. The deadline set by the public body should be “reasonable”, meaning that when establishing its duration the public body should into account the specifics of the concert case (gap) and establish in accordance with principle of procedural efficiency enshrined in art. 18 (principle of de-bureaucratization and efficiency) a deadline within which the party is normally (within the limits of reason) expected to recover the specific gap.

3. Obligation of active assistance

Para. 2/b also stipulates the obligation of the public body to actively assist the submitter to recover the gaps of the request. The obligation is a concretisation of art. 10. It should be noted that the means of assisting the party are various, the assistance might be provided by contacting the party on phone or other communication means or else. But, the minimum required standard should be the inclusion in the notification of at least clear information on the gaps to be recovered and general instruction on recovering such gaps. It should, also, be noted that the active assistance is not “legal assistance”, it is generally accepted that it should consist in informing the party on how the administration generally understands and interprets the formal legal requirements and their fulfilment.

4. Further legal consequences according to para. 2 “b” first sentence

Depending on the case, giving the party the opportunity to correct the gaps, might lead to an eventual extension of the deadline for the conclusion of the procedures as provided by art. 92. While in case the gap relates to the content of the request the rule enshrined under para. 3 of art. 91 shall apply, i.e., the deadline for the conclusion of the administrative procedure shall be triggered only with the completion of the request.

V. Recovering the gaps within the established deadline (para. 2 lit b)

Para. 2, does not explicitly provide for what happens if the party recovers the gaps within the given deadline. Based on a *per a contrario* interpretation and by analogy with art. 62/2, if the party completes/corrects the gaps within the deadline established by the public body, a complete request shall be deemed to have been correctly submitted *ab initio* (*n.a: especially relevant for the requests which submission is related to a deadline*). In addition the administrative procedure shall continue and concluded in a regular manner. The deadline for the public body for the conclusion of the administrative procedure shall be triggered only upon completion of the request, if the defect relates to the content of the request.

VI. Failure of the party to recover the gaps within the established deadline (para. 2 lit “b”, third and fourth sentence)

Para. 2, lit b third and fourth sentence, stipulates the legal consequence of the failure of the party to recover the gaps within the given deadline: the failure shall lead to the “non-admission of the request”.

1. The failure of party

The preconditions for such a consequence (the non-admissibility) are the following:

- a) submission of a written request to initiate an administrative procedure;
- b) the request has certain gaps: it does not fulfils one or more conditions of admissibility;
- c) the party was notified in due time and in written about the gaps, was instructed to recover them and it was given a deadline for the recovery.
- d) the party fails to recover the gaps within the given deadline.

## 2. The legal meaning of non-admission

The term of “non-admission” is a new undefined legal term which should be interpreted and understood in accordance with the general principles and other explicit provisions of this Code. As already explained, the submission of an initial request, has as the first legal consequence the automatic initiation of the procedure (art. 41/ 1 and 3/b), without requiring any procedural act of formalisation by the side of the public body. That would mean that in legal terms the procedure is deemed as initiated with this very action of the party and per consequence the public body duty to proceed (thereinafter) and the obligation to conclude the procedure by taking an explicit decisions (art. 16, Principle of Decision Making) is *ex lege* triggered.

At the other side, the failure of the party to recover the above-mentioned “gaps” within the established deadline could, practically, take two different forms: i) the party stays completely inactive/not interested: it does not respond to the notification of the public body, or ii) the party responds to the notification but still fails to fulfil the conditions of admissibility

### a) Party’s inactivity.

The inactivity of the party in the light of art, 94/1 should be deemed as an abandonment of the proceeding (regulated by art. 94/2) which shall lead to the declaration of the conclusion of the respective administrative proceeding without a final decision on the substance of the case (regulated by the second sentence of art. 90/3).

### b) Party’s impossibility to recover the gaps

Differently from the first case, the party impossibility to recover the gaps, could not be interpreted as an abandonment of the proceeding because of inactivity or lack of interest. Given the situation two interpretations are possible: a) the procedure continues and is concluded regularly with a final administrative act (on the substance of the case), or b) consider that para. 2 “b” third and fourth sentence have implicitly provided for another additional case/ground for the declaration of the conclusion of the administrative proceeding without a final decision in the sense of art. 90/3, enriching the list provided by art. 93 to 96 of the CAP with the new ground of “inadmissibility”. The wording of para. 2 b third and fourth sentence as well as the general rule of interpretation, in accordance with each the same legal causes should procedure the same legal effect, seems to suggest more the second choice if interpretation.

In conclusion despite the type and reasons of failure (weather inactivity or impossibility), the failure of the party, would lead to the declaration of the conclusion of the proceeding without a final decision on the substance of the issue. The latter declaration is a full- fashioned administrative act (as explicitly stated by art. 90/3) which means it should be properly motivated and properly notified accordingly to the party. As such it could be appealed (para. 2/b last sentence) accordingly in order to ensure the protection of the party (according to Part VI, Chapter II of this Code). In addition the party is entitled to eventually submit a new initial request because the declaration of the conclusion of procedure shall not abolish the right, which the individual has requested to be recognized, assuming there is no any restrictive deadline for the initial request.

## VII. Completion of addition procedural actions (Para. 2 lit. c)

Para. 2 “c” is in fact a specific application of para. 2 “b”. It seems to relate to the cases when the request is non-complete, for instance when in accordance with a special law it is required the party submits an additional document, declaration or performance of another procedural action all together and as part of the initial request. Since this hypotheses is further more regulated in more details by art. 62 (requirements of the content of the request) pls. refer to the commentary on this article.

## C. Proposals of *lege ferenda*

It is advisable to consider in the future the possibility of merging art. 44, 62 and 65 under the same section and same article or various subsequent articles.

## **CHAPTER III**

### **RIGHTS OF PARTIES DURING THE ADMINISTRATIVE PROCEDURE**

#### *Article 45 Right of the parties to inspect the files*

1. All parties to an administrative procedure shall have the right to inspect the documents of the file of such procedure, and get a copy of them.
2. The public body involved in an administrative procedure shall, within 5 (five) days from the submission of the request, provide in its working premises conditions for storage of data, conditions for inspecting and obtaining copies of the documents, as per Paragraph 1 of this Article. In special cases, when it is more appropriate for the applicant, the inspection of the file may also be made in premises of another public body or in the consular and diplomatic missions of the Republic of Albania abroad. Documents containing personal, trade or professional data may be obtained or used by the third parties only upon the consent of the individual, to whom such data belong. The consent shall not be required if the documents will be used for the purposes provide in the law, or secondary legislation.
3. In cases where the documentation is administered electronically, the public body shall provide the party with the necessary technical means to inspect it. The public body may make the electronic documents accessible via internet, if that does not affect the security of the data protected under the law.
4. The delivery of copies is done against payment of a fee, which is determined by decision of the public body, and, at any case, it shall not exceed the cost of their reproduction.

#### A. General Introduction

##### I. Content and purpose of art. 45

Art. 45 regulates:

- the right of the party to look onto and take copies of the documents of the file (also known as the “right of inspecting the file”) of their administrative case to which corresponds an/the obligation of the proceeding public body to ensure the exercise of such a right as well as the legal preconditions for triggering the above mentioned public body’s obligation;
- the deadline within which the public body should give the party the opportunity to inspect the files, procedural rules in terms of venue and conditions to exercise of such a right as well as procedural rules guaranteeing the protection of personal, trade or professional data, that might be involved in the file, during the inspection of the file by the party;
- specific procedural aspects and obligations related to the inspection of electronic files and on-line consultation of files, as well as
- the cost the party has to bear for receiving copies of the documents from the file.

The purpose of art. 45 is to give to the party the opportunity to look into the records of the file on which the public body relies for its decision. The right of the party to inspect the file of its case is one of the instruments recognised to the party, by the legislator, in the ambit and aiming to ensure party’s actual and proper participation in a proceeding that might affect its subjective rights or legitimate interests. It is an explicit concretisation of principle of transparency and cooperation (art. 5) and it is directly connected (almost a precondition for) with the right of the party to submit comments and explanations (art. 46) and the right of the party to be heard (Art. 87), which effective exercise would be hardly imaginable unless the parties are firstly given the opportunity to look into the records of the file on which the public body relies for its decision.

##### II. Constitution and EU law

With the start of the procedure the party acquires the Right to “Good Administration” stipulated in Art. 41 of the EUCHFR and it is further developed by para. 2/”b” of Art. 41 which explicitly stipules “the right of every person to have access to his or her file, while respecting the legitimate interest of confidentiality and of professional and of business secrecy”.

### III. Legal consequence of Art. 45

The legal consequence of art. 45 is the obligation of the proceeding public body to ensure to the party under appropriate conditions the opportunity to look at the file of its administrative case and receive copies of its documents. The breach of such an obligation by the public body hinders the participation in the proceeding including the exercise of the substantial procedural rights of the party such as the one to submit opinions and explanation and to be heard, constituting a breach of the rules on the administrative procedures that depending on the further course/development of the respective proceeding might affect the lawfulness of its final result.

### IV. Relation to previous CAP

The normative content of Art. 45 deals with the same subject matter as Art. 52 of the previous CAP did correlated at certain extent to art. 53 and art. 54. The new regulatory content, differently from the old CAP provisions, it is more: I) citizen oriented and precise: i) the interest of the party in inspecting the files is presumed, ii) it provides for the possibility of inspecting the files in other premises (than the one of the proceeding public body) more appropriate to the party and in the same time it is more: II) wide and detailed: i) it includes procedural rules on the exercise of the right of inspection, ii) it includes procedural details on the inspection of files in electronic form or on the on-line inspection as well as iii) includes the rules on the costs of receiving copies from the documents of the file. Para. 4 and 5 of Art. 46, the new Code are novelties.

### V. Scope of application of the norm

The norm of art. 45 is applicable during the entire course of the administrative procedure. It applies to the first instance administrative procedure to its conclusion in accordance with art. 90. It also applies during or after the legal remedies, during the enforcement of the administrative act as well as during the procedure *of ex officio* annulment and repeal.

## B. Right of the parties to inspect the files in details

### I. Right to inspect the file (para. 1)

Para. 1 explicitly stipulates the right of the party to inspect the documents of the file. The right of inspection of files is regulated in *lato sensu*, by including both: the right to a) inspect the documents in the file of the administrative proceeding and respectively b) take copies of such documents from file.

The "inspection of the documents" means the possibility of the party to look at/to consult the documents of the file and accordingly to take notes on them if necessary, whilst, "taking copies" means the possibility of receiving, by the party, of reproductions of the documents in the file. The reproduction could be taken in whatever form and format (whether in the original format or another equivalent format), it might be a simple photocopy, it might be the electronic copy of a traditional written document, it might be traditional print or electronic copy of an electronic document, or a reproduction of a video or else.

The involved legal preconditions for the right of inspection are three: i) the procedural right belong to the parties of the respective procedure, ii) it is related to an ongoing procedure, and iii) the exercise of such right is not limited by the need of protecting the interest of state secret, of confidentiality, of professional and of business secrecy (as regulated by para. 46).

#### 1. All the parties and only the parties have the right to inspect the file

The provision refers to "all the parties in an administrative procedure", which includes all and only the parties which either by request or *ex officio* are introduced or are *ex lege* recognised such a procedural position. For more explanation on the concept of the party pls. refer to the commentary on art. 33. In addition it should be noted that the party is not supposed to prove any interest in the respective file, such interest is presumed and is inherent to the position of the party. In practice the right to inspect files should be clearly distinguished by the right of access to official documents (regulated by law no. 119/2014 "On the right of Information"), whilst the first derives from the legal position of party in a proceeding, the latter derives from the quality of being a "citizen" and per consequence from the general right of "good administration" any citizen have in front of its administration.

#### 2. An on-going administrative procedure

The provision refers to "... parties in an administrative procedure". It means the right of inspecting the files can be exercised in the ambit of an already initiated proceeding in course of development. The moment a procedure is

initiated (as explained above) is upon submission of the initial request (in case of a proceeding initiated upon request) or upon performance of any relevant procedural action by the public body (in case of an ex officio proceeding). For more details on the moment of initiating the procedure pls. refer to the commentary on art. 33. In addition it should be noted that such a right could be exercised even after conclusion of procedure in accordance with art. 90, it might exercise also before, during or even after the legal administrative remedies in order to make possible the party properly prepares to exercise its right to legal remedies (whether administrative or judiciary) by looking into the records of the file on which the public body relied for the appealed decision.

### 3. The limits in the exercise of the right of inspection

Article 46, is complementary with art. 45 as it explicitly stipulates a negative precondition for the application of the latter, limiting the exercise of the right of inspection in the cases and to the extent needed for the safety of protected data (that might be included into the file of the case) in accordance with the legislation into force. The reference of art. 46 to the “legislation into force” should be read as an explicit reference to such a legislation, which includes the legislation to the protection of state secret, of the personal data, of professional and business secrecy or of other kind of information explicitly protected by legislation. For more details see the commentary on art. 46.

### 4. The meaning of “documents”

The provision refers to “... *documents of the file of that procedure*” and should be interpreted in *lato sensu* in all the involved aspects. Firstly, in terms of location of the documents: it should be read as referring to any document whatsoever that is administered by the public body on the respective administrative case despite the fact on whether the document is factually and/or materially included in the one “file” created for that specific case by the public body (there might be cases where documents relevant for the case and administered as part of the case by the public body that are found in other offices, all these should be made available to the party). Secondly, in terms of provenience of the documents: it should be read as referring to documents in *lato sensu* to any kind of document, whether created by the public body conducting the proceeding (any procedural acts, records, minutes, notes made in the files or minutes kept by the public body when performing procedural actions), by other public bodies (if it is the case) or even submitted by other parties of the proceeding (documents submitted by other parties regarding proving of facts as well as opinions and explanation of other parties, including minutes of such declaration verbally made in front of the public body). Finally, in terms of form/format the documents: it should be read as reading not only writs (documents made in written form, whether traditional writs or electronic form) but any kind of documents despite of its form: thus including, pictures, projects, layouts, voice or video recording (ex: imagine the recoding of an in site inspection visit or else).

## II. Obligation of the public body to ensure the inspection of the file by the party (para. 2)

Para. 2 stipulates the obligation (“*the public body ..... ensures...*”) of the public body to ensure the exercise, by the party, of the right of inspection of files as well as the preconditions and modalities for appropriate observance of such an obligation and the applicable deadline.

### 1. The obligation of the public body is triggered by a request of the party

In addition to the fulfilment of the preconditions explained above under I/1 –I/3, the obligation of the public body is triggered only as result of a request of the party. The provision should be seen in the context of other provisions of the CAP: as already explained the public body should inform the party through the communication of the initiation of an ex officio procedure (art. 42) as well as through the communication on the right of hearing (art. 87) on his/her right of inspection as well as provides him proper information to potentiate the exercise of such a right (by providing information on address of the institution, the identification of the responsible unit and official, as well as of the office when the documents could be looked at, (art. 87, para. 1/c), etc..). The party could request the inspection of files whether following the above mentioned notification or despite them. In relation to the term request it should be understood in the meaning of request as explained under commentary of art. 58.

### 2. The deadline to ensure the inspection of file

The provision, requires a prompt reaction of the public body, providing of a very short deadline of 5 days to take the measures to ensure the exercise of the right of inspection. Such a short deadline is implied by the ground of celerity and the need to conclude the procedure with the respective deadline. For the calculation of the 5 days deadline should be observed the rules of CAP on the calculation of the deadlines set in days as stipulated by art. 56 as well as the respective presumptions provided by art. 57. The request is presumed as submitted in accordance with the rules of article 57, para. 1. The day of the submission shall be deemed as the day “when the event occurred” for the purpose of calculating the deadline running against the public body (art. 57/2), but it shall not be included in the

calculation of the deadline (art. 56/2) which will practically shall start counting from the next day and calculated in calendar days. In addition if the last day of the deadline shall be a week end day or a national holiday the deadline shall expire on the next working day. Within this given deadline the public body should make possible the party looks at the file and receives (if requested on spot) copies of the documents, meaning it should collect and systemise the documents relevant to the case and ensure the party has the opportunity to factually look at and receive copies of them.

### 3. Obligation of ensuring the inspection of the files relies on the responsible official

Although the provision does not explicitly stipulates who precisely bears the responsibility to ensure the right of inspection, it is evident that such a responsibility relies with the official responsible to conduct the proceeding (art. 43). This does not necessarily mean that this official shall be the one present when the party inspect the files, or taking the measures, hi/she might delegate this duties to other officials within the responsible unit of institution, but shall hold the ultimate administrative responsibility for the obligation.

### 4. Venue for the exercise of the right of inspection.

Para. 2, regulates also the venue where the party could inspect the file and the necessary conditions to be ensured by the proceeding public body for a normal/smooth exercise of the right of inspection.

Venue: as a rule the party shall be given the opportunity to look at the files and/or receive copies of its documents in the premises of the respective public body. In the spirit of the citizen-orientation (of the CAP) the legislator opens the possibility to exercise the right of inspection in the premises of other public bodies or even in the diplomatic or consular representatives of Albanian abroad. As a further exception, according to para 3 sentence 2, the public body may make electronic documents accessible via internet. In this case the party is not obliged to come to the premises of any public body or consular or diplomatic mission.

The wording “*may also be made...*” denotes the discretion of the public body in allowing the inspection of file at other premises (than the one of the proceeding public body itself). Such discretion is rather legally and practically limited: i) it should be exercised in a lawful way (art. 11) which means in accordance with the aim for which the law allows such discretion: in other words only when “more appropriate to the party” and not the vice versa (when appropriate to the public body) and ii) it should also exercise when technically possible in accordance with the principle of procedural efficiency (enshrined by art. 18).

### 5. Adequate conditions for exercising the right of inspection.

The provision uses the indeterminate legal term “*conditions for the storage of data (n.a: documents) and conditions for inspecting and obtaining copies of the documents*”, which should be read as reasonable and acceptable conditions for the party to physically look at the file documents, take notes on the content as well as normal logistic and human assistance that would enable their reproduction.

## III. Exception from the limitations in the exercise of the right of inspecting the file (para. 3)

Para. 3 is substantively connected to and constitutes a partial exception from the limitation stipulated by art. 46. It provides that by way of exception the party is entitled to inspect even documents containing protected personal, professional or commercial information with the consent of the data subject. The exception applies under two preconditions: i) only in regard to personal data and to professional or business secrecy and ii) when the concerned party (to which data belongs) gives the consent to disclose that information.

### 1. Only in regard to “personal, professional or business secrecy data”.

The exception applies only regarding to personal data as well as professional and of business secrecy and not to information classified as state secret or any other kind of information protected by special law.

### 2. Upon the consent of concerned party

The other precondition requires that the concerned party to which the protected data belongs, gives the consent to disclose that information regarding him (whether personal data, professional or business protected information). Although the provisions is not detailed, being an exception it should be interpreted in a restricted sense: the consent should be given in written form (including the electronic form, art. 58 para 3) and rather explicitly define the information that could be disclosed. The latter requirement is applicable to the personal data, as it derives explicitly from the law no. 9887 date 10.03.2008 “On the protection of personal data” which explicitly provides under art. 4/24 that “24. *Data subjects consent*” shall mean any statement in writing, freely given and fully informed on the reason for which his data will be processed, which signifies the data subject agreement that personal data relating to him to be

*processed*.”, but can also be extended by analogy to other protected information subject to para. 3 of art. 45, with the exception of the state secret classified information which disclosure follows different rules.

The consent of the concerned party is not required if the documents will be used for the purposes provided in the law, or in secondary legislation, para 3 sentence 2.

#### IV. Inspection of electronic documents/files (para. 4)

The more files are kept in electronic form, the more it is necessary to ensure the actual possibility of the right to inspect the file and all the electronic documents it consists of as well. This is principally possible in the premises of the public body as well as online. That is why para. 4 deals with two aspects: i) the cases of the electronic documents or documents storage/converted in an electronic form (not traditional paper printed form) and ii) on-line exercise of the right of inspection.

##### 1. Electronic documents or documents storage/converted in an electronic format (para. 4 first sentence)

Para 4, first sentence, firstly makes clear that the term “document” in Paragraph 1 includes electronic documents as well. It then puts the administration under the obligation to provide (to the party) the technical means to inspect the documents forming the files kept in electronic form. The wording of the sentence excludes the discretion. It puts the burden of providing the necessary means to inspect the document onto the public body that chose the soft- and hardware initially and therefore can be assumed to dispose of these means. The body can provide software filters as well in order to convert the special file format of its electronic document system into more common file types that can more easily be read by the party.

##### 2. On-line exercise of the right of inspection (para. 4 second sentence)

Para 4, second sentence, opens the door to the public body to allow the on-line exercise of the right of inspection to electronic documents (or documents stored in an electronic format). The provided discretion (“*may make*”) in fact is significantly limited by several concerns: *firstly* it should be exercised in a lawful way, which presumes that on-line access should be allowed by the public body, as much as possible, when technically available and possible and only to achieve the aim such discretion is allowed by the provision: the aim is pretty clear, because this can boost efficiency and be very citizen-friendly, as no one is bound to physically go to an administration office any more in order to inspect the documents. The public body, on the other hand, is relieved of the burden that an on-site inspection brings to it. No special rooms or working places to inspect the files are necessary, and no staff is obliged to oversee the process constantly. The file is not blocked from being worked with in the meantime. The chance of manipulation of the file is minimized. *Secondly*, the on-line inspection can be allowed only if it does not affect the protection of the data protected by law (see para 3 sentence 1, above); thus it must be made certain, however, that data security and privacy of the persons concerned are respected. Therefore the administration has to be sure that the applicant is entitled to see the documents and that no one else is able to read the information, for example underway over the insecure Internet.

#### V. Cost of taking copies (para. 5)

Para. 5, provides that in order to receive copies of the documents in the file of the party shall bear only the cost for the reproduction of such copies, taking into account also the time and work needed to produce such copies. The provision is in fact a specific concretization of the principle of non-payment for the administrative procedure (art. 9). In addition the provisions should be read to be equally applicable to the electronic documents too: since it may be burdensome and therefore costly for the administration to make electronic files available to the parties, it shall demand payment for reproduction of electronic documents as well.

*Article 46 Limitation of the parties' right to inspect the file*

The right of the parties under Article 45 of this Code shall be limited only in the cases and to the extent as provided for by legislation in force.

A. General Introduction

I. Content and purpose of art. 46

Art. 46 regulates the limits in the exercise of the right of inspection of the file, by the party, in cases the respective documents contain information specially protected by the legislation into force.

Art. 46 is a logical continuation of art. 45, providing for the limits on the exercise of right of inspection by the party. The purpose of art. 46 is ensure the implementation, by the proceeding public body, of the duty of protecting special protected (by special legislation) information in the ambit of the administrative proceeding (connected in particular with the exercise of the right of inspection) constituting a concretisation and a specific reminder of the obligation to protect the state secret (art. 7), the personal data and confidential data (art. 8 and 9) as well as professional and of business secrecy (art. 9), as regulated and protected in details by existing special legislation.

II. Constitution and EU law

Part of art. 46 is a concretisation of art. 35 of the Constitution in the ambit of the administrative procedure. It is also a partial entrapment of art. 8 (protection of personal data) and of art. 41/2/b of the EUCHFR which is it is further developed by art. 21 (Data Protection) of the ECGAB.

III. Legal consequence of art. 46

The legal consequence of art. 46 is the obligation of the proceeding public body to ensure the protection of special protected (by law) information during the course of the proceeding, by limiting the exercise of the right of inspection on such information contained in the documents of the file. The public body is entitled and in the same time obliged to limit the exercise of the right of inspection only in the cases and to the extent needed for the protection of special protected information. On one hand the failure of the public body to comply with the obligation does not affect the lawfulness of the administrative procedure in question but might constitute the ground for criminal, contraventional and disciplinary liability of the responsible official in accordance with the special legislation. Whilst on the other hand any excess to the provision's preconditions (limiting in other cases not especially protected in accordance with the legislation into force) and non-observing the principle of proportionality affects the participation of the party in the proceeding, constituting a breach of the rules on the administrative procedures. The non-observance of these preconditions, i.e. the respective procedural action of the public body cannot be appealed separately (art. 130/1) but can be constitute one of the grounds of the appeal with the occasion of the exercise of the legal remedies against the result of that procedure.

IV. Relation to previous CAP

The normative content of art. 46 deals with the same subject matter as art. 52, correlated to art. 53/2. Whilst the latter refer only to protection of state secret classified information, the new regulatory content, differently from the old CAP provisions, refers across the board to "the cases protected by legislation into force".

V. Scope of application

Being a continuation of art. 45, the scope of application of art. 46 is indispensably related to that of art. 45.

B. Limitation of the parties' right to inspect the file in details

Art. 46 should be understood not as abolishing the right of the party to inspect the file but as case by case limitation of the actual exercise of such a right to the extent indispensable to protect the "information" especially protected by legislation. The preconditions for application of this limitation are two: i) the limitation shall be applicable only in cases the information in the documents in the file comprise specially protected information in accordance with the legislation into force, and ii) the limitation should be proportional to the aim of protecting that information as defined by the respective special legislation.

## I. Especially protected information

Art. 46 contains a sort of general reference to “*cases foreseen by the legislation into force*”, such reference should be understood in three different perspectives: i) as a reference to the legislation into force meant to protect special types of information: In this regard the provision is a concretization (rather a reminder) to the general principles of CAP explicitly stipulating the principle of protection of state secret (art. 7), principle of protection of personal data (art. 8 and 9) as well as professional and of business secrecy (art. 9) and to the application of the special respective laws; ii) the “loose” language of the legislator, although not typical in case of such limitations (which are exceptions from the rule) is meant to open the application of the limitation to other type of data not included in the list of (i) above if there is special legislation protecting such type of information such as for instance the criminal procedural legislation in regard to the investigation secret, and iii) it also extends the application of limitations to the cases in which a special law provides for limit to the right of inspection (ex: art 25 law on public procurement refers to confidential information on the offer of the economic operators).

Finally, it should be also noted, that the despite of the loose wording (“legislation into force”), the limitation of the right of inspection being an exception from the rule, should be stipulated by primary law only.

### 1. The limitation should be proportional to the objective

The wording used by the legislator “*..and to the extent..*” is a concretization of the principle of proportionality (art. 12), in deciding the limits of the exercise of the right of the inspection of the party. It means that the inspection of specific documents should be limited only when and to the extend indispensable for the protection of the respective special protected information and by using the less invasive protective means.

### 2. Practical aspects of implementation

The practical implementation of the obligation shall require to the administration the use of different means such as restricting the inspection to certain specific documents or only to part of them by making “deletion” of certain information in these documents, using of filters or else. In any case the extent of restriction should be proportionate to the protection of the specific protected information, it should be appropriate and necessary to achieve the protection of the involved information limiting the right of inspection to the less possible extent indispensable for such protection. Although not explicitly provided in the provision, the total or partial restriction of inspection of specific documents is a procedural action in the sense of art. 130/3 (see the commentary on art. 130). As such, the procedural act limiting the exercise of the right of inspection, should be properly justified, documented, notified to the party and included in the file of the respective case.

## Article 47 Right to submit opinions and explanations

All parties, at any stage of the procedure, shall be entitled to submit opinions, explanations on facts, circumstances or legal issues, as well as to submit evidence or to present proposals on the resolution of the case.

## A. General Introduction

### I. Content and purpose of art. 47

Art. 47, recognizances to the party the right to submit his opinions, explanation on the factual situations (on the facts and circumstances of the case), but also on legal questions, to submit means of prove accordingly, as well as to make proposals during the entire course of proceeding.

The right of the party to “participate” in the administrative procedure is one of the most important keystones of administrative procedure. In broad terms this right aims to achieve a degree of fairness in the relations between the administration and individuals- this principle provides that the person concerned will be given a possibility to participate in the administrative proceeding: he may put forward facts and arguments, and where appropriate call evidence. So the party will be enabled to participate in the proceeding and can defend his rights, liberties and legitimate interests. Seen from the side of the public administration, the participation is also an instrument of administrative investigation. The recognition of the right of the party to submit opinions, explanations and proposals in the overall course of the proceedings, is one of the instruments part of the “right of participation” in the administrative proceeding (the other most relevant is the “right of hearing”). Thus the party has the possibility to influence the procedure and its result during the entire course of the proceeding. In general terms it is not stipulated

at what stage of the proceeding the person concerned ought to be granted the opportunity of putting forward facts, arguments or evidence, that is why in fact there are regulated two ways of participation one by art. 47 which is more general and could be exercised at any phase of the proceedings and the other by art. 87 more formalistic and related to the moment "prior to the issuance of the act". Art. 47 is also correlated to the following article 48 which against the right of the party to submit opinions and explanation regulates the obligation on the side of the public body to individually assess such opinions and explanations.

## II. Constitution and EU law

The general right of hearing is explicitly stipulated by Para. 2/a of art. 41 of the EUCFR: "the right of every person to be heard, before any individual measure which would affect him or her adversely is taken" and it is further developed by art. 16 of the ECGAB", which explicitly regulates the right of defence "at every stage of decision making procedures".

## III. Legal consequence of art. 47

Art. 47 enriches the ambit of the available instruments the party have to influence the result of the administrative proceeding, by enabling it to intervene in the proceeding through his opinions and explanations and as a consequence triggers the obligation of the proceeding public body to respect such right, by individually assessing each opinion and explanation (see art. 48 below).

## IV. Relation to previous CAP

There are no similar provisions in the previous CAP.

## V. Scope of application

Art. 47 is applicable during the entire course of the administrative procedure. It applies to the first instance administrative procedure to its conclusion in accordance with art. 90. It also applies during or after the legal remedies, during the enforcement of the administrative act as well as during the procedure of *ex officio* annulment and repeal.

## B. Right to submit opinions and explanations in details

Art. 46, recognizances to the party the right - but not the obligation - to submit opinions and explanations. It has two legal preconditions: i) the existence of an already initiated and ongoing proceeding at any stage of it and ii) the procedural capacity of a party in that proceeding. The right applies to all parties of the proceeding (on the concept of the party pls. refer to the commentary on art. 33 above).

The right is regulated in a rather comprehensive sense it includes: i) submission of opinions and explanation on questions of facts and law; ii) submission of means of prove and iii) making of proposals.

### 1. Questions of facts and law

An administrative action is in a broad sense the application of the law in an individual case, so the administrative procedure might involve questions of fact as well as questions of law. "Questions of Fact concern the circumstances in the case"<sup>15</sup>. "The relevant fact (according to the interpretation of the statutory condition) must exist in the case. Whether it does or not depends on the circumstances in the case"<sup>16</sup>. "Questions of Law are the meaning to be accorded to a statutory term that defines the initial decision-maker's scope of authority"<sup>17</sup>. The establishing of the meaning of the statutory condition, the interpretation, is a question of law. "For example if the law states that an alien who feels "a well-founded fear of persecution" is a refugee and has the right to a residence permit" there might be a need to interpret "well-founded fear of persecution (quote)". What does it mean and what facts are relevant?<sup>18</sup>.

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<sup>15</sup> Edelstam, Gunilla, *The Duty to Investigate and the Burden of Proof. - Part of the Legality principle in Administrative Law?* "Problèmes de procédure administrative non contentieuse". Table ronde organisée par La Chaire "Mutations de l'Action Publique et du Droit Public", Sciences Po, [http://www.sciencespo.fr/chaire-madp/sites/sciencespo.fr/chaire-madp/files/the\\_duty\\_to\\_investigate\\_and\\_the\\_burden\\_of\\_proof.pdf](http://www.sciencespo.fr/chaire-madp/sites/sciencespo.fr/chaire-madp/files/the_duty_to_investigate_and_the_burden_of_proof.pdf)

<sup>16</sup> *Ibidem*

<sup>17</sup> *Ibidem*

<sup>18</sup> *Ibidem*

The party can submit arguments on both: as a rule the opinions and explanation of the party aim to clarify the factual circumstances of the case, parties could also bring arguments on the interpretation of legal provisions although the latter is not predominant. In addition the provision should be interpreted in the *lato sensu*, the party could submit opinions on almost everything related to the procedure, including the procedural actions of the proceeding public body.

## 2. Means of evidence

The submission of evidence is related to the questions of facts and not to the one of law and aim to prove the existence of such fact, for instance, in case of the alien applying for the refugee status, in order to show “a well-founded fear of persecution”<sup>19</sup> might for example mean that “the alien has been involved in political activities that are illegal in his country”<sup>20</sup>. That could be a relevant fact according to the interpretation. “A sentence from a criminal court of the country that the alien comes from where he is sentenced for having founded an illegal political party in the 3d country would be an evidence to show that the relevant fact is true but it can be shown also in other ways, through other information or other documents”<sup>21</sup>. For the general meaning of means of proves pls. refer, also, to the sense of art. 80 of this Code. Anyway it should be understood that the latter refers to the means available to the public body for the administrative investigation and could not be interpreted as limiting the means of proves the parties could submit to the public body: in principles the party could use any kind of prove to make his point in establishing the circumstances of the case.

## 3. Making of proposals.

A party might make proposals in relation to investigation or even resolution of the case in a certain way: for instance the party may propose to the public body to extend its investigation to other factual circumstances, to take other means of prove or else; the party could propose for instance the initiation of a reconciliation procedure with other parties with contravening interests in accordance with art. 69; one other possible case is when the party proposes the conclusion of the administrative proceeding with an administrative contract instead of an administrative act in the sense of art. 119 and 120. It worth mentioning that a similar mechanism is recognised explicitly in the Italian law (law of 7 August 1990, n. 241 “New norms in the area of administrative proceeding and the access to the administrative documents” which explicitly provides (under art. 11/1) “1. As result of receiving observations or proposals ... the proceeding administration.. could conclude.... agreements (n.a: administrative contract) with the interested (n.a: party)”.

## 4. The ambit of application of art. 47 compared to the right of being heard

It, should be emphasised that the ambit of application of art. 47 is somehow larger than the one of the formal right of hearing regulated by art. 87-89, whilst in the latter case the party shall not be notified and accordingly given opportunity to be heard if in the presence of one of the grounds of exclusion explicitly provided by art. 89 (exclusion from the right of hearing), it can still submit opinions and explanations upon its initiative as regulated by art. 47.

## 5. Rules and form for the submission

The instrument is regulated into a non-formalistic approach. The opinions or explanations, the evidence or the proposals could be submitted in written or orally in front of the responsible official. In relation to the form, content and way of submission, art. 61 shall apply, making applicable the provisions of art. 58 to art. 60 accordingly.

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<sup>19</sup> *Ibidem*

<sup>20</sup> *Ibidem*

<sup>21</sup> *Ibidem*

Article 48 *Obligation to assess*

The public body shall, at any case, be obliged to assess in writing the opinions and explanations presented by the parties as provided for by Article 47 of this Code.

A. General Introduction

I. Content and purpose of art. 48

Art. 48, stipulates the obligation of the proceeding public body to assess in writing the opinions and explanation submitted by the parties. Art. 48 is the continuation of art. 47, it regulates the other facet of the right of the party to submit opinions and explanation, or in simpler words it regulates the legal consequence of art. 47. In the same time art. 48 should be seen in a broader prospective connected with provisions of Chapter X “Administrative Investigation” and art. 100 of this Code. As will be explained further on, in an administrative procedure the public body should investigate *ex officio* everything necessary for the final decision (derives from art. 77/1), it is entitled to determine the type and scope of investigation independently and to assess whether a fact or circumstance is relevant for the case (art. 77/1); in addition in accordance with the principle of free evaluation of evidence, the public body shall rule by its own conviction which facts shall be deemed as proved (art. 80). These powers are based on one of the basic pillars of the administrative law, in accordance with which the public body is a at first and at last instance the trustee of public interest and should use all the legal means at its command in order to give a right and lawful decision in a concrete administrative case. At the other side, the administrative procedure is based on the participation of the parties, in order the latter is given the opportunity to expose facts and, put forward and defend their rights and legitimate interests. In order to align these desiderates, the will of the public body exteriorised through the administrative act should be reasoned enough (art. 100) to allow the party understand the logical *iter* for the decision and to act accordingly or eventually appeal it. Within this ambit the public body is expressly obliged to assess the opinions and explanations submitted by the party and so that the party should know about this assessment.

II. Constitution and EU law

The obligation of the public body to assess the opinions and explanations of the party derives by Para. 2/c of art. 41 of the EUCHFR: “the obligation of the public body to give reasons for its decisions”.

III. Legal consequence of art. 48

Art. 48 is the continuation of art. 47, it regulates the legal consequence of art. 47. Public body’s failure to assess in writing the opinions and explanation of the parties, would be part of the failure to give complete reasoning for the administrative decision and have same legal consequences as the latter (see the commentary on art. 100 of this Code).

IV. Relation to previous CAP

The is no similar provision in the previous CAP

V. Scope of application

Art. 48 is applicable during the entire course of the administrative procedure. It applies to the first instance administrative procedure to its conclusion in acc. to art. 90. It also applies to the legal remedies, to the enforcement as well as to the procedure *of ex officio* annulment and repeal of the administrative acts.

B. Obligation of assessment in details

Art. 48, stipulates the obligation of the proceeding public body to assess the opinions and explanations submitted by the party and the form for such assessment.

1. The public body shall, at any case, be obliged

This part of the provision stipulates the legal consequence the submission of opinions and explanations of the party has. It triggers the obligation of the proceeding public body to assess such an input of the party.

2. To asses

The obligation of the assessment should be understand as the obligation of the public body to reflect on or to study the opinions and explanations submitted by the party. It does not mean that the proceeding public body should

necessarily take into consideration or act accordingly to such opinions and explanations in taking the final decision. The obligation is rather a reminder or reiteration of the public body's duty to undertake a complete investigation and to carefully investigate what relevant for the final decision (see the commentary on art. 77 of this Code). As explained under art. 47 the opinions and explanation of the party might relate both to questions of facts and/ or questions of law. It should be understood that in both prospective (law and facts) the public body remains ultimately free to independently decide: on the interpretation of the law; on the assessment of whether a fact is relevant for the case (art. 77/1) or on assessing whether a fact is considered as proved or not (art. 81).

### 3. The opinions and explanation submitted by the party

For the term opinions and explanation see the commentary on art. 47. Both should be submitted in the course of an ongoing administrative proceeding (see the preconditions for the application of art. 47 above). It should be noted that the first part of art. 48 refers only to opinions and explanation and does not mention the means of prove and the proposals submitted respectively made the party. In our opinion the reference (at the end of the sentence) allows an *in extenso* interpretation as to include all the submissions of party in the course of the proceeding including evidences and proposals.

### 4. In writing

The wording of art. 47 is quite demanding and restrictive, it not only obliges the public body to reflect on or study the opinions and explanations submitted by the party, but also requires the assurance that this obligation is fulfilled requiring the "documentation" of such process in written. The question, normally raised in this case, are what "standard" is meant to be achieved by the legislator or in other words which/what is: i) the instrument the public body should use to fulfil the obligation and ii) what is *in concreto* the standard of content the writ should include in order to consider the obligation as observed. In our opinion both issues should be resolved by a systematic interpretation in correlation to art. 100 of this Code (Reasoning of the Act). The latter (the reasoning) is the instrument through which the public body should show it has already assessed the opinions and explanations of the party and also establishes the standard of content of such assessment. In poor terms it would be enough that in the final administrative act the public body includes a complete reasoning, meaning a clear: resume of the result of the administrative investigation and of the assessment of proves (art. 100, lit. b); explanations of the situation of fact (art. 100, lit. a) upon which it bases its decisions; explanation of the legal bases including an explanation on why the legal precondition apply in the respective case (art. 100, lit. c) as well as an explanation why the discretion is used in the given manner (art. 100, lit. ç) in order to consider the above mentioned obligation as properly observed.

Of course, a complete reasoning in the sense of art. 100 would constitute the "minimal standard", which does not forbid the proceeding public body to communicate in written (with the party) or in other form, during the proceeding, expressing and explaining its position towards party's opinions, explanations or proposals.

## **CHAPTER IV**

### **DOCUMENT UNIFICATION AND SIGNATURE CERTIFICATION**

#### *Article 49 Unification of own documents*

1. Every public body may issue upon request copies or parts and certify as true with the original of the documents issued by itself, or other documents under its administration.
2. The unification with the original shall not be made if, according to the circumstances, it comes out that the original contains differences, discrepancies, deletions, amendments, illegible words, figures or signs, traces of erasure, or where the continuity of a document composed of several sheets has been interrupted.
3. Exceptionally, in the cases as provided for by Paragraph 2 of this Article, when that original is the only existent copy of the document, the unification of it can be made by making a relevant note on the respective deficiencies.
4. The unification with the original shall be made through a unification note placed at the end of the copy. This note should contain the following:
  - a) An exact description of the document, which is being unified;
  - b) A statement maintaining that the copy is identical with the original document or it is an extract of such document;
  - c) The place and date of unification;
  - ç) The public body making the unification and its official stamp.
  - d) The name and the signature of the official responsible for the unification;
5. The deadline to issue the unified copy is 10 (ten) days from the day the request is submitted.
6. In the event of failure to fulfil the request or of rejection by the public body, the applicant shall have the right to appeal against the failure to issue a unified copy under this Code.
7. Provisions of this Article shall apply to the extend it is possible for the unification with the original of other documents stored in the form of photography, video recording or recorded with any other technical means.

#### A. General introduction

##### I. Content and purpose of Art. 49

Art 49 recognizes the possibility, that upon request, public bodies certify as true and issues certified copies of their own document or of other documents kept in their files. It, also, establishes the procedure and the rules for such a unification.

The provision aims to facilitate the contact between the citizens/businesses and the administration and reduce the burdens (whether in time and cost) to citizens and businesses. The unification of documents on the one hand allows the use of copies of an original document. The use of copies makes it easier for the citizen to prove the existence and content of the document without needing to give away the original. This, however, comes with the loss of certainty that is connected only with the original of a document. Copies do often not bear the signs of authenticity of the original document. They are therefore more likely to be forged. The unification of the copy prevents this by letting a trusted authority make the copy and certify it as true.

##### II. Legal consequences of Art. 49

The public body is obliged to certify as true and issue, upon request, copies of any document in its possession. Such copies certified as true in accordance with art. 49 have the same legal value as the respective original documents.

##### III. Relation to the previous CAP

There are no provisions in the previous CAP dealing with the unification of documents. Thought it contained specific application of substance of art. 49 without regulating the procedure thereof, e.g. art. 52 of the previous CAP gave the interested parties the right to certified copies of documents from files managed by the administration, while art. 53 on the other hand obliged the competent civil servant to issue a certificate or an authentic copy of an application,

petition, appeal and the like, or a declaration to certify the confidentiality of a document requested by the interested party.

#### IV. Scope of application of the norm

The obligation enshrined by this article do not belong to rules on the course of the procedure in the *stricto sensu*. Art. 49 applies at any stage of an administrative procedure, and even beyond a specific procedure, whenever a citizen/business needs a document having the same legal value to the original. Art. 49 allows the unification of public body's own document or of other documents kept in its files only.

#### B. Unification of own documents in details

##### I. The obligation to issue certified copies authorisation (para. 1)

Para 1, stipulates that every public body shall be authorized to certify as true: i) full copies or ii) extracts (parts) of original documents. Despite the "loose" language ("may") the public bodies are obliged to issue such certified copies upon request.

The rule is applicable regarding: i) documents issued by the public body itself, as well as to ii) other documents the public body preserves in its files despite the fact are not compiled/issued by the same public body.

Although not explicitly mention, this obligation should be performed observing the principles of protection of personal data, business and professional data (in acc. to art. 9), state secret information (acc. to art. 7) and other sensitive data protected by special legislation.

##### II. Main preconditions conditions for unification (para. 2)

Para. 2, stipulates the two main legal preconditions for unification of a certain document: i) the document to be certified should be original, and ii) the document should be of full integrity. A document is deemed to have full integrity if it has no changes, deletions or any kind of alteration and if its continuity is not interrupted. The rules are similar to the ones for the unification of writs by the public notaries and intended to avoid the unification of not reliable documents, which might have been altered due to timing, natural conditions or human interventions.

##### III. Exception from the condition of integrity (para. 3)

Para. 3, enshrines an exception by the rule provided by para. 2, allowing for the unification of documents that do not fulfil the full-integrity conditions. The exception is applicable upon one strict precondition: the defective document is the only available/existing original. The aim of the provision is reasonable making the exception applicable only as a last resort. Of course, the requesting party should claim and proof that the document is the only existent. In addition the provision stipulates that in this case the note of unification (para. 3) should explicitly and in detail refer/mention to the respective defects of the original documents, which copy is certified.

##### IV. Unification procedure and note (para. 4)

Para. 4, establishes the procedure for the unification and the mandatory content of the unification note. The unification is done through the application on the copy of a unification note. The reference should be read in a narrow sense allowing for the application of the elements of the note in the copy of the document or in another page attached to it.

The mandatory elements of the note are detailed in lit. a) to lit. d), including a full list of elements meant to ensure necessary verification of the "genuinity" of the certified copy and avoid forgery. The elements of the note are similar to the one applied in the unification by the Public Notaries.

##### V. The deadline for the issuance of a certified copy (para. 5)

Para. 5, provides the applicable deadline for the issuance of the certified copies, which is 10 days from the submission of the request. As in accordance with para. 1, the issuance of certified copies is performed only upon request, a deadline for the action of the public body is needed. For the submission of the request the provisions of art. 58 and 59 shall apply. On the "event" that triggers the start of the deadline art. 57 shall apply, whilst the deadline itself shall be calculated in acc. to art. 56.

## VI. The legal remedies in case of non-issuance of the required certified copy (para. 6)

Para. 6, provides the possibility to exercise the administrative legal remedies in case of non-action or refusal by the public body to issue the certified copies. Although not explicitly regulated in the provision, the non-issuance of the requested certified copy equals with the non-performance of a required other administrative action and as such the applicable legal remedy in this case is the administrative complaint to which the rules of art. 141 to 146 of this Code applies.

## VII. Unification of documents stored in other traditional formats (para 7)

Para. 7, extends the applicability, by analogy, of the rules of para. 1-6 to the information preserved in other formats such as documents stored by photographic, recordings or any other similar technical means. The list is exemplificative and should be read as referring to any traditional form of storage of information, which exception of electronic documents (to which the special rules of art. 50 shall apply). In years to come there might be documents stored/preserved in other non-traditional formats, which copies might be needed to be certified and used accordingly.

### Article 50 *Unification in connection with electronic documents*

The unification of paper copies of an electronic document in regard to an electronic signature, of the copies of an electronic document, which is generated to reproduce a written document, as well as the unification of the copies of an electronic document in another technical format other than the original document related to an electronic signature, and any other unification related to documents in electronic form, shall be regulated by special law.

#### A. General Introduction

##### I. Content and purpose of art. 50

Art. 50 provides for the “unification related to documents in electronic form”, of which itself names three. It does not, however, contain specific rules to that respect, but rather refers to a “special law”. One of them is the Law on the Electronic Document, regarding “paper copies of an electronic document”.

Art. 50 supplements art. 49 and 51 on the unification of documents as well as art. 52 on the unification of manual signatures. This historical view of the need for certified documents is of course limited to paper documents. With electronic documents there is no “original” but only copies that can be “given away” without loss, a special provision is needed to ensure the “truthfulness” wherever the format of the document changes in the act of copying: when the document is printed out, i.e. a hardcopy of the electronic document is created; when a paper document is scanned in, i.e. an electronic copy is made of the paper document, and when a document connected with an electronic signature changes its file format. In each case the “copy” of the document is technically different from the “original”, although the content of the two documents remains unchanged. The unification process allows for stating this fact and thereby for using the “copy” instead of the “original”.

##### II. Constitution and EU law

Neither the constitution nor EU law contain provisions regarding the unification of copies, lest in connection with electronic documents. Certified copies are, however, acknowledged by the community law: The Services Directive 2006/123/EC states in article 5 paragraph 3 that the Member States shall accept any document from another Member State that proves a legal requirement to be met, and may not require the document to be produced in its original form *or as a certified copy*, subject to several exceptions. Recital 47 explains that this aims at administrative simplification.

##### III. Legal consequence of art. 50

Article 50 itself does not provide or legal consequences but leaves them to special law it refers to.

##### IV. Relation to previous CAP

The previous CAP did not provide for a unification of copies in connection with electronic documents.

## V. Scope of application

Art. 50 applies to “any ... unification related to documents in electronic form”, but covers especially the following three scenarios:

- an electronic document that bears an electronic signature is printed out (“paper copy”)
- an electronic document that bears an electronic signature is changed into a different electronic format
- a written document is scanned in with the aim that the electronic document replaces the written document.

## B. Unification in connection with electronic documents in details

Art. 50 provides for the “unification related to documents in electronic form”, of which itself names three. It does not, however, contain specific rules to that respect, but rather refers to a “special law”

### 1. Paper copies of an electronic document

An electronic document may be printed out (“hard copy”/ “paper copy”). The electronic signature connected with the electronic document has no value in relation to the paper copy. In order to remain that value and transfer it at least partially to the paper copy, it is necessary to verify the electronic signature as well as all certificates. The result then needs to be documented and connected to the paper copy.

It is crucial that a trustworthy person verifies the electronic signature as well as the document copy. Therefore, article 10 of the Law on the Electronic Document -- the “special law” referred to by article 50 -- requires that in public institutions the certifying of a hardcopy of an electronic document shall be carried out only by persons that are specially authorized by the head of the institution. In all other cases the public notary is the competent institution.

Paragraph 3 of article 10 of the Law on the Electronic Document requires that the certified hardcopy (paper copy) of an electronic document must have attached the notice “Identical copy with the electronic document”.

### 2. Electronic copies of an electronic document

The same applies mutatis mutandis to an electronic document that is converted to an electronic document with a different file format (for example a text document into a PDF file). The electronic signature connected with the “original” electronic document (here: the text document) has no value in relation to the file in the different file format. An electronic signature is blind to the content of a document but very strictly connected to the electronic representation of that content. In order to remain the signature’s value and transfer it at least partially to the electronic copy, it is equally necessary to verify the electronic signature as well as all certificates. The result then needs to be documented and connected to the electronic copy.

There is no “special law” addressing this scenario. The Law on the Electronic Document does not contain provisions in this regard.

### 3. Scan of a written document

A written document may be scanned in. This may have the purpose simply to have a copy of the document that is more easily stored, transferred, copied and worked with. It may, however, also have the purpose to replace the written document in fact as well as legally. In that case the electronic copy is an accepted substitute for the written document. The paper document may be given back to the creator respectively the sender of the written document, or may be disposed of. This is possible only if the scan system as well as the whole scanning process is especially trustworthy and tamper-proof. Regular or even constant checks and controls of the scan product and its accordance with the written document are the minimal condition. For a reference, see the technical guideline “TR 03138 – RESISCAN” of the German Federal Office for Information Security (BSI).

4. There is no “special law” addressing this scenario, either.

#### Article 51 Unification of documents issued by other public bodies

1. A public body may certify as true copies or extracts of documents issued by another public body, if the copy or extract is necessary for the conduct of the procedure before the body, which is making the unification, and provided that the interested party presents the original of the document issued by the other body.

2. The rules on unification provided for by Article 49 of this Code shall apply accordingly in cases described in Paragraph 1 of this Article. The unification note shall contain the identification data of the person that has presented the original document.

3. The public body shall record any unification performed and keep a certified copy of the act.

#### A. General introduction

##### I. Content and purpose of Art. 51

Art 51 establishes the obligation as well the rules for the unification of documents issued by another public body if the latter is needed to be submitted to the certifying body in the course of an administrative proceeding conducted by the latter.

The rules of Art. 51 are a continuation of Art. 49, but they refer, to the unification of documents issued by other public bodies. The provision aims to facilitate the efficiency of administrative procedure and reduce the cost of unification by the public notaries (in acc. to art. 18. Para. 2), by providing that in the case, when it is required a certified copy of an official document to be submitted as part of the request for the issuance of an administrative act (ex: an application for a license), the submitter could certify and submit it directly to the public body conducting the proceeding.

##### II. Legal consequences of Art. 51

If the legal preconditions are fulfilled the public body conducting the procedure is obliged to certify as true a copy of the original document and accept it in the procedure.

##### III. Relation to the previous CAP

There are no provisions in the previous CAP dealing with the unification of documents.

##### IV. Scope of application of the norm

It applies at any stage of the administrative procedure.

#### B. Unification of documents issued by other public body in details

##### I. The obligation of unification (para. 1)

As already explored, the provision aims to reduce the cost of the administrative procedure and is especially relevant in cases when the party should submit a document (as part of a request or during the course of the procedure) in order to prove certain facts (ex: the fulfilment of certain legal criteria) related to the procedure. In this case the provision makes possible the submitter presents the original of the document, in front of the public body it is applying to, which certifies it and accepts it accordingly.

Para 1, despite the relaxed wording (“may”), a systematic interpretation of the provision and of the entire spirit of this Code, the provision clearly stipulates the obligation of the public body to certify as true a document and accept the certified copy. The legal preconditions for activating such an obligation are the following: i) the party should present the original of the document; ii) the document to be certified is issued by another public body, and iii) the certified copy is necessary and actually shall be submitted in the framework of an administrative procedure conducted by the same public body (to which is required the unification). The first precondition (i) is rather stricter than the one under para. 1 of art. 49, it refers to a document issued by another public body, excluding the application of the provision to the documents of private parties. The latter (iii) precondition, also needs certain clarification: firstly: the term “necessary” should be read in the *lato sensu* as referring to any document requested by law, or by the public body to be submitted in the course of the procedure as well as to any other document the party thinks it is useful to submit (in

acc. to art. 61) to the public body; secondly: the expression “public body” should be, also, read in the *lato sensu* as referring to the public body competent for the procedure to which the document is intended to be submitted, including the point of single contact (art. 75), in cases such exists for that specific administrative procedure.

## II. The rules and procedures for the unification (para. 2)

Para 2, stipulates that the rules and the procedure for the unification which are the same as the one stipulated for the unification of the own documents, by explicitly referring to the provisions of art. 49. The last sentence of para 2 introduces an additional element to the unification note, which is the identification data of the person that presented the original document. The latter is a solution in accordance with the tradition of unification by public notaries.

## III. Additional rules for the unification of documents issued by other public bodies (para. 2)

Para. 3, stipulates an additional rule to increase the safety of the unification process, it provides the obligation of the public body to keep a register, where to register any unification performed and the obligation to keep the certified copy. In fact the last part of the sentence is redundant, because it is implied by the wording of para 1 (precondition (iii)): the unification of the documents of other public bodies (not issued or administered by the respective public body in accordance with art. 49 (1)) is legally possible only if the documents is required to be and actually is submitted to the same public body which performed the unification, which implies that the same certified copy has no any legal value to third institutions.

## Article 52 Certification of signatures

1. Any public body authorized upon Decision the Council of Ministers shall certify signatures, where the signed document is required for submission to another public authority or body, to which the signed document has to be submitted.
2. The signature certification shall be made only when the signature was made or acknowledged in the presence of the official of the public body assigned for this purpose.
3. The certification note shall be placed immediately adjacent to the signature, which is being certified and it should contain the following:
  - a) a statement maintaining that the signature is genuine;
  - b) the exact identity of the person whose signature is being certified, and also a note as to whether the employee responsible for certification is convinced about the identity of the person and whether the signature was made or acknowledged in his presence;
  - c) The statement maintaining that the certification is only made for submission to another public authority or body and mentioned and the name of such an authority or body;
  - ç) The place and date of certification, and the signature of the official responsible for the certification and the official stamp.
4. Paragraphs 1 to 3 of this article shall apply to the extent possible also regarding the certification of other personal identification signs.

## A. General introduction

### I. Content and purpose of Art. 52

Art 52 establishes the general rules for the certification as true of hand written signatures or other personal identifiable signs. It might be cases (stipulated by special law) when a certified signature is requested as a guarantee for proving that a certain document is signed by a certain person and no else. In this case the signature should be performed in the front of the respective public body, which implies the personal appearance of the respective person in front of the officials of the public body. In order to facilitate the process, the provision makes possible that the signature is performed in front of and it is certified by another public body which is more accessible to the respective person, avoiding his/her appearance in front of the public body which need the signature guarantee.

## II. Relation to the previous CAP

There are no provisions in the previous CAP dealing with the certification of signatures or other personal identification signs.

## III. Scope of application of the norm

It applies at any stage of an administrative procedure, and even beyond a specific procedure, under the condition there is an explicit legal provision that requires such guarantee.

## B. Certification of signatures in details

### I. Certification of signatures in a document to be submitted to another authority (para. 1)

Para. 1 regulates the certification of the hand written signature in a document which shall be submitted to another authority or public body. The word “authority” is meant to be broad enough to make possible the certification of signature, also, in case of submission to courts or other foreign authorities.

The certification of signature could be done only by a public body explicitly authorized, for this purpose by a CoM decision. The aim of such a restrictive conditions is to limit this operation only to given public bodies, which in accordance with the practice in some countries, are the ministries of foreign affairs in cases the certification is needed for documents requested by foreign authorities or to the representatives in territory (ex: the prefects) when the certification is needed for documents requested by central authorities.

### II. The procedure and the note of certification (para. 2 and 3)

Para. 2 and 3 regulates the rules and the procedures for the certification of hand written signature, by applying common rules generally used by the public notaries. Para. 2, foresees that the signature on the document should be performed or accepted to have been performed personally in front of the certifying official. In addition para. 3 (lit. a) to c)) stipulates the content of the certification note, which is broad enough to ensure the genuinity of the operation of certification. It requires that the certifying official checks in advance the identity of the person. In addition the certification is valid only for the authority explicitly mention in it (lit. c)

### III. Certification of other personal identification signs (para. 4)

Para 4, extends the applicability of the rules of para. 1-3 to the other personal identification signs. The wording “personal identification signs” is left on purpose wide enough to accommodate current forms personal identification signs (ex: the identification stamps) as well as any future possible identification signs that might appear with the technology development and innovations.

## **CHAPTER V DEADLINES**

### **Section 1 Deadlines for Procedural Actions for the Parties, Extension and Reinstatement**

#### *Article 53 Determination and extension of procedural deadlines*

1. Deadlines of performing a procedural action by the parties hereinafter referred to as “procedural deadlines” shall be set by law or secondary legislation;
2. Unless otherwise provided for by this Code, if the laws or secondary legislation fail to provide for a specific deadline of conducting a procedural action, the public body conducting the procedure, shall, by means of a special decision, set a reasonable deadline according to the specific case and in line with the principle of lawful exercise of discretion.
3. The procedural deadline specified by law or secondary legislation may be extended only if this is explicitly provided in the law or secondary legislation, whereas the deadline set by the public body may be extended upon justified request of the interested party submitted prior to expiry of the deadline.”

#### A. General introduction

##### I. Content and purpose of Art. 53

Art 53 deals with the procedural deadlines, which are deadlines for the implementation of certain procedural activities by the party. It regulates:

- the establishment of the procedural deadlines, whether directly by legislation or by the public body conducting the procedure;
- the conditions/criteria for the establishment of a procedural deadline by the public body, conducting the procedure, and
- the conditions and the procedure for the extension of a procedural deadline.

The deadlines could be defined as periods of time which have to be observed concerning particular activities in the procedure. They are meant to ensure both the “celerity” as well as the “legal certainty” of the procedure and could concern both the procedural activity of the public bodies or the implementation of the procedural activities by the parties of the procedure. The latter one are defined as “procedural deadlines”. Only part of the deadlines for the implementation of certain activities by a party, in the course of an administrative procedure, are established directly by legislation (e.g. art. 132 prescribes a 30 days deadline for the submission of the administrative appeal or e.g.. art. 64, para. 2 second sentence, stipulates that the right of withdrawal or could exercises “as long as the public body has not taken a final decision”) ). In case the legislation does not, directly, prescribes such a deadline, the public body should be entitled and in the same time obliged to establish the procedural deadline in order to ensure a smooth and expedited course of the proceeding. Finally, the failure of the party, to perform a procedural action within the respective deadline has as the legal consequence the sanction of “decadence”, i.e. that the procedural right (i.e. the respective procedural action) can’t be exercised after the expiration of such a deadline. In the real life the parties might be prevented from to observe a certain procedural deadline for different reasons. Losing such a deadline might aggravate the position of the party and consequently affect its rights or legitimate interests. That is why in justified cases and under a certain procedure it should be possible to extend the deadline.

##### II. Legal consequences

In case the legal provisions do not directly establish the deadlines for implementation, by the party, of a certain procedural action in the course of an administrative procedure, the public body is obliged to do so. In addition, when provided by the legislation for the deadlines prescribed by legislation or unless forbidden by law for the procedural deadline established by the public body, the latter is, also, entitled to extend the deadline when requested by the party due to justified grounds.

### III. Relation to the previous CAP

There are no provisions in the previous CAP dealing with determination and extension of the procedural deadlines.

### IV. Scope of application of the norm

Art. 53 applies to any procedural deadline across the course of an administrative procedure, despite the phase or stage of such procedure.

### B. Determination and extension of the procedural deadlines in details

#### I. Meaning of a procedural deadline and their establishment (para. 1)

Para. 1, has an introductory character to the rest of the article. It first, gives the concept of the “procedural deadline” as a period of time for the implementation of a certain procedural activity (in the administrative procedure) by a party, e.g.: the deadline for correction/completion of a defective request (art. 62); the deadline for exercise of the right of hearing (art. 88, para. 1) or the deadline for the exercise of the right to lodge an administrative appeal (art. 132, para. 1) etc... The reference to “a procedural action” should be read in broad sense as referring to any procedural action of the party in the procedure whether performed by its own initiative or because requested by the law or by the public body.

The definition is needed to distinguish a “procedural deadlines” from other deadlines foreseen for the actions to be implemented by the public body, e.g.: the deadline for conclusion of the administrative procedure (art. 91), the deadline for the conclusion of the appeal procedure (art. 140) or the deadline for the public body to inform the party on the inaccuracies of the initial request (art. 62, para. 2), and it also serves to determine the scope of application of the entire section (art. 52 to art. 55).

Para. 2, also, foresees that the procedural deadlines, as a rule, should be established by legislation i.e. by law (whether a general deadline proscribed by this Code or a special deadline established by special/sectoral law) or secondary legislation. It should be noted that this Code generally avoids establishing general deadlines (applicable across the board to any type of procedural action and to any type of administrative procedure) unless for very crucial a procedural actions (e.g. the deadline for the legal remedies, or the deadline for the withdrawal of the request) and leaves to the special legislation the attribute to determine these deadlines. The logic and the approach followed by the Code is evident, it is because, as a rule, the duration of such deadlines should be procedure-specific, meaning its duration should depend on the complexity of that certain type of procedural action and that certain type of procedure and by consequence the deadline should be established by sectorial legislation or case-by-case by the public body conducting the procedure.

#### II. Procedural deadlines established by the public body and criteria there off (para. 2)

Para. 2, stipulates the obligation of the public body to establish a procedural deadline in case the legislation fails to directly prescribe it. In addition it stipulates the criteria for the determination of the duration of such a procedural deadline as well as the means to establish it.

##### 1. Obligation of the public body to establish a procedural deadline

The public body is entitled and in the same time is obliged to establish a procedural deadline only in case of silence of the legal provisions, i.e. when not directly provided by a law (whether a general deadline established by CAP itself or a special one established by special law) or by a piece of secondary legislation. The obligation derives from both: a) the literal interpretation, nota bene the wording: “determines”, and b) by a logical and systematic interpretation of CAP, the public body should take all the necessary measure to ensure a smooth continuation and finalization of the procedure (art. 18).

In addition the wording “the public body conduction the procedure” defines to whom the competence belongs to.

##### 2. Duration of a procedural deadline established by the public body

Determining the duration of a procedural deadline, to be established by the public body, is at the lawful discretion of the public body (as defined by art. 11). Such discretion is further limited by two explicit conditions: the first condition is provided by para. 2, by explicitly stipulating that the deadline should be “reasonable according to the respective case”, whilst, the second, derives from the principle of procedural efficiency enshrined by art. 18. In determining the duration of the procedural deadline the public body has to find a balance between the “reasonability” and the “efficiency of the procedure” (which also involves the legal protection of other parties involved). The reasonability

should be contextual, meaning it should depend on the concrete procedural action the party is expected to implement within that deadline: the duration should be such as to make possible the party objectively and actually could implement such action within that deadline, in the contrary case (for instance when the deadline is very short) the party might be impeded to implement the procedural action which per consequence might affect its chances to have an finalization of the procedure in its interest or (in case the deadline is too long) the procedure risks to take longer than needed and per consequence affect the public interest (which requires prompt action), the interests of other or of even of the same party.

### 3. The deadline is decided by a procedural act

The establishment a procedural deadline is to be decided by the public body through a “special decision”. Such a decision is “special” in the sense it is not an administrative act, meaning it is a procedural act of the public body (a procedural action is any act, action or omission of the public body during the procedure which is not the final administrative act or act of declaration of conclusion - art. 130, para. 3). Per consequence it can’t be challenged, by the party, separately from the final decision (art. 130 para. 3), but instead the establishment of a non-reasonable deadline (e.g. a very short deadline), which might actually have affected the party’s procedural rights might by an important ground for challenging the final result of the administrative procedure itself.

### III. Extension of a procedural deadline (para. 3)

Para. 3 deals with the extension of procedural deadline. A procedural deadline could be extended, by the public body conducting the procedure, when the following legal preconditions are met: i) the deadline is an “extendable” one; ii) the party has submitted a request for the extension before the expiration of the original deadline, and iii) the request is justified.

#### 1. An extendable deadline

In accordance with the general principles a deadline established directly by legislation is a rigid one (“i prerë” in Albanian). A rigid deadline, as a rule, can’t be extended, unless the possibility of extension is explicitly allowed by the same provision stipulating the deadline. Whilst the deadlines established by the public body, as a rule, might be always extended, unless of course forbidden by law.

#### 2. Party has submitted a request for the extension before the expiration of the deadline

##### a) Upon a request of the party

The wording of this part of regulation is meant to denote that the request should be of the party that is expected to implement the action and it is prevented to do so. The extension could not be decided neither *ex officio* by the public body nor by request of another party of the procedure.

##### b) Submitted before the expiration of the original deadline

This part of the regulation clarifies that there is a deadline for the submission of the request for extension - which is the original deadline for the performance of the required procedural action. The wording is meant to clearly distinguish the institute of extension from the one of reinstatement into the deadline (regulated in the coming article 54).

#### 3. Justified request

The extension might be decided only when the request is justified. The provision does not define what could be “justified” ground for the extension using a rather indeterminate legal term. By way of systematic interpretation and analogy with para. 2 and the subsequent art. 57 the “justified” grounds has to be interpreted by the public body by means of objective criteria. Objective criteria especially concern unforeseen or unavoidable events, e.g. grave illness or accidents which might impede that party to perform the action. Another ground might be when the deadline, when established by the public body (in acc. to para. 2) was actually shorter than what objectively required to perform the specific action and the party succeeds to prove this.

#### 4. Competence to decide the extension

The decision to grant or refuse the extension belong to the public body conducting or competent to conduct the procedure. The interpretation derives from a systematic interpretation of para. 3 correlated with para. 2. In addition such a decision to grant or refuse the extension of the deadline as well as the duration of such extension (in case of granting it) is at the lawful discretion (nota bene: “*may be extended*”) of the public body under the same conditions as for the establishment of the original deadline as commented under para. 2. The aim for attributing the discretion in

this very case, is on one hand to avoid a deterioration of the position of the party that have lost the deadline for justified reasons and on the other hand to ensure protecting the public interest in an efficient manner (within reasonable time-limits). In making a lawful decision the public body should properly weight both objectives in the context of the concrete situation.

The decision on granting or refusing the extension is a procedural act as defined in acc. to art. 130 , para. 3 and can't be appealed by the party separately from the final decision (in acc. to art. 130, para. 2). At the other hand the refusal to extend the deadline in the presence of the objective and justified grounds, if it is claimed to have affected the party's procedural rights might by an important ground for challenging the final result of the administrative procedure itself. In addition the extension of the deadline might affect the course of the procedure and the deadline for the conclusion of the procedure in acc. to art. 92.

#### Article 54 Reinstatement of deadlines

1. Except when explicitly excluded by law, a party may ask for the reinstatement of the deadline, if, for reasonable reasons it has been prevented to comply with the procedural deadlines, except where the deadlines have a preclusive character.
2. A reinstatement of the deadlines may be requested with regard to the following:
  - a) deadlines set for the submission of the initial request;
  - b) in connection to the deadlines for the performance of activities during the administrative procedure;
  - c) in regard to the deadlines for lodging appealing remedies; as well as
  - c) any other deadline which is to the detriment of the party.
3. A request for reinstatement of the deadline shall be made within 15 days of the day when the obstacles are eliminated, but not later than one year of the date of the expiry of the lost deadline. The procedural action, due to which the party has lost the deadline for reasonable causes, should be performed within the same deadlines.
4. The one year deadline provided for by Paragraph 3 of this Article shall not be applicable in case of force majeure.

#### A. General introduction

##### I. Content and purpose of Art. 54

Art. 54 regulates:

- the possibility of the party to request the reinstatement into a lost procedural deadline;
- the conditions for granting the reinstatement into the deadline;
- the applicable deadline for the submission of the request for reinstatement by the party.

Parties, might be prevented from to observe a certain procedural deadline from different situation that might happened in the everyday life and do not depend by the party. Losing such a deadline might aggravate the position of the party and consequently affect its rights or legitimate interests. That is why in justified cases should be possible to reinstate the party into the lost deadline. At the other side the administrative proceeding should follow its normal course and concluded with reasonable deadlines, that is why the restoration of a deadline should be allowed only under certain well restricted conditions and within a defined deadline from the expiration of the original deadline.

##### II. Legal consequences

If the preconditions for the reinstatement are fulfilled the public body is obliged to grant the reinstatement. Other legal consequences of the submission of the request for reinstatement or of its approval/rejection are regulated or derive by art. 55.

##### III. Relation to the previous CAP

The regulation of art. 54 is very similar with the art. 64 of former CAP. The only difference is that the letter allowed the reinstatement into deadline line only in justified cases a party was prevented to observe the deadline but with "no fault". The new art. 54 does not explicitly include the latter precondition, which is only implied.

#### IV. Scope of application of the norm

Art 54 applies to any kind of “procedural deadline” across the administrative procedure. The reinstatement could be requested and granted for the deadline for the initial request for the initiation of an administrative procedure, for the deadline for the exercise of the legal remedies and any other deadline for implementation of an action by the party, whether established by legislation or by the public body conducting the procedure. It applies only after the expiration of the original deadline.

##### B. Reinstatement into a deadline in details

###### I. The preconditions for reinstatement (para. 1)

Para. 1, stipulates the possibility of reinstatement and also establishes that it could be requested and granted only under these preconditions: i) the party should have already failed to observe the deadline; ii) the reinstatement could be granted only upon request of the respective party; iii) the reinstatement should not be forbidden by law, and iv) the party should have been prevented from observing the deadline because a “justified reason” (obstacle). In addition two other preconditions derive from para 3 of the same article: v) the request should be submitted within a given time-limit, and vi) within the same time-limit the party should implement the action from which it was prevented. Upon fulfilment of these cumulative preconditions the public body is obliged to grant the reinstatement.

###### 1. Party should have already failed to observe the deadline (precondition “i”)

The wording of para. 1 requires that the party has already failed to observe the deadline, otherwise for the non-rigid deadline there is possibility of application of previous art. 53, para. 3 related to the extension. It should also be noted that the provision applies even in case of the rigid deadlines established by law, which extension, in acc. to art. 53, para. 3 is not allowed because is not explicitly established by law.

###### 2. The reinstatement should be requested by the party that was prevented from observing the deadline (precondition “ii”)

The request cannot be granted ex officio by the public body or requested by another party of the procedure. It should be requested by the party that has been prevented from observing the deadline. The request for the reinstatement is a request in the sense of art. 58 and art 58 to-60 shall apply accordingly.

###### 3. The reinstatement should not be forbidden by law – precondition “iii”

There are cases, when a procedural deadline has a preclusive (peremptory) nature, i.e. by an explicit provision of law, the reinstatement is forbidden: e.g. art. 27 (1) of the law No. 133/2015 “On the treatment of property and the conclusion of the property compensation process” foresees that the parties could apply for the recognition of the property within a “preclusive deadline of 90 days” from the entry into the force of the law, it also explicitly establishes that “*such a deadline shall not be extended or restored from the court or any other administrative organ*”). In these cases the reinstatement is excluded. It should, also be noted, that the wording provision clarifies that the “ban” of reinstatement is an exception in our administrative procedural law and as such it should be provided: i) explicitly and ii) by primary law only.

###### 4. The party should have been prevented from observing the deadline because a “justified reason” (precondition “iv”)

The party should have been “prevented” to observe the procedural deadline “because of justified reasons”. Prevention because of justified reason is an indeterminate legal term, which has to be interpreted by the public body by means of objective criteria. Objective criteria especially concern unforeseen or unavoidable events, e.g. grave illness, hospitalization or accidents as well as any other situation that denotes the objective impossibility of the party to observe the procedural deadline and it is not related to its fault. Though the last element should be interpreted in a case-by case approach, e.g. if the party has been hospitalized after an attempted suicide, the fact that the hospitalization has been due to its fault should not be interpreted as a non-justified impediment. In addition, it is important the public body should establish a direct cause - effect relation between the event and the failure.

###### II. Scope of application of reinstatement (para. 2)

Para. 2 regulates the scope of application of the institute of reinstatement. It stipulates a list of procedural deadlines, in which relation the restoration could be requested/granted. The list, in fact, is exemplificative and open, meaning that, in principle, the restoration could be requested for any kind of procedural action to be implemented by the party

associated with a deadline. By using the legal technique of an exemplificative list (almost chronological to the main stages of the administrative procedure: first instance administrative procedure, appeal, enforcement) followed by an open clause, the legislator has aimed precisely to emphasize that the reinstatement applies to any kind of procedural deadline that runs to the detriment of the party and across all the phases/stages of the administrative procedures. In addition it should be noted that it could be applicable in case of a deadline established directly by legislation (if not otherwise excluded by law) as well as to a deadline established by the public body conducting the procedure.

III. The deadline for the submission of request for reinstatement - precondition “v” (para. 3 first sentence and para. 4)

Para. 3, establishes the time-limits for the submission of the request for reinstatement through a double set of combined deadlines. It establishes a relative deadline of 15-days beginning with the removal of the obstacle (i.e.. the “day of the event” in the meaning of art. 56, para. 2). It also establishes an absolute time limit of one year from the expiration of the deadline (i.e.. the “day of the event” in the meaning of art. 56, para. 2) which was not observed. In simpler terms the reinstatement shall not be granted if from the date of the expiration of the original deadline to the date the request is submitted has passed over 1 year although the party might be within the 15 days deadline from the removal of the obstacle. In the calculation of the deadlines the rules in acc. to art. 56 and 57 e shall apply.

The only exception from the absolute time-limit concerns the *force majeure* and it is stated in para. 4. By force majeure, in accordance with general principles it should be understood as any event or effect that cannot be reasonably anticipated or controlled (such as war, or extreme natural conditions) that are not the fault of any party and that makes difficult or impossible to carry out normal activities.

IV. The implementation of the procedural action within the same deadline - precondition “v” (para. 3 second sentence)

Para. 3 second sentence, stipulates another precondition for the reinstatement -the action to be implemented by the party (to which performance it was prevented to implement within the original deadline) should be actually implemented within the same deadline described above under III, e.g.: if the party has failed to observe the deadline for submission of the appeal against an administrative act, the appeal should be submitted with the same deadline. The reason for this regulation is evident and it is precisely to avoid any further delay in the course of the procedure. Usually the request for the reinstatement is (or should be) submitted concomitantly with the implementation of the required action, e.g.: in the request for administrative appeal the party shall include the request for reinstatement and its respective justification. What is important to note, is that the public body could not grant the reinstatement if the required action has not been implemented in the meantime or could grant it only upon condition that the party implements the required action before the expiration of the combined deadline provided by para. 3 and 4.

*Article 55 Decision and effects of the reinstatement of deadline*

1. The request for reinstatement of the deadline shall be presented to and examined by the competent public body conducting the administrative procedure, or the competent body deciding on the legal remedies, or the body that continues with the execution in accordance with the case. The body, to which a request for reinstatement of the deadline is presented, shall make a decision within 15 (fifteen) days.
2. Filing of the request shall cause the suspension of all procedural actions performed as a result of missing the deadline.
3. The decision of the public body to reject the request for reinstatement of the deadline may be appealed according to the rules as contemplated in this Code.
4. The acceptance of the request for reinstatement of the deadline shall bring the annulment of all procedural actions, which have been performed as a result of missing the deadline.

A. General introduction

I. Content and purpose of Art. 55

Art. 55 regulates:

- the competent public body to decide on the request for reinstatement;

- the legal effect of submission of the request for reinstatement;
- the deadline for the decision-making,
- the effect of the reinstatement, as well as
- the legal remedies against the decision to grant or refuse the request reinstatement.

Art. 55 is the continuation of art. 54. The public body conducting or competent to conduct a procedure is logically more prepared to decide on the request for reinstatement. The choice also serves to the expediency of the procedure. In addition upon the submission of the request the ongoing procedural actions should stay till there a final decision is reached, which if positive should lead to the restitution of the party to the previous moment and positions as before losing the deadline.

## II. Legal consequences

The submission of the request for reinstatement shall stay the course of the procedure. If the reinstatement is granted the party shall be restored to its previous procedural position and be able to exercise its procedural rights. The decision of reinstatement or refusal of the request for reinstatement could be appealed separately.

## III. Relation to the previous CAP

The regulatory content of art. 55 is partly the same with the art. 65 of the former CAP. Though the latter does not regulate the legal consequences of submission of the requests or of its approval.

## IV. Scope of application of the norm

See above under art. 54

## B. Decision and effect of reinstatement in details

### I. The competent public body to decide on the request for reinstatement and the deadline for the decision (para. 1)

Para. 1, determines the competent public body to decide on the reinstatement and the respective deadline to take and notify the decision. Although the “casuistic” wording which follows the chronological order of art. 54, para. 2, it attributes the competency to deal with the request for reinstatement to the public body conducting the procedure or to competent to conduct the procedure to which the action required by the party relates to. It should be noted that the wording is pure exemplificative, if it is the case of an action related to the first instance procedure the public body conducting the proceeding shall be one competent; if it is the case of a legal remedy, the body competent to decide on the legal remedy is the one competent to decide on the reinstatement, or for instance in case of a deadline concerning a procedural action related to enforcement of the administrative act the competent public body for the reinstatement shall be the one in charge with the enforcement procedure.

In addition it also establishes a deadline of 15 days to decide on the request of the party and notify it accordingly. The day of the submission of the request will be the “day of the event” in acc. to art. 57, para. 2, that will trigger the deadline for the public body which shall start calculating in acc. to art. 56, para. 2.

### II. The legal effect of submission of the request for submission (para 2)

Para. 2 is a logical solution imposed by the principle of efficiency of the procedure (art. 18), it establishes that upon submission of the request for reinstatement the public body shall stay the procedural actions in course of development. The logic is clear: till there is a decision on the request for submission the course of the procedure should be suspended to avoid conducting procedural actions that might afterwards be annulled in case the request is granted (in acc. with para. 4). The legal effect of staying the main procedure is produced *ex lege*, the public body should only obey accordingly. If the public body continues with the procedural actions, the legal consequences will depend on the final result: i) if the request is granted the procedural action of the public body shall be annulled, in acc. to para. 4 or ii) if the request is refused the procedural actions would be deemed to have been performed in contradiction with the rules (the para. 2) on the administrative procedure and per consequence might affect the output of the procedure.

### III. The legal remedies against the decision (para 3)

Theoretically the decision of granting the request for reinstatement might take the form of a procedural action (in acc. to art. 130, para. 3), whilst the decision of refusing the request for reinstatement might take the form of a procedural action (in acc. to art. 130, para. 3) or of an administrative act (e.g.: in case the party has failed the deadline for the administrative appeal, he might lodge the appeal together with a request for the reinstatement into the deadline. In this case the reply of public body might take the form of the refusal of the appeal as non-admissible in acc. to art. 137, para. 2). To avoid any possible interpretation and because of the importance of such decision on the course of the main procedure (imagine for instance the refusal of the request of reinstatement of the initial request or of the appeal - the refusal in these cases has the same effect of a final administrative act of refusal or respectively rejection of the appeal) the legislator has opted to stipulate explicitly the possibility for an administrative appeal.

Such an administrative appeal, in case of refusal, could be lodged only by the party the submitted the request for reinstatement, while in case of granting the reinstatement the administrative appeal could be lodged by other parties with opposite interests.

### IV. The legal effects of granting the reinstatement (para. 4)

Para. 4, regulates the consequences of granting the reinstatement. If the reinstatement is granted, any procedural action implemented by the public body and which is the consequence of the failure to observe the deadline (i.e.. performed after the expiration of the deadline and a direct consequence of it) shall be automatically (*ex lege*) annulled and the "procedural relationship" shall be restored at the previous situation giving the party the possibility to exercise its procedural rights as from that moment and on, e.g. if the public body declared the conclusion of the administrative procedure on the ground of failure to correct the defects of the request within the prescribed deadline (in acc. to art. 44), the granting of the requests for the reinstatement will lead to the *ex lege* annulment of the declaration of the conclusion and continuation of the procedure from that procedural moment on.

## Section 2 Calculation of Deadlines

### Article 56 Calculation of the deadlines

1. Except when otherwise provided for by law, deadlines shall be set in days, months or years. The expiry of a deadline may be also marked as a specified calendar date.
2. When the deadline is defined in days, the day when the event has occurred, and from which the deadline starts to run, shall not be included in the calculation of the deadline.
3. A deadline, which is set in months or years, shall expire upon expiry of that last day, month, or year, the number of which corresponds to the day when the event, from which the deadline has started to run, has occurred. When such a day is missing in the last month, the deadline shall expire with the expiry of the last day of this month.
4. Saturdays, Sundays and public holidays shall not impede the starting and duration of the deadlines. If the last day of the deadline is a Saturday, Sunday, or a public holiday, the deadline shall expire on the next working day.

#### A. General introduction

##### I. Content and purpose of Art. 56

Art. 56 establishes the rules for the stipulation and calculation of the deadlines in the administrative procedure. In more detail it regulates:

- the types of the applicable deadlines in the administrative procedures (deadline in days, months or years);
- the moment of initiation of calculation of the deadlines stipulated in days;
- the method of calculation of deadlines established in week, months and years and the rules on the calculation of the deadlines when the last day is a Holiday.

Proper rules on the calculation of the deadlines are at utmost important because of the legal consequence the failure of observing the deadlines has on the party or on the public body. The rules of art. 56 have a threefold target, the

legislator, the public body and the party, and aim to preserve the unity in the stipulation of the deadlines, in order that their understanding and calculation is simple and univocal. The rules are adopted taking stock from the relevant and well known provisions of the Code of Civil Procedure (art. 148, 149) and are meant to be friendly, simple to calculate and reasonable.

## II. Legal consequences

All the deadlines established by special legislation and related to administrative procedure should be calculated based on the rules established by art. 56, unless such legislation explicitly provides for a different type of deadline and/or different method of calculation.

## III. Relation to the previous CAP

Art. 65 cover the regulatory substance of art. 62 of the former CAP. Though the latter article was “strangely” enough miss-situated under a section dealing with the enforcement of the administrative acts. The calculation of the deadlines in the former art. 62 was based on the method of working days, in which the Saturdays, Sundays and other official holidays were not counted in the calculation of the deadline, instead the new article is based on the method of calendar days, which is generally assessed as more understandable by the citizen prospective.

## IV. Scope of application of the norm

Art. 54 applies to the calculation of any deadline related to an administrative procedure, notwithstanding whether its concerns the activity of the public body or the procedural actions of the party’s. It also applies to the calculation of the procedural deadlines established by legislation or by the public body (in acc. to art. 53). Art. 54 establishes the rule for the calculation of the deadline in our administrative procedure law which applies whenever not otherwise provided by special law.

## B. Calculation of deadlines in details

### I. Stipulation of deadlines (para. 1)

Para. 1 foresees the rules on the stipulation of the deadlines. The target of para. 1 is twofold: i) the legislator (for the deadline established by legislation) and ii) the public body (for the procedural deadlines established by the public body in case of silence of legislation (in acc. to art. 53). The regulation aims to preserve the unity in the way the deadline are prescribed, in order that their understanding is easier by the point of view of the citizens. It stipulates that the deadlines should be established in: i) days (e.g. 15 days); ii) months (e.g. 1 month) or iii) years (e.g.: 2 years). In relation to the deadlines stipulated in days, the reference should be read as referring to calendar days. The latter interpretation derives from the wording of para. 1 correlated with the wording of para. 2 and 4. It practically means that whenever there is a deadline stipulated in days it shall be deemed to be in calendar days unless it is explicitly provided otherwise (i.e.. the legal provision should be explicit: e.g. “the deadline shall be of 15 working days”, instead if a legal provision prescribes for e.g.: “the deadline is 15 days” the latter shall be read as to refer to calendar days).

The wording of the first part of para. 1, first sentence, is meant to accommodate exceptions by special law only. By way of interpretation it means that: i) the legislation might explicitly provide for other types of deadline such as for instance: deadlines in working days; deadlines in weeks or deadlines which expiration is related to the occurrence of a certain event e.g.: “*the amendment or withdrawal of the request could be made at any time as long as the public body has not taken a final decision*” (art. 64, para. 2, and ii) the exceptions is not allowed in case of procedural deadlines stipulated by the public body (n acc. to art. 53, para. 2), which should always be stipulated in calendar days, months or years only.

In addition para. 2 stipulates that the expiration of a deadline could marked as a specific calendar days (e.g. the law no. 9831, date 12.11.2007, as amended by law no. 10111/2009, use to stipulate that the request for compensation could be submitted to the Ministry of Justice “*within the date of 1.7.2009*”).

### II. Calculation of a deadline prescribed in days (para. 2)

Para. 2, establish the first rule for the starting of calculation of the deadlines prescribed in days: that “the day of the event” (else labelled as starting date) which triggers the running of the deadline shall not be counted into the calculation of the deadline i.e. whenever a provision foresees that the deadline is x days from the day of submission/registration/notification, or else, the latter day shall be the “day of the event” which triggers the deadline but is not counted in the calculation of the deadline which shall started to be counted from (including) the next calendar day. This rule is necessary because the deadline prescribed in days are usually short enough. E.g. 1: if a

deadline for the conclusion of the administrative procedure (art. 91) is triggered by the submission of the initial request (art. 57, para. 2), the day of submission of the request is “the day of the event” triggering the deadline, but it shall not be counted in the calculation of the deadline, which shall start to be counted from (including) the next calendar day, so if a request was submitted on the 20th of May and the deadline is 7 days, the 20th of May shall not be counted and per consequence the deadline for the public body shall expire on the 27 of May. E.g. 2: the deadline for lodging an administrative appeal (in acc. to art. 132, para. 1) is 30 days from the notification of the administrative act, whilst if the act is notified by mail the notification is presumed to have been received on the third day from the submission to the post office (in acc. to art. 155, para. 2). In this case the third day shall be the “day of the event” and the calculation of the deadline for lodging the appeal shall start including the next immediate calendar day.

### III. Calculation of deadlines stipulated in months or years (para. 3)

Para. 3, establish the rules (the method) for the calculation of the deadlines stipulated in months or years, meaning the rules on the beginning and expiration of such deadlines. The provision adopts the so called the “method of respective date or numeric day” in accordance with which the deadline expires in that respective numeric date of the respective month or of the respective year that coincides with “the day of the event”, e.g. if the deadline for the conclusion of the administrative proceeding is 3 months or respectively 1 year and the submission of the request (the day of the event) is the 31st of January than the deadline shall expire on the 31st of March of the same year or respectively on the 31st of January of the next year.

In addition (the second sentence), the provision foresees a solution in case such a corresponding expiration date lacks in the last month. As we know the months might have various number of days (30, 31, 28 and 29). To avoid the possible confusion the rule under sentence two stipulates that if the last month does not have the same calendar date, than the deadline shall expire in the last day of the month. E.g. if the deadline for the conclusion of the administrative proceeding is 4 months and the submission of the request (the day of the event) is the 31 of January than the deadline shall expire on the 30 of April, because April has only 30 days or if the deadline was 2 month the deadline shall expire on the 28th or 29<sup>th</sup> of February (as the case might be).

### IV. The calculations of the deadlines is based on calendar days (para. 4)

Para. 4 stipulates two important rules on the calculation of the deadlines. The first rule is that the deadlines have a calendar meaning and are not related to working days, which means that the Saturdays, Sundays, or any other official holidays do neither impede the starting nor the running of the deadline. The rule is applicable to the three types of deadlines (in days, months or years) but it is especially important for the deadlines stipulated in days which are rather short deadlines.

The second rule, is applicable to any kind of deadline (notwithstanding whether stipulated in days, months or years) relates to the expiry date. It extends the expiration of the deadline to the next working day in case the day of the expiry of the deadline shall fall at a Saturday, Sunday or official holidays. E.g. if the deadline for the conclusion of the administrative proceeding is 3 months and the submission of the request (the day of the event) is the 31 of January than the deadline shall normally expire on the 31 of March, but if the latter date is a Saturday than the deadline shall expire on the next working day (on the next immediate Monday, assuming it is not an official holiday or if the Monday is an official holiday than it shall expire on the Tuesday). In addition it should be noted the day of expiring (unless otherwise provided), is not related to working hours: A deadline shall be deemed as observed if the action connected to it, is effectuated before the end (23:59:59 H) of the last day of the deadline.

Article 57 Assumptions for calculations of the deadlines

1. For the purpose of the calculation of the procedural deadlines that run against the party, the day of submission of the request shall be deemed the day of:

- a) the submission of the request at the post office, when the request is delivered by certified mail;
- b) the submission of the request in the post office of the public body;
- c) the submission of the request to the branches of the institution, in the prefecture or diplomatic missions or consular offices;
- ç) the presentation to the command or detention institution.
- d) registration by the respective device for receiving messages if the electronic document is sent electronically, or the written request is sent by fax. Such communication shall not cause the missing of the deadlines. If the sent document is not readable, the public body shall inform the sender without delay by asking him to resend it in another suitable way.

2. The day provided for by Paragraph 1 of this Article shall be deemed also as the day when the event has occurred for the purpose of calculating the deadlines, which run against the public body.

A. General introduction

I. Content and purpose of Art. 57

Art. 57 stipulates:

- the day that legally matters for observance of a deadline related to a request or submission of a party.
- the “day of the event” that triggers the deadline running against the public body if related to a request or submission of the party.

Art. 57, para. 1 is a continuation of art. 59 and aims to determine the legal moment the request is *ex lege* deemed to have been submitted in case of an indirect submission. The regulation provided by art. 57, para. 2 aims to facilitate the calculation of the deadlines running against the public body, by the concerned party.

II. Legal consequences

If a party succeeds to submit a request till 23:59:59 of the last day of the deadline, the latter shall be considered as met, despite the requests has not yet reached the public body it is addressed to. The same day of the request is also the “day of the event” that triggers the deadlines running against the public body, despite the time actually necessary for the transfer of the request to the competent organ.

III. Relation to previous CAP

There are no provisions in the previous CAP with same or similar regulatory content.

B. Presumptions on the calculation of the deadline in details

I. The observance of the procedural deadline related to the submission of a request by the party (para. 1)

Para. 1, determines the day when a request of the party, which is conditioned by a deadline, shall be deemed *ex lege* as submitted: it practically stipulates that if there is such a deadline which should be observed by the party for the submission of the request, it shall be deemed as observed if the request was submitted actually within the deadline (including the day of the expiry) in one of the ways established by lit. “a” to “d” (correlated with art. 59), despite the actual moment the request reaches the competent public body to which it is addressed. The regulation is an application of the general principle of logic that, in order to meet a deadline, a party is only obliged to do everything in its might to submit the request. The risk of failures out of the party’s reach lies with the administration. The preconditions for the application of the provision are the following:

### 1. Submission of a request

The reference to “request” here should be read in *lato sensu*, as including any kind of request (in the sense of art. 58) or other submissions (in the sense of art. 61) that could be made in a written or verbally declared, it might be: an initial request (in the sense of art. 41, para. 1); a legal remedy (in the sense of art. 132, para 1); a submission of explanation and comments for exercising the right of hearing (in the sense art. 88, para. 1) or a submission documents, proves or else for completing the defective request (in the sense of art. 62). In other words the regulation applies to any request/submission than can be submitted and transferred to the public body in one of the means/ways provided by lit. a) to d).

### 2. Submission of the request should be conditioned by a deadline

The submission should be conditioned by a deadline. Deadlines, in this case, are periods within which a party should implement an action related to an administrative procedure, it might be a deadline for the submission of the initial request (e.g. art. 27, para. 1 of the law No. 133/2015 “On the treatment of property and the conclusion of the property compensation process” foresees that the parties could apply for the recognition of the property within a “preclusive deadline of 90 days” from the entry into the force of the law) or another procedural deadline established by law or stipulated by the public body (e.g. the deadline for completion of the request established by the public body in acc. to art. 44). In case the submission is not conditioned to a deadline the provision is not useful in the sense of para. 1, instead it becomes useful for the application of para. 2 below.

### 3. Submission should not be a direct submission to the competent organ

The cases listed under lit. “a” to “d” deals with submission that are not “direct submissions” i.e. that do not imply a direct and personal contact between the submitter and the competent public body (to which the request is addressed). Practically the cases from lit. “a”. “c” and “ç” are the cases in which the submission is done in accordance with art. 59, para. 2, 3, 4 and 6, to a different body or provider than the one to which the request is addressed. In all these cases there is usually a discrepancy in time between the moment of submission in one hand and the moment the competent public body actually receives the submission. By logic, since the legislator has recognised the possibility to submit indirectly a request (in accordance with art. 59), in order to enhance the access to the administration, it should consider the actual day of submission to such a body as the day of submission for the effect of observing the deadlines the submission is related to.

Lit. “a” “c” and “ç” do not deserve any special attention; lit. “a” refers to certified mail submission; lit. “c” refers to indirect submission through the institution’s branch, prefecture or diplomatic/consular offices whilst lit. “ç” refers to indirect submission in the penitentiaries or command of the military forces, as regulated by art. 59. Instead lit, “b” and “d” deserve some attention:

Lit. “b” deals with submission in the post box of the institution. The question arising depends on the proving of the day the submission was actually done. The post box is managed by the institution. The post box should be opened, as a rule daily with the start of the working hours of and any mail found in the box is presumed to have been submitted within the immediate previous day.

Pursuant to lit. d), an electronic document, submitted by electronic means, or a written document sent by fax, is deemed to be submitted in the moment it has been recorded by the device dedicated to receive such messages. A document recorded in time shall not cause the missing of the deadlines, even when the document is produced physically (i.e. printed) only after the expiration of the deadline. If the sent document cannot be read, the public body informs the sender without delay and the request has to be submitted in another suitable form.

The rule in the first sentence upholds the principle set up by the other alternatives of the first paragraph, and formulates it for the field of electronic communication: In order to meet a deadline, a party is only obliged to do everything in its might to submit the request. The risk of failures out of the party’s reach lies with the administration. This is true for the postal service (lit. a) as for the ways within the public body itself (lit. b), etc... The same applies for all electronic communication means in use by the public body: As soon as the relevant device has recorded the message, the party has done everything it can to submit the request, and has no influence as to what happens to all requests recorded in that device. This takes up several European examples, namely the Finnish Act on Electronic Service in the Administration (1318/1999) section 23-1 as well as paragraph 130a of the German Code of Civil Procedure. Also under these provisions, a document sent electronically to the administration or court is submitted the moment it has been recorded in a device under administrative respective court control.

It is relevant only the moment the device records the message and not the moment that message is printed nor the moment it is received by or even read by the competent official. That moment can lie several hours or -- in the case of

for example a weekend -even days later. The rule therefore ensures that deadlines running against a party can be utilized by the party to the very last moment. An email received at 23:56 h is received at that very day, not the morning after when the working day begins again.

It is not necessary that the message is received by (an official of) the administration itself. It is sufficient that the email (or the fax message) is recorded in the sphere of control of the administration, for example in the electronic inbox maintained by an Internet service provider who is commissioned by the administration.

When using electronic documents, the communicating parties have to agree upon technical standards and conditions, at least implicitly. Nevertheless it is possible that technical incompatibilities arise that hinder the recipient from reading the document. In this case the public body is under the obligation to inform the sender of a non-readable document and to ask him to resend it in another suitable way. The provision follows the example of § 3a of the German Code of Administrative Procedures (VwVfG).

In the cases, however, the deadline was met not in the moment the public body receives a document it may read and process. As long as already the document submitted first was formatted according to the known standards of the public body, it must be deemed submitted in the first place. As long as the sender has undertaken everything needed to send the rightfully formatted document, the document must be deemed to have reached the recipient in time, when he re-sends the document accordingly.

## II. The day of the event for the deadlines running against the public body (para. 2)

Para. 2 stipulates that the day of actual submission of the request (determined in acc. to para. 1) shall be *ex lege* deemed as the “day of event” that triggers the running of deadlines against the public body, in sense of art. 56 para. 2 and 3, despite the time needed for the request to be transferred and actually reach the competent public body. The solution might look somehow “unfair” to the public administration, because it implies, most of the times, a reduction of the amount of time available to the public body by the number of days it takes the submission to actually be transferred to and reach the competent public body to which it is addressed (e.g. if a deadline for the public body is of 30 days, it start shall counting from the next day of submission of the request to the post office, and assuming that the transfer to the competent body would take 2 days, it would mean that the public body will have at disposal only 30 - 2 days to conclude the proceeding and notify the decision). The choice is deliberate and is meant to facilitate the calculation of the deadlines running against the public body, by the concerned party, which, simply, shall start counting from the time it knows pretty well: the moment it actually submitted the request. So the party can more easy calculate the expiration of the deadline for the conclusion of the administrative procedure expires, or in other words when the silent consent starts producing its effects (in acc. to 97) or when the deadline for lodging an appeal against the administrative silence shall begin (in ac. to art. 132, para. 2).

## **CHAPTER VI**

### **REQUEST AND ITS SUBMISSION**

#### *Article 58 Form and content of the request*

1. Except in cases when the law requests a specific form, any request, by which parties address the public body in an administrative procedure, may be:
  - a) in writing;
  - b) declared verbally in front of the public body and registered by the latter;
  - c) in any other appropriate form.
2. The request should be sufficiently clear in defining the applicant and its purpose, unless the law has provided for a specific content of it.
3. The request shall be considered as submitted in written form even when it is submitted by fax or electronically, provided that it clearly indicates its author. The law may require that the request has to be signed by hand.

#### A. General introduction

##### I. Content and purpose of Art. 58

Art 58, stipulates the general rules on the form and content of a request to the public administration.

The provisions on the form and content of the request are citizen-friendly and non-formalistic and aim to ensure a friendly communication to the administration.

##### II. Constitution and EU Law

The provision is a contribution to the concrete implementation of Art. 48 of the Constitution “Everyone, by himself or together with others, may address requests, complaints or comments to the public bodies, which are obliged to answer within the time periods and under the conditions set by law”, by entitling the party to initiate an administrative procedure, though submission of an request and communicating further to the public body during the entire course of the procedure.

##### III. Legal consequences of Art. 58

A request submitted to the administration in breach of the rules/conditions foreseen by art. 58 (including in the breach of a more restricted form and/or content required by a special law), will be consider to lacks the required form or content and therefore has a “defect” in the sense of Art. 44 and Art. 62. The legal consequences of a “defective request” are stipulated in art. 44, art. 62 or art. 91 as the case might be.

##### IV. Relation to the previous CAP

Art. 58 seems similar with art. 66 of the previous CAP, but while the first applies to any request through which a subject communicates with the public administration the latter applies only to the initial requests. In addition the regulation of art. 58 are less formalistic and more citizen oriented.

##### V. Scope of application of the norm

Art 58 is applicable to any type of request of a subject to the public administration and despite the phase of the administrative procedure. The article stipulates the general rules, meaning that it applies to the form and the content of the request, whenever a special provision (of this Code or of a special Law) does not prescribe a more restricted requirement of form or content for a given type of request.

## B. Form and content of the request in details

### I. Form of the request (para. 1)

Para. 1, stipulates the general requirements on the form of a request to the public body. The provision constitutes the applicable rule in our procedural law: all the forms are possible and on the free choice of the submitting party unless there is a more restrictive form required by law.

#### 1. Any request, by which parties address the public body in an administrative procedure

The wording used by the legislator (“any request by which parties address the public body in an administrative procedure”) clarifies that para. 1 and in fact the entire article applies to the form of any type of request a subject addresses to the public administration in the course of an administrative procedure and not only to the “initial request” (i.e.. the request for the initiation of an administrative procedure) in the sense of art. 41 of this Code.

#### 2. Except in cases when the law requests a specific form

This part of regulation opens the possibility, that through, a special law, might be require a specific form from among the one regulated in the paragraph or a more restricted one. The meaning of “law” should be read as referring to a provision of this Code or another sectorial law. Being an exception from the rule, the reference to “law” should be read as referring to primary law.

#### 3. Might be

The wording clarifies that all the three forms (see below) are possible and on the choice of the submitting party, making clear that this is the rule in our administrative procedural law, unless provided otherwise by an explicit provision of this Code or of another sectorial law.

#### 4. The possible forms (lit. “a” to “c”)

The wording of this part of the regulation makes clear that the law does not set up formalities for their own sake, it simply requires the information submitted to the administration to be perpetuated in an appropriate form. A request needs, simply, to be readable in order to be worked with. It establishes three alternatives for the form of a request: i) in writing; ii) by oral statement to be recorded by the public body or iii) in any other appropriate form.

As a rule the communication to the public administration is done in written form. But any other appropriate form is also acceptable in a citizen-oriented administration. In relation to second alternative (the verbal form) para. 1 stipulates that a request could be declared verbally in front of the administration. In this case the verbal declaration should be recorded by the receiving public body. The provision does not require a special form for recording of a verbal declaration by the public body: it might be done by any appropriate technical means, such as voice recording, writing the minutes of the declaration or else. In case of an initial request, only, art. 63 prescribes a set of rules for recording the verbal request.

In relation to third alternative: any other appropriate form, the provision is wide enough to allow any possible and appropriate form, imagine for instance a request for assistance and/or entry to a harbour directed to the Harbour Authority, which might be made in the form of a coded signal for assistance/help or other technical means.

### II. The content of the request (para. 2)

Para. 2, contains a set of rules on the content of the request: one on the “quality”:

#### 1. The request should be sufficiently clear in defining the applicant and its purpose

In the spirit of citizen orientation the provision keeps low the exigencies for the content of a request. The only essential requirements are that the request should identify the two indispensable elements: i) the submitter and ii) the purpose of the request (otherwise the “objective” of the request or what is the request for). The identification of the submitter is important to know the person to communicate with, or to check the (in some cases) the legal capacity or the legal standing of the requestor, whilst the identification of the purpose serves to understand it and establish the object/objective of the procedure. The identification of the two elements should “sufficiently clear” i.e.. sufficiently readable and understandable based on the standard of common sense.

#### 2. unless the law has provided for a specific content of it

This part of the regulation clarifies that the special legislation might require a stricter content for a certain type of request: it might require it to contain certain information or require additional documents/declaration should

accompany the request, ex: imagine for instance the application for a building permit which should be accompanied by a set of documents such as the plan of the building or documents to prove that application fulfils the urban regulation rules), etc...

It should be noted that the first part of para. 2 establish the rule in our administrative procedural law, the exception from this rule, enshrined in the second part of the paragraph, implies the reference to "law" to be read in the *stricto sensu* as referring to the primary law only.

### III. The written form (para. 3)

Para. 3 is a central provision for the use of electronic documents in administrative proceedings. It opens up the understanding of "written" or "in writing" in administrative law, as for example in para. 1 lit. a), to include not only paper documents but also electronic documents including fax messages. The second sentence makes it clear that the law may require a manual signature, thereby excluding electronic documents.

A document that shall fulfil the "written" form must "clearly indicates its author". This is achieved most commonly by a written name finalizing the document. However, certain formalities are not needed, so that a print-out fulfils the written form, even when it is not signed, as long as it evinces its author. Such a document is generally enough to satisfy the administration's needs for perpetuation of the requests content as well as to its author.

The "written" document can be a paper document or a printout, but also an electronic document or a fax message. A special electronic signature is not necessary to fulfil the simple "written" form. The law may, however, restrict the "written" form to the traditional paper form, for example by formulations as "in written, but not electronic form". The request for a manual signature has the same effect. The use of electronic documents is further restricted by their necessary admission in respect to each public body and procedure, as provided for in Article 59 para 7.

The law does not require a signature when it simply requires the written form. This understanding of "written" is taken up in other provisions of the law as well, for example in art. 57 para. 1 lit. d), art. 59 para. 6, art. 98 para. 1 and 2, art. 99 para. 2, art. 100 para. 1, art. 101 para. 1, art. 148 and art. 156 para. 4. Special law may on the other hand require a handwritten signature. The CAP itself does not contain such provision.

Although not explicitly mentioned here, the law may also require an electronic document to be provided with a specific electronic signature. According to art. 6 lit. a) of the Law No. 10 273 of 29 April 2010 on the Electronic Document, an electronic document, in order to be legally valid, must contain an electronic signature according to the legislation on digital signature. This refers to the Law No 9880 of 25.2.2008 on Electronic Signatures, which defines several quality levels of electronic signatures, from the simplest name mentioned in the electronic message up to qualified electronic signatures based on qualified certificates. It is open to the special law requiring the electronic signature to determine the quality of the electronic signature required. The law easily may take reference to the Law on Electronic Signatures and the different qualities of electronic signatures defined there. In doing so, art. 3 para. 7 of the Signature Directive 1999/93/EC or now art. 27 of the eIDAS regulation No 910/2014 has to be considered, prohibiting the Member States from discriminating against qualified electronic signatures that fulfil all requirements of these regulations.

*Article 59 Submission of the request*

1. The request shall be submitted directly to the competent public body, or to any of its offices or branches. A request, which is addressed to a central public body, may be submitted also to the prefecture, in the territory of which the party has the residence, if the central public body has no office or branch in that territory.
2. The request may be submitted also to diplomatic missions, consular offices of the Republic of Albania, in the country where the party is staying or residing.
3. The offices, branches or diplomatic missions or consular offices shall, without delay, and, at any case, forward, within 48 hours of its submission, the request to the competent public body and inform the applicant.
4. Persons serving in the Armed Forces may submit their request to the corresponding command where they perform their service, whereas the detained or imprisoned persons may submit their request to the institution where they are detained or serving their sentence.
5. Under Paragraphs 1 to 4 of this Article, the request may be submitted directly to the public body within the office hours. The public body may determine specific hours during office hours, in which oral requests may be submitted. The specific hours rule does not apply if the submission of the request is related to any deadline running against the applicant.
6. The written request may be submitted also by certified mail, electronic means or fax, directly to the respective official address of the competent body, to which it is directed or, to the mailbox of the public body. Urgent requests may be made also via phone, if this is possible according to the nature of the request.
7. The Council of Ministers shall define by a decision the public bodies and administrative procedures where requests may be presented by electronic means, along with the relevant technical requirements. The technical requirements have to be non-discriminatory and refer to products and technologies, which are generally available and interoperable with the products of communication and information technology for general use. Each public body shall publish the relevant technical requirements on its website.

A. General introduction

I. Content and purpose of Art. 59

Art 59 stipulates the available ways/means of submission of a request and the respective applicable conditions. More concretely it regulates:

- the face to face submission of a written or verbal request directly to the addressed public body or through another public body under special conditions;
- the submission of a written request via surface mail or in the post box;
- the submission of a written request via fax or electronic means;
- the submission of urgent request via phone;

The purpose of art. 59 is to facilitate the contact of the citizens to the public administration, by providing rules on the submission of the request which are intended to ensure a friendly and increased the access to the administration.

II. Constitution and EU Law

See art. 58.

III. Legal consequences of Art. 59

A request submitted to the administration in breach of the rules/conditions foreseen by art. 59 will be considered to lack the required form of submission (the rules of submission) and therefore has a “defect” in the sense of Art. 44 and Art. 62 (e.g. a written request submitted by simple mail or a non-urgent request submitted by phone, lacks the required form of submission or an electronic document submitted to the administration although either the public body was not permitted to receive such documents or at least not in that special procedure, lacks the required form of submission and therefore has a “defect” in the sense of Art. 62). The further legal consequences of a “defective request” are stipulated in art. 44, art. 62 or art. 91 as the case might be.

#### IV. Relation to the previous CAP

The content of Art 59 is very similar and takes stock of the provisions of Art. 69-71 of the previous CAP. In addition art. 59 contains some additional provisions on electronic submission.

#### V. Scope of application of the norm

Art 59 is applicable to any kind of submission to the public administration and despite the phase of the administrative proceeding. The article stipulates the general rules on the way of submission, meaning that it applies, whenever a special law or a special provision of this Code itself does not prescribe a more restricted or prescribes the applicability of a given way of submission.

#### B. Submission of a request in details

##### I. The face to face submission (para 1)

Para 1, stipulates the rules for the so called “face to face” of a request. The term “submitted directly” in para. 1 means that a written request can be face-to face/*in persona* handed out or a verbal request may be made (declared) in the front of the public body (assigned official to receive the requests).

As a rule, the face to face submission is done to/in front of the public body to which is addressed (here in after referred to as “direct submission”). In addition, part of central institutions might have their branches or offices organized in the territory of the country. In these latter cases, in order to increase the access of the citizens to the administration, para. 1 extends the possibility to submit a request to these offices (here in after referred to “indirect submission”). The alternative is at the choice of the submitter.

Finally the second sentence of para. 1 prescribes the possibility of indirect submission, by submitting a request to the Prefecture, which is rather an exception from the rule established by sentence 1 of para. 1. The Prefect is the representative of the CoM to each region (art. 114 of the Constitution) and, by this provision, is recognized the position as a channel of communication to the central services. Usually the Prefect activity is supported by a number of and sub-prefects and by a small administration. The term “Prefect” should be read in the *lato sensu*, as referring to the prefect’s or sub-prefect’s administration. The possibility of allowing for the indirect submission through the prefect is related to two preconditions: a) the public body which is the addressee of the request should not have established a branch or office in the respective territory of the residence of the submitter, and b) the submitter should have the residence in the territory of the respective prefecture. These two preconditions are meant to denote the exceptional character of this possibility, which is seen as a last resort to the direct submission.

##### II. Indirect submission through a diplomatic/consular office (para 2)

Para. 2, opens the possibility for submission in persona of a request to the diplomatic/consular offices where the submitter has the domicile or the residence. The provision is meant to ensure the access to the administration by submission not only within the geographical territory of the country but even abroad through the diplomatic/consular offices.

##### III. Transfer of the request to the addressee body (para 3)

Para. 3 is, systematically, a continuation of para. 1 and 2. In these cases (provided by para. 1 and 2) the body where the request is submitted (the territorial branch or office of the competent body, the Prefect administration or diplomatic/consular offices) should forward the request to the public body to which it is addressed within the 48 hours. The 48 hours deadline, for the transfer, has an internal character. It is not relevant neither for the calculation of the deadline for the submission running against the submitter (if any provided by special law) nor for the calculation of the time limit for the conclusion of the administrative procedure. In both cases, the day of the submission of the request, is the only legally relevant constituting, in acc. to art. 57, the “day of the event” i.e.: i) the deadline for the submitter (if any) is deemed as observed if the submission to the territorial branch or office of the competent body, the Prefect administration or diplomatic/consular offices was done within the applicable deadline, despite the time the request needs to be transferred to the body it is addressed (acc. to art. 57para. 1) and ii) it triggers the starting of the deadline for the public body to conclude the administrative procedure (acc. to art. 57 para. 2).

##### IV. Indirect submission in case of special status persons (para. 4)

Para. 4, establishes some friendly rules for the submission of the request of the detained persons or the one serving in the armed forces, by allowing the indirect submission to the institution where they are respectively detained or

perform the service. The purpose is to facilitate or make possible the access to the administration for these persons found at special conditions with limited or restricted capacity of movement. Although not explicitly regulated the rules prescribed under para 3 (commented above) shall apply by analogy.

#### V. Timing for the face to face submission (para. 5)

The first sentence of para. 5, states that the face to face submission, as a rule, should be done within the official working hours of the institution. The purpose of the provision is clear, the direct submission of a request implies that the institution is open and operating because the submission of a written request should be registered and to the submitter should be issued a certification of submission (see art. 60), or because a verbal request should be recorded (acc. to art. 58, para. 1, lit b)).

The second sentence of para. 5, entitles the institution to limit the timing for submission of a verbal request only, by determining specific hours for the submission (within the working hours). The latter rule is necessary because the public body must engage an official to record the request (acc. to art. 58 (para. 1/b)).

The sentence 3, instead, stipulates an exception to sentence 2, meaning that the norm established under sentence 2 is not applicable for the requests that cannot be postponed because of a time limit running to the detriment of the submitter. In these cases, the public body, is obliged to accept such a verbal requests even beyond the applicable specific hours. The only precondition for the application of this exception is that the submission of the specific request should be related/conditioned to a deadline running against the party.

#### VI. Submission by mail, electronic means or by phone (para. 6)

Para. 6 first sentences stipulates other means of submission of a written request such as the submission by certified mail or in the mail box of the institution as well as submission by fax or other electronic means. Such means are alternative to the face to face submission and are possible (allowed) only in case of a written form requests. In addition the last sentence of para. 6, prescribes the possibility to submit a verbal request by phone and the conditions under which such a way of submission is allowed. In all cases the submission, should be directed to the official address of the institution to which it is addressed (whether it is respectively the official surface address, the official electronic address, or official phone number).

##### 1. Submission by certified mail or in the mail box of the institution

While para. 5 provides for the submission of requests *in persona*, para. 6 allows for written requests to be submitted to the public body by mail. Paper documents must be sent by certified mail. The reference to certified mail should be read in *lato sensu* as the opposite of “*simple mail*”. A certified mail service is a post service where the delivery is registered; in the current postal services there are two forms of certified mail: registered mail - the mail is delivered to the recipient only against the signature in a special delivery register, so the fact of delivery is certified by the respective signature and mail with notification of delivery - the mail is delivered to the recipient only against the signature in a special delivery register and on a reception notice, in addition the sender receives the reception note identifying the date and the persons who actually received the mail. They can be addressed to the street address of the public body or to its mailbox.

##### 2. Submission by fax or electronic means

Para. 6 first sentences, also, explicitly opens the possibility to submit a written request to the administration by means of telecommunication (fax or other by electronic means). By including fax and other electronic means the law makes again clear that also an electronic document or a fax message can be a written document. This understanding of “written” is taken up in other provisions of the law as well, e.g. in art. 58 para. 3, art. 98 para. 1 and 2, art. 99 para. 2, art. 100 para. 1, art. 101 para. 1, art. 148 and art. 156 para. 4. A special law may, however, require, the document to be submitted by surface mail, in which case the notification by electronic means or fax message is not allowed. Fax messages must be sent to the public body’s relevant fax number, electronic messages to the dedicated electronic address, at which the “respective device for receiving messages” is to be assumed to be installed (art. 57 para 1 lit. d).

The application of para. 6, has one precondition: the public body and the specific administrative procedure allows for an electronic submission in accordance with para. 7.

##### 3. Submission by phone

The last sentence of para. 6, allows for urgent requests to be submitted by telephone. This must be understood as one of the “other appropriate forms” of art. 58 para. 1 lit. c), as the caller is not “in front of the public body” in the sense of art. 58 para. 1 lit. b). As stated there, however, the public body is under the obligation to register the verbally

declared request and its reasoning. This is required already by the public body's obligation to document all relevant requests and submission as well as all important information and decisions in the files.

To submit a request by telephone is permissible only in urgent cases and only where this is possible according to the nature of the request. "Urgency" in this sense is given only where a decision or at least an action of the public body is required immediately and may not be postponed until the request may be submitted by other means of (written) communication including fax and e-Mail. The case on the other hand must be one where verbal communication *of the request* is an appropriate form given the nature of the request, i.e. the complexity of both the factual and legal situation and the request and its reasoning. Both must be so clear and understandable that it is possible to explain them on the phone. This possibility is likely to be reserved for emergencies.

## VII. Electronic submissions and their file formats (para. 7)

The three sentences of para. 7 build the grounds for a detailed regulation on the administrative bodies' obligation to receive and process electronic files. This obligation is set up by art. 8 of the Services Directive 2006/123/EC. The directive seeks to abolish barriers which are preventing or slowing down the development of services between Member States, especially those barriers that arise from unnecessary administrative burdens as authorisation schemes, procedures and formalities (Recital 3 and 42). For this, the Directive *inter alia* sees the setting up of electronic means of completing procedures and formalities as vital for administrative simplification in the field of service activities, and as beneficial to providers, recipients and competent authorities (Recital 52). Therefore, art 8 of the Directive requires the Member States to ensure that all procedures and formalities relating to access to a service activity and to the exercise thereof may be easily completed, at a distance and by electronic means, except for the physical inspection of the premises, equipment and the provider himself as well as his staff. The Directive therefore demands the possibility of electronic communication and even transaction at least in all fields governed by the Directive, mainly the administrative procedures connected with providing services, be it the application for licenses etc. or necessary notifications to the competent authorities including the registration of the business. As the Commission's official implementation handbook puts it, the Directive aims for "the setting-up of fully functioning and interoperable electronic procedures by the end of the implementation period" which ended in December 2009.

In order to be able to fulfil this legal obligation, at least the administrative procedures that fall into the scope of the Directive have firstly to be prepared technically and organizationally to receive and process electronic messages and reply in the same way. This applies especially to electronic signatures required by law. These require rather advanced technology that is not so common and ubiquitous. Additionally, the interoperability of electronic signature systems is not guaranteed, although all Member States are required to treat equally all qualified electronic signatures, regardless of where the certification service provider is established: Article 27 of the eIDAS Regulation No 910/2014, the successor of the Signature Directive 1999/93/EC, explicitly forbids additional requirements. Therefore, a public body that requests are submitted electronically, and requires the requests to be electronically signed, must accept all electronic signature formats that fulfil the requirements of the eIDAS Regulation, and must hence be able to process all of them. The eIDAS Regulation addresses the problem (see for example recitals 7, 54 and 72 and article 28 para. 3), as well as technical solutions like the German "Common PKI Specification", <http://www.common-pki.org/>).

Secondly, the relevant public bodies and the respective administrative procedures have to be legally opened for the submission of electronic documents, both as at the incoming side as at the outgoing one. The CAP does not open all administrative procedures generally for electronic communication means, but rather leaves the decision as to which procedures at which public bodies are to be opened when, to a decision of the council of ministers, i.e. to a sub-legal norm. Such decision can be more detailed and is easier to change whenever the technical progress requires so. It can also more flexibly determine the "ripeness" of each public body and procedure to handle electronic files, and the file formats. The law requires the Council of Ministers to decide upon this issue, as all ministries and their respective administrative bodies may be affected.

The decision has to define which administrative procedures "relate to access to a service activity" and open those procedures for electronic access. At the same time, the decision must determine the permissible file formats: As there is no standardized format for electronic messages, but a whole world of different possibilities, it is necessary for the addressee to prescribe one or all formats he is able to process and therefore to receive. While the relative "chaos" is inevitable when each and every citizen determines his communicative equipment and prerequisites, it is problematic when it comes to the administration. It must be clear for the citizen who wants to address a public body and submit his request, if this is possible in electronic form and, if so, which technical requirements need to be met. This includes information on the possible file formats (Microsoft Word DOCX, Rich Text Format RTF, Portable Document Format PDF etc...), as well as the relevant version numbers.

The public administration is free to determine the technical requirements. They only have to be non-discriminatory and refer to products and technologies, which are generally available and interoperable with the products of communication and information technology that are generally used. This takes up the example of art. 42 para. 4 of the Public Procurement Directive 2004/18/EC. Pursuant to this norm, all communication may be done by those means chosen by the contracting authority. The means chosen must be generally available and thus not restrict economic operators' access to the tendering procedure. The technical tools and their technical characteristics must be non-discriminatory, generally available and interoperable with the information and communication technology products in general use. The public body shall therefore set up no technical characteristics that may be met only by certain computer programs and their respective systems. It would be discriminating in that respect, for example, to only allow for files of Microsoft origin.

In order to ease the burden both on the administration as well as on the citizens, the public bodies should strive for an "official electronic language", i.e. technical norms and standards for all public bodies in the Republic of Albania. This would make it much easier for both the citizens as well as for the public bodies to exchange electronic files and documents.

The technical specifications must be easily to be determined for the party before submitting an electronic document. Therefore each public body publishes the relevant technical provision on its website. The law assumes that a public body that is capable of handling electronic files also has a website it can use to publish information. The provision at the same time transposes the obligation of the administrative bodies to inform the citizens generally on administrative procedures and their formalities, as set out in art 7.1 lit a) and 2 of the Services Directive.

An electronic document submitted to the administration although either the public body was not permitted to receive such documents or at least not in the special procedure, lacks the required form and therefore shows an "inaccuracy" in the sense of Article 62 para 1.

For the permissibility of electronic documents to be sent to a citizen see art. 156.

#### *Article 60 Registration and certification of submission of requests*

1. The receipt of the request shall be registered by the public body where it is submitted, according to the chronological order of submission in a special register. The register of requests for the initiation of an administrative procedure shall contain the following information:

- a) the number of the request;
- b) date of submission;
- c) the object of the request;
- ç) the number and title of documents attached to the request, and
- d) identity and address of the applicant.

2. If two or more requests arrive with the same postal delivery to the public body, they shall be considered as submitted to this body at the same time.

3. At any case, the person submitting the request shall be issued a certification, which confirms the fact of acceptance of the request, its object, date and list of attached documents, if any. The lodging via certified mail shall be proven by the post document that shall contain the same data.

4. Upon the request of the submitter, in the cases of submission of the request by electronic means or fax, the certification, as provided for by Paragraph 3 of this Article, shall be sent, without delay, to the same address with the same means, by which the delivery was made.

#### A. General introduction

##### I. Content and purpose of Art. 60

Art. 60 regulates:

- the obligation of the receiving public body to register any submitted request;

- the obligation of the public body to issue *ex officio* (or upon request in case of an electronic means submission), to the submitter, a certification of the submission;
- the content of the registration and of the certification of submission;

The rules are important for the many reasons related to the observance of the deadlines for both the submitter and the public body, including the application of the rule of silent consent

## II. Legal consequences of Art. 60

Art. 60 imposes firstly on the public body the duty to register the submission of any request in a certain register and through special notes. As well as its obligation to issue on its initiative to the submitter the certification note (in case of electronic submission only upon request).

## III. Relation to the previous CAP

The provisions of Paragraph 1-3 are very similar to Art. 72-73 of the previous CAP. The provisions on the registration and certification of electronic submission are a novelty.

## IV. Scope of application of the norm

Art. 60 is applicable to any kind of submission to the public administration and despite the phase of the administrative procedure.

## B. Registration and certification of submission in details

### I. Registration of submissions and its content (para 1)

Para 1, stipulates the obligation of the public body to register all the received submission, determines the conditions as well as the content of such a registration.

#### 1. Obligation of registration

The obligation of registration lays on the public body “where it (n.a: the request) is submitted”, which means that in the cases foreseen by art. 59 (1 second part): case of submission to the branches/offices of the organ, art. 59 (2): case of submission to the prefect and art. 59 (4): case of submission to the diplomatic/consular service, the obligation, actually, lays to organs other than the one to which the request is addressed. This, certainly, does not exclude an additional registration of the request to the public body it is addressed, but for the sake of the legal consequences the registration to the first body is the one that matters.

The obligation is valid despite the way of submission, it applies to direct face to face submission (by handing over or verbal declaration) as well as to mail, fax, electronic means or phone submissions.

#### 2. Conditions of registration

The registration should be done: i) in a special register and ii) in the chronological order of the submission. The first condition implies the existence of a special register for the registration of the request at each body, the register might be either in written traditional or electronic form. The requirement of registration in the chronological order, is a logical condition for any registration.

#### 3. Content of registration

Lit. “a” to “d” stipulates the content of the registration note (in the special register), the elements to be registered are comprehensive enough to ensure the full proof of the elements legally relevant for the submission: a) the number of the request – it is necessary as a case number to trace the request; b) the date of receipt (is necessary for certain deadline running against the public body, as for instance the dead line foreseen by art 62 (2)); c) the object of the request – which expresses what is actually required through the request and might serve for statistical purposes or for the proper allocation of the request to the responsible unit to conduct the procedure; ç) the number and the name of the attached documents -which serve to make formal proof for the “completeness of the request” and has legal relevance for the application of art. 62; d) the identity and the address of the submitter- serves to register the contacts needed for the communication.

In fact, the second sentence of para. 1 refers to the “*registers of the request for initiation of an administrative procedure*”. This special reference should be seen as an emphasize by the legislator of the importance of registration in case of an “initial request”, but the substance applies logically to any kind of submission.

## II. Registration of submissions received with the same mail charge (para 2)

Para. 2 relates to the submissions by mail, it stipulates a legal assumption (of a *juris et de jure* character) in the case of more than one request are received by the same mail charge. Despite the eventual different timing of submission at the mail office, they are deemed to have been received by the public body concomitantly. The provision might have some legal effects in when two or more requests are related to beneficial acts (ex: authorizations) which are decided based on the principle first come- first served. In this case the order of priority, as a rule, should be decided by the moment of submission, but if such a moment could not be proved in any way they should be deemed to have been submitted concomitantly.

## III. Certification of the submission (para 3)

Para 3 first sentence, regulates the obligation of the receiving public body to issue to the submitter a certification of submission and the content of such certification.

### 1. The obligation to issues the certification of submission

The obligation is applicable in the cases of face to face/in persona submission (handed over to the public body or declared in front of the public body) where the submitter is present. In addition the expression “at any case” means that the issuance of the certification should not be requested by the submitter (as for instance in case of para. 4).

### 2. The content of the certification of submission

The content of the notification is similar to the content of registration (in the special register) and serves similar objectives: a) the confirmation of submission - needed to confirm the fact of submission; b) the object of the request; c) the date of submission - which is important for the calculation of deadlines for both the part and the public body and ç) the list of the attached documents - serve to make formal proof for the “completeness of the request” in case it is applicable.

### 3. The issue of certification in case of mail submission

Para 3, second sentence regulates the certification of submission by certified mail. It extends the obligation for the receiving public body (first sentence) to the receiving post office: the certification of the submission in this later case shall be issued by post office and shall have the same content. This is the reasons why art. 59 requires the submission by certified mail. It should be noted that in this case the registration (at the special register) happens at a latter moment, when the mail is received by the body to which it is addressed and in accordance with para. 1 and 2.

## IV. Certification of electronic requests (para. 4)

While para. 3 provides for the certification of requests submitted personally or by mail, para. 4 provides for the certification of requests sent by fax or electronically. It takes up the definition and the details of such certification as provided for by para. 3.

The sender of an electronic message -- just like the submitter of a paper document -- shall have certainty that his message is received by the public body, and when. Therefore the administration is required to send out a notification without delay. This also takes up the good example of art 11.1 of the Electronic Commerce Directive 2000/31/EC. The notification of receipt does not have any other effect than to say that the message is received. It does in no way predict the outcome of the matter or decide upon its prerequisites.

In case the request was submitted by fax or electronically, the public body sends a certification as defined in para. 3 to the address the request was submitted from. That means the certification is sent by telefax to the number the telefax request was submitted from, or to the e-mail address the electronic request was sent from. The certification is sent without delay upon the request of the “person”, that is the “person submitting the request” (para. 3). His special request seems to be necessary here, as: i) the submission by electronic means, enables the proofing of the fact of submission through the electronic system (e.g. the automatic certification of the telefax machine or the submission is preserved in the email of the submitter) thus the certification note issued by the public body is not automatically required and ii) all forms of notification by electronic means require that “the addressee has preliminary agreed” on this form of communication, (acc. to art. 156 para. 1) On the other hand, by choosing the electronic communication way the submitter has declared implicitly he is able to receive messages over this channel as well.

The certification must contain, according to para. 3, the fact of acceptance of the request, its object, date and a list of attached documents, if any. In order to be able to send such certification, the public body is bound to keep records as for example log files on the documents and files received. The log files must *inter alia* contain the accurate date and time the public body received a certain document (see art. 57 para. 1 lit. d), the name and address of the sender and

information about each file received, including the file format and the file size. If the public body performs checks on the integrity and originality of the document, their outcome is to be documented as well.

#### Article 61 *Other submissions*

The rules contemplated in this Code on the submission of the request shall also be applied regarding the submission of opinions, explanations, comments, statements and submission of other documents in the framework of an administrative procedure.

#### Content of Art. 61

Art. 61 is an open clause, which makes possible that the rules on means of submission stipulated by art. 59 are also applicable for any other kind of submission of the party to the public body, in the course of an administrative procedure. The provision applies for any kind of other submission e.g.: submission of opinions and explanations (in acc. to art. 47); submission of declarations or of means of prove, etc.

#### Article 62 *Inaccuracies of the request of the interested party to initiate the administrative procedure*

1. In the event the request of the interested party for the initiation of an administrative procedure has not been submitted according to the requirements of article 58 and 59 of this Code, the applicant is requested in writing to correct the existing inaccuracy.
2. Save for cases where special laws have provided otherwise, the public body shall address the applicant for the correction of inaccuracies within 7 (seven) days of the day of registration of the request, and set a deadline to the applicant to fulfil the inaccuracies.
3. Notwithstanding the provisos of Paragraph 1 and 2 of this Article, and to the extent it is possible, the public body shall correct the inaccuracy of the request by itself, if this does not harm the legal interests of the interested parties.
4. If the applicant corrects the inaccuracies within the time specified, the request is deemed registered as of the day when it is registered in the public body.
5. If the applicant fails to correct the inaccuracies within the time specified, and such inaccuracies may not be corrected by the public body under Paragraph 3 of this Article, the request shall not be considered registered and it shall be returned back to the applicant if necessary along with the other submitted documents.

#### A. General introduction

##### I. Content and purpose of Art. 62

Art. 62 regulates what should happen in case when the party has submitted a request to initiate an administrative procedure (the initial request) and such request does not fulfil the requirements in terms of content, form and means/way of submission as stipulated by respectively art. 58 and 59 of the code. It stipulates:

- the obligation of the public body to correct the inaccuracies of the initial request and in case of impossibility to request to the submitter to correct such inaccuracies within a reasonable deadline set by the public body, as well as
- the legal consequences the correction or alternatively the failure of the party to correct the inaccuracies within the set deadline shall have on the course of the procedure.

Art. 62 is a logical continuation of art. 41 (the institution of administrative procedure) in the case of a procedure initiated upon request. It relates also to art. 44 (recovering the gaps of the request) and to art. 65 (preliminary verification). Actually all the provisions of art. 44, 62 and 65 regulate the same subject matter, have the same general preconditions and should be interpreted all together and systematically. The submission of a request, produces the legal consequence of automatic institution of the procedure, to which corresponds on the side of the public body “the obligation to proceed” in regard of taking an explicit decision as announced by the principle of decision-making (art. 16) and further on concretised in acc. to art. 90. Firstly the norm aims ensure the understanding, by the public body, of the content of a request, which is relevant because the content of the request defines the “object” of the

procedure, which is decisive for the relevant legal provisions to be applied for the requested administrative action. Secondly the respective time limits provided, both for the informing the party on the inaccuracies and for the correction of the inaccuracies by the party, are meant to avoid a delay of the procedure due to inaccuracies that can be quickly remedied and ensure a smooth continuation of such proceeding. In this respect the norm contributes to ensure the continuation of the procedure based on the implementation of the principles of de-bureaucratization procedural efficiency as stipulated in Art. 18. Finally, the norm constitutes a concrete application of the principle of providing active assistance (Art. 10).

## II. Constitution and EU Law

The provision is a contribution to the concrete implementation of Art. 48 of the Constitution “Everyone, by himself or together with others, may address requests, complaints or comments to the public bodies, which are obliged to answer within the time periods and under the conditions set by law, by entitling the party to initiate an administrative procedure, though submission of an request.”

With the start of the procedure the party acquires also the Right to Good Administration stipulated in Art. 41 of the EUCHFR, that finds its expression also in Art. 17 of the ECGAB dealing with reasonable time-limits for taking administrative decisions and in the principle of citizen-orientation (in acc. to Art. 12).

## III. Legal consequences of Art. 62

- Art. 62 imposes firstly on the public body a duty of taking the initiative for correcting the request, whereby the initiative can either consist of correcting the request itself, if and as far as the nature of the inaccuracy allows it (para 3), or
- if the public body cannot do the correction itself, it is obliged to inform the submitter within 7 days about the defect and how and by when he/she can correct the inaccuracy.
- Finally, the norm also regulates legal effects for the case when the party though properly informed about the defect does not successfully correct the request within the set deadline, which is the declaration of the conclusion of the procedure.

## IV. Relation to previous CAP

The regulated subject matter of Article 62 is very similar with that of Art. 68 of the old CAP. However, the new provision specifies, also, the procedural rules dealing with a defective request.

## V. Scope of application of the norm

Article 62 applies to the first instance administrative procedures instituted upon request and also to legal remedy administrative procedures, the latter as far as special rules of Part VI of this Code do not apply. The norm cannot be applied to submission of documents (Art. 61) due to the wording of Art 62 (which explicitly refers to the “request... for the initiation”) and due to the meaning. Art. 62 referring explicitly to the requirements of Art. 58 and 59 which do not cover submissions of opinions etc. neither by wording nor by meaning.

## B. Inaccuracies of the initial request for the initiation of an administrative procedure in details

### I. Submission of defective request (para. 1 to 3)

Para. 1 regulates how the public body shall deal with the defective/incomplete requests by stipulating the obligation to communicate in writing to the party and require it to correct the defects, under the following legal preconditions:

- submission of a request to initiate an administrative procedure
- a defect of the request i.e. non-fulfilment of a requirement on the request stipulated in Art. 58 and 59 of the Code.
- the public body does not have the possibility to correct the defect itself (para. 3)

#### 1. Submission of a request to initiate an administrative procedure

a) Art. 62 para. 1 requires that party has submitted a request that despite some defectiveness is – on the basis of a reasonable assessment of the circumstances - to be understood, as a request to initiate an administrative procedure (here in after referred to as “initial request”). b) Art. 62 para. 1 applies and it is meant mainly for the inaccuracies in case of a written request, but theoretically we cannot exclude its application in case of verbally declared request, imagine e request which is verbally declared (and recorded) in front of a public body and misses certain information

required by special law as part of the request, e.g. the special law requires that request should include information on the address of residency of the applicant during the 10 last years.

## 2. Non-fulfilment of a requirement on the request stipulated in Art. 58 and 59

For the requirements a correct request needs to comply with Art. 62 refers to Art. 58 and 59. These articles cover three categories of requirements:

- requirements on the form (Art. 58, para. 1 and 3)
- requirements related to the content (Art. 58, para. 2)
- requirement on the means of submission, i.e.: procedural details on where and how a request is to be submitted (Art. 59)

For a detailed explanation of these requirements it is referred to the explanations of these articles above. The concept of non-fulfilment requires some further explanations:

### a) Non-fulfilment of the requirements on the form of the initial request.

Article 58, para. 1 and 3 (see above) regulates the form of the initial request, in a very citizen oriented approach, admitting any possible appropriate form of request, unless otherwise provided by law. That means the non-fulfilment of requirements on the form (defects in form), referred to by para. 1, of art. 62 is related to the cases when a special provision (special law) requires a specific form for a given initial request, for instance when the special law provides that the request should be in only traditional written form, whilst the applicant has not observed such a form, but instead submits an electronic request.

### b) Non-fulfilment of the requirements on the content of the request.

The content of initial request is regulated by art. 58 para. 2 (see above), which also takes a very citizen oriented approach by establishing that the request should only be sufficient enough to determine the submitter, its objective (what is requested), except when explicitly otherwise established by the law. So the defect in content referred to by para. 1 could possibly relate to cases when: i) the object of the request is not clear and should be clarified (the request is not sufficient enough to determine its objective); ii) the submitter is not identified or ii) the request is not complete, in cases a special law requires a more restrictive content of the request (i.e. requires certain information or requires additional documents/declarations should accompany the request, e.g. the application for a building permit which should be accompanied by a set of documents such as the planned of the building or documents to prove that application fulfils the urban regulation rules), etc.

In relation to the content special care should be paid in cases there are approved forms for the submission of the request. It should be noted that these forms are meant to assist the applicant when submitting a written request and not the contrary, so, as a rule, any other writ identifying the submitter and the objective of the request or respectively containing other elements required by the special law, should be deemed to be a valid/complete request in the meaning of the Code. The simple fact that the request is not compiled in the prepared form would not make it incomplete.

### c) Non-fulfilment in the means of submission of the request.

Para. 1 by referring to art. 59 "submission of the request", also, refers to defects in the submission of the request. The cases the legislator intends to cover are when a special law may contain special provision allowing for one form/mean of submissions only, e.g. the special law requires only submission by electronic means but the part has submitted the request by mail or other cases provided by art. 59 as for instance in the case a non-urgent request submitted by phone.

## 3. The public body does not have the possibility to correct the defect itself (para. 3)

Paragraph 3 adds a negative legal precondition to para. 1 by obliging the public body to try to the extent possible to correct any such defects of the request. Para. 3 has a twofold purpose: i) to ensure that the party is not affected to its right due to simple ignorance or mistake, and ii) to ensure the smooth and timely continuation of the procedure without losing time by asking for the correction of the defects from the submitter.

The negative legal preconditions for para. 1 derived from para. 3 are as follows:

- a) the public body is not able to correct the request.

This is the case when the defect is of such nature that it can be corrected by the submitter only. E.g. only the applicant himself is able to make clear the subject and the aim of his request. The same takes place if special law requires a signing by hand. Positively, it is possible for the public body to do the correction itself if it has got the means to remedy the defect(s) (usually of minor gravity and relevance) without involving the party according to para. 1 and 2.

Impossibility of correcting by itself would not be satisfied, where the public body could clarify incorrectness just by having a short contact with the party on the phone or other communication means simpler than the written clarifying procedure according to para. 1 and 2.

- b) the public body is able to correct itself the defective request but doing so would harm the legal interest of the party.

If the purpose of the request is unclear the public body must not choose one possible alternative of understanding but leave explanations to the requesting person.

#### 4. Practical consequences to proceed according to para. 3

When taking into account the possible consequences to be drawn by the public body when the party has submitted a defective request, priority for the public body should have to proceed according to para. 3, which obliges the public body to act as follows:

- c) safeguarding the interest of the party by exploring diligently the possibilities of correcting the defect(s) of the request by the body itself, including other ways of communication with the party;
- d) undertaking the necessary actions including taking notes of the action in the official file of the case.

#### 5. Legal consequences according to para. 1 and 2

Para. 1 and 2 obliges the public body for the following procedural actions, otherwise:

- informing precisely the party in writing about the existing defect of the request (para. 1);
- sending the written information within 7 days after the registration of the defective request (para. 2) unless special laws regulate this case differently,
- prompting the party in the written information to correct the defect (para. 1);
- setting - in accordance with the principle of proportionality – a deadline for the party for completely fulfilling all requirements of a correct request.

If the public body does not act in accordance with para. 1 and 2 the administrative procedure shall be conducted and concluded in a regular manner. In this case the applicant is entitled to correct or amend the request during the entire procedure until it is concluded by the final decision.

Finally, if the public body failed to correct the defective request by itself (para 3) but instead the party had to do so upon the request of and within the deadline set by the public body (para 1 and 2), usually no legal consequence would follow from that, unless the delay of the procedure due to the public body's failure would negatively affect the factual or legal situation of the party. Such effect could lead to state liability. Whilst if the public body rejects a request although it could have corrected the defective request by itself, the rejection is unlawful. In this case the rejection could be challenged by appeal according to Part VI, Chapter II of this CAP. Furthermore the rejection of the request in accordance with para. 5 does not preclude to submit another and this time correct request with the same content on the same subject matter.

#### II. Party's correction of the inaccuracies within the set deadline (para. 4)

Para. 4 must be read in such a way, that if the defects of the request are corrected within the established deadline, it shall be deemed correctly submitted *ab initio*, i.e. from the day of submission of the defective request. The wording of para. 4, when referring twice to the registration, requires some clarifications. One reason for this is the need to align the legal consequence of para. 4 with the protective purpose of the norm to safeguard the party's interest. The other reason is that in all the other provisions of the CAP it is always the day of submission that is relevant (see e.g. Art. 41, para. 3 lit. b) and there is no reason for a different regulation in the context of Art. 62 para. 4. In short the provision should be read as referring to the submission instead of registration, and the direct legal consequence of the para. 4 is that the request of the party, if completed within the prescribed deadline, shall be deemed to have been submitted with the initial submission and it is relevant only in cases such submission is restricted by a deadline (if provided by

special law and as reminded by art. 65, lit. c). On the other hand if the inaccuracy was of such a type that would qualify under the precondition of an incomplete request, in acc. to art. 91, para. 3 (related to the content of the request) the deadline for the conclusion of the administrative procedure shall be triggered with the day of completion of the request, which constitutes the “day of the event” for the calculation of the deadline in accordance to art. 57, para. 2. In other eventual (if any) cases when the “inaccuracy” does not qualify under the preconditions of an incomplete request, in acc. to art. 91, para. 3, the deadline for the conclusion of the administrative procedure whether: i) might be suspended for the period from submission of the request to recover the inaccuracies (in acc. to para. 1) or ii) if needed might be extended by the public body assuming the legal preconditions for the extension in acc. to art. 92.

### III. Party’s failure to correct the inaccuracies (para. 5)

Para. 5 stipulates that the request shall “be deemed not be considered as not registered and it shall be returned back to the applicant” if the following two conditions are met: i) the submitter does not complete the request within the given deadline (which also implies that it was properly informed by the public body to do so in acc. to para. 2), and ii) the completion could not be done by the public body itself. The legal wording the request “shall be returned back to the applicant” indicates that there is no need to decide upon the request. However, despite this wording the applicant must not be left without legal protection if the returning back is not rectified.

Therefore it is necessary a systematic interpretation of the provision in the light of art. 41 (initiation of the administrative proceeding), art. 44 (initiation of a proceeding upon request) and taking into account the principles of decision-making in acc. to art. 16 and the general rules on the finalisation/conclusion of the procedure as regulated by articles 90 and thereof.

As already explained, the submission of an initial request, has as the first legal consequence the automatic initiation of the procedure (art. 41, para. 1 and para. 3, lit. b), without requiring any formalisation by the public body. That would mean that in legal terms the procedure is deemed as initiated, from this very action of the party and per consequence the public body has (thereinafter) the duty to proceed and the obligation to conclude the procedure by taking an explicit decisions (art. 16 Principle of Decision Making). Under these circumstances, the failure of the party to correct the above-mentioned inaccuracies of the request within the established deadline shall lead to the declaration of the conclusion of the respective administrative procedure without a final decision on the case (see the commentary of art. 44, under B/IV). The latter declaration is an administrative act (art. 90, para. 3 last sentence) and as such could be appealed accordingly in order to ensure the protection of the party (in acc. to Part VI, Chapter II of this Code). In addition the party is entitled to submit a new initial request because the abandonment of the procedure shall not abolish the right/interest, which the individual has requested to be recognized/satisfied, assuming there is no any restrictive deadline for the initial request. Such an interpretation is the only possible in the view of the principles and other explicit provisions of this Code and it ensures the proper protection of the party. In addition such interpretation would be, also, consistent with the one of art. 44 (para. 2, lit. “b”, two last sentences) which basically deals with the same subject matter.

Whilst the wording of para. 4, “the request shall “be deemed be considered as not registered and it shall be returned back to the applicant” should be read as applying to very rare cases, when the non-fulfilment of the requirements on the request are that serious that would equal with its non-existence. E.g. a request which is completely not-readable or partially not readable and in which the requestor is not at all identifiable. In these cases, one of which concretisation is for instance the art. 57, para. 1, lit. d), last sentence, the failure of the requestor to complete the inaccuracies (to make it readable within the established deadline) and/or the failure of the public body to identify the requestor to whom to communicate with, would put the public body in an absolute impossibility to proceed further and per consequence could justify the legal fiction of the “non-existence” of the request and of deletion of the legal consequence of its submission i.e. the automatic initiation of the procedure, and bring along the “sanction” of deeming the request as not registered at all. In this case, due to the fact that “returning back” cannot be seen as an administrative act only an administrative complaint must be seen as permitted according to Art. 141, para 1 lit. d).

*Article 63 Verbal request for the initiation of the administrative procedure*

1. If a verbal request is presented, the official shall register the following data:

- a) the number of the request;
- b) the date of statement;
- c) object of the verbal request;
- ç) name and title of the documents attached to the request, if any; and
- d) the identity and address of the applicant.

A. General Introduction

I. Content and purpose of art. 63

Art. 63: stipulates the obligation of the public body to record (meaning: to set down in traditional writing or equivalent form) a request declared verbally in front of the public body and the respective content. Art. 63 is a continuation of art. 58, para. 1: a request could be submitted in a written form, declared verbally in the front of public body or else. In case of a verbally declared request, since the public administration works on documents, the request declared verbally in the front of the public body should be recorded in writing so it could be part of the file.

II. Scope of application

Art. 63 applies only in case of an initial request (meaning the request for the initiation of an administrative proceeding) only. This interpretation derives from the explicit wording of the title of the article. In addition it applies only in case of initial requests declared verbally in the front of public body.

B. The verbal request to initiate an administrative procedure in detail

First sentence of art. 63 stipulates this obligation of the public body to record in writing a request for the initiation of an administrative procedure declared verbally, whilst lit. "a" to "d" regulates the content of the recording minutes.

I. The obligation of recording a verbally declared request (first sentence)

The form of the request is regulated by art. 48, para. 1: a request could be submitted in a written form, declared verbally in the front of public body or else. In the second case, the public body (the official in the unit responsible for receiving/registering the requests/petitions) is obliged to record it in a written form, in other words should elaborate the written minutes (set down in written the content) of the verbal declaration of the submitter. A broader interpretation might allow even other possible recording forms, as for instance voice recording.

The condition for such an obligation are two: i) a request for the initiation of an administrative procedure (see the commentary on art. 41) and ii) the request is declared verbally (see the commentary on art. 58, para. 1, lit. b).

II. The content of the record (lit. "a"-"d")

a) the number of the request, is the number of registration to the Register of requests provided by art. 66 para. 1. This means, that in case of a verbal request, the registration number is assigned concomitantly with the elaboration of the records/minutes.

- the date of declaration, is the date the verbal request is done.
- the object of the verbal request. In the accordance with art. 58, para. 2, in terms of content, a request should be "clear enough to determine the requestor and the objective of the request". In consequence the registration in written of a verbal request should reflect the same content's requirements and identify what is requested or what is aimed to be achieved through the submission of the request.
- the number and the title of the accompanying documents, if applicable. As already mentioned a special law might require a special content of the request, including the submission of accompanying documents. The documents should be mentioned in the registration in written of a verbal request.

- the identity and the address of the requestor. One of the mandatory elements is the request is the identity of the requestor, as such it should also be recorded in the minutes of a verbal request, together with the address for further communication

*Article 64 Right to complete, amend and withdraw the request*

1. A party, which has submitted a request, may complete or amend it only when the purpose of the amended request is based on the same factual situation as the initial request.
2. The party may entirely or partly, upon a written request, withdraw from the administrative procedure and waive his legal rights and interests, except when prohibited by the law. The amendment or withdrawal of the request may be done at any time, as long as the public body has not taken a final decision. After the withdrawal of the party, the public body shall decide for the termination of the administrative procedure. In such case the public body shall notify the other parties, if any.
3. The decision of the public body to terminate the administrative procedure, following the withdrawal of one of the parties may be appealed by any other party.
4. The withdrawal of one party shall not necessarily lead to the end of the administrative procedure, if the public body considers that the continuity of the procedure is to the public interest or the legal interest of the other parties.

A. General introduction

I. Content and purpose of Art. 64

Art. 64 regulates two procedural rights of the party: i) the right to complete or amend the initial request, and ii) the right to withdraw such a request. In addition it regulates the condition for the exercise of these rights as well as the legal consequences of their exercise.

The right of the party to complete or amend the request, in fact, is part of the procedural rights of the party in an administrative procedure, along with the right to inspect the file (art. 45) and submit opinions and explanations (art. 47) and should have been systematically located close or in relation to these procedural rights. As in accordance with art. 48 of the Constitution anybody is entitled to make a request to the public administration in order to satisfy its subjective rights or legitimate interest, it also implies the possibility to amend, complete or withdraw such a request. Part of art. 64 (the part of the provision on the withdrawal only) relates to article 94 which regulates also the legal consequences of withdrawal of the request.

II. Constitution and EU Law

The normative substance of the article is implied by the Art. 48 of the Constitution: As anybody may address requests, complaints or comments to the public bodies, it also is entitled to amend or withdraw such requests, complaints or comments.

III. Legal consequences of Art. 64

- The legal consequences of the completion or amending of the request is the continuation of the procedure in accordance with the new object. While in case the request for completion/amendment is rejected the respective procedure shall continue with the same object.
- In case of withdrawal, as a rule, the procedure is concluded through the administrative act of declaration of conclusion, unless a public interest is at stake, case in which the procedure continues to eventually a final decision on the substance of the case.

IV. Relation to previous CAP

Art. 64 in relation to the withdrawal covers a similar regulatory substance with art. 101 of former CAP.

V. Scope of application of the norm

Art. 64 applies only in relation to administrative procedure initiated upon request. It applies to any phase of the procedure till a final decision, on that phase, is issued. It might apply to the first instance procedure as well as to legal remedies procedure. It

## B. Right to complete, amend and withdraw the request in detail

### I. Completion or amending of the request (para. 1)

Para 1, stipulates the right of the party to complete or amend the request. Practically the words “complete” and “amend” in this very context are almost synonyms: complete would mean the extension of the objective whilst amend would mean the change of the objective of the request.

The legal preconditions for the exercise of this right to amend/complete the request, under para. 1 are: i) only the party that has submitted the original request could take the initiative to amend or complete it (which implies its application to procedure instituted upon request); ii) the objective of the amended/completed request should be based on the same factual situation as the initial/original request, and iii) the right should be exercised till a final decision is taken (this precondition derives explicitly from the second sentence of para. 2).

#### 1. Party that submitted the original request

The meaning of “request” in para. 1 is not beyond debate. The location of art. 64 seem to suggest it refers to the initial request (the request for the initiation of an administrative procedure or to the request for a legal remedy) only.

The initiative for completing/amending the request could be taken only by the party (in the legal sense of the concept) that submitted the original request.

Para. 1, differently from para. 2 (dealing with the withdrawal) does not require a specific form for the request of amend/completion, per consequence art. 58 shall apply accordingly.

#### 2. The object of completed/amended request should be based on the same factual situation

As already explained, the submission of an initial request, defines the “objective” of the requests and per consequence the “object” of the concrete administrative procedure itself. According to general principles it is not allowed to change the object of the procedure in its course, the party may amend the object only if such a request is based on essentially the same state of facts. The logic is clear: to the legislator is not important the legal qualification of the request but instead the factual situation it is based upon and secondly it is the factual situation that is investigated in the administrative procedure. Ex: the applicant has applied for a subvention of a certain value, based on the same factual situation he might want to request a higher value.

#### 3. The completion/amendment can be requested till the final decision is issued

In accordance to the second sentence of para. 2, the completion/amendment could be requested till the moment of a final decision is taken. The reference to “a final decision” should be read in the broad sense as referring the decision for termination of the procedure in accordance with art. 90, which includes both the final decision on the substance of the case as well as the decision of declaration of termination of the proceeding. The reasons for this dynamic time-limit rests on the fact that any change of the request after a final decision would be useless, because the administrative action would start producing its effects.

#### 4. The legal consequences of para. 1

The legal consequences of para. 1 is whether: a) if the above mentioned preconditions are met - the public body is obliged to continue the procedure in accordance with the new object, or b) in case the public body find that the request of the party to amend/complete the original request does not fulfil the above-mentioned preconditions - it shall reject it by a procedural act in the sense of art. 130 (3), which is not separately challengeable in the sense of art. 130 (2) and the respective procedure shall continue with the same original object. Eventually the request for completion/amending (e.g. when not of such a nature as to classify within the same concrete administrative case) might be deemed as a new requests related to a different new case.

### II. Withdrawal of the request (para. 2)

Para 2, stipulates the right of the party to withdraw whether partially or totally its original request. It foresees the legal preconditions for the exercise of such a right as well as the legal consequences.

#### 1. The legal preconditions

The provision provides for five legal preconditions:

- a) the withdrawal could be done till a final decision is taken (as provided by the general principles of logic the withdrawal or amendment of the request should be done at any time during the proceeding till a final decision has been taken, otherwise it would be useless);
- b) it should requested by the party that submitted the original request (although not explicitly or vaguely stipulated the precondition derives from art. 94, para. 1 which regulates the same substance).
- c) the request should be made in a written form (in case the request is done in another form the rules of art. 62 shall apply by analogy);
- d) the right of withdrawal should not forbidden by a special law provision, and
- e) there is no any public interest or other party's interest within the competence of the conducting public body at stake (see commentary on para. 4 below).

## 2. The legal consequence

The third sentence of para. 2 stipulates the legal consequences of the withdrawal (in fact of a total withdraw, because a partial withdraw would be same as the "amending" of the object of the request in accordance with para. 1):

-In case the above (under B/II/1) legal preconditions are meet the legal consequence is the obligation of the public body to conclude the administrative procedure. In accordance to art. 90, para. 3 correlated with art. 94, para. 1 the administrative procedure, in this case, is concluded by an administrative act of declaration of conclusion (as opposite to a final decision) which should be notified to the other involved parties so they can exercise the legal remedies as provided by para. 3 below and the last sentence of the very para. 2; or

- In case the public body find that the request of the party to withdraw the original request does not fulfil the above-mentioned preconditions, it shall reject it by a procedural act in the sense of art. 130, para. 3, which is not challengeable directly in accordance to art. 130, para. 2.

## 3. The meaning of "waive his legal rights and interests"

The meaning of "waive his legal rights and interests" is misleading. In accordance with the general rules the withdrawal of the initial request does not necessarily lead to the abolishment of the involved substantial/material subjective right or legitimate interests, it affects only the procedural rights of the party in that specific procedure. Furthermore according to art. 94, the withdrawal of the initial request leads to the declaration of conclusion of the procedure. The main feature of the declaration of the conclusion of the procedure (which is an administrative act, in acc. to art. 90. Para. 3) as opposite to the conclusion by a final decision is that it does not rule in the definitive way on the case, because it does not decide on the substance of the request and per consequence a new procedure with same object might be reassumed with the submission of a new request. The only case when indirectly it might lead to the "abolishment" of the substantial rights is when the request is limited by a peremptory deadline (see. Art. 65, lit. c), which if lost brings along the impossibility of the party to initiate a procedure for satisfaction of its subjective rights or legitimate interests.

## III. The right of appeal of other involved parties (para. 3)

Para 3, stipulates that the administrative act of declaration of conclusion of the procedure, based on the withdrawal of the party, could be challenged by the other involved parties. The rationale of the provision is rather contestable, it is rather unimaginable (or at least rather improbable) a procedural interest of other parties (which have, as a rule, a defensive legitimate interest in the procedure initiated by the request of the party that is willing to withdraw) to stop the effects of the conclusion could exists, unless it refers to parties with same identical interest. In this case latter case if two different parties with same identical interest have submitted together a request or even separate requests which were joined by the public body in acc. to art. 65, lit. "c" there might an interest of the other party to stop the conclusion of the procedure for its own part.

## IV. The continuation of the procedure in case of other involved interests (para. 4)

Para 4, is the continuation or better an exception from the second sentence of para 2. It stipulates that, by way of exception, in case of withdrawal, the public body shall not conclude the procedure, if there is a public or other party's interest involved. The provision is a repetition of art. 94, para. 2 although unfortunately with a slight difference, i.e. it adds the expression "or in the lawful interest of another party". The latter (art. 94, para. 2) foresees that the public body might decide to continue the procedure under two preconditions: i) a concrete public interest under the competence of the proceeding public body requires so, and ii) the procedure is not of the type which initiation could be only upon the request of a party.

The two provisions seem to contradict each other. Based on the general understanding the principle of “disponibility” does not fully function in the administrative procedure because of the involved public interest the public body is meant to serve. But anyway there are procedures that could be initiated only upon a request of the party (imagine: the request of party to have a permit, a licence or an authorisation), only such request would entitle the public body to exercise the administrative power. In this case the administrative procedure could not continue if the party has withdrawn the request because the precondition for the public body to start exercising the attributed administrative power ceases to exist anymore. The provision might be theoretically applicable in case of procedures which could be initiated both by the public body and by the party.

In relation to the continuation of the procedure because “another party’s interest” is at stake, the rule could be applicable only in case of parties with same interest. In this case the procedure shall continue with the other party with same identical interest.

#### *Article 65 Preliminary verification before the initiation of the administrative procedure*

1. The public body shall make the following verifications at the beginning of the administrative procedure:
- a) whether the rights or interests required by the parties are subject to any time limitations;
  - b) the legitimacy of the party that has submitted a request for the initiation of the administrative procedure;
  - c) whether the deadline provided by law for the submission of the request has been complied with;
  - ç) whether the request of a party for the initiation of an administrative procedure may be examined together with the requests of other parties if based on the same facts and legislation.

#### General comment on Art. 65

Art. 65 is a provision closely connected to para. 2 of Art. 44, but in contrast to that Art. 65 has mainly a declaratory character.

The cases a), b), and c) in Art. 65 are dealing with the same cases as para. 2 of Art. 44 does, namely with deadline, legal standing and time limitations of a requested right or interest. A substantive difference can be seen related to lit. ç), dealing with the situation that the public body can conduct the examinatory steps for two administrative procedures together if the two are based on the same facts and legislation. Art. 44 does not cover such case. The conclusion of both procedures by final decisions must be done separately again.

The norm establishes rules on how a public body and its responsible official respectively shall efficiently organize the work process at the beginning of the procedure by saying that the public body should start the procedure with the examination of a request, which was submitted by a party, under a certain number of procedural legal aspects. By providing guidelines or directives addressed to a civil servant conducting a procedure Art. 65 could be relevant for the civil service relationship between the public body and its employees, possibly with disciplinary consequences in case of non-observance.

Art. 65 does neither constitute a specific legal relationship between the body and the party nor does it have legal consequences for the administrative procedure as such.

## **CHAPTER VII**

### **PRELIMINARY ISSUES AND INTERIM DECISIONS**

#### *Article 66 Preliminary issues*

1. If the public body conducting the procedure comes across an issue, the resolution of which is a precondition for resolution of the matter and, which constitutes an independent legal issue, for the resolution of which a court or other body is competent ("preliminary issue"), the public body conducting the administrative procedure shall suspend the procedure till an unchallengeable decision is issued on the preliminary issue and notify the party thereof.
2. If the review of the preliminary issue may be started only upon request of a party, the competent body for the conducting the procedure shall suspend the procedure, by simultaneously informing the party on its right to submit a request on the concrete matter.
3. If the resolution of the preliminary issue requires the *ex officio* initiative of another public body, the competent body for conducting the procedure shall request the initiation of the procedure by the other body.

#### A. General Introduction

##### I. Content and purpose of art. 66

In the course of an on-going administrative procedure a legal issue can arise that first need to be clarified before the public body can conclude the on-going procedure acc. to art. 90, and the clarification requires a separate judicial or administrative procedure. In cases, when the public body conducting the on-going procedure comes across such a preliminary issue, art. 66 para. 1 stipulates the body's obligation to discontinue the procedure as long as the preliminary issue is pending. According to the wording of art. 66 para. 1 preliminary issues are those, which are legally independent, i.e. the decision on which falls within the competence of a court or another public body.

However, there can be also cases, when an issue is "preliminary" in the meaning of para. 1, although its resolution falls in the competence of the same body that carries out the on-going procedure. This for instance may be the case, when the same body is competent to decide on different legally independent matters on the basis of different legal bases and one of the decisions constitutes a precondition for taking the final decision on the on-going procedure. So, the decisive criterion is in the end not the involvement of a "court or other body" but the criterion "independent" as explained more in detail below (see section B. I. 2. a.).

The purpose of para. 1 of art. 66 is twofold. One the one hand, the regulation is in the public interest to avoid unnecessary procedural activities of a public body, i.e. waste of time and resources, as long as the outcome of the on-going procedure is uncertain because of its dependence on the preliminary procedure. In this way the norm contributes to the implementation of the efficiency principle stipulated in art. 18.

On the other hand this provision also protects the interest of the party, when the continuation of the procedure could interfere with individual rights of the party as long as the resolution of the preliminary issue is pending. Two special cases of comparable interest situation are addressed in para. 1 of art. 36 and para. 1 of 93. In supplementation to these special regulations para. 1 art. 66 provides a general rule to ensure this party-related protective purpose in similar cases with comparable interests.

Para. 2 and 3 of art. 66 complement the *ratio legis* of para. 1. They aim at keeping the period of interruption of the procedure at a reasonable duration by obliging the public body to undertake the initiative for expediting the process of clarifying the preliminary issue. Moreover, the two paragraphs serve both, the individual interest of the party in being informed and supported in connection with the requirement of a preliminary issue (para. 2), as well as the common interest of the party and the public in a speedy conclusion of the overall procedure (para. 2 and 3).

##### II. Legal consequences of art. 66

If a "preliminary issue" arises the public body conducting the procedure should not continue the procedure but is obliged to suspend it till that issue is resolved. As further consequence of the suspension, the deadline for the conclusion of the administrative procedure - as stipulated in art. 91 - is interrupted and resumes with the resolution of the preliminary issue.

### III. Relation to the previous CAP

Art. 66 covers the same normative substance as art. 23 of the previous CAP. The regulatory content of either norm is rather similar with the exception that the old provision used to foresee, by way of exception, the possibility of the public body conducting the procedure to decide itself on the preliminary issue in specific cases when a delay in the procedure could cause an irreparable damage to the fundamental constitutional right of the party. Such a decision on the preliminary issue had legal effect only in relation to the respective administrative matter. In addition, the old provision used to address cases when the suspension of the procedure was terminated (the procedure was reassumed) due to i) inactivity of the party or ii) urgency to conclude the procedure.

### IV. Scope of application of the norm

Art. 66 applies at all stages and phases of an administrative procedure, whenever a preliminary issue arises, be it during the procedure at first instance or during the procedure of legal remedies. In cases of art. 70 on “joint decisions” and art. 74, 75 regulating “one-stop-shops” the art. 66 is not applicable, although “another public body” is involved in the procedure (explanation see below under B. I. 2. b.).

## B. Preliminary issues in details

### I. The preliminary issue and the obligation to suspend the proceeding (para 1)

#### 1. Public body conducting an administrative procedure

The wording of para. 1 denotes firstly the existence of an administrative procedure, specifies furthermore the addressee of the norm, which is the public body competent to conduct this procedure, and finally prescribes the time-frame, within which the norm applies.

The latter is specified by the concept administrative procedure (art. 3, para. 3), i.e. its beginning (cf. art. 41 and explanation above) and conclusion (cf. art. 90 et sequ. and explanation below). In this way the wording of the norm excludes preliminary issues that notoriously exist already before the commencement of the procedure. This is unproblematic in most of the cases, when procedures are to be initiated of ex-officio; the reasonably acting body will simply refrain from initiating a procedure acc. to the 1st alternative of para. 1 of art. 4. In cases of 2<sup>nd</sup> alternative of para. 1 of art. 41 however, when a procedure is initiated upon request of a party, application of art. 66 by analogy is adequate, with the practical result that the public body after receiving the initiating request of the party should without delay inform the party acc. to para. 2 of art. 66 and suspend the process. Whether or not in very exceptional ex-officio cases with particular constellation (e.g. the body needs to initiate an “ex-officio procedure” in order to meet a deadline) analogue application is likewise required, might be taken into consideration.

#### 2. Preliminary issue

Para. 1 determines the term preliminary issue by two criteria, a.) the “independent legal issue” and b.) the resolution of the preliminary issue is a “precondition for resolution of the matter”.

##### a) Independent legal issue

In the context of this provision an issue is legally independent, if it cannot be dealt with as part of the on-going procedure. Here two alternative situations are to be considered.

##### i) Competence of a court or of another public body

One situation is explicitly described by the text of the provision, namely that the resolution of the issue in question is under the competence of a court or of another public body. However, an additional criterion is required in order to distinguish “independent legal issues” stipulated in art. 66 from cases regulated in art. 70 “Joint decisions” and art. 74, 75 regulating “one-stop-shops”. The latter provisions also deal with cases, where one or more other public bodies vested with own competences are involved in an administrative procedure. But the difference between those provisions and the situation of art. 66 is that acc. to art. 70, 74, 75 the legally prescribed co-actions of the bodies involved serve no other purpose than to contribute to the one and common goal of issuing the administrative procedure’s final decision. Instead, preliminary issues stipulated in art. 66 have their own goals independent from the goal of the on-going procedure.

As a consequence, the preconditions for fulfilment of the concept “independent legal issue” are as follows:

the resolution of the legal issue is under the competence of a court

or

the issue is under the competence of another public body (administrative body acc. to art. 3, para. 6 ),

and the involvement of the other body does not fall under art. 70, 74, and 75.

ii) The same body is competent but preliminary issues serves a different goal than the on-going procedure

Comparable to the situation when another public body is competent to decide on the preliminary issue is the case when the issue in question falls under the competence of the same public body conducting the procedure but serves a different goal than the on-going procedure and therefore is to be dealt with in a separate one. Here in this context the body conducting the procedure has the same status and function as “the other” public body. Therefore, para. 1 of this article shall apply likewise to this second situation.

b) Resolution of the preliminary issue is a precondition for the resolution of the matter

i) Resolution of the matter

Resolution of the matter is the “final decision-making on the case” referred to in art. 90, para. 1., i.e. the issuance of an administrative act, the conclusion of an administrative contract or the performance of any other administrative action under the regime of the administrative law (art. 126, 127 ) related to the on-going procedure.

ii) Resolution of the preliminary issue

With the term “resolution” the legislator determines the moment, when the uncertainty caused by the pending preliminary issue has come to an end. For this purpose the legislator uses at the end of para. 1 the phrase “till an unchangeable final decision is issued on the preliminary issue”. With this phrase using the (Albanian) concept “vendim i forms te prere” para. 1 refers here to art. 451 of the Code of Civil Procedure.

It follows from this that for court procedures in general - be it for civil procedures by direct application of art. 451 of the Code of Civil Procedure or for any other court procedure by analogous application of this norm - the preliminary issue shall be resolved in the moment, when the pending court decision cannot be challenged (any more) by ordinary remedy.

However, as explained above (under B. I. 2.) the concept “preliminary issues” includes issues to be dealt with public bodies as well. For these cases, when the preliminary issue falls within the competence of a public body, the wording of art. 451 of the Code of Civil Procedure is not directly applicable. Nevertheless, in the context of para. 1 of art. 66 the legislator’s will is clear, namely that the rationale of art. 451 of the Code of Civil Procedure is to be applied also to preliminary issues dealt with through administrative procedures. Accordingly, those administrative preliminary issues are considered to be resolved, which have become unchallengeable in light of the provisions on administrative remedies (art. 128 ff.), resp. have become executable acc. 164.

For the administrative practice it is recommendable that the public body conducting the on-going procedure asks the court resp. public body dealing with the preliminary issue to keep the former informed about the relevant development of the procedure, in particular on the fact that it has become unchallengeable.

iii) Precondition

The concept “precondition” for the resolution of the matter means that the preliminary issue is legally relevant either for the continuation of the procedure or for taking the final decision on the case, depending on whether the issue is of procedural law or material law character. As long as the preliminary issue is pending and not clarified through court decision resp. administrative action, the public body is not in the position to take a final decision on the case in accordance with the law.

A preliminary issue though pending is not a “precondition” in the meaning of this provision, if from the list of legal preconditions stipulated for a certain final administrative decision (e.g. the rejection of a requested beneficial administrative act or the prohibition of certain action such as driving a car) the fulfilment or non-fulfilment of at least one other legal precondition than the preliminary issue already allows or obliges to take the final decision on the case.

### 3. Coming across

The provision requires that the public body conducting the procedure came across the preliminary issue. An issue “comes across” if the public body realizes that such an issue exists, whereby the realisation may either be based on the public body’s own insights or triggered through external initiative be it from a court, another public body, a party or any other subject.

### 4. Legal consequences of para. 1

Direct legal consequences: If the above preconditions are cumulatively met, the public body conducting the procedure is obliged to suspend the procedure without delay. The suspension is a procedural action, more precisely a procedural act (in the meaning of a procedural action, see the commentary of art. 130, para. 3). As any such action it should be notified to the involved parties (in relation to the means of the notification the provisions of the CAP on the rules of notification acc. to art. 147 and ff. shall apply), but acc. to art. 130 para. 2 the suspension cannot be challenged separately.

The duration of suspension is time-limited. It shall last (*ex lege*) till the preliminary issue is resolved by court or other public body. After this moment the administrative procedure shall be reassumed and continue its path. The calculation of the deadlines running against the public body shall be suspended and their calculation shall be reassumed (for the remaining time-frame) after the public body gets cognizance of the definitive decision.

Possible legal consequences in case of non-observance of the obligation: In case the public body does not suspend the procedure even though the legal preconditions are met, the procedure is defective and might impact on the lawfulness of the final administrative that concludes the administrative procedure. The non-observance of the obligation could be invoked as one of the grounds for the exercise of the legal remedies by the affected parties.

## II. Warning of the party in case the preliminary issues could be resolved upon request only (para 2)

Art. 66, gives to the public body conducting the procedure an “active role” in case of the suspension of the proceeding, by providing to it further obligations (in addition to the one to suspend the proceeding in accordance with para. 1). The character of the additional obligations varies on the type of the “preliminary issue” depending on the criteria of “disponibility”.

Para. 2, regulates the cases in which the preliminary issue could be resolved by an administrative procedure which could be initiated only upon party’s request. In this case the public body conducting the suspended procedure should have an additional active role reflected in the obligation to explicitly inform the party on this fact and on the party’s right to initiate the proceeding for the resolution of preliminary issue. The obligation is a concretization of the principle of active advice enshrined by art. 10 and aims to ensure the smooth further continuation of the procedure. The warning should be part of the procedural act of suspension.

The public body is obliged to alert the party. Possible legal consequences in case of non-observance of the obligation: In case the public body does not alert the party on the fact that the procedure for the resolution of the preliminary issues could be instituted only upon its request, the party might be inactive and if the procedure is concluded (on the ground of abandonment see below) the procedure is defective which might impact on the lawfulness of the final administrative action adopted to conclude the administrative procedure. The non-observance of the obligation could be invoked as one of the grounds for the exercise of the legal remedies by the affected parties. In addition another question arises: What happens in case of inaction by the party properly alerted in accordance with para. 2? In our opinion the provision on conclusion of the administrative procedure by a declaration of conclusion (which is an administrative act) on the ground of “the abandonment” in acc. to art. 94 (2) should apply (see the commentary on art. 94).

## III. Additional obligation of the public body in case the preliminary issue could be resolved ex officio (para 3)

Para. 3, regulates the cases in which the preliminary issue could be resolved by an administrative procedure which could be initiated only ex officio by another public body (competent to decide on the preliminary issue). In this case, also, the public body conducting the suspended procedure, should have an active role reflected in the obligation (imperative wording “requests the initiation”) to explicitly request the other competent body to initiate the proceeding. It should also be noted that the term “request” under para. 3, should be read in *stricto sensu*. It is not a request in the sense of an original request, which submission is *ex lege* able to institute a procedure (in accordance with art. 41) but rather an official “recommendation” or “reference to the legal situation” to initiate a procedure, which in its turn could be instituted only ex officio by the competent public body in acc. to art. 41.

Possible legal consequences in case of non-observance of the obligation: In case the public body does not request the other public body to initiate the process for the resolution of the preliminary issue, the procedure is defective and might impact on the lawfulness of the final administrative action adopted at the conclusion of the administrative procedure. The non-observance of the obligation could be invoked as one of the grounds for the exercise of the legal remedies by the affected parties.

There is no legal remedy if the other body, irrespective of having been recommended by the body conducting the procedure, does not take any ex-officio initiative to start a procedure aimed at resolving the preliminary issue. The only way is to activate the supervisory body by issuing an informal complaint.

#### Article 67 *Interim decisions*

1. The public body, which is competent to make the final decision, may also make interim decisions when it is deemed that the failure to take certain measure would cause serious and irreparable damage to public interests or to the rights or legal interests of the parties.
2. The interim decisions may be made by the public body either ex officio or at the request of the interested parties.
3. The decision to adopt interim measures should be reasoned, with a specified deadline, and notified to the parties.

#### A. General introduction

##### I. Content and purpose of art. 67

Art. 67 stipulates the possibility of the public body to undertake during the procedure measures based on an interim decision with the aim of avoiding an imminent, serious and irreparable damage to the public or party's interest.

Art. 67 provides an exception of the regulation in art. 90, according to which an administrative procedure shall be concluded by a final decision-making on the case, in other words - as a rule by one final administrative act or administrative contract. However, during the procedure real life situation might appear requiring the performance of urgent measures in order to avoid or limit serious and irreparable damages to the public or party's interests, that could not be prevented by carrying out the whole administrative procedure necessary for preparing the final decision, because such final decision came too late for tackling the problem. Another area of application is the situation, when an interim measure is needed to assure the final decision's efficacy, in other words to avoid that due to factual or legal changes in the course of the proceeding a final decision could become impossible or useless. In those cases art. 67 enables the public body to take not only the final decision that concludes the procedure but also find an interim solution in between, without prejudging the final decision.

The norm is not only a procedural norm stipulating the requirements related to the competence taking such interim decision, its form, content and notification. It is also of material character providing the material legal base in the meaning of art. 4 para. 1 for undertaking urgency measures, whenever a serious risk to the public or party's interest is caused by the duration of an ordinary procedure. However, the public body's authorisation for exercising discretion related to an interim decision is limited by the material legal base regulating the final decision of the procedure. That means, as a rule the interim decision shall not anticipate the final decision, in other words should be a "minus" to the final decision allowed by the material legal base. Moreover, the discretionary decision on an interim measure is subject the principle of proportionality acc. to art. 12.

##### II. Legal consequences of art. 67

The interim decision is at the discretion of the public body. Although different to the final decision as far as the content is concerned, the interim decision has the same legal character as the final decision, i.e. as a rule it has the legal nature and effect of an administrative act. Consequently, para. 3 requires a reasoning of the decision as stipulated for administrative acts by art. 100. As further consequence, the legal nature of an administrative act makes it possible that the public body can use this instrument for example to issue commands or prohibitions and execute them, whilst - on the other side - the party can challenge this decision by administrative remedy pursuant to Part Six .

##### III. Relation to the previous CAP

Art. 67 covers the normative substance of art. 78 of the previous CAP. The regulatory content is almost identical, except that the new provision allows the interim measures are taken not only to avoid serious and irreparable damage

to the public interests but also to the interests of the party.

#### IV. Scope of application of the norm

Art. 67 applies in all stages and phases of an administrative procedure, whenever the possibility of a serious and irreparable damage to the public interests or to the rights or legal interests of the parties might appear. The interim decisions could be taken at any phase of the procedure before the matter is resolved by a decision.

#### B. Interim decisions in details

##### I. The possibility to take interim measures (para 1)

Para. 1, stipulates the concept of the “interim decision”, the preconditions and the competence to take such decisions. It recognizes the possibility of the public body competent for the final decision (the competence), to perform urgent measures based on an “interim decision” during the course of an administrative proceeding in the public or party’s interests. The cumulative preconditions for this entitlement are: i) the acting public body is competent for the final decision and takes the interim decision as integral part of the on-going procedure; ii) there is a risk for a serious and irreparable damage to a public or party’s interest; iii) the damage is imminent and can materialise before the procedure would end; iv) the damage can be prevented by a certain measure the type of measure to be taken by the interim decision should be within the remit of competence of the public body

##### 1. Public body competent for the final decision

###### a) Jurisdictional rule

The wording “public body, which is competent to take the final decision” is to be understood firstly as a jurisdictional rule. As such it establishes that no-one else but the body that has got the competence for the final decision is also responsible for taking interim decisions.

###### b) Interim decision as integral part of a procedure

Although not explicitly said by the phrase “public body, which is competent to take the final decision”, this wording expresses also the legislator’s will that an interim measure could be taken only as integral part of an on-going administrative procedure. In other words, without and outside a concrete proceeding aimed at a final decision there is no space for an interim decision. This precondition derives from a reasonable literal interpretation of the legal text when providing the juxtaposition of the terms “interim” versus “final” decision in combination with the consideration of systematic location and purpose of the norm.

Thirdly, the connection of interim to the final decision defines the time frame within which an interim decision may be taken, namely within the period between beginning (cf. art. 41 and explanation above) and conclusion (cf. art. 90 et sequ. and explanation below) of the administrative procedure initiated with the aim to prepare and adopt the final decision. Interim decisions might reasonably be taken at the beginning of the proceeding, in case of an ex-officio procedure even simultaneously with the communication of the initiation of the proceeding acc.to para. 1 of art. 42. But in principle interim decisions can be taken at every stage before the conclusion of the procedure, once the public body comes into cognizance of the need for urgency measures..

##### 2. Serious and irreparable damage to public or party’s interest

Para. 1 requires that a (probable) damage to public or party’s interest is both serious and irreparable. According to the exceptional character of this norm, “serious damage” means a damage of “considerable gravity”. Relevant in the meaning of serious and irreparable are always damages on body and life as well as health impairments on body and soul of greater gravity than slight physical and psychological discomforts, in case of health impairments independently whether they are of permanent or temporary nature. Serious material damages of (not only economic but also cultural) importance are relevant if repair is impossible or possible only with disproportionate amount of effort or cost. Financial losses of considerable gravity can frequently be compensated and therefore are not irreparable, unless the temporary financial status of a person does not allow an individual to live in dignity or ruins the economic existence of a business.

Art. 67 protects all parties participating in the concrete procedure acc. to art. 33. Damages to the public interests include not only those occurring in the sphere of public security and order or those that affect public goods of economic, financial and cultural relevance. Also individual interests of natural or legal persons who are not party of the administrative procedure in the meaning of art. 33 fall under public interest, if the public body has got a guarantor’s legal obligation vis-à-vis these persons. Both the conditions should be assessed by the public body based

on objective criteria.

### 3. Imminence and probability of the damage

Para. 1, requires an imminent as well as a concrete risk that the damage will materialise, unless certain measures are taken to prevent the damage. This follows from the wording “the failure to take certain measures” suggesting both urgency and probability. The probability of the risk should not only be abstract but concrete, i.e. for the concrete individual situation to be dealt with by the administrative procedure it can be assumed with reasonable certainty that the danger will materialise. In this context imminent means that the materialisation of the danger could happen at any moment during the period of time before the final decision can be taken.

### 4. Certain measure

The concept certain measure in the meaning para. 1 is an indeterminate legal concept that is to be interpreted firstly by the special law authorisation for the final decision. Accordingly, it shall not anticipate the final decision but as a rule shall always remain a “minus” in comparison to what the special law authorisation allows for the final decision.

Furthermore, the term certain measure is to be read in light of the principle of proportionality stipulated by art. 12. According to this principle a certain measure shall be suitable and necessary to prevent the materialisation of the danger. Suitability must be determined from objective standards and not from the subjective judgement of the public body. The principle of necessity, also be called the principle of mildest means, requires that out of several suitable means available for achieving the purpose of law only those should be pursued, which cause minimum injury to the individual and in the case of beneficial measures cause minimum loss to the community. Furthermore, efforts, resources and costs, which the public body needs to expend for the applied measure, as well as other disadvantageous (legal) effects that could occur outside the sphere of the public body must be in a reasonable, i.e. proportionate, ratio to the positive effect of the certain measure, namely the prevention of the danger. For this harm-benefit weighing the gravity of the danger as well as its level of probability are decisive criteria.

### 5. Legal consequences of para. 1

On the cumulative presence of the above mentioned preconditions the public body “may” impose an urgent measure. The wording “may” denotes that an interim decision is at the discretion of the public body, for which the principles of art. 11 apply. Legal limits are stipulated by the material legal base regulating the final decision of the procedure (see explained above und A. I.).

The discretionary power is given to the public body on two levels. Firstly the public body has to decide whether to act or not to act. On a second level the body has got the discretionary power, which out of possible (suitable) means should be chosen.

On both levels the exercise of discretion is subject to the principle of proportionality as explained above (under B. I. 4.) Though, in exceptional cases the discretion could be “reduced to zero”. It means that in spite of the theoretical choice given by the discretionary power to act one way or the other, in some specific cases (eg. of exceptional gravity of danger) only one course of action may be legal. In that case the discretionary margin is reduced to the extent that the body is under duty to follow only that course of action. *(Example: It is assumed that the inspectors of buildings have full discretion to intervene if the owner of a building misuses his building. But in case of material danger to the legally protected important interests of neighbours by such misuse they are under obligation to intervene, i.e. not only initiate an administrative procedure aimed at taking a final decision but also perform urgent measures based on an interim decision.)*

#### II. The initiative for an interim measure (para 2)

Para 2, stipulates the impulse for an interim measure. It could be decided ex-officio (e.g. as result of inspection) or upon request of the party (e.g. the party may request the allocation of the minimum pension till a final decision is taken). It should be noted that in case of a request, the acceptance or refusal of interim decision is at the lawful discretion of the public body.

#### III. Conditions on the form and content of the interim decision (para 3)

Para. 3, stipulates elements concerning content and form of the interim decision. The here mentioned requirements of reasoning and notification are already apparent from the interim decision’s legal character as administrative act.

Specific is the requirement that the decision should establish a deadline when its legal effect expires, which underlines and follows from the interim character of the decision. As to the form there is in principle no reason to deviate from the principle of freedom of form regulated in para. 1 of art. 98 and para. 1 of art. 148. However, even if not provided

by special law, in practice it is recommendable to use for the notification of the interim decision the same form as needed or intended to be used for the final decision, unless due to the urgency of a measure the oral notification is appropriate and possible acc. to para. 1 of art. 148.

#### Article 68 Termination of interim decisions

##### 1. The interim decisions shall automatically terminate in the following cases:

- a) the administrative procedure has ended or the deadline, within which a final decision should have been made, has expired;
- b) when the deadline set in the interim decision has expired;
- c) In other cases explicitly provided for by the law;

##### 2. The public body shall abrogate the interim decisions, if during the procedures the ground provided for in Paragraph 1 of article 67 of this Code disappears.

#### A. General introduction

##### I. Content and purpose of art. 68

Art. 68 ensures the temporary and exceptional character of interim decisions in two ways. Para. 1 stipulates that the legal effect of an interim decision ends at the latest and “automatically” with the conclusion of the administrative procedure, which the interim decision is a part of. Para. 2 obliges the public body to “abrogate” the interim decision, “if during the procedures the ground provided for in paragraph 1 of article 67 disappears”, and hence the interim decision becomes unlawful. In so far para. 2 is to be understood as a special regulation in relation to art. 114, acc. to which annulment and repeal of an unlawful administrative act is at the discretion of the public body.

##### II. Legal consequences of art. 68

Upon automatic termination or abrogation the interim measure stops producing its legal effects.

##### III. Relation to the previous CAP

Art. 67 covers the same normative substance as art. 79 the previous CAP. The regulatory content is very similar.

##### IV. Scope of application of the norm

See the scope of application of art. 67.

#### B. Detailed Explanations

##### I. Automatic termination of an interim decision (para. 1)

Para 1, stipulates four grounds for the automatic termination to the effect of an interim decision. The word “automatically” means that there is no obligation of the public body for taking and notifying a decision on termination. However, for the administrative practice it is recommended to include in the final decision of the procedure the declaratory reference that the interim decision terminates with the notification of the final decision, unless the interim decision was already abrogated at an earlier stage acc. to para. 2 of this article.

##### 1. Administrative proceeding “has ended” (lit. a, first alternative)

There might be two options:

- a) End of an administrative procedure initiated upon request of the party

The administrative procedure initiated upon request of the party is either concluded through a final decision (i.e., either by issuance of an administrative act or through conclusion of an administrative contract) in acc. to art. 90, para. 1. or declared as concluded acc. to art. 90, para. 3 in connection with art. 93 to 96.

A final decision on conclusion of the procedure implies that the public body resolves that administrative matter on final basis, with the consequence of no more need for the interim measures taken during that procedure, because the

public or party's interest is served and protected through the final decision.

In case of declaration of conclusion without a final decision on the substance of the case acc. to para. 3 the interim decision also stops producing its effects, because it is also affected by one of the reasons regulated in art. 93 to 96.

b) End of an ex-officio administrative procedure

Three alternatives are to be distinguished.

The administrative procedure initiated ex officio might be concluded through a final decision in the cases provided by special law (1<sup>st</sup> alternative). In cases special law does not explicitly establish the obligation to conclude the proceeding through final decision, para. 2 of art. 90 establishes the rule of discretionary conclusion of the procedure with the consequence that the public body either concludes (2<sup>nd</sup> alternative) or does not conclude the procedure (3<sup>rd</sup> alternative).

In the cases of alternative (1) and (2) the interim decision terminates automatically with the conclusion of the procedure. In the case of Alternative (3) the public body is obliged to terminate the interim decision in application of para. 2 of art. 68, unless it expires acc. to lit b) of para. 1.

2. Expiration of the deadline for the final decision (lit. a, second alternative)

The law always provides for a deadline to conclude an administrative procedure in case of an administrative procedure instituted upon request.

In case of an ex officio instituted procedure such a deadline might exist (if provided by special law) or not (art. 90 establishes the rule of discretionary conclusion of an ex officio initiated procedure). In case there is such a deadline, its expiration, without a decision-making, would also mark the day of termination of interim decisions taken during the procedure. If there is no deadline, the explanation above under B. I. 1. b) on the first alternative of lit. a applies.

3. Expiration of deadline established by interim decision itself (lit. (b))

In accordance to para. 3 of art. 67 the interim decisions shall include a deadline. The interim decision shall stop producing effects from the moment of expiration of this deadline. If the public body failed to set the required deadline, the first alternative of lit. a applies.

4. Other cases explicitly provided by special law (lit. c).

The lit. "c" is an open clause allowing special causes regulated by special law.

5. Legal consequence of para. 1

In the presence of one of the cases prescribed by lit. "a" to "c" the effect of any interim decision shall terminate *ex lege*, with no need for an explicit decision on termination or revocation, except in the case iii) explained above under B. I. 1. b).

II. The obligation of abrogation of an interim decision (para 2)

Para 2. is *lex specialis* in relation to art. 114. In contrast to art. 114 granting discretion for the decision on annulment or appeal of an administrative act, the special norm stipulates the obligation of the public body to abrogate such interim decision when the grounds for it have ceased to exist (one of the preconditions stops existing) and hence has become unlawful. It should be noted that whether taking or not an interim decision (lawful discretion) is in the discretion of the public body, its abrogation is not. So if the ground which have caused the urgent measures ceases to exist the public body is obliged (imperative wording "abrogates the interim decision") to abrogate the interim decision, even before the stipulated deadline. In this respect there is a difference to the *lex generalis* of art. 114, which for the rest is here applicable by analogy.

The abrogation could be decided on the impulse of the party or ex officio as soon as the public body get cognizance that one of the preconditions has stopped existing

By analogy of art. 113, para 3 for the abrogation of the interim decision written form is required.

The act of abrogation is also an administrative act (cf. also explanation on art. 113 ) as the interim decision and thus subject to administrative remedy. If the public body does not fulfil its obligation of para. 2 of art. 68 to abrogate the interim decision, the party may challenge the existing interim decision as long as it has not terminated acc. to para. 1.

1. During the entire conduct of an administrative procedure with opposing parties the responsible official of the public body shall try to reconcile the parties in the procedure, if allowed by the nature of the case.
2. The reconciliation act of two or more parties in an administrative procedure shall be in written form and, after being read and signed by the parties, it shall become fully effective. A copy of this act shall be provided to the parties in the procedure.
3. The reconciliation act between two or more parties in an administrative procedure shall have the same effect with that of the administrative act.
4. The competent public body shall not accept the reconciliation between the parties in the procedure, if the reconciliation is to the detriment of the public interests or lawful interests of other natural persons or legal entities.

## A. General introduction

### I. Content and Purpose of art. 69

Art. 69 regulates: i) the possibility of two or more parties with opposite interests to reconcile their interests in the course of an initiated administrative procedure as well as ii) the obligation to public body to try to achieve the reconciliation of parties

Although in rather rare cases, parties in an administrative proceeding might conciliate their opposite interests and concord in a certain solution of the case, which might lead to the resolution of the case which is accepted by all the parties and also properly serves to the involved public interest (or which whilst observes the public interests also takes into account the reconciliated interest of the parties. The provision is an application of the principle of active assistance enshrined in art. 10 of this Code, it also serves to both: the interests of the involved parties and the public interest in having a resolution of the administrative case with an outcome that would be acceptable to everybody and avoid eventual future disputes.

### II. Legal consequences of art. 69

If the reconciliation is legally possible, the public body has the obligation to try its achievement and enter into an administrative agreement with parties. In case the reconciliation is not allowed (the preconditions are not fulfilled) the public body should not endorse any such possibility and the procedure shall continue normally.

### III. Relation to previous CAP

There are no provisions on the previous CAP on the reconciliation.

### IV. Scope of application of the norm

The provision applies in the entire course of first instance administrative procedure. It might also apply by analogy to the legal remedies procedure if not in contradiction with the specific rule provided by this Code on the legal remedies.

## B. The content of art. 69 in details

### I. Public body's obligation to try the reconciliation of the parties with opposing interests (para. 1)

Para. 1, stipulates the obligation of the public body to try to reconciliation of the parties and establish three preconditions for such an obligation: i) an already initiated and concluded procedure; ii) the procedure should involve two or more parties with oppositely interests and iii) the nature of the case should allow the reconciliation of the opposing interests. An additional preconditions is regulated by para. 4: iv) the reconciliation should not be in the detriment of the public or of the other person's interest.

#### 1. An already initiated administrative procedure

The application of the provision requires firstly, that there is an administrative procedure that was initiated according to art. 41 and para. 1, - either upon request of a directly involved party or ex officio by the public body - and not

concluded yet by a final decision. Implicitly this, first precondition presumes the relation (a sort of cause-effect) of the outcome of the administrative procedure with the existence or the not-existence of the reconciliation/agreement between the parties with opposite interest. The conciliation should be able to impact the resolution of the case in a certain way/direction, otherwise the agreement would be useless for the procedure and the obligation of the public body to try to achieve the reconciliation of the parties would be not justified.

## 2. Two or more parties with opposite interests

Secondly, the provision requires that in addition to the party of the procedure in acc. to para. 1 of art. 33 there is one or more additional person that have become a party to that procedure according to para. 2 and/or 3 of article 33 and which have an or more opposite interests with the one of the party in acc. to para. 1 of art. 33. Although, theoretically, applicable across the board, the main objective of the provision is to regulate cases related to application procedures, initiated upon request of the party in acc. to lit. a), para. 1 of art. 33, in case the outcome of that procedure might affect the rights or legitimate interests of another party introduced in the procedure in acc. to para. 3 of art. 33 of this Code, e.g. the building permit a party applied for could have a negative effect to the right of the owner of a neighbouring property, if it allowed the applicant to construct a house, the dimensions of which would impair the utilization of the adjacent piece of land.

It should also be noted, that in case of more parties with opposite interest, which reconciliation is able to affect the outcome of the procedure, the reconciliation agreement should involve all such parties. A partial reconciliation agreement, among only some of the involved parties would not have any legal effect on the case.

## 3. Nature of the case should allow the reconciliation of the opposing interests

Thirdly, the provision requires the nature of the case allows a possible reconciliation of opposing interests. The terminology used is rather indeterminate and needs some further explanations. We are of the opinion this precondition intrinsically relates to the precondition established by para. 4, especially in relation to need not have an agreement between the parties in the detriment of a public interest. In fact the reconciliation might take two possible practical forms: a) one of the parties restricts its requirements in the advantage of the other party with opposite interest, e.g.: the applicant for a building permit agrees to have a five floors building instead of a six floors he originally applied for, although neither of the options is against the imperative provision of a regulation aiming to protect a public interest; and b) one of the party "waives" its right or legitimate interest or part of it e.g. the law provides that distance from one building to another should be less than x meters and the neighbouring party agrees to allow a building to a smaller distance. What is important to note is that in acc. to para. 4 the agreement of the parties with opposite interests should not be in the detriment of the public interest that means the case involves private rights and or interests that although protected by law can be waived. These means that the law should explicitly or implicitly allow these right/interests could be waived. In general, in accordance with interpretation in similar jurisdiction (e.g. Germany), it is commonly accepted that a party cannot waive its human rights or fundamental liberties, but instead it could waive interests that even though protected by law (with rather imperative provisions) are not protected as for public interests, but instead for "other general interests" as for instance certain civil or building codes rules on the proximity of two building that are considered rules aiming to protect the so called "good vicinity's relations" and not a general public interest in special. In fact almost all the examples in similar jurisdiction come from the area of building law.

## 4. Not in the detriment of public or other persons interests (para. 4)

As already explained under 3 (above) the reconciliation of the parties should not affect the public interests or other person's interests. A party cannot waive the application of a legal provision meant to protect the public interests, even though it might directly and practically protect its rights or interests; the public body, in this case should neither try to reconcile the parties or endorse such agreement. The same is valid for other persons' interests, if the outcome of a procedure might possibly affect other persons interests, they should be involved in such procedure under para. 2 and 3 of art. 33. The same as in the private law an agreement between parties could not have any legal effect and be opposable to other persons.

## II. Form of the reconciliation agreement (para. 2)

Para. 2 regulates the form of reconciliation agreement, by providing two requirements i) a written agreement, and ii) signed by the parties. In relation to the written form the rules on the form of the request in acc. to art. 58 shall apply by analogy.

In addition, the regulation provides that once it is signed accordingly the agreement becomes “perfect” which means it starts producing its legal effects i.e. the legal effects of an agreement between parties which would legally mean their waive their private interest or part of them.

### III. The legal effect of the reconciliation agreement (para. 3)

Para. 3 is meant to regulate the function or the legal effect of the reconciliation agreement, though the wording and the meaning is rather vague and imprecise. The only viable interpretation of the referred “equivalence” in terms of legal effects of a reconciliation agreement to an administrative act, is the interpretation of such agreement under the light of art. 119 and seq. on the administrative contracts. If that is the case in order the reconciliation agreement has an equivalent effect of an administrative act it should be seen as a particular and rather special case of an administrative contract, it should involve the public body too in a kind of multi-lateral agreement which should further observe the preconditions for entitling the public body to conclude such an administrative agreement, e.g. the public body on the concrete case should be authorised to decide with discretion and the conclusion of the agreement serves better to the public interest than compared to an unilateral administrative act.

### IV. Refusal of the public body (para. 4)

Para. 4, is a continuation of paragraph 1 and establishes (as already explained) additional preconditions to the one provided by para. 1. If one of the preconditions is not meet the public body has no more the obligation to try the reconciliation, and furthermore has the obligation to “non-accept/endorsement” the already reached agreement. The non-acceptance in our opinion is a procedural actions (procedural act) in acc. to para. 3 of art. 130 and as such not appealable separately by the outcome of the procedure in acc. to para. 2, of art. 130. The legal impact of the non-endorsement is the continuation of the procedure and its eventual conclusion with an explicit decision.

On the contrary, if the above mentioned preconditions, as well as the preconditions in acc. art 119 are fulfilled, the instrument to endorse/accept the reconciliation agreement, would be by transforming it in an administrative agreement in which the public body is also a part under the conditions of art. 199 and seq.

## **CHAPTER VIII**

### **JOINT DECISION- MAKING AND ASSISTANCE BETWEEN PUBLIC BODIES**

#### *Article 70 Joint decision making*

1. When under the law, two or more public bodies shall decide on one administrative case in the context of one single administrative procedure, they shall, upon agreement, determine the body that will issue the joint administrative act, which shall comprise also the decision of the other body.
2. Notwithstanding the provisions of Paragraph 1 of this article, each of the involved bodies shall make a decision in accordance with the relevant authority
3. If under the law, the decision-making of a public body is based on a prior consent, confirmation, approval or opinion of another public body, the latter shall make a decision and notify the public body, within 30 days of the submission of the request, except for cases where the law has specified a different deadline.
4. If the public body, whose consent, confirmation, approval, or opinion is necessary for the adoption of the act, fails to respond within the deadline specified in paragraph 3 of this Article, its opinion shall be deemed positive.
5. Save when otherwise provided by law, disputes related to Paragraph 1 of this Article shall be resolved under Article 27 of this Code.

#### A. General introduction

##### I. Content and purpose of art. 70

Art. 70 provides basic procedural rules for cases when special law requires that two or more public bodies have to create a joint decision in a unique public administrative procedure. While as a rule each public body has to act and decide in its very own procedure within the scope of its specific competence (art. 22 ff.), art. 70 provides rules for the exceptional cases when specific law requires only one joint decision of two or more public bodies involved in only one administrative procedure.

##### II. Art. 70 in the system of cooperation of public bodies

For understanding the regulation of Art 70 it is necessary to take a view on the different forms of cooperation resp. contribution in administrative matters. Systematically, not less than 5 constellations must be distinguished:

(1) Parallel procedures: Two or more independent administrative procedures are to be conducted by public bodies in relation to one project/one complex etc... Each public body has to issue its own administrative decision within its own competence. This constellation is the normal case and in this way public bodies shall proceed if not otherwise regulated by special law. It is not regulated by art. 70.

(2) Procedures with contribution of other public bodies: One public body conducts the administrative procedure, other public bodies have to contribute their opinion, approval, confirmation etc. without conducting special administrative procedures and without issuing administrative acts by their own. This constellation takes place when special law requires special contributions of other public bodies to (only) one independent administrative procedure. It is regulated by art. 70, para. 3 and 4.

(3) Joint decision-procedures: In principle one case (it could be a project or more complex case) is to be decided on by two or more public bodies conducting two or more administrative procedures, but special law requires that only one administrative procedure shall be conducted and only one administrative act shall be issued. This special case is regulated in art. 70 para. 1, 2 and 5. It requires that the competent administrative bodies shall determine upon agreement the body that will issue the joint administrative act.

(4) One stop shop-procedures: If provided for by special law all administrative procedures needed to establish or perform services or projects may be managed by or through one public body assigned to act as a point of single contact (so called one stop shop), art. 74. In this constellation the competence of the public bodies involved is not infringed, para. 2 of art. They keep their competence and have to conduct their procedures. But regarding information, receiving requests, notifications etc... (art. 75, 76) the one stop shop approach can be used.

(5) Preliminary procedures: If it occurs that an administrative procedure cannot be concluded without a preliminary

decision in another issue, the body conducting the procedure must suspend the procedure until the preliminary decision is taken. This special case is regulated in art. 66, which presupposes special constellations different from the 4 others listed above, namely that the issue is not directed to the same issue but legally independent (see above explanation to art. 66 und B. I. 2.)

### III. Variety of contents and purposes of art. 70

Art. 70 comprises regulation for two different constellations which need to be treated different: The first one is regulated in art. 70 para. 1, 2 and 5 and concerns cases when two or more administrative procedures are bound together to a joint procedure to be concluded by only one joint administrative act, the second one is regulated in art. 70, para. 3 and 4 and concerns cases when there is only one administrative procedure in which internal contributions of other public bodies are required.

### IV. The content of the joint-decision-regulation in art. 70, para. 1, 2 and 5)

If special law requires that two or more normally independent procedures conducted by different public bodies shall be bound together to one single procedure, regulation is required, in which way the public bodies have to cooperate and how to contribute to the one single procedure. art 70, para. 1 provides that the public bodies involved shall determine upon agreement the body that will issue the joint administrative act, which shall comprise the decisions of the other bodies involved. Para. 2 of art. 70 states the other public bodies involved shall make a decision in accordance with the relevant authority.

It is clear that the public bodies involved have to make an agreement to determine the leading body. Unlike stated in art. 75, para 3, Art 70, para. 1 does not provide criteria for the agreement. For this reason art. 70, para. 1 is to be understood as that it is at the discretion of the public bodies involved, which of them shall act as the leading body and issue the joint administrative act. This must be seen in alignment with art. 25, because the other public bodies involved don't lose their competence in the case. As stated in art. 70 para. 5, in cases an agreement could not be achieved Art. 27 shall apply *mutatis mutandis*.

All public bodies involved have to make their decisions in the range of their competence in accordance with the leading authority. "In accordance" doesn't mean that the leading authority must give its consent to the decision made, because the public bodies involved stayed independent in using their competence. "In accordance" means only that there must be coordination between the leading body and the other bodies involved, because there is only one administrative procedure to fulfil the procedural duties, especially to hear the parties, to let them inspect the files etc... There are no provisions how to proceed in the cases regulated in art. 70, para. 1. If there are no regulations in special law the fulfilment of all procedural duties is up to the leading public body. There are missing regulations for the inclusion of all decisions into the only administrative act. If not otherwise stated by law, the administrative act has to compile all decisions contributed by the other public bodies involved. As the result, the administrative act issued in cases of art. 70, para. 1 comprises two or more material decisions which are put together formally in the joint administrative act. In order to ensure effective legal protection of the party each single decisions comprised in the joint administrative act can be separately subject to administrative remedies without affecting the rest.

### V. The content and purpose of art. 70, para. 3 and 4

As shortly mentioned above (A. I.) art. 70 para. 3 and 4 regulates cases when there is only one administrative procedure conducted by only one responsible public body, within which internal contributions of other public bodies are required. The regulation applies only if special law requires that the decision-making of the public body is based on a prior consent, confirmation, approval or opinion of one or more other public bodies, which are not entitled to decide by administrative act on this issue. The listing of contribution-forms (prior consent, approval etc...) should not be seen as final. There may be other forms of contribution the norm applies to as well. The decision-making of the competent body must be "based on" the contribution mentioned in art. 70, para. 3. That means (only) that special law requires the contribution. A special form of relevance (i.e.. consent) of the contribution is not required.

The 30-day deadline provided in art. 70, para. 3 makes sure that the contribution of other public bodies relevant for the decision-making is made within due time. Art. 70, para. 4 provides a regulation in cases the other public bodies, which contribution is required, fail to contribute within the stated deadline of 30 days.

### VI. Constitution and EU Law

The regulation of art. 70 can be seen in alignment with the constitutional rights and with the provisions of the EU. A problem may be seen that art. 70, para. 1 does not contain any provision for the achievement of the agreement between the competent bodies. But since the regulation of art. 70 (1) does not change the competence of public

bodies, no substantial constitutional problems should arise.

## VII. Relation to the previous CAP

There are no provisions in the previous CAP dealing with the same or similar regulatory content.

## VIII. Scope of application of the norm

As stated above, art. 70, para. 1, 2 and 5 is applicable only if special law requires a joint decision of two or more public bodies, which normally have to conduct and complete independent administrative procedures within their own competence in only one administrative procedure. The regulation does not apply to one stop shop cases regulated in art. 74 ff. and not in cases stipulated in art. 70, para. 3 and 4, in which the public bodies involved are not entitled to contribute independent decisions. On the other hand art. 70, para. 3 and 4 are applicable only, if contribution or internal character to administrative procedures are required.

Moreover, art. 70 para 4 shall apply only to administrative procedures initiated by request of a party. This restriction is to be derived from para 4 which stated that the opinion of a public body “shall be deemed positive” if the body fails to respond within the deadline specified in para 3. This provision makes sense only in cases a positive opinion is in favour of the requesting party. Procedures initiated ex-officio must be in line with the law, they are neither positive nor negative.

Art. 70, para. 3 and 4 cannot be applied to cases regulated in art. 70, para. 1, since it is restricted on cases when the decision-making of a public body is based on special kinds of contributions of other public bodies. Art. 70 para. 1 does not regulate the decision-making process but the issuing of a joint administrative act. Therefore art. 70 para. 2 requires the accordancy which means a kind of proper coordination. Nevertheless it can be possible that art. 70, para. 1, 2 and 5 and art. 70, para. 3 and 4 are applicable in the same cases, if special law requires not only a joint decision (art. 70, para. 1) but also contribution of other public bodies (art. 70, para. 3).

Art 70 para 1, 2 shall not apply to cases regulated in art. 74 ff. (one stop shop), because the determination of one public body to act as a one stop shop (art. 75 para 3) does not affect the competence of the public bodies involved, notwithstanding the additional duties of one stop shops stated in art. 75, 76. As mentioned above, art. 70 must be distinguished from the regulation in art. 66 (preliminary decision).

## B. Joint decision in details

### I. Joint decision-making, para. 1 of art. 70

#### 1. When under the law

This wording makes clear that art. 70, para. 1 shall only apply if special law requires so, since the constellation is an exemption to the regular one that each public body conducts its administrative procedure in its own competence independently. According to the general use of the term “law” in the entire Code the term comprised the primary and the secondary legislation, but not the several forms of local bylaw.

#### 2. Two or more public bodies shall decide

The norm is based on the legal definition of public body in art. 3 para. 6. But a systematic view shows that “public bodies” in the meaning of art. 70, para. 1 are only those that have their own competence to conduct administrative procedures and to issue administrative acts related to the concrete procedure in question. Acc. to art. 70, para. 1 a public body without this kind of competence could neither be involved as “two or more public bodies” nor become a “relevant authority by agreement”.

#### 3. One administrative case

Art. 70, para. 1 is applicable only, if two or more public bodies have to decide on “one administrative case”. Otherwise it is no joint decision required. One administrative case is given if the matter of the decision is related to the same party (cf. art. 3, para. 7) and to the same project, activity, object etc... (*Example: Special law may require that the establishment and operation of an industrial plant shall be permitted by only one administrative act, all permits, approvals etc... which as to issue by different public bodies must be comprised and handled jointly, it must be seen as only one administrative case.*)

#### 4. In the context of one administrative procedure

The procedure should be considered by law as a unique one. The advantage of this constellation is that the party that has submit several requests to get the required permits, licenses etc. have to deal with only one leading public body conducting only one administrative procedure.

#### 5. Legal consequences

- a) Determine the body that will issue the administrative act upon agreement

The public bodies involved in the (one) case must take their choice and determine the public body to issue the joint administrative act, if required so by special law. They have to make their choice by discretion (cf. art. 3, para. 3), which means by objective and fair reasons. They are not obliged to choose the public body competent for the most important administrative act, as stated in art. 75, para. 3 in one stop shop cases. The determination of one of the public bodies involved does not have the character of an administrative act, because there is no external effect on rights of a party (cf. art. 104). The termination has to be performed by agreement. If no agreement can be concluded (for instance because no public body is ready to take the job), art. 27 shall apply *mutatis mutandis*.

- b) The administrative act shall comprise the decision of the other body

Art. 70, para. 3 states that the one and only issued (joint) administrative act shall comprise all the other decisions of public bodies involved in the process of managing the one administrative case. The other decisions remain independent in a material sense, they shall be taken up in the regulations to be issued in the administrative act. Consequently, the comprised decisions must be seen as parts of the formal unique administrative act which can be challenged by legal remedies separately.

### II. Range of the organs' competence and obligation to cooperate, para. 2 of art. 70

#### 1. Each of the involved bodies shall make a decision

Art. 70, para. 2 makes clear that in the cases of joint-decisions of art. 70, para. 1 the public bodies involved in the case do not lose their competence and their competence to decide within their competence. Their decisions merge into the joint administrative act to be issued by the determined public body in accordance with art. 70, para. 1, but themselves do not have the character of administrative acts. Nevertheless, the decisions of the other public bodies keep their material character and thus are subject to separate administrative remedies when comprised in the joint decision and the final administrative act has been issued.

#### 2. Decision in accordance with the relevant authority

Relevant authority in art. 70, para. 2 means the public body which has been determined by agreement to conduct the procedure ("leading body") and to issue the joint administrative act. "In accordance" means that the other public bodies must coordinate their decision-making process with the leading body in order to keep the right of the party to be heard and to inspect files etc. before the decisions of the contributing bodies have been made.

### III. Inter-related decision making, para. 3 of art. 70

#### 1. Decision-making process of a public body based on contribution of another body

Art. 70, para. 3 states a deadline for notifying contribution of other public bodies if special law requires contribution of other public bodies. It applies if special law requires an internal form of contribution of other public bodies, be it a decision, an opinion or any other form of contribution, and irrespective of whether or not the contribution is binding (see next section below). "Based on" means that the administrative act or action must not be issued without taking into account the contribution required. It is not necessary that the contribution required is a substantial one.

#### 2. Forms of contribution: Prior consent, confirmation, approval, opinion

Art. 70, para. 3 regulates only internal forms of contribution as the listed examples make clear. If another independent administrative act is required before the decision-making process can be concluded, art. 70, para. 3 is not applicable. Otherwise it would affect the competence and independence of the other public body. Consequently, the norm regulates only assisting contribution of other public bodies, regardless which form and which kind of relevance they have. The list of contribution-forms is not enumerative. There may be many other forms of assisting contribution. It should be noted the art. 70 does not aim to "regulate" all the possible and eventual types of relations between public bodies concerning the decision making, that is why the wording and the reference to the above mentioned type of "instruments" is mere exemplificative; it only aims to establish the procedural rules in terms of applicable deadline

between the involved public bodies in the cases these relations are provided by the legislation. It should also be noted that these relations between the involved public bodies might relate to the stage of administrative investigation (when the body conducting the procedure investigates the other public bodies' interests involved in the case) or to the stage of decision-making (as preconditions for the decision of the public body).

### 3. Legal consequence: Deadline of 30 days of the submission of the request

Art. 70, para. 3 states a deadline of 30 days of the submission of the request to perform the form of contribution requested by law and to notify the result the leading public body. Special law may set a different deadline. This cannot be seen as affecting the competence and independence of the other public bodies because they act in assistance of the leading body only.

## IV. The case of silence of the contributing organ, para. 4 of art. 70

### 1. Aim of the regulation

Art. 70, para. 4 regulates the legal consequences in case of inactivity of the public body, whose reaction is necessary for the decision of public body conducting the administrative procedure. It comprehends a legal fiction and as such is a special application of the rule of silent consent. This fiction is necessary to avoid disadvantages for the parties caused by inactivity of the public body.

### 2. Opinion shall be deemed positive

If the public body that is obliged to contribute to the administrative procedure fails to respond (notify) within the deadline set in para. 3, the opinion "shall be deemed positive". The wording seems to be unclear because it is not determined which kind of opinion can be seen as "positive". However, as explained above the regulation shall only apply to procedures initiated by request of a party. If the provision is understood in this way, i.e. if the party requested the procedure with the aim to achieve a permit, concession, license etc., the meaning becomes clear: the opinion is deemed "positive" if the result of such legal assumption is a precondition to come to an administrative decision as requested by the party. In cases initiated ex-officio para 4 is not applicable, because no opinion can be seen as positive.

## V. The disagreement acc. to para. 5 of art. 70

Para. 5 regulates the way to resolve the disagreement on the question, which body shall become the "relevant organ", i.e. is the one that shall issue the unique decision in the case foreseen by para. 1 of art. 70. It does so by referring to the rules on the resolution of the conflict of competences (for more details see the comment on art. 27).

## Article 71 *Administrative assistance*

1. A public body may seek the administrative assistance of another public body to perform one or more actions, which are necessary in the context of an administrative procedure.
2. The administrative assistance may be requested if:
  - a) for lawful reasons, the requesting body is not able to perform such actions by itself;
  - b) the performance of the actions by the requesting body is not effective or the cost of their performance is much higher than the cost of their performance by the other body;
  - c) it is necessary to check documents, facts or other means of evidence in the possession of the other body.
3. Unless otherwise provided for by law, the public body may choose the body it asks assistance from by estimating the cost and effectiveness.

## A. General introduction

### I. Content and purpose of art. 71

Art. 71 (together with art. 72 and-73) deal with the administrative assistance. It entitles the public body to request the assistance of other public body and defines the conditions when such assistance could be legally required (i.e. is justified). It is a fact that every administrative authority acts within the guidelines of its competence, and – nevertheless – all segments of administration form a network, which is the administration of the state. It is in citizens interest all administrative authorities must cooperate, and do so, in order to enhance a speedy decision-making process, to exhaust all available knowledge, information and ideas of the whole public body, to further effectiveness and efficiency. Consequently, each public body may require the assistance of other authorities and they, as requested, shall assist.

### II. Legal Consequences

The legal consequences of art. 71 are in fact stipulated by art. 72: a justified (i.e. if based on one of the grounds provided by art. 71) request of assistance triggers the obligation of the requested body to provide the assistance.

### III. Relation to the previous CAP

There are no provision in the previous CAP with same or similar regulatory content.

### IV. Scope of application of the norm

Art. 71 applies to any phase of administrative procedure.

## B. Administrative assistance in detail

### I. The substance of the administrative assistance (para. 1)

Para. 1, clarifies in the first sentence that it is at the public body's discretion to decide, whether or not to request administrative assistance ("may seek"). It also defines the scope of the application of administrative assistance: i) it might requested in connection to the performance of one/more procedural actions and ii) in the framework of an administrative procedure. The "loose" language used by the legislator (in the second part of para. 1) is meant to clarify that the administrative assistance could be justified not only in the course of an administrative procedure already instituted, but even simply in connection ("within the framework") with it, making possible its application in relation to preparatory actions (with no external effect) before an ex officio procedure is instituted, e.g. collecting information on whether or not a procedure is to be initiated or against whom. Such preparatory action do not meet the requirements of a "procedural action" able to trigger the institution of an ex officio procedure in acc. to art. 41, para. 3.

### II. The ground for requesting of assistance (para. 2)

Para. 2, defines a limitative list of grounds/cases (when and for what) for which the administrative assistance might be requested. On one hand, in the presence of these grounds a public body is legally entitled to require assistance but on not obliged to do so (it might proceed itself with the performance of respective action). Of course, practically the "discretion" is rather contextually restricted especially in case of lit. a) and lit. c) in which the action can be performed only with the assistance of other organ. On the other hand only a request on such grounds is lawful (or justified) and able to trigger the obligation to provide the assistance of the other body (in acc. to art. 72, para. 1).

#### 1. The impossibility (lit. a)

The wording of lit. a), clarifies that the public body may require assistance in case of absolute and objective impossibility to perform itself a necessary action in the course of the procedure.

## 2. Cost-effectivity (lit. b)

The wording of lit. b), stipulates another ground for requesting assistance referring to situation in which the performance of the respective action by the public body might be un-successful (not effective) or would require a significant higher cost than if performed by the other organ. E.g. imagine for instance if the public body needs the declaration of party with limited ability of movement situated in another departed location. The cost to acquire such declaration by the public body is significantly higher than if the declaration is acquired by the nearby municipality or other de-concentrated organ.

## 3. Document, facts or means of proof are administered by the other body(lit. c)

Lit. c), stipulates another ground, related to the cases when documents, facts or means of proof are administered by the other organ. This is a typical case of administrative assistance and it is a concretization of art. 77, para. 2 of this Code. In acc. to the latter the public body should not request to the party the submission of documents on acts, facts or subjective situation which are administered by the administration. The administrative assistance is precisely the "instrument" to acquire such documents and to reduce the administrative burdens to the party.

## III. The criteria for choosing the body to require assistance (para. 3)

Para. 3, is an important tool to materialize the general principles of effectiveness and efficiency of administrative action, in choosing which other public body should be requested for administrative assistance. It stipulates the criteria of cost-efficiency in choosing the public body to which require the assistance. Of course, the criteria applies only when necessary to choose between more than one public body that could equally perform the required procedural action.

### *Article 72 Refusal of a request for administrative assistance*

1. A public body, which is asked to provide administrative assistance, may not refuse to render it, save for cases of objective inability to perform the requested actions. In such a case, the requesting body shall be notified immediately, but, at any case, no later than 2 days of the receipt of the request for administrative assistance.

2. Dispute between the two bodies shall be resolved by the superior body of the one from whom the assistance is requested. In case this body does not exist, the action shall be performed by the body which requests the administrative assistance.

## A. General introduction

### I. Content and purpose of art. 72

Art. 72 stipulates the obligation of the other public body (which assistance is requested) to perform the requested action, unless in case of objective impossibility. It also provides for certain procedure for dealing with the disputes in regard.

Purpose: Timely provision of assistance is crucial to an administrative procedure that is why the request for assistance could be declined only in rare cases of objective impossibility.

### II. Legal Consequences

The requested public body is obliged to provide the assistance, unless it is in a situation of objective impossibility. In this latter case it is obliged to inform the requesting body with no delay.

### III. Relation to the previous CAP

There are no provisions in the previous CAP with same or similar regulatory content.

### IV. Scope of application of the norm

See the scope of art. 71

## B. Refusal of the request for administrative assistance in details

### I. Obligation to provide assistance and the ground for refusal (para. 1)

Para. 1, first sentence, provides the obligation of the other public body to provide the required assistance, the obligation could not be waived but for reason of “objective” impossibility. The purpose is clear, the timely provision of the required assistance is crucial for continuation and conclusion of the administrative procedure within a reasonable deadline, and the refusal should be a last resort.

But on the other side the wording of para. 1 first sentence requires a systematic interpretation in correlation with art. 71, para. 2. Not any request of assistance is enough to trigger the obligation of providing it, only a justified request, i.e. if based on one of the grounds provided by art. 71, is able to do that. While if the request is justified, the only possibility to waive the obligation is the impossibility of the requested public body to perform the required action. Such impossibility should be assessed based on objective and absolute criteria.

Para. 1, second sentence, foresees, that in presence of objective impossibility the requested public body is obliged to inform, the requesting organ, as soon as possible but not later than two days (from receipt of the request), so the latter can proceed itself with the action or require the assistance of another organ. The same logic would apply when the requested public body deems the request is not justified. The deadline being an internal one (without a direct legal consequence on the administrative procedure) is triggered from the receipt of the request (and not from the submission which is the rule in our Code).

### II. Resolution of possible disputes (para. 2)

Para. 2, first sentence, provides that in case of dispute between the two public bodies, the final decision rests with the superior body of the requested one. The wording implies the dispute might be related to both: a) the existence or not of the “objective impossibility” and b) justifiability of the request (for instance on grounds of cost efficiency in acc. to art. 71, para. 2, lit. b).

Para. 2, second sentence, provides that in case such a superior body, of the one refusing the assistance does not exist, the performance of the action turns in the responsibility of the requesting organ. The provision aims to avoid delay in the procedure, obliging the first public body to find other ways to perform the action other itself or by requesting assistance to another body.

## Article 73 Procedure of administrative assistance

1. The body, from which the administrative assistance is requested, shall be subject to procedures and obligations set forth in the law about the body seeking the administrative assistance, and shall perform the requested actions as soon as possible.
2. The requesting body, in its request for assistance, shall inform the other body on the procedures and obligations foreseen in Paragraph 1 of this Article.

## A. General introduction

### I. Content and purpose of art. 73

Art. 73, provides that when another public body performs an action upon a request of assistance it should observe the same obligations and follow the same procedures as the requesting body is obliged to. In order to successfully do so, the public body on whose behalf the action is performed should provide detailed instructions and assistance.

The provision is meant to ensure the regularity and lawfulness of the procedural action and per consequence of the entire procedure.

## II. Legal Consequences

The public body providing the assistance is obliged to follow the same specific obligations and procedure as the public body on which behalf is performing the action, whilst the latter has the duty to provide for instruction and assistance on the observance of the obligations.

## III. Relation to the previous CAP

There are no provisions in the previous CAP with same or similar regulatory content.

## IV. Scope of application of the norm

See the scope of art. 71

## B. Procedure of administrative assistance in detail

### I. Procedural rules and obligation for performing actions under assistance (para. 1)

In performing a procedural action the competent public body should follow the specific procedure and observe the specific obligations foreseen for the respective type of the administrative procedure. Para. 1 provides the obligation that same procedures and rules are observed by the other public body providing the assistance. The obligation is meant to ensure the regularity and lawfulness of the performed action despite it has been performed by another public body. Failure to observe such an obligation might lead to a defective procedure and might eventually hinder the output of such a procedure.

In addition the assisting public body should act as soon as possible. The latter obligation is a reminder of the principle of efficiency (art. 18).

### II. Duty of information and assistance (para. 2)

Para. 2, provides the duty of the requesting public body to inform the other body on the procedures and obligations it has to observe, for performing the requested action, consequently the first public body takes responsibility for the action. The respective procedures and obligations should be detailed and clarified in the very request for assistance. The restrictive wording does not, of course, exclude provision of assistance and instructions, upon request, with any other appropriate means and at any other moment including during the actual performance of the required action.

## **CHAPTER IX ONE STOP SHOP**

### *Article 74 One stop shops*

1. The provisions of this Code shall apply to all the services, for which one stop shop is provided for by the special laws, In such cases, all administrative procedures shall be performed through the one stop shop.

#### A. General Introduction

##### I. Content and purpose of Art. 74

Art. 74 contains basic rules for the implementation of so called one stop shops. One stop shop is the name for an administrative entity which is designed to make it easier to conduct and complete administrative procedures necessary to provide services and to operate as a service provider on the Albanian service market.

The concept of the one stop shop has been established by the EU-Services Directive (2006/123/EG) in 2006. Since the development of the EU-Service market had been seen as not satisfying especially in comparison with the EU-goods market, the EU decided in 2006 to alleviate the access to the service market for providers from other member states.

If providers from other EU-countries plan to establish a service business in Albania and to offer their services on the Albanian market all permissions, registrations, approvals etc. shall be managed and concluded by using one public body or institution only (a so-called point of single contact).

The art. 74 – 76 are designed to implement the requirements of the Services Directive into Albanian law. But art. 74 makes clear that points of single contact (one stop shops) shall be established only if provided for by special law. Therefore, the regulations of art. 75 and 76 must applied not automatically but only on the fields of services defined by special law. According to art. 74 the provisions of art. 75 and 76 are established in advance as an instrument to implement the requirements of the Services Directive at the very moment special law shall open the access.

##### II. Constitution and EU Law

It is quite clear that art. 74 – 76 cannot be seen a proper implementation of the Services Directive as long the access to one stop shops is not open to service providers to all fields of services within the scope of the Directive. But at the mean time it is reasonable to let the opening of the opportunity to the legislator of the special law to use the one stop shops in the time to come. At the latest if Albania should become member of the EU the entire law dealing with the access to service market must be screened in order to implement the one stop shop option.

##### III. Scope of application of the norm

The application of one stop shops is not restricted to services within the scope of the Services Directive. But it is necessary that special law opens the implementation and the use of one stop shops in the field of services. Art. 76 para. 3 lit) contains an authorization of the Council of Ministers to determine the scope of economic activities and administrative procedures regarding the start and exercise of service activities, which might be carried out through one stop shops.

#### B. Explanation of art. 74 on one stop shops in details

##### I. The legal reservation of Sentence 1

Sentence 1 of art. 74 makes clear that the provisions of the CAP shall apply to all administrative procedures concerning services for which the one stop shop is provided for by special law. That means firstly if a one stop shop is provided for by special law all provisions of the CAP shall be applied in the same manner like in ordinary administrative procedures. Especially there must not be any disadvantages by conducting procedures through the one stop shop. That means secondly that the provisions of art. 75, 76 shall apply only if provided for by special law.

According to sentence 1 the provisions may apply “to all services”. It is not necessary that it is a service within the scope of the Services Directive. Moreover, it must be assumed that the one stop shop rules might be applicable not only to services issues but also to all other projects and activities if provided for in special law.

## II. sentence 2

Sentence 2 stipulates that in the case a one stop shop is established for a service all administrative procedures shall be performed through the one stop shop. This regulation must be seen in accordance with art. 75 para. 2 which stated that the existence of one stop shops shall not affect the right of the interested persons to address the competent body directly. So it is up to the party whether to use the commodities of one stop shop or to conduct the administrative procedures needed with the competent bodies directly.

### Article 75 Responsibilities of one stop shops

#### 1. One stop shops shall be responsible for the following:

- a) advising the interested persons in the same way as the competent public body;
- b) receiving requests for the issuance of an administrative act or the performance of another administrative act, as well as submission of opinions, explanations, proposals, comments, documents or of legal remedies, under this Code, and forwarding them to the competent public body accordingly;
- c) notification of the applicant on any administrative acts and procedural actions of the competent public body, as well as on any communication between the interested party and the competent public body concerning the specific activity.

2. Unless otherwise provided by the law, the existence of one stop shops shall not affect the competence of any public body involved in the administrative procedure and the right of the interested persons to address the competent body directly.

3. Unless otherwise provided by the law, the one stop shops shall be the public body competent for the most important administrative act related to the initiation and exercise of the activity by the public bodies involved. In case of dispute between public bodies involved, the dispute shall be resolved in accordance with Article 27 of this Code.

## A. General Introduction

Art. 75 para. 1 describes the tasks and duties the public body acting as one stop shop is responsible for. In alignment with the requirements of the Services Directive the one stop shop must give advice to the service provider in the same way and to the same extent the competent bodies have to (lit.a). As stated in art. 76 para. 1 the one stop shop must provide a good deal more information (see art. 76).

The core duty of the one stop shops prescribed in lit.b) and c) is to receive all requests for the issuance of administrative acts necessary to get access to the service market and forward them to the competent bodies. Moreover, it must be ensured that the entire correspondence and communication to conduct the administrative procedures can be handled through the one stop shop. Finally, the one stop shop must notify the administrative acts and actions to the party.

Para. 2 makes clear that the involvement and the extent of the involvement of one stop shops must be determined by the interested persons. The involvement of the one stop shops is designed as an option only. The service providers are entitled to correspond partly or entirely with the competent bodies directly. Therefore, a party requesting is not obliged to perform the entire correspondence and communication through the one stop shop.

Para. 3 defines which public entity shall act as one stop shop. There is no designation of a new organisation provided in para. 3. The role to act as one stop is assigned the public body competent for the most important administrative act concerning the initiation and exercise of the service in question.

## B. Responsibilities of one stop shops in detail

### I. Tasks and duties, para. 1

Para. 1 describes the scope of tasks and duties the public body acting as a one stop shop is responsible for. Since according to para. 3 the public body which is competent for the most important administrative act needed to get

access to the service market, para. 1 leads only to an extension of tasks and duties regarding procedures the body has no competence for.

1. Provision of advice, lit. a

The public body acting as one stop shop has to provide advice in the same manner and to the same extent the competent body has to. This regulation refers to art. 10 (principle of providing active assistance).

Para. 1 lit.a) must be seen in connection with art. 76, which extends the duty to provide information substantially. While competent bodies are obliged only to inform about the specific administrative procedures they are competent for, art. 76 para. 1 requires the provision of information about the entire project of access to the service market. In the effect the competent body acting as one stop shop has to give advice as competent body and, moreover, as one stop shop also regarding all other questions and problems within the scope of the responsibility of the one stop shop. If the answers necessary are not available for the one stop shop, it must procure the information by questioning the other competent bodies involved.

2. Receiving all kinds of correspondence and communication, lit. b

The public body acting as one stop shop has to receive not only the requests of the services provider but also all kinds of correspondence and communication regarding the service issue and forward them to the competent bodies involved. To do so the one stop shop must know, which bodies are involved and how the competencies are regulated. Therefore, the competent bodies which are likely to act as one stop shop should collect proper and actual information in advance. Otherwise it will not be possible to act within due time.

3. Any kind of notification, lit. c

Consequently, the one stop shop is obliged and entitled to notify the applicant any administrative acts and procedural actions it has received from the competent bodies (lit.c).

II. Option model, competence, para. 2

As stated in para. 2 the involvement of a one stop shop must not lead to a change of the regular competence of the competent bodies. If a service provider decides to have its administrative procedures conducted through a one stop shop the competences of the public bodies involved remain unaffected. The one stop shop itself is not granted any material competences. Its duties are only to inform, to receive, to forward and to notify without any substantial decisions. Even if a competent body is acting as one stop shop as well (para. 3) its material competences shall not be extended.

Para. 2 makes clear that it is up to the service provider whether or not or to what extent the whole issue of getting access to the service market shall be conducted through a one stop shop. Experiences in other countries show that most administrative procedures are still conducted by the competent bodies directly without involvement of a one stop shop which is mostly restricted to provide information about the permissions, registrations and authorizations needed.

III. Competent body as one stop shop, para. 3

According to para. 3 the public body competent for the most important administrative act in the whole issue of access to the service market shall act as one stop shop as well, if not otherwise stipulated by law. As stated in art. 76 para. 3 lit.b) this regulation shall be substantiated by the Council of Ministers. For the time a determination has not been issued the public bodies involved must reach an agreement about which of them shall act as one stop shop. In case of dispute art. 27 shall apply *mutatis mutandis*.

*Article 76 Information and procedure*

1. One stop shops shall inform or make available to the interested persons all the information needed for the administrative procedure. The information shall include also data on the means and conditions for accessing to public registers and state databases and remedies in case of a dispute. The services specified in Paragraph 1 of Article 76 of this Code shall be performed directly at the one stop shop, as well as by mail or electronic means.
2. The deadlines for the public body shall start to run from the submission of the request and complete documentation to the one stop shop, or under the rules provided for by Article 57 of this Code, regardless of the time needed to forward it to the competent public body.
3. The Council of Ministers shall determine upon a decision the following:
  - a) the economic activities and administrative procedures regarding the start and exercise of the activity, which are carried out through the one stop shops;
  - b) the public bodies, which act as one stop shops or, established special public bodies for this purpose;
  - c) the internal procedures of communication between the one stop shop and the competent public body.
  - ç) the procedures and standards for the front offices and the back offices responsible for the data processing and finalization of the public services in the one stop shops.

I. The wide range of information, para. 1

Art. 76 para. 1 contains a far-reaching scope of information a one stop shop has to provide for. Firstly, the one stop shop must provide all information needed to perform and conclude all administrative procedures needed for the access and to perform the specific service. Secondly, the information shall include data, means and conditions even for accessing public registers, databases and finally remedies in case of a dispute. All this information must be kept available in favour of persons requiring advice. Moreover, the information must be performed directly at the one stop shop as well as by electronic means. It must be possible for persons of other countries to get the information without travelling or writing letters.

II. Deadlines, para. 2

Art. 76 para. 2 makes clear that using the one stop shop must not lead to any disadvantages for the provider. Therefore, the deadlines for the public body shall start to run from the time of submission of the complete request, regardless the time needed to forward it to the competent body. That means in the effect that the public body would have less time to come to a conclusion if a one stop shop is involved.

III. The power of the Council of Ministers, para. 3

Art. 76 para. 3 authorized the Council of Ministers to enact decisions as secondary legislation in order to substantiate the regulation of art. 75 and 76. Firstly, the council is authorized to define the scope of the economic activities and the administrative procedures, which can be carried out by or through a one stop shop. Secondly, the Council can decide which public bodies in which cases shall act as one stop shop as well, in order to avoid dispute on this issue. Moreover, the Council is empowered to establish special entities that have to act as one stop shop, even if these entities have no competence to decide on the case substantially. Thirdly, the Council is entitled to regulate the internal procedures of communication between the one stop shop and the competent body. And finally, the Council can define the procedures and standards for the internal communication in the one stop shops, especially between front offices and back offices.

Within the scope of para. 3 the Council of Ministers is entitled to decide on by-laws even if there is a divergence to the regulation in art. 75 and 76. But on the other hand there must not be any difference between the decision of the Council and the special law adopted acc. to art. 74. In this case, according to the rule of law, the special law has a higher status than the decision of the Council

## **CHAPTER X**

### **ADMINISTRATIVE INVESTIGATION**

#### **Section 1**

#### **Principles of Administrative Investigation**

*Article 77 Principle of Ex Officio Investigation*

1. The public body shall ex officio investigate all facts and assess all circumstances necessary for the resolution of the case.
2. The public body shall determine independently the type, purpose and extent of administrative investigation, and assess whether a fact or circumstance is necessary for the resolution of the case.
3. Unless otherwise provided for by law, the documents that certify acts, facts, qualities or subjective situations, necessary for the conduct of an administrative investigation, shall be administered ex officio by the body that conducts the administrative procedure, when they are either under its own administration or under the administration of other public bodies. The public body may request from the party only the necessary elements for their identification.

#### A. General Introduction

##### I. Content and purpose of Art. 77

The core of the preparatory stage of an administrative procedure is the administrative investigation which might be broadly defined as the process of acquiring and assessing of information, be it facts or interests. The administrative investigation phase is led by the inquisitorial principle, that is the principle of ex officio investigation, and its counterpart, the duty of careful consideration.

Art. 77 deals precisely with the investigation of “facts and circumstances”. It stipulates the obligation of the public body to ex officio investigate all the necessary information for the resolution of the case and determines the meaning and the content as well as the means of that obligation.

The purpose of the inquisitorial principle that is expressed by art. 77 is to ensure legally right and especially factually true administrative decisions. In that respect the public body, in the exercise of the administrative power in a concrete administrative case, is the guarantor for safeguarding the public interest. As such the public body is the master of the procedure and as such is under a duty to ex officio, that is without depending on the party’s initiative or will, conduct a comprehensive and accurate investigation in order to establish the real factual situation in order to correctly apply the law and take the right decision. Art. 77 is interconnected and derives from the principle of objectivity stipulated in art. 14 of this Code.

With respect to the responsibility of investigating facts and circumstances relevant for an administrative case the obligation of an administrative body is comparable to that of an administrative court. However, there are substantial differences. Art. 77 of this Code serves to prepare and adopt an administrative action that is in line with the legal order. It regulates the process of taking a primary administrative decision, whilst the court decides on a legal remedy lodged against such an administrative decision. Accordingly, the purpose of the administrative investigation of facts and circumstances is mainly to implement the principle of legality of the public administration as stipulated in art. 4 of this Code, whilst the court procedure primarily serves the principle of legal protection of an individual in connection with an adopted administrative decision. The administrative investigation is performed from an ex-ante perspective and therefore at the beginning of the investigation process the range of potentially relevant facts and circumstances can frequently not be foreseen and needs to a certain extent to be open to the development of the individual case. The range of investigation of facts of an administrative court procedure, in contrast, with its ex-post perspective is clearly pre-determined by the concrete administrative action as its matter of the procedure. So, the range of administrative investigation can be wider and go into various directions, and not all facts that were ascertained need in the end turn out to be relevant for the final decision.

## II. Constitution and EU Law

The substance of art. 77 derives from the right of good administration stipulated by art. 41 (1) of the EUCFR, which inter alia guarantees every person's "right to have his or her affairs handled impartially [and] fairly". Even more it derives from art. 9 of the ECGAB: "*When taking decisions, the official shall take into consideration the relevant factors and give each of them its proper weight in the decision, whilst excluding any irrelevant element from consideration.*"

## III. Legal consequences of Art. 77

The public body should ex officio conduct a complete, proper and accurate investigation able to determine the objective factual truth and lead to a lawful administrative action. The obligation of ex officio investigation, as shaped by para. 1 and 2, is the centrepiece of serving the public interest and lawfulness. The failure of the public body to ex officio investigate, or the failure to conduct a complete and accurate investigation determining the objective factual truth constitutes a defect of the administrative procedure and might impact the lawfulness of the result of the administrative proceeding, primarily the final decision. These principles bear consequences, also, in the field of discipline of civil servants in charge of the procedure and in the field of the administration incurring liability for compensating those who result negatively affected in their rights or interest by negligent behaviour of the public officials.

## IV. Relation to the previous CAP

Art. 77 regulates the same substance of art. 81/1 first part of the previous CAP.

## V. Scope of application of the norm

Art. 77 applies in principle at all stages and phases of an administrative procedure. While its primary relevance lies in the first phase of the administrative procedure, it is also applicable to later stages regarding for example the notification of the administrative decision, administrative remedies or the execution of the administrative decision.

## B. Principle of Ex Officio Investigation in details

### I. Ex officio investigation (para 1)

Para. 1 stipulates the inquisitorial principle of investigation, or in other words, the public body's obligation to ex officio investigate everything necessary for a lawful final decision. The provision is a composite one having a twofold objective: i) to establish the obligation of the public body to ex officio investigate the facts, as the general rule for administrative information gathering applicable in our administrative law, and ii) to establish the duty to a complete investigation.

#### 1. The obligation to ex officio investigate

The first part of para. 1 establishes the obligation of the public body to "ex officio investigate" the relevant facts and circumstances. It also stipulates such an obligation as the general rule for administrative information gathering applicable in our administrative law. The core of the obligation of ex officio investigation consists in the requirement that the public body cannot confine itself to the information and evidences produced by the parties, it should seek any information and collect any evidence as needed for adoption a lawful final decision. The obligation is applicable to ex officio procedures as well as to application procedures. In the case of an ex officio procedure the obligation is more evident, but also in the case of an application procedure the public body cannot blindly trust the information provided by the parties but has to scrutinise them carefully; neither can it confine itself to information and evidence produced by the parties.

As further explained below at art. 78, the parties to an administrative procedure are under a general obligation to cooperate with the public body to help the public body in this matter. Exceptionally, when prescribed by special law, the parties may even be under an intensified obligation to cooperate with the public body. However, the final duty and accordingly the responsibility to establish the objective truth and in consequence adopt an administrative action that reflects the objective truth relies at the last instance with the public body.

#### 2. A Complete investigation

The second part of para. 1 with its wording "all the facts and.... circumstances necessary" establishes the duty for the public body to ex officio conduct a complete investigation "for the resolution of the case", aiming at a correct and lawful final administrative action. The investigation needs to be complete in quantity as well as in quality, meaning the investigation should be extended to comprehend all the facts and circumstances necessary for the final decision and

in the same time it should be proper and accurate. In any case the administrative investigation is under a functional obligation of result, meaning the investigation should be as complete as possible but only as extensive as necessary to allow the public body to resolve the case in a rightful manner. The concrete way to follow as well as the instruments to use in the investigation in order to fulfil this obligation are left to the choice of public body in accordance with para. 2.

## II. Concretisation of the complete investigation (para 2, first part)

Paragraph 2 is a logical continuation of paragraph 1: The public body has not only the obligation and the right to conduct a complete and proper investigation *ex officio*. It is also left to the public body to structure the investigation and to decide upon its direction and its scope. In other words, the concretisation of how to achieve a complete and proper investigation as well as the named “functional obligation of result” is left to the independent choice of the public body. It has to balance both obligations in the light of the factual reality of the concrete case. That is why paragraph 2 leaves the determination of the type, scope, the purpose and the extent of the investigation at any concrete administrative case to the lawful discretion of the public body.

The lawful discretion of the public body, however, is limited and guided by the applicable material law as well as the other principles enshrined by the Code. First of all, the choice is directly limited by the legal provisions in the material law which individualize the relevant facts and circumstances. While in some cases the relevant facts for application of the statutory conditions are precisely determined (the age of 65 for receiving the pension; the distance of x m or the height of y floors for the issuance of the construction permit, the height of z cm for admission to the competition test for entering the police force, or the like), in other cases the legal material provisions use general categories or only indicate the public interest to be protected. In the cases of the first kind the public body should only ascertain the correspondence between the situation of facts and the statutory conditions, whilst in the cases of the other kind the choice of the public body is significantly broader, in defining the scope of the investigation and in determining which facts to ascertain as well as in determining whether a fact is relevant and therefore necessary to ascertain for the resolution of the case or not. In any case, the choice of the public body is secondly guided by the principles of efficiency, simplicity and cost effectiveness of the procedure, as emphasized by art. 18, as well as the principle of objectivity as put forward by art. 14.

## III. Duty of careful consideration (para. 2, second part)

As said above, the administrative investigation may be defined as the acquiring and assessing of information. According to the second part of para. 2, the public body has not only to obtain information, but also has to “*assess whether a fact or circumstance is necessary for the resolution of the case*”. It is under a duty to carefully consider the gathered information, which is an important counterpart to the principle of *ex officio* investigation. In doing so, the public body has to adhere to the said principle of objectivity, according to which the public body has to take into consideration the relevant factors and give each of them its proper weight in the decision, whilst excluding any irrelevant element from consideration. This is a centre-piece of procedural impartiality and fairness.

## IV. Acquisition of facts in possession by the administration (para 3)

Certain facts and circumstances that are relevant for the case might be already certified by documents which constitute the evidence for their existence and truthiness and which are under the possession of the public administration. Paragraph 3 stipulates the obligation of the public body conducting the procedure to acquire such documents *ex officio* without asking their submission by the party. The latter could be only asked to inform the public body on the necessary elements for their respective identification. The obligation is on the one hand a concretization of the inquisitorial principle enshrined by paragraph 1 and while on the other hand it aims to reduce the administrative burdens. This is the case regardless if, according to art. 82, the burden of prove rests with the party. Even then, as long as the necessary preconditions are fulfilled, the public body is under the obligation to *ex officio* administer the necessary documents in the possession of the public administration, and cannot ask the submission of the document by the party. The preconditions for such an obligation are the following:

### 1. Documents that certify facts, qualities or subjective situation

The provision refers to documents that certify certain information, be it administrative acts, simple declarations or declaration of science. The documents, certifications, statement or the like must have been created directly by the proceeding administration or must at least be already existent in the public body conducting the procedure or in other administrations.

## 2. Relevant for the administrative investigation

The facts and circumstances proven by the said documents must be related to the ongoing procedure in the sense that the information must be relevant for the administrative investigation on the assessment of the public body, according to the independent choice of the public body as said above.

## 3. Under the administration

The documents must be in possession, meaning in the files of the administration, whether the public body conducting the procedure itself or any public body. It is regardless whether they were created directly by the administration or presented to the administration by the private parties in the course of another proceeding.

## 4. Not forbidden by law

A special provision may limit the application of this obligation by explicitly reinforcing the obligation of the party to submit all relevant documents.

### *Article 78 Cooperation during the administrative investigation*

1. The party shall collaborate with the public body in establishing the facts and circumstances necessary for the solution of the case. The law may explicitly provide for the additional obligation of the party to submit information, evidence, documents, statements, or appear in person before the public body.

2. The parties may not be required to appear in person before the public body, if communication with them can be ensured with other suitable means.

3. Parties may present their statements either in verbal or written form. Due to the problems or complexity of the case, parties may be required to submit their statements in written form.

## A. General introduction

### I. Content and purpose of Art. 78

Art. 78 stipulates in its first paragraph the party's general obligation to cooperate with the public body in the course of the administrative investigation while at the same time recognizing the possibility for a more intensified obligation of cooperation in the conditions of the special law. In the second and third paragraph it contains concretization of the general obligation of the party to cooperate.

The purpose of the provision is to support the public body to fulfil its obligation to of ex officio investigate the necessary facts and circumstances. This makes clear that the administration does not bear the responsibility for accurate fact finding alone. According to art. 78 on the contrary, the parties are obliged to cooperate with the public body in this regard especially with providing information. This serves both to the private interest of the party as well as the public interest of reaching true and lawful administrative decisions. In cases where the burden of proof lies with the party, as regulated in art. 82, the law recognizes a heightened private interest and therefore intensifies the duty of the interested party to cooperate and to submit information as well as evidence even more. In these cases even the administrative procedure is instituted solely upon the request of the party.

### II. Relation to the previous CAP

There are no corresponding provisions in the former CAP.

### III. Scope of application of the norm

The scope of application of art 78 is the same as that of art. 77.

## B. Cooperation during the administrative investigation in details

### I. The obligation of cooperation (para. 1)

The parties are obliged ("shall cooperate") to support the public body in ascertaining the facts and circumstances of the case. Such an obligation supplements but may not compromise the public body's obligation of ex officio

investigation. The final responsibility for the completeness and accuracy of the administrative investigation lies with the public body, according to art. 77.

In fact paragraph 1 enshrines two kinds of obligations of cooperation which are substantially different from each other. For once, sentence 1 stipulates a general obligation of the party to cooperate with the public body, while sentence 2 stipulates an intensified obligation of cooperation.

### 1. General obligation of cooperation (sentence 1)

The first sentence of paragraph 1 stipulates the general standard for the duty to cooperate in ascertaining the facts and circumstances of the case, in order to balance the administrative efficiency and procedural fairness. The standard is based on the assumption that the party shall inform the public body about the facts which are known to this party or which can be reasonably expected to be presented by the party, because it is in its own interest. This is the case with procedures instituted ex officio as well as with the ones that are instituted upon request of the party.

The general obligation to cooperate is a rather light one. As becomes clear from the wording of the sentences 1 and 2, the general duty to cooperate is the rule that applies whenever there is no explicit legal provision that obliges the party to cooperate more intensively.

Although the provision uses the imperative wording "shall", it does not establish a procedural duty to the party which could be enforced by the public body. If the party refuses to cooperate with the administration in ascertaining the facts, it will bear the risks of an unfavourable decision but does not violate an obligation, nor is the public body freed from its obligation to conduct a complete and careful investigation.

### 2. Intensified obligation of cooperation (sentence 2)

The second sentence of paragraph 1 opens the door for special legislation to provide for a more intensified obligation of cooperation of the party in ascertaining of the facts. The wording denotes that such an intensified obligation of cooperation is the exception in our administrative law and should be explicitly provided by special law. It also needs to be specific in the meaning that it should explicitly define which piece of information, prove, document, declaration, or statements the party is obliged to submit to the public body. This is justified as the concrete information to be supplied depends on the subject matter and can therefore only be regulated in a sector-specific law.

The intensified obligation of cooperation relates primarily to information duties, but wording denotes also another difference to the first sentence: whilst the first sentence denotes more to the acquiring of information, the second sentence refers to submission not only of information, by also of documents or means of evidence, statements or personal appearance, etc...

It should be noted that such intensified obligation of cooperation might exist not only in case of the procedures instituted upon the request of the party but also in case of the administrative procedures initiated ex officio. Examples may be the tax procedures laws as well as laws on inspections.

### 3. Legal consequence of para. 1

In case a party fails to state the facts known to it or to submit the evidence or statements or to appear personally, the legal consequences might be different depending on the type of the procedure and by the specific provision of the special law determining the intensified obligation: In case of a procedure instituted ex officio the public body shall continue and conduct a complete investigation and the final decision making shall be taken on the bases of the available information and evidences; the lack of cooperation shall be taken into account together with other evidences of the case, while the party will bear the risks of an unfavourable decision. In the case of an application procedure there might be two different situation: If the special law provides for the burden of proof to the party and at the same time stipulates that the documents which constitute evidences should be submitted as part of the initial request, than the request shall be deemed as an incomplete request if such documents are not provided, and shall be dealt with in accordance to art. 62. If the special law on the other hand provides for another intensified obligation of cooperation and the party fails to obey the party the public body shall continue and conduct a complete and careful investigation and the final decision making shall be taken on the base of the available information and evidences, while the party will bear the risks of an unfavourable decision because there is the risk the public body refrains from investigation of facts which are not evident and might be in the favour of the party.

### II. Summoning the party (para 2)

Paragraph 2 is a continuation of the intensified obligation of cooperation in the way that it regulates a non-formal hearing of the party, when needed by the administration as part of investigation. As any other intensified obligation of

cooperation the duty of the party to appear personally in front of the public body should be explicitly provided by special law, according to the second sentence of paragraph 1. As the obligation to personally appear in front of the administration in order to give a statement is generally considered as cumbersome and costly for the party, paragraph 2 defines it as a last resort, applicable only when the communication through other more appropriate means like for example e-mails or phone calls is not possible or is not adequate because it cannot achieve the same result.

### III. Statements of a party (para 3)

Paragraph 3 on the one hand regulates unsolicited statements by the party, but also ones that follow an intensified obligation of cooperation that is explicitly provided by special law. It tries to establish some rules for the sake of procedural efficiency. While its first sentence lets it for the party to decide whether it wants to communicate in verbal or written form, the second sentence deals with complex cases. Here the public body is entitled to require the submission of a statement in written form. When doing so, the public body should act in accordance with the principle of procedural efficiency and should take into account the exigencies of the party.

#### Article 79 *Subject of investigation procedure*

1. The investigation procedure shall be conducted by the public body that has the competence to make the final decision.
2. The public body, which has the competence to make the final decision, may delegate the right to conduct the investigation procedure to the subordinated body, save for cases where delegation is prohibited by law.
3. The public body, which has the competence to conduct the investigation procedure may assign the subordinated body with the conducting of specific investigation tasks.

### A. General introduction

#### I. Content and Purpose of art. 79

Art. 79, which ends the section 1 of the chapter X “Administrative Investigation”, provides for the possibility of a competent supra-ordinated public body to delegate parts of the administrative procedure towards a subordinated body part, more precisely the duty of conducting: i) the entire administrative investigation for a concrete administrative procedure, or ii) only specific investigation actions in relation to such a concrete administrative procedure. It also recognizes the right of the subordinated bodies to further delegate specific investigation duties.

Paragraph 1 is a reemphasis of the general principle of the exercise of the competency, according to which the competent public body has to lead the entire administrative procedure including the administrative investigation as well as the decision making. This is at least the general rule. In accordance with paragraph 2 the competent supra-ordinated public body, on its lawful discretion, can choose to delegate the performance of the entire administrative investigation or of specific investigation actions for a concrete administrative case to a subordinated public body. Whilst in accordance with paragraph 3 the public body assigned with the administrative investigation might further delegate to its subordinated bodies the performance of only one or more specific and determined investigation actions.

The Purpose of this provision is to clarify the scope of the competence of the public body while at the same time allowing for the contribution of other public bodies. Such contribution may serve to a better achievement of their institutional goals. One of the possible instruments is the administrative assistance (regulated by art. 71 to 73 of this Code). Another instrument is the delegation of part of the administrative procedure such as the entire or specific actions of administrative investigation from a supra-ordinated to a subordinated public body, regulated by art. 79. While the first instrument (the administrative assistance) is more demanding and restrictive in terms of scope of application, the second (the delegation in accordance with art. 79) is less restrictive as it happens within the hierarchical organisation of the administration.

#### II. Legal consequences of art. 79

A super-ordinated public body is entitled to delegate the administrative investigation or special investigation actions to a subordinated body. The administrative investigation or the special investigative actions conducted by the subordinated body, based on such a delegation, are the same as conducted by the competent public body, which maintains the responsibility for the completeness and accuracy of such an investigation.

### III. Relation to previous CAP

Art. 79 covers in a rather similar way the substantial content of art. 80 of the previous CAP, which in addition used to include in its paragraph 4 a provision on the delegation of the investigation in case of a collegial organ. The latter provision is not included in the new article, because its substance is considered already regulated by para. 5 of art. 43 of the new Code.

### IV. Scope of application of the norm

Art. 79 applies to any kind of the first instance of an administrative proceeding, defined in art. 3 para 9 as the “public body activity aiming to prepare and adopt a concrete administrative actions”, notwithstanding whether the procedure is aiming to the issuing of an administrative act or the conclusion of an administrative contract (in accordance with art. 3, para. 10).

## B. Subject of investigation procedure in details

### I. The general rule (para. 1)

Paragraph 1 reaffirms the general rule that the public body to which the competency is allocated in accordance with the general rules established by Chapter I of Part II of the Code has to lead the entire administrative procedure, defined in art. 3 para. 9 as the “public body activity aiming to prepare and adopt a concrete administrative action”. This includes the phases of administrative investigation as well as the decision-making. Indeed the administrative procedure is the main modality to exercise the assigned competence in a concrete administrative case and as such should be carried out (as a rule) by the respective competent organ.

### II. Delegation of the administrative investigation (para. 2)

Paragraph 2 regulates the lawful discretion of the competent public body to delegate the duty of performing the administrative investigation. The preconditions for such a delegation are two: i) the delegation is possible only towards a subordinated public body, and ii) such delegation is not excluded by law.

#### 1. The public body, which has the competence to make the final decision,

Despite the un-necessary restrictive wording, “the public body, which has the competence to make the final decision” is meant to refer to the competent public body to which the competency is allocated in accordance with the legislation.

#### 2. Option of delegating the right to conduct the investigation procedure

As becomes clear from the first part of the wording (“may”), the provision denotes the discretion of the public body or in other words the public body’s choice to whether delegate or not. The discretion should be exercised lawfully, meaning in accordance with art. 11 of the Code. As a general rule, the delegation should be considered when the investigation could be carried better or more efficiently by the subordinated public body or for other legitimate reasons.

The second part of the regulation stipulates the object of delegation. The competent public body may delegate the competence to conduct the administrative investigation as defined in art. 77 in its entirety and not only partly, as provided for by paragraph 3). However, in accordance with the general principles of interpretation “*a maiori ad minus*” (meaning: if a law permits one to do what is greater, all the more it permits one to do what is less), the competent public body may delegate not only the entire administrative investigation but also specific investigation actions, for instance the conduction of the hearing; the administration of a means of prove (including the testimony of a witnesses) or else.

The wording does not specify whether it refers to the delegation of the administrative investigation for a type of administrative procedure (*en block*) under the competence of the delegating body or the delegation of the administrative investigation for a concrete administrative procedure (on case by case basis). The systematic location of art. 79 suggests the second understanding.

#### 3. to the subordinated body

The delegation in the sense of art 79 paragraph 2 is possible only towards a subordinated public body. In case there are more than one subordinated body the delegation has the discretion to lawfully choose among the bodies in question.

#### 4. save for cases where delegation is prohibited by law

The delegation must not be excluded by law. The reference to “law”, being an exception from the general rules established by the Code should be interpreted in a *stricto sensu* and should be read as referring to a law adopted by the Assembly (excluding the secondary legislation).

#### 5. The relation and the difference to art. 28

Whilst art. 28 regulates the delegation of the competence in its entirety (including all phases of the administrative procedures i.e. including the decision-making) and *en bloc* for a given type of administrative procedure, para. 2 of art. 79 regulates the delegation of the investigation phase and for a concrete administrative procedure only.

#### 6. The relation and difference to art. 43

Whilst art. 43 refers to the “delegation” within the competent public body (meant as “institution” to which the competency is allocated) and basically applies when the competence is assigned to the public body (or institution) in its entirety without defining the competent authority within the public body, paragraph 2 of art. 79 regulates the delegation from a public body to another public body subordinated to the first.

#### 7. The form of delegation

Paragraph 2 does not stipulate any conditions on the form and content of the act of delegation. Consequently the delegation might be made in any appropriate form. In addition, being a case by case delegation it has to explicitly stipulate the concrete case the administrative case which investigation is delegated.

#### III. Delegation of specific duties of investigation (para. 3)

Paragraph 3 is a continuation of paragraph. 2. It stipulates the possibility of a public body, assigned to conduct the entire administrative investigation for an individual administrative case, whether by law or in accordance to paragraph 2, to further delegate only specific investigation actions or duties to another public body under its subordination. The first two legal preconditions are the same with one of paragraph 2. In addition the delegation is allowed only for determined and specific investigation actions/duties.

In conducting a specific investigation action, the public body assigned to conduct the administrative investigation might choose between i) to conduct itself the action (the rule), ii) to delegate its performance to a subordinated public body, or iii) to require the “assistance” of another public body.

In case of requiring the assistance of another public body, the more restrictive conditions of art. 70 to 73 apply: a) the request for assistance shall be justified under the restrictive conditions of art. 71; b) it might be towards any public other public body chosen based on the cost-effectivity logic and c) the request might be refused under the conditions of art. 72. This is not the case under paragraph 3. Here a) the supra-ordinated body might delegate to a subordinated body only; b) it might delegate the performance of any investigation action, c) without needing or having to give any justification; it can do so for whatever lawful reason. Accordingly, d) the delegated body cannot refuse the delegation

## Section. 2 Means of searching the Proves

### Article 80 *Meaning and means for search of evidence*

1. In order to determine the situation of facts and circumstances relevant to the case, the public body may:
  - a) gather statements from parties, witnesses, and experts;
  - b) obtain documents and other documents stored by photographic or recording devices or any other technical means;
  - c) visit and inspect goods or places involved.
2. The provisions contemplated in the Law on the Organization and Functioning of Administrative Courts and Adjudication of Administrative Disputes on means of evidence search shall apply to the extent possible also to the administrative procedure, unless otherwise provided for in this Code.
3. Facts already known to the public authority or commonly known facts, and facts presumed by law shall not need further evidence.

## A. General Introduction

Para. 1 displays the instruments for the search of evidence, whereas para. 2 enables additionally the analogue application of the corresponding rules of the Law on the Organization and Functioning of Administrative Courts and Adjudication of Administrative Disputes. So, these two paragraphs indicate the frame for the permitted means of administrative investigation, as the use of not listed instruments is not allowed.

Para. 3 gives an important rule by limiting investigative efforts and shall avoid unnecessary investigation work. Especially it interdicts to burden the party with the submission of evidence that is already known to the public body or commonly known or presumed by law.

For the significance of the **constitution and the EU-Law** see the explanation above on art. 77 under A II.

In the **legal consequence** of art. 80 the use of other means of investigation than permitted by Para. 1 and 2 is illegal. The same applies to the demand of the party to present evidence in the sense of para. 3.

Para. 1 is a much more detailed version of art. 81 para. 1 of **previous CAP**. Para. 3 adopts art. 81 para. 2 of the previous CAP. Para. 2 has no equivalent in the previous CAP, but gives an important clarification.

For the **scope of application** see the explanation above on art. 77 under A V.

## B. Meaning and means for search of evidence in details

The instruments of investigation listed in para. 1 and referred to in para. 2 are of different value.

The most reliable instrument of investigation is the document, provided it is authentic, especially certified by a public authority, and its authenticity is not contested.

From the point of view of the public body, an on-site visit or an inspection of goods provides good evidence. The danger that this might be contested by the party is minimized when the party takes part and a common protocol is signed. This applies *mutatis mutandis* to experts, too.

A witness is a common instrument of investigation, but not the most reliable. The crucial factors are his ability to remember and to explain, but also his trustworthiness and his relation to the party. Thus a party must never be a witness.

### I. List of instruments of investigation (para. 1)

The public body has to establish the state of fact by any appropriate kind of evidence. The evidences may be direct or indirect. In the first case the evidence leads straight to decisive facts. In the second case the evidence leads to facts, which are the basis for a conclusion concerning a decisive fact. Para. 1 displays the common and proven means to gain evidence.

The enumeration of lit. a comprises all gathered statements from the parties, the witnesses and the experts, be it in written, oral or electronic form. For reasons of traceability, statements submitted orally or electronically should be stored in an appropriate form. If necessary, the regulations of the Albanian Civil Procedure Code is applicable *mutatis mutandis* on witnesses and experts.

Lit. b relates to documents, which does not only mean written ones, but any material object suitable to prove facts or confirm statements. Possible are e. g. photographs, tapes, DVD, CD-ROMs or other technical devices.

On-site visits and the inspection of goods are enabled by lit. c.

All these means of investigation may be presented or rather be proposed by the public body as well as by the party.

### II. Applicability of the Law on the Organization and Functioning of Administrative Courts and Adjudication of Administrative Disputes (para. 2)

Para. 2 declares as applicable the provisions on means of evidence contemplated in the Law on the Organization and Functioning of Administrative Courts and Adjudication of Administrative Disputes. In fact, there are few regulations in the Law on the Organization and Functioning of Administrative Courts and Adjudication of Administrative Disputes which are appropriate or even necessary to fill gaps by analogy in the administrative procedure of investigation, apart from art. 35 (Burden of proof), which will be dealt with below in art. 82.

Art. 25 para. 1 lit. c of the said law regulates the choice of experts, their duties, the time period for performing their expertise and the instruction about their responsibility in case of false expertise. These rules are *mutatis mutandis* applicable in the administrative procedure.

Art. 25 para. 1 lit. ç of the said law refers to art. 158/a of the Code of Civil Procedure and thus to the decision to summon witnesses, but without regulating further details on this topic. Here also the possible necessity to secure evidence is mentioned, but this topic is dealt with much more detailed in art. 86 of this Code. Thus there is no necessity of an analogous application of that provision.

### III. No evidence for known facts (para. 3)

Para. 3 is a sequel of art. 77 para. 3 which relates to documents in the hands of other public bodies.

Art. 80 para. 3 aims at facts that need not to be contained in documents but are commonly known or at least known to the public body. It is self-evident that these facts need no further evidence. The same applies to facts which are presumed by law.

## Article 81 Evaluation of evidence

1. The public body shall, based on its conviction, evaluate which facts shall be considered as proved, based on a detailed evaluation of each piece of evidence separately, and of all evidence together, and also based on the entire result of the administrative investigation.

### A. General Introduction

Art. 81 describes the duties of the public body when evaluating evidence.

For the significance of the **constitution and the EU law** see the explanation above on art. 77 under A II.

In the **legal consequence** of art. 81, if pieces of evidence are dealt with in violation of the regulations of art. 81, e. g. when some evidence is suppressed or deliberately misinterpreted, the resulting decision is illegal.

There is no direct counterpart to art. 81 in the **previous CAP**.

For the scope of application see the explanation above on art. 77 under A V.

### B. Evaluation of evidence in details

Art. 81 displays the obligations of the investigating public body that result from the principle of *ex-officio* investigation (art. 77). Unlike in civil procedures, where the opponent parties must present evidence to prove their claims, in administrative procedures the public body is the “master” of investigation. It shall rule by its own conviction which facts shall be taken as proved. Every piece of evidence must be taken into consideration, also those which are provided by the party and possibly do not validate the previous opinion of the body. The evaluation should be consequent, without contradiction, logical and in accordance with the practical experience. Otherwise the administrative decision is defective.

It shall also be pointed out that the evaluation of evidence is not subject to the discretionary power of the public body.

Article 82 Burden of proof

1. In administrative procedures initiated upon the request of the interested party, the burden of proof on alleged facts shall rest with the interested parties in the administrative procedure, regardless of the obligation of the public body to make available to the parties the evidences under its possession.
2. In cases where the interested party presents evidence, on which its claims for discrimination are based and, based on which it may be presumed that there was discrimination, the other party shall be obliged to prove that the facts do not constitute discrimination, regardless of the duty of the public body to make available to the parties the evidence under its possession.
3. In order to support their allegations, the interested parties may attach to the request for initiating the administrative procedure various documents or facts.
4. The parties may ask the public body to take the necessary measures to ensure the use of evidence in its possession in the course of the administrative procedure.

A. General Introduction

Art. 82 para. 1 accentuates the field of tension between the principle of ex-officio investigation (art. 77) and the obligation of the party to support the public body in providing evidence (art. 78). In the constellation of an administrative procedure initiated by the party the burden of proof is shifted more to the party.

Para. 2 – 4 regard the special situation that parties with differing interests are involved and regulate the arising problems of evidence.

For the significance of the **constitution and the EU law** see explanation above on art. 77 under A II.

In the **legal consequence** of art. 82, if the parties do not fulfil their obligations to present evidence according to the distribution of burdens in art. 82, they are in danger to suffer disadvantages.

Art. 82 regulates the same substance as art. 82 of the **previous CAP**, but much more detailed regarding the constellation with parties with differing interests.

For the scope of application see the explanation above on art. 77 under A V.

A. Burden of proof in Details

I. Burden of proof in an administrative procedure initiated by the party (para. 1)

In civil law the burden of proof is decisive for the outcome of a law suit, as here two or more parties must provide evidence for their claims. In administrative procedures normally a public body and on the other side a party or several parties with parallel interests are opponents. Here the principle of ex-officio investigation (art. 77) is predominant. This principle is complemented by art. 78 that demands collaboration of the party with the public body to submit pieces of evidence.

Para. 1 of Article 82 boosts this obligation when the administrative procedure has been initiated by the party itself. Although the obligation of the public body to make the evidences under its possession available remains untouched, here mainly the party shall verify its claims by presenting the necessary pieces of evidence for its allegations.

The burden sharing of proof resembles the corresponding regulation for the procedure of administrative courts in art. 35 para. 3 of the Law on the Organization and Functioning of Administrative Courts and the Adjudication of Administrative Disputes.

II. Different parties with diverging interests (Para. 2)

Para. 2 deals with the constellation where a party initiates an administrative procedure, claiming to be discriminated by a third person which thus becomes a party in the sense of art. 33 para. 3. This might e. g. happen in a dispute between neighbours, when A got a construction permit and his neighbour B requests the public body to stop building, presenting an expert opinion which says that the unsecure structure of the building under construction threatens his own property. In this case A is obliged to prove that his building does not endanger B's property and that B is not discriminated, e. g. by a counter-assessment. But as the principal duty of the public body to make available to the parties the evidence under its possession persists, A might instead demand the presentation of the internal expert

opinions that had been established by the public body before issuing the construction permit, provided such an expert opinion exists.

### III. Attachment of documents and facts (para. 3)

According to para. 3, the interested parties may attach to the request for initiating the administrative procedure various documents or facts in order to support their allegations. This is a mere repetition of the general statement of para. 1 that a party should underpin its request by pieces of evidence.

### IV. Support by the public body by making available the evidence in its possession to the parties (para. 4)

According to para. 4, the parties may ask the public body to take the necessary measures to ensure the use of evidence in its possession in the course of the administrative procedure. This includes the obligation of the public body to administer the necessary documents etc. under its administration, art. 77 para. 3. Here the burden of proof of the party is limited to the obligation of the party to identify the necessary documents, art. 77 para. 3 second sentence.

## Article 83 *Presentation of evidence before another public body*

1. If the presentation of evidence before the public body conducting the administrative procedure is difficult, requires time, or has great cost, the public body may ex officio or upon the request of the party decide that the admission of all evidence or a part of them is made by another public body.

2. In this case, the provisions of Articles 71 and 73 on administrative assistance shall apply to the extent possible.

### A. General Introduction

Art. 83 makes possible the presentation of evidence to another body than the one conducting the procedure and thus can facilitate the situation of the party.

For the significance of the **constitution and the EU law** see the explanation above on art. 77 under A. II.

In the **Legal consequence** of art. 83, when the conditions of art. 83 are fulfilled, the presentation of evidence to a public body not conducting the procedure has the same consequences as to the competent body.

Art. 83 has no equivalent in the **previous CAP**.

For the scope of application See the explanation above on art. 77 under A. V.

### B. Presentation of evidence before another body in details

#### I. Presentation of evidence to a public body that is not conducting the procedure (para. 1)

In cases where the presentation of evidence to the competent public body were connected with great disadvantages or problems of time or disproportionate costs for the party, e. g. as he lives in a place far away or he has a restricted mobility, the presentation may be performed partly or in total at another public body of the Republic of Albania. Another condition is the previous permission of the competent body, which may be given ex officio or on request.

This regulation derives directly from the principle of efficient procedures and also does not touch the legal protection of the parties. So deadlines must be deemed as met by the presentation of the public body that is not competent if the permission was given.

#### II. Application of the rules on administrative assistance (para. 2)

The receiving of evidence by a public body that is not competent for the competent public body is a form of administrative assistance. Thus para. 2 declares art. 71 and 73 as applicable accordingly.

*Article 84 Methods for submission of information and evidence*

1. In the event when parties are required to submit information or evidence, the party should be notified in writing or any other verbal form, under the provisions of this Code.

A. General Introduction

Art. 84 states the matter of course that parties who shall present evidence must be notified about their obligation. Thus shall be secured secure that the party gets aware of its obligation.

For the significance of the **constitution and the EU law** see the explanation above on art. 77 under A II.

In the **legal consequence** of art. 84, if because of the lack of notification the party does not submit information or evidence it has at hand and thus a decision is taken to its detriment that would have been avoided if the notification had taken place, the decision is unlawful.

Art. 84 corresponds to art. 84 para. 1 of the **previous CAP**.

For the scope of application see the explanation above on art. 77 under A V.

B. Methods for submission of information and evidence in details

Art. 84 supplements the regulation of art. 78 and 82 para. 1 about the obligation of the party to present evidence, not only in procedures initiated on request of the party but in all procedures of investigation. The result of an administrative procedure often depends on the timely and comprehensive presentation of proofs. If the public body regards particular pieces of evidence from the party as necessary, it must inform the party thereof in the form of notification (cf. Art. 147 et seq.)

*Article 85 Failure to submit the evidence*

1. In the event the parties fail to respond to the notification, the administration may issue a new notification or interrupt the procedure, if that does not compromise any public interest.

2. The failure to respond to the notification may be taken into consideration for the purposes of proving, in accordance to the circumstances of the case, but, in any case, it will not release the administration from the duty to search for the evidences and facts itself and to make a final decision.

3. In cases where the information or documents required by the parties are necessary for the examination of the allegation raised by the parties themselves, the procedure shall be suspended until information is provided and the parties are notified accordingly.

A. General Introduction

Art. 85 displays the consequences of the party's failure to provide the required evidence.

For the significance of the **constitution and the EU law** see the explanation above on art. 77 under A II.

The **legal consequences** are described under B below.

Art. 85 adopts art. 85 of the **previous CAP**.

For the scope of application see the explanation above on art. 77 under A V

B. Failure to submit the evidence in details

I. Repeated notification or interruption of the procedure (para. 1)

Para. 1 is applicable when the party fails to respond to the notification as described in art. 84. It offers two alternatives. The first alternative is a repeated notification to remind the party. The second alternative is to interrupt the procedure, what is especially appropriate when the procedure has been initiated by the party itself, who now

hinders its progress by not providing the necessary evidence for his request. This alternative should not be used if it leads to disadvantages to public interests.

Para. 1 shows the general consequence of the party's failure to respond to the notification regulated in art. 84. In more special situations para. 2 or 3 apply.

## II. Priority of the principle of ex-officio investigation (para. 2)

Para. 2 underlines the priority of the principle of ex-officio investigation. When the party fails to submit the necessary evidence, this allows an inference about his interest to continue the procedure. But the Code prevents that this attitude incites the public body to interrupt the procedure. Instead the public body shall primarily – in accordance with the principle of ex-officio investigation – exploit its own possibilities of investigation to bring the procedure to an end. But as para. 3 shows, this rule is not applicable in cases where the continuation of the procedure is in the mere interest of the party, especially when the party has initiated the procedure.

## III. Lacking evidence in case of art 82 para. 1 (para. 3)

When in cases of art. 82 para. 1 the continuation of the procedure depends solely on the presentation of evidence that can only be provided by the party and this is not presented, the procedure shall be interrupted until the evidence is provided. Because the public body has in such a case no possibility to obtain the necessary evidence, the principle of ex-officio investigation is not applicable.

The public body has to notify the party of its decision to interrupt the procedure. This obligation, although mentioned only here in para. 3, applies to the interruption according to para. 1, as well.

## Article 86 *Securing the evidence*

1. In cases where a piece of evidence, on which the resolution of the case depends, or which has an impact on its clarification, is in danger of disappearance or its collection becomes difficult or impossible, the public body, either ex officio or upon a justified request of the party, may decide to acquire this evidence in advance (secure the evidence).

2. The public body conducting the administrative procedure may decide to secure the evidence prior to the initiation of the administrative procedure. The securing of the evidence may also be done at any stage of the procedure. The responsibility for securing the evidence falls on the public body conducting the procedure.

3. Expenses incurred in the course of activities undertaken by the administration for securing the evidence, except for the evidence possessed by it, shall be covered by the interested party requesting them.

### A. General Introduction

Art. 86 applies when there is a risk that a decisive piece of evidence might disappear or become unattainable. Then the public body may secure it. Additionally, para. 3 regulates the costs of such a measure.

For the significance of the **constitution and the EU law** see the explanation above on art. 77 under A II.

As the **legal consequence**, Art. 86 grants the possibility to the competent public body to acquire an endangered piece of evidence.

Para. 1 corresponds to art. 87, para. 3 to art. 88 of the **previous CAP**.

For the scope of application see the explanation above on art. 77 under A V

### B. Securing the evidence in details

#### I. Requirements to secure the evidence (para. 1)

##### 1. Object of securing

A piece of evidence. E.g. a document or another object that can provide proof, may be acquired by the competent public body, when

- a) the resolution of the case depends on this piece or
- b) this piece has an impact on the clarification of the case.

## 2. Preconditions of securing

The securing is admissible, when there is danger that

- a) the piece of evidence might disappear (e. g. there is a risk that it might be removed to an unknown place or eliminated) or
- b) its collection might become difficult or impossible (e. g. there is threat that the piece is transferred abroad or by other developments greater efforts, costs and time would become necessary to get it).

## 3. Objective of securing

The securing serves to preserve the availability of a given piece of evidence for the procedure, normally in the premises of the competent public body. If the piece of evidence is immobile (e. g. object of evidence is whether the wall of a house is suffering from construction works on the neighbouring ground), the securing must be provided by other means (technical measures like photos, or expert opinion).

## 4. Decision on securing

The decision is possible ex officio or on request of the interested party.

### II. Time and competence for securing evidence (para. 2)

Para. 2 states that the competent public body may execute the insuring of evidence even before the administrative procedure is initiated. In the latter case the objective of such future institution should be clear.

### III. Costs of securing evidence (para. 3)

In case an interested party has requested the securing and thus expenses occur, in accordance with the costs-by-cause principle the party must pay these.

Whereas the action of securing evidence including the decision must be regarded as procedural actions of the public body, and as such cannot be appealed separately (cf. art. 130 para. 2), the costs of securing are claimed by an administrative act that might be part of the final decision.

## **Section 3 Hearing of the Party**

### *Article 87 Notification and the right to be heard before a final decision is made*

1. Before a final decision is made, the public body shall, except for the cases provided for by Article 89 of this Code, notify the party regarding its right to be heard.
2. The notification, as per Paragraph 1 of this Article, shall be made in writing or in a meeting with the party and it shall include the following information:
  - a) the public body conducting the procedure and the responsible official;
  - b) the parties involved;
  - c) information on the right to inspect the files and the office and the place where this may be exercised;
  - ç) the administered evidence, the results of investigation, as well as the expected result of the administrative procedure and its reasoning
  - d) information on the right of the party to be heard and the manner and deadline for the exercising of this right;
  - e) the date of the initiation of the procedure and the deadline, within which the decision shall be made and notified, if such deadline is applicable.
3. The deadline provided by Subparagraph d) of Paragraph 2 of this Article if not provided for by law or secondary legislation, shall be determined by the public body, under Article 53 of this Code

## A. General introduction

### I. Content and purpose of Art. 87

Explicitly Art 87 regulates the obligation of the public body to notify the party of the opportunity to be heard before the final decision is taken and the modalities of performing such a notification. But beyond this regulation Art. 87 must be seen as the basic norm for, and – together with Art. 88, 89 – the substantiation of the right to be heard. The right of hearing is a paramount element of citizens' fundamental rights, deriving directly from the fundamental principles of human dignity and the rule of law and the key stone of participation in administrative procedure. This right provides that the party will be given the opportunity to explain its own way to see the facts and judicial problems the procedure is dealing with before a decision is taken and – furthermore – the obligation of the public body to take notice of the statement and to take it in consideration for the final decision. The latter requires that the public body documents this consideration in the reasoning of the final decision (Art. 100).

The party's right of a fair hearing during the procedure corresponds to the obligation of the public body to proactively inform the party about this right and the related opportunities, so that the party concerned will be enabled to participate in the proceeding and defend his rights and legitimate interests by putting forward facts and arguments. In order to do that the party should be properly notified with all the necessary elements he needs to be aware of in order to exercise his right in the procedure. The right of hearing, allows the party to be subject to the proceedings rather than a mere object to the administration.

However, the fair hearing is not only in the interest of the party but also in the public interest. Public administration of today shall the party see an active partner, whose input, cooperation and participation in the administrative procedure shall be encouraged and sought after as a necessary condition for efficient administrative decision-making based on the two pillars of legality and citizen-orientation. In this context the fair hearing is a procedural instrument to contribute to "right" administrative decisions, decisions that are lawful, expedient, and find acceptance on the part of the addressee, the latter even in cases when due to the legal situation the party's expectations or demands could not be fully satisfied. Moreover – more generally spoken - the hearing of the party is the procedural implementation of basic values and principles of public administration, such as legality (art. 4), transparency (art. 5), active assistance (art. 10), fairness and impartiality (art. 13), objectivity (art. 14), simplicity and clarity (art. 18). They redefine the relationship between citizens and public administration as more equal ("horizontal") than in former times of all national administrations in Europe, when the citizen was regarded mainly as subordinated to public authorities.

### II. Constitution and EU Law

The right of hearing is explicitly stipulated by art. 41 para. 2 lit. a), of the EUCFR: "the right of every person to be heard, before any individual measure which would affect him or her adversely is taken". It is further developed by art. 16 of ECGAB.

### III. Legal consequence of Art. 87

Art. 87 is part of the essential procedural requirements. A final decision made without observing the right to be heard leads to the unlawfulness of the administrative act.

### IV. Relation to the previous CAP

The regulatory substance of art. 87 is similar with art. 94 and 95 of the previous CAP. The new provision is much more explicit and detailed on regulating the content of the notification.

### V. Scope of application of the norm

Art 87 applies to all parties (art. 33) involved in any kind of administrative procedure which leads to an administrative act (Art. 98 ff.) or contract and any stage of such procedure.

## B. Notification and right to be heard in details

### I. Obligation of ex officio notification on the right of hearing (para. 1)

Para. 1 stipulates the obligation of the public body to notify the party of the right of being heard. A person, who wants to use this entitlement effectively, needs to be aware of it. The prerequisites of this obligation are the follows: (i) the public body should have almost finalised the administrative investigation, so that the party can be informed about its

results (see lit. “ç” of para. 2); (ii) the final decision is likely to affect adversely the party and (iii) the right of hearing is not excluded in accordance with art. 89 (n.a: the reference to art. 64 is erroneous).

### 1. The public body and the party

Addressee of the obligation to notify the party is the public body conducting the procedure. As a rule it might be concluded that if more than one public body are involved, the leading body is responsible, i.e. the one stop shop in cases of art. 75 or the body that will issue the joint administrative act in cases of para. 1 of art. 70. For more details on the public body responsible for the notification in the case of points of single contact (in acc. to art. 75) and in the case of joint decisions (in acc. to para. 1 of art. 70) please refer to the explanations on the respective articles. In accordance with art. 43, a public body shall act through the “responsible official” who is in charge of conducting the procedure and proposing (art. 43 para. 3). resp.- taking the final decision (art. 43 para. 4). So the notification about the right to be heard as well as performing the hearing of the party is essential part of the duties of the responsible official.

The term “party” includes not only one or more addressees of the final decision concluding the procedure (art. 90) but also all parties involved in a procedure according to para. 2 and 3 of art. 33.

### 2. The final envisaged decision shall not be in the favour of the party.

This precondition is stipulated by art. 89 para. 1 lit. “c”, but is somehow different from the other exceptions from the right of hearing. If it is evident that if the final decision will be in favour of the party, i.e. all parties involved in the procedure, then a hearing would not have any added value. Avoiding unnecessary steps of an administrative procedures is demanded by the principle of efficiency (art. 18 para. 2).

Art. 89 para. 1 lit. c will mostly be applicable to procedures initiated by the party’s request and the final decision will fully satisfy the request and – if there are other parties involved in the procedure acc. to art. 33 para. 2 or 3 - does not adversely affect another party. However, even in those cases a hearing shall be performed, if the request – due to a lack of information of the party - does not fully exploit the legitimate opportunities of the party in the context of the concrete case and its circumstances.

Moreover, art. 89 para. 1 lit. c can also cover cases of an ex-officio procedure, either because the initiated procedure will not lead to the issuance of the onerous administrative action as the public body had initially intended, or the final decision of the ex-officio procedure will be a beneficial act or action vis-à-vis the addressee and does not have any adverse effect to another party.

In any case, being an exceptional norm, the wording of art 89 para. 1lit. c “it results clearly that the decision shall be entirely in the favour of the party” requires very restricted interpretation. In cases of doubt the public body must always opt for notifying all parties of the right to be heard.

### 3. Before taking the final decision.

This precondition has not only a temporal but mainly a material aspect. It clarifies that a hearing is lawful, if the party is given the opportunity to express its arguments in due time of the procedure when this expression could have relevance for the outcome of the procedure, but anyway at the latest before the final decision is issued. Accordingly, the moment of the hearing is appropriate, when the public body is not far from a final decision, meaning it has already resp. almost concluded the phase of the administrative investigation and the likely direction of final decision to be taken has become more concrete and crystalized. In this sense, the wording of para. 1 “before the decision is taken” is to be understood. This interpretation is also based on para. 2 lit. ç of art. 87 explicitly referring to the content of notification by mentioning “the result of the administrative procedure and the reasoning”. On the other hand a hearing is without relevance and does not fulfil the legal requirement if performed just as a tiresome formality at the very end of the procedure, when actually the responsible official decision has already taken his/her decision on the matter.

In the end, it is up to the discretion of the public body to decide upon the very moment of the notification. It can be useful to give the party the opportunity to be heard at an early stage. But in this case another hearing shall take place, because the obligation according to para 1 is met only when the party could be heard to all points mentioned in para 1 lit. ç. Otherwise the party would not be able to submit comments on the points mentioned in Art 88 para 2.

## II. Form and content of the notification (para 2)

Para. 2 regulates the form and the content of the notification.

## 1. Form and addressee of notification

The notification of the right of hearing could be done in written form or in a meeting with the party. In choosing the form of notification the public body should be led by the principle of procedural efficiency (art. 18). If the party performs the procedural actions through a representative, the notification must be directed to the representative (art. 35 para 2).

## 2. Content of notification

The aim of notification is not just to get the party aware of its right, but in the same time to provide it with a core of necessary information enabling him to actually exercise the right of hearing, meaning to explain its own arguments in relation to the facts and legal problems of the case so it could defend its rights and legitimated interests. Lit. a-dh of para. 2 include a comprehensive set of information which necessarily should be comprised to the notification, as follows:

- a) the public body conducting the procedure and the responsible official

The responsible official is the one official in charge of the conducting the proceeding (including the hearing) as defined by art. 43.

- b) the parties involved

The parties in the proceeding are the one determined in accordance with art. 33 and identified for the concrete procedure.

- c) information on the right to inspect the files and the office and the place where this may be exercised

The right of inspection is stipulated by art. 45. The right of the party to inspect the files of its case is directly connected with the right of the party to be heard. The latter is hardly imaginable unless the parties are given the opportunity to look into the records on which the public body relies for its decision.

- d) the administered evidence, the results of investigation, as well as the expected result of the administrative procedure and its motivation

The provision requires the party is notified with a résumé of the “results of the administrative investigation” including the administered evidences. In addition the provision requires the party’s notification of “expected results of the procedure and the respective reasoning”. This requirement is very problematic because the public body must remain open to the arguments of the party submitted by the hearing. The results and the opinion of the public body shall be indicated only as “so far likely” because otherwise the aim of a hearing of the party could not be met. If the public body has drafted the reasoning of the final decision already, it is not likely that it would change its mind after the hearing. Therefore in para 2 lit. ç) only a provisionally, possible opinion of the public body is required to be expressed.

The above said also applies to the “reasoning” that should be read in accordance with art. 100. It is clear that the legislator does not require the notification of a complete draft decision with the respective reasoning. Required is a summary of the elements (including the legal elements) on which the decisions is likely to be based, enabling the party’s full understanding and the possibility of providing its comments on both factual and legal issues. The provisions of the information must allow the party to be subject to the proceedings rather than a mere object to the administration and ensuring a real “contradictory” conduction of the proceedings.

- e) information on the right of the party to be heard and the manner and deadline for the exercising of this right

The provision requires the party is notified about its right (the meaning of the right), the modalities of its exercise (in any appropriate form) and the respective deadline within which it can exercise the right (see below under art. 88).

- f) the date of the initiation of the procedure and the deadline, within which the decision shall be made and notified, if such deadline is applicable

The information on the date of initiation of the procedure and the deadline, is necessary for the party to calculate the deadline with the view of the effects of the silent consent or in relation to the starting of the deadline for the appeal.

## III. The deadline for the exercise of the right of hearing (para. 3)

Para. 3 stipulates the rules on the deadline for the exercise of the right of hearing. The wording of para. 3 is designed to ensure the party is given the adequate time in which to exercise its right to be heard.

The deadline is a procedural deadline and the rules stipulated by Art. 53 shall apply, according to which the deadline may either be established by special law – this Code does not provide a deadline - or by the public body conducting the procedure. In either case the information on the deadline shall be part of the notification of para. 1. The decision of the legislator to leave the choice of the adequate deadline mainly to the administrative practice is justified because of the great variety of procedures. For the discretionary administrative decision on the deadline it is relevant that on the one hand the period is long enough to allow to the party the actual exercise of its right to be heard, whilst on the other hand to not lead to unnecessary delay of the whole procedure. The deadline established by the public body could be postponed with the justified request of the party submitted before the expiry of the deadline. The reinstatement in the deadline (art. 54) shall also apply to such a deadline.

#### IV. Legal consequences

Concerning the legal consequences of non-compliance with the requirements it must be differentiated: A final decision must not be issued without having given the party the opportunity to be heard. Failing this requirement leads to the unlawfulness of the administrative act (Art. 109). The same applies if the public body had not taken in consideration i.e. assessed the comments of the party submitted in accordance with Art 88. An incomplete notification would, also, equal with the lack of the notification and might affect the lawfulness of the administrative act. If the requirements are not met because the party was not notified in accordance with para 1 or not given the information in accordance with para 2, this must be seen as an infringement of the law. Nevertheless this would not lead to the unlawfulness of the final decision, when the party has exercised its right to be heard by its own initiative before the final decision was made and the comments of the party were assessed properly.

#### *Article 88 Exercising the right to be heard*

1. The right of the party to be heard may be exercised in any appropriate way and within the deadline determined by the public body.
2. When exercising their right to be heard, the parties may submit comments also on the evaluation of administered evidence, the results of the investigation, and on the possible result of the procedure.
3. The public body shall make a final decision, only after the deadline set for the party to exercise its right to be heard has expired. The parties' failure to exercise such right within the set deadline shall not cause the postponement of the issuance of a final decision.

#### A. General introduction

##### I. Content and purpose of Art 88.

Art 88 regulates the exercise of the right of hearing. The right of hearing is not bound to a specific form. It may be exercised in any appropriate form. As participation in the hearing is completely voluntary, the party may even deny it.

##### II. Constitution and EU Law

See explanation above on art. 87.

##### III. Relation to the previous CAP

The regulatory substance of art. 88 is similar with art. 94 and 95 of the previous CAP. The new provisions is less restrictive in regulating the form of exercise of such right.

##### IV. Scope of application of the norm

See explanation above on art. 87.

#### B. Exercising the right to be heard in details

##### I. Form of exercising the right of hearing (para. 1)

The notification is a formalized procedure of the public body and regulated in details. On the contrary, the exercise of the right of hearing is regulated into a non-formalistic approach: para. 1 only states that the comments of the parties

may be submitted in any appropriate form. The right of hearing could be exercised in written or orally in front of the responsible official, as more appropriate and convenient to the party. Art. 58 and 59 apply only *mutatis mutandis*.

The public body exercising the hearing is not necessarily the same body that has the obligation to notify the party of the right to be heard (see above explanation B.I. 1. to art. 87). In the cases of art. 75 (one-stop-shop) and art. 70 para. 1 (joint decision) the other public bodies involved in the administrative procedure do not lose their competence for taking the decision on the matter within their scope. Consequently, - as a rule - they do not lose their competence nor their obligation to hear the party before they take their decision, unless the involved bodies have for an individual case agreed that the one-stop-shop (art. 75) resp. the leading public body (art. 70 para. 1) shall perform a "joint" hearing. Similar applies, when a public body asks another body for performing a hearing in application of administrative assistance acc.to art. 71.

## II. Content of the right of hearing (para. 2)

The "content" of the right of hearing is also regulated in a non-formalised approach. In principle the party is free to present its opinion, comments and explanation related to both legal and factual situation and concerning the proceeding as well as the expected final administrative act. The time of exercising the right of hearing at the end of the procedure before the final decision is formally issued (see above explanation of art. 87 under B. I. 3.) provides the party with the opportunity to comment especially on the results of the administrative investigation and give them the possibility to contribute to its enrichment: the party might also submit documents, means of proves, it may also make proposals for the resolution of the case in a certain way, e.g. may propose to conclude the procedure by an administrative contract instead of an administrative act.

## III. The effect of the waiving (para. 3)

The participation in the hearing is completely voluntary, the party may deny it. In this way it loses its chance to influence the procedure, especially to correct results of the investigation procedure. It should be seen as opportunity but not as obligation to actively influence the result of the procedure but limited by the respective deadline. The deadline is meant to allow the public body to finalise the procedure in case of non-exercising the right within the given deadline. However, it should also be noted that seen from the side of the public administration, the hearing is also an instrument of investigation. It follows from this that if the party exercises its right to be heard after the expiration of the deadline but before the final administrative action is issued the public body is obliged to take the party's submission into consideration for the final decision, unless this is impossible for cogent, technical grounds. Arguments of the party of should never be disregarded just for formalistic reasons.

### *Article 89 Exemption from the right to be heard*

1. An administrative procedure may be terminated without notifying and giving to the party the opportunity to be heard, only in the following cases:

- a) there is an urgency to make a final decision due to the damage, which could be caused to the public interest as a result of the delay;
- b) the parties have presented their opinions, comments, and full explanations during the course of the administrative procedure;
- c) during the course of the administrative procedure it is evident that the decision will be entirely in the party's favour;
- ç) in an administrative procedure, which is based on a public competitive procedure; or
- d) that is explicitly provided for by law.

## A. General introduction

### I. Content and purpose of Art 89.

Art 89 regulates the cases of exceptions from the right of the party "to be heard". In these cases the public body may not give the party the possibility to be heard.

The purpose of the exceptions is to avoid the delay in the procedure in case the hearing would not have any added value or in case the public inters requires tempestated action.

## II. Relation to the previous CAP.

The regulatory substance of art. 89 is similar with art. 96 of the previous CAP.

## III. Scope of application of the norm.

See explanation above on art. 87.

## B. Exemptions from the right to be heard in details

Art. 89 regulates the exception from the right of the party “to be heard”. The right to be heard is subject to the general provisions, in particular the principle of de-bureaucratization and efficiency (art. 18), and must be compatible with the requirements of good and efficient administration. In order to reflect this principle, Art. 89 states a limitative and exhausting list of cases when the proceeding might be concluded without giving the party the opportunity to be heard. It should be noted the text uses the term “could ...be concluded”, denoting the discretion of the public body, meaning that even in the presence of the cases the public body is not obliged to waive the right of hearing, but might nevertheless provide the party with the opportunity of being heard. Of course, the discretion should be exercised in a lawful manner, particularly in line with art. 11. These exceptional cases are:

### I. Urgency to make the final decision (lit. a)

This expectation is related to the existence of an urgency to exercise the administrative power (through issuance of an administrative act), in cases an immediate decision is strictly necessary to avoid a damage to the public interest the public body is serving. Of course, it is incumbent to the public body to provide reasons and evidence as to why these conditions are applicable in the concrete procedure.

### II. Parties have full presented their opinions, comments and explanations (lit. b)

This exception is a concretisation of the general principles of de-bureaucratization and efficiency: if the party has exploited the opportunity of submitting comments and explanation during the course of the proceeding, than its hearing is useless. It should be noted the use of the term “full” underlines the legislator’s will related to the exceptional character of the provision. In order to exclude the right of hearing the party should have fully presented their opinions and explanation.

### III. It is evident that the decision will be entirely in the party’s favour (lit. c)

See above explanation B.I. 2. under art. 87.

### IV. Competitive administrative procedure (lit. c)

The exception is due to the nature of this administrative procedure, which usual involves a high degree of transparency and a significant number of parties. This is the case of for instance the procurement procedures, recruitment procedures and any other special procedures opened to the public and involving the competitive aspect.

### V. When explicitly provided by law (lit. ç)

This is an open clause allowing the legislator to explicitly waive the right of hearing. Being an exception the “law” should be understood in the *stricto sensu* as referring to the primary law only.

## **CHAPTER XI**

### **CONCLUSION OF THE ADMINISTRATIVE PROCEDURE**

#### *Article 90 Conclusion of the administrative procedure*

1. An administrative procedure, initiated upon request, shall be concluded with a final decision-making on the case, respectively an administrative act or administrative contract. In the final decision on the case, the public body shall decide on all issues raised by the parties during the procedure, and which were not resolved in the course of it.
2. The conclusion of the administrative procedure, which is initiated *ex officio*, is in the discretion of the public body, except for cases when it is otherwise provided for by law.
3. The administrative procedure, which is initiated either upon request or *ex officio*, shall be declared concluded without a final decision on the case, in cases provided for in Articles 93-96 of this Code. The declaration on the conclusion of the administrative procedure without a final decision on the case shall constitute an administrative act.

#### A. General introduction

##### I. Content and Purpose of art. 90

Art. 90 opens Chapter XI, which is the last chapter of the Part IV “Administrative Procedure”. It prescribes the rules on the finalisation of an initiated administrative procedure, depending on whether the administrative procedure has been initiated upon request or *ex officio* (para 1 and 2), or whether there is a reason named in art 93 to 96 to terminate the procedure without a final decision (para 3). Para 1 establishes, as the general rule, the obligation of the public body to conclude an administrative procedure which has been instituted upon request with a final decision on the merits of the case. In accordance with para. 2, the conclusion of an administrative procedure initiated *ex officio* by the public body is at the lawful discretion of that organ; it can decide to conclude it or not, save for a special statute provision that requires for an explicit decision in this sense. Furthermore, para. 3, provides that both kind of administrative procedures (whether initiated *ex officio* or upon request) shall be obligatorily concluded by a special administrative act, named the “declaration of conclusion” in the presence of a limiting and exhaustive list of cases. These are the death of the party or the termination of a legal person (art. 93), the withdrawal or abandonment of the request (art. 94), the impossibility of the object or of the purpose of the procedure (art. 95) and the failure to pay the owed fees of the procedure (art. 96).

The effective enjoyment of many subjective rights and legal interests depends on a final decision of the public administration. Therefore the law implies that an administrative procedure has a regular conclusion, especially an administrative procedure that has been initiated upon request. The conclusion with an explicit decision is therefore not only an obligation of the respective public body but also a central requirement of such an administrative procedure: It is a continuation of the obligation to proceed (enshrined in accordance with art. 41, para. 1) and a concretisation of the principle of decision-making enshrined in art. 16. Furthermore such an obligation aims to ensure the legal protection of the party (art. 1), the transparency of the public administration (art. 5) and legal certainty to both the concerned parties and the general legal order. Additionally this obligation aims to ensure the supervision and the legal control of administrative actions (art. 4 and art. 20) as well as the effectiveness and efficiency of administrative behaviour (art. 18). The same is valid for most of the *ex officio* initiated procedures.

##### II. Constitution and EU Law

Art. 90 para 1 and 3 derives from the second part of art. 48 of the Constitution, according to which “Everyone, by himself or together with others, may address requests, complaints or comments to the public bodies, *which are obliged to answer* within the time periods and under the conditions set by law”. Accordingly para. 1 and 3 ensure that every request is answered by the administration, while art. 91 ensures that the request is answered within reasonable time or within the time limits set by special law.

At the EU level Art. 41 of the EUCHFR grants the right to “good administration” which according to para 1 includes “Every person[s] right to have his or her affairs handled impartially, fairly and within a reasonable time, by institutions, bodies, offices and agencies of the Union”. In addition para 2 lit b enshrines that the right to good administration also “includes the obligation of the administration to give reasons for its decisions”, implying an obligation of the administration to answer with an explicit and reasonable decision.

The ECGAB explains in more details the principle of good administration. The right of a citizen to be answered to every request to the administration, is made clear by art. 17 which states the obligation that “a decision on every request or complaint to the Institution is taken” and furthermore it “is taken within a reasonable time-limit”.

### III. Legal consequences of art. 90

The administration is obliged to conclude an administrative procedure instituted upon request with an explicit decision. The same obligation is valid for an *ex officio* instituted procedure only when required by a special law provision.

### IV. Relation to previous CAP

Art. 90 covers in a rather similar way the substantial content of art. 99 (Grounds of Conclusion) and 100 (Explicit Final Decision) of the previous CAP. The two latter articles provide the rule – the obligation to conclude the administrative procedure by an explicit decision for both kind of procedures, initiated *ex officio* or upon request. In contrast the new art. 90 sets this rule only in para 1 for cases of an administrative procedure initiated upon request and not in case of the administrative procedure instituted *ex officio*. Here the conclusion is now at the discretion of the public body, unless a specific provision requires the mandatory conclusion by an explicit decision, para 2.

### V. Scope of application of the norm

Art. 90 applies to any kind of the first instance of an administrative proceeding, defined in art. 3 para 9 as the “public body activity aiming to prepare and adopt a concrete administrative actions”, notwithstanding whether the procedure is aiming to the issuing of an administrative act or the conclusion of an administrative contract (in accordance with art. 3, para. 10). Whilst para. 1 applies to administrative procedures initiated upon request, the para. 2 applies to *ex officio* initiated procedures. Finally para. 3 applies to both kind of procedures and is applicable only in the presence of one of the specific grounds and its respective applicability conditions, limiting and exhaustively regulated in the coming articles 93-96 of this Code.

## B. Conclusion of the administrative procedure in details

### I. Conclusion of an administrative procedure instituted upon request by a final decision (para. 1)

Para. 1 stipulates the obligation of the public administration to always conclude an administrative procedure instituted upon request through a final decision-making, except when it should be declared concluded in accordance with para. 3. The cumulative preconditions for activating this obligation are a) an administrative procedure instituted upon request, and b) the absence of the grounds for the declaration of the conclusion of the procedure referred to by para. 1 or their non-applicability because the respective conditions as prescribed by art. 93-95 are not met.

#### 1. An administrative procedure, initiated upon request

This part of the regulation clarifies that para. 1 applies only to administrative procedures that are instituted upon request.

#### 2. shall be concluded with a final decision-making on the case, respectively an administrative act or an administrative contract ...

##### a) shall be

This wording “shall” denotes the mandatory character of the provision and establishes the obligation of the public body.

##### b) be concluded

The law uses the words “conclude” and “conclusion” with respect to the administrative procedure without defining what is meant by “conclusion of the procedure”. In contrast, art. 41 para 3 defines that an administrative procedure upon request shall be deemed to have been initiated *ex lege* with the submission of the request. Additionally, art. 3 para 9 names as the purpose of the administrative procedure to prepare and adopt concrete administrative actions, mainly an administrative act or an administrative contract, art 3 para 10.

The sole “creation” of the will of the public body in the decision-making stage, however, does not produce any external legal consequence, nor does the production of an administrative act or agreement itself. For that, the administrative act has to be notified, as it made clear especially by art. 104 para 1, but also by art. 97 which reads: “if the public body dos not notify the decision within the time-limit [for the conclusion of the procedure] the request shall

*be deemed as approved and the requested written administrative act as approved in silence*". The systematic interpretation of art. 90, art. 91 and 97 therefore leads to the result that the administrative procedure is legally concluded only with the successful notification of the issued administrative act, as this is the only action able to produce the desired legal consequences. In the case of the conclusion of an administrative agreement the equivalent moment with which the agreement becomes effective is its signature by both parties on the written requested form, unless the special law requires a more restrictive form as for example the notarization.

- c) with a final decision-making/decision on the case

The meaning of the term "final decision-making" or "final decision", as used by both the second sentence of the first paragraph as by para 3, is complex, as it is intentionally multi-purposeful: i) It firstly denotes the crucial "decision-making stage" of the administrative procedure and its output, the decision on whether to issue an administrative act of a certain content or to conclude an administrative contract of a certain content, or not. ii) Secondly the term is used to distinguish the final decision as the one that ends the administrative procedure from other decisions within the course of the administrative procedure such as procedural decisions or procedural actions in the sense of art. 130 para 2 and 3, but also from intermittent decisions which do not mean to terminate the procedure but instead to ensure its smooth continuation and the proper preparation of the decision making stage. iii) Finally the term aims to distinguish the final decisions from the ones regulated under para. 3 of the same articles, which simply declare the conclusion of the procedure. The final decision in contrast decides on the "substance" or on the "merits" of the request, accepting or rejecting it on the grounds that the statutory conditions are met or not. The decision of the second kind on the other hand decides on the impossibility or uselessness to continue the procedure. The legal consequence of this difference is that in cases of the first kind of decisions any repeated new requests by the same party shall be deemed and rejected as abusive, whereas in cases of the second type of decision such new request submitted by the same party should be proceeded, assuming the other admissibility conditions such as for instance the deadline for the submission of the initial request are met.

- d) respectively an administrative act or an administrative contract

The administrative procedure instituted upon request shall be concluded by an administrative action, be it an administrative act or an administrative contract. The provision, in contrast to art. 3 para 10, does not mention other administrative actions. It is therefore rather disputable whether the decision for such an action may be seen as sufficient enough to be a "final" one.

3. In the final decision on the case the public body decides on all the issues raised by the parties during the procedure and which have not been resolved

The second sentence of para. 1 gives an additional meaning to the term "final decision" by stating that a final decision rules on "all the issues raised by the parties during the procedure". The final decision is to be comprehensive, meaning it shall decide on the objective of the request in its entirety. The objective of a request is as a rule determined by and with the initial request, although a request may and sometimes need to be clarified in accordance with for instance art. 44 para 2 lit b and art. 62, or changed or amended in accordance with art. 64. The final decision shall rule on the comprehensive objective of the request in the form and with the content it has been given as a result of the procedure, that is including the changes during the procedure's course.

## II. Conclusion of an administrative procedure instituted ex officio (para. 2)

Para. 2 regulates the conclusion of an administrative proceeding that is instituted *ex officio*. Here the principle of conclusion of the proceeding through the adoption of a final decision is not applicable. The conclusion remains at the lawful discretion of the public body. While the difference seems disputable at first, its reasons are evident: The obligation to conclude the procedure has as its three concurrent aims the protection of the party, the general legal certainty and the efficiency of the public administration. Where the administrative procedure has been instituted ex officio, the first aim is of a lesser importance whereas the third desiderate might or might not be always important. Therefore it is up to the public body to decide upon whether a final decision is necessary, as long as there is no special law.

1. The conclusion of an administrative procedure instituted ex officio

Para 2 applies only to an administrative procedure that has been instituted *ex officio*.

2. Is in the discretion of the public body

The conclusion of an administrative procedure instituted ex officio is at the lawful discretion of the public body that is conducting the procedure, as long as there is no special provision that reduces the discretion by providing the

obligation to conclude the procedure. The discretion should be exercised lawfully in accordance with the principle enshrined by art. 11. In accordance to this the public body has to take into account the reasons to initiate the administrative procedure in the first place, art. 41 para 2. This reduces and leads the discretion accordingly.

### 3. Except when otherwise provide by law.

The reference to “law”, being an exception from the general rules established by the Code should be interpreted in a *stricto sensu* and should be read as referring to a law adopted by the Assembly (excluding the secondary legislation). In any case the reference to “the law” is to be read as referring both to the very provisions of this Code and to special laws. One example is paragraph 3 of the same article (see below). Another one is art. 46 of the law no. 10433, date 16.6.2011 “on the inspection in the republic of Albania”, which foresees that the administrative procedure of inspection shall be concluded by a final decision, as a rule, “*within 30 days from the date of notification of the minutes of the inspection*”. Here the intention of the legislator is clearly to ensure the legal certainty to the individuals involved and to the administrative activity and the protection of the individuals involved.

### III. Declaration of conclusion of an administrative procedure (para. 3)

Para. 3 stipulates that the administrative proceeding should be closed through a declaration of conclusion and explicitly not a final decision on the substance of the request in the presence of the grounds and under conditions of art. 93 to 96. Paragraph 4 deems this declaration of conclusion to be an administrative act, with all the consequences that derives along: it should be reasoned, can be challenged as any administrative act, etc...

#### 1. An administrative procedure, instituted ex officio or upon request

Paragraph 3 applies to any type of administrative procedures within the scope of the Code whether it is instituted ex officio or upon request and notwithstanding whether the procedure is aiming to the issuing of an administrative act or to the conclusion of an administrative contract.

#### 2. Shall be declared

The wording “shall be” denote the imperative character of the provision: the public body conducting the procedure is obliged to declare concluded the procedure with the precondition of the presence of one of the grounds regulated by art. 93-96 and fulfilment of their specific conditions of applicability as regulated by each article.

#### 3. Declared concluded without a final decision of conclusion of the case.

##### a) declared concluded

The wording is meant to distinguish the declaration of conclusion from other decisions during the procedure that do not conclude such procedures, such as for example a procedural or an intermittent decision.

##### b) without a final decision

The decision regulated by paragraph 3 differs from the final decision mentioned under para. 1 because it does not rule on the merits of the request. In consequence the administrative procedure might be reassumed with the submission of a new request.

#### 4. In cases provided by articles 93-96 of this Code

Para. 3 includes an explicit reference to subsequent articles: art. 93 dealing with the declaration of conclusion in case of death of the party physical person and the termination of the legal person; art. 94 dealing with the withdrawal of the request and the abandonment of the procedure; art. 95 dealing with the impossibility in the objective and purpose of the procedure and of art 96 dealing with the need to pay the procedural fee.

#### 5. The “declaration of conclusion” shall constitute an administrative act.

The intention of the legislator is to brush away any possible misinterpretation on the nature of the declaration of conclusion and to protect the interests of the eventually affected parties. Such a declaration is an administrative act in the sense of this Code and as such produces all the intended legal consequences: it should be reasoned; it can be challenged as any administrative act (through administrative appeal; the provisions of this code and the lawfulness as well the rules on annulment or revocation also apply to the administrative act of declaration of conclusion.

*Article 91 Deadline for the conclusion of the administrative procedure*

1. The administrative procedure, initiated upon request, except when this Code has provided for otherwise, should be concluded as soon as possible and within the deadline set by the special law.
2. In case the special law has not specified any deadlines, the deadline for the conclusion of the administrative procedure shall be 60 (sixty) days.
3. If the law has provided for the duty of the party to submit documents or evidence, as a part or together with the request for initiation of the procedure, the deadlines defined in Paragraph 1 and 2 of this Article shall start to run from the date of their full submission.
4. In the event of an extraordinary situation the administrative procedure shall be completed within 3 months from the day of the termination of the extraordinary situation.
5. Failure to comply with the deadline provided for in Paragraph 1 of this Article should be justified by the responsible body to the superior body, or by the responsible official to his own superior within 10 days of the expiry of the deadline or the end of extraordinary.

A. General introduction

I. Content and Purpose of art. 91

Art. 91 is a continuation of art. 90, which would not be complete if not complemented with the basic principle of administrative law, that a decision on every request to the administration is taken without delay and within a reasonable pre-established time-limit. The possibility and the respective conditions to extend such a deadline are latter foreseen in the art. 92 (Extension of procedures time limit), while – at least some of – the legal consequences of the failure to observe such a deadline are regulated by art. 97 (Silent consent).

Para. 1 stipulates the obligation to conclude an administrative procedure that is instituted upon request as quickly as possible but always within the respective deadline prescribed by sectorial legislation. Exception from this rule could only be foreseen explicitly by the Code. Para. 2 establishes the general deadline of 60 days for the conclusion of an administrative procedure, which applies whenever there is no specific time-limit prescribed by sectorial legislation. Para. 3 establishes the crucial rule that the time-limit for the conclusion of a procedure shall be triggered always and only from when a complete request is submitted. Para. 4 provides for a special complete deadline of 3 months that is applicable only in case where the administrative procedure is interrupted by an extraordinary situation, running from the moment the extraordinary situation is terminated, whereas para. 5 provides for the duty of the public officials and public bodies to justify the non-observance of the time limit to their respective superiors.

The conclusion of an administrative procedure that is initiated upon request within a reasonable deadline that is established in advance by legislation is an obligation of the respective public body and also a central requirement of an administrative procedure. Such an obligation ensures the predictability of the administrative behaviour, the legal certainty for the individuals involved and the public interest as well as the efficiency of the administration as emphasized by art. 18 para 2. The establishment of sectorial time-limits is an appropriate solution to balance the celerity of the procedure and the quality and lawfulness of its final output.

II. Constitution and EU Law

Art. 91 derives from the second part of art. 48 of the Constitution, according to which “everyone, by himself or together with others, may address requests, complaints or comments to the public bodies, which are obliged to *answer within the time periods and under the conditions set by law*”. This requirement is fulfilled by the regulation in art. 91, which ensures that every request is answered by the administration within a reasonable time-limit to be established by legislation. The article and it is completed by the following articles which regulate the extension of a time-limit as well as the legal consequences of failure of the public body to observe the time-limit.

A conclusion within a reasonable time limit is also a basic demand of para. 1 of art. 41 of the EUCHFR granting the right to good administration, which explicitly enshrines that “every person has the right to have his or her affairs handled impartially, fairly and *within a reasonable time*, by institutions, bodies, offices and agencies of the Union”. The right is also made clear by art. 17 para. 1 of the ECGAB, which regulates the obligation of the administration to “*ensure that a decision on every request or complaint to the Institution is taken within a reasonable time-limit, without delay, and in any case no later than two months from the date of receipt*”.

In addition art. 91 is also inspired by EU Directive 2006/123/EC on services in the internal market, a directive with a strong influence on the administrative procedure legislation of the member states in terms of administrative simplification. Art. 13 para. 3 of the Directive *stipulates that "Authorization procedures and formalities shall provide applicants with a guarantee that their application will be processed as quickly as possible and, in any event, within a reasonable period which is fixed and made public in advance."*

### III. Legal consequences of art. 91

The administration is obliged to conclude an administrative procedure instituted upon request with an explicit decision within the pre-established time-limit. The time-limit, as a rule, shall be established by the legislation providing for the respective procedure. In case there is no such time-limit the general deadline of 60 days shall apply. In case the procedure is interrupted because the presence of an extraordinary situation another time-limit of 3 months, starting with the termination of the extraordinary situation, shall be at the disposal of the administration.

In case of failure to observe the time limit for the conclusion of the administrative procedure, the rules of art. 97 on the silent consent shall apply if that is explicitly foreseen by sectorial law. In any case the affected party can challenge the "fact" of the administrative silence with an administrative appeal against the silence in accordance with art. 138 of this Code. The public administration does not, however, lose the power to issue the required administrative action once the time-limit expires: the administrative power survives not only the adoption of the administrative action in order for example to annul or revoke that act, but also a given time limit. Yet, the public body is responsible for the delay in the adoption of such an action.

### IV. Relation to previous CAP

Art. 91 covers in a rather similar way the substantial content of art. 49 (General time-limits for the conclusion of the proceeding) of the previous CAP. While the latter article applies to procedures that are initiated upon request as well as those that have been initiated ex officio, the new art. 91 applies only in cases of administrative procedure that are initiated upon request. In addition the general deadline in the new Code is of 60 days instead of 3 months in the previous CAP. The rest of the provisions on the calculation of the deadline in the presence of extraordinary situation are very similar.

### V. Scope of application of the norm

Art. 91 applies to any kind of the first instance of an administrative proceeding that is initiated upon request, notwithstanding whether the procedure is aiming to the issuing of an administrative act or the conclusion of an administrative contract (in accordance with art. 3 para. 10).

## B. The content of art. 91 in details

### I. Obligation of conclusion of the procedure within the time limit prescribed by legislation (para. 1)

Para. 1 stipulates the obligation of the administration to conclude an administrative procedure that is instituted upon request as quickly as possible given its complexity but always within the respective deadline prescribed by the legislation. The obligation to conclude the administrative procedure as quickly as possible has two precondition: an administrative procedure that is initiated upon request, and no legal exception to this general rule. The time-limit set by the special law on the other hand is applicable only when it has not been suspended, interrupted or extended.

#### 1. An administrative procedure which is instituted upon request

Art. 91 applies only to administrative procedures that are initiated upon request irrespective of whether the procedure is aiming to the issuing of an administrative act or the conclusion of an administrative contract and irrespectively whether such a procedure is concluded by a final administrative decision on the merits of the request (art. 90, para. 1) or by an administrative act of declaration of conclusion (art. 90 para. 3) without deciding on the merits.

#### 2. Shall be concluded

The wording "shall be concluded" denotes the mandatory character of the provision which stipulates an obligation for the public body once the above mentioned preconditions are met. As already explained the submission of the initial request legally marks the institution of the administrative procedure according to art. 41. The day of submission of the request is also the "day of the event" for triggering the running of the time-limit in the sense of art. 57 para. 2. For the

calculation of the time-limit see art. 56. The procedure is concluded in the sense of that provision as well in the moment of notification; see the explanation under art. 90 and respectively art. 155 to 163 of this Code.

### 3. Except when otherwise determined by this Code

The general rule to conclude the procedure within the respective time-limit sometimes does not fit cases where the public body is objectively prevented by different obstacles from observing the time-limit. Therefore, the code here opens the door for accommodating such situations as exceptions from the general rule, as far as the exception is provided by “this Code” only. Furthermore the interpretation of the applicability condition for the application of such grounds should be restrictive because on the one hand they are exceptions from a general rule. On the other hand an abusively wide interpretation hinders two important desiderates aimed at by art 91, the legal certainty for the individual concerned and the public interests as well as the efficiency of the public administration as emphasised by art. 18 para 2.

Such exceptions should and are indeed explicitly provided by the Code, namely: **i) the Suspension of the time-limit** by the justified suspension of the proceeding as a whole as provided for by art. 36 para. 1 (Ex officio appointed representative) or by art. 66 para. 1 (Preliminary issues); **ii) the Interruption of the time-limit** by interruption of the whole **procedure** in the presence of an extraordinary situation as provided for by para. 3 of the same article; **iii) the Extension of the time-limit** because of the unwarranted complexity of the procedure which finally is provided for by art. 92 (Extension of procedures time-limit).

### 4. As soon as possible and within the time-limit

The legal consequence of para. 1 is the obligation of the public body to conclude the procedure as soon as possible and within the respective time-limit. This is a specification of the general principle of efficiency and celerity as emphasised by art. 18 para. 2. The actual due time-limit for the public body to conclude the procedure depends on the case-by-case complexity of that individual procedure, while the time-limit prescribed by the legal provisions for that type of the procedure should be seen as the ultimate dead-line. It means that the public body should not expect the end of such a deadline to issue a decision but at any time proceed in accordance with the principle of efficiency and terminate the procedure as soon as possible and as the complexity of that individual procedure allows. It is a call to find a balance between the celerity and quality of the procedure. The instruments to make the observation of such duty possible usually goes beyond the remit of administrative procedural law and have no exterior legal consequences. They are mainly related to performance indicators of respective officials and/or units and their respective performance appraisal system.

### 5. The time-limit set by the special law

The time-limit for each type of administrative procedure needs to be fixed in advance and not set on a case by case base, and fixed by a legal provision and not by the public body itself. The rationale of the legislator is clear: The time-limit should be fixed in advance for reasons of transparency and legal certainty. And secondly, a general deadline applicable to all types of administrative procedures on the other hand would hardly be appropriate but might, if it is too long, affect the legal certainty while, if it is too short, affect the efficiency. This is why the time-limit for a given type of a procedure should be sectorial or procedure-related, it should depend on the average complexity of that type of procedure. In each case the legislator foresees for a new administrative procedure in a piece of legislation he should therefore determine the respective reasonable deadline finding the right balance between the requirement of certainty, the requirement of efficiency and the complexity of the average case in order to properly determine the necessary time needed by the administration for a lawful outcome.

The reference to “the special law” needs to be read in a broad sense as referring to both the primary law of the Assembly as well as to the secondary legislation. On the one hand, in this special case the reference to “the special law” does not, unlike in the other references in the text of this Code, provide for an exception from a general rule established by the Code, which would necessarily require a *stricto sensu* interpretation of the wording “special law” as referring only to the law adopted by the Assembly. Here the Code rather delegates to sectorial legislation the right to establish sector-related deadline for each type of administrative procedures. On the other hand, para. 1 of art. 97 refers to the very same deadline as being “*established by law or secondary legislation*”. And finally it seems much better for the reasons and principles named above, in case of silence of a primary law on prescribing the time-limit to apply a sectoral time-limit established by secondary legislation rather than to apply the default time limit provided by para. 2 which is too general and should be read as a very last resort.

## II. The general time-limit for the conclusion of an administrative procedure (para. 2)

Para. 2 establishes a general time limit or default time limit of 60 days for the conclusion of the administrative procedure. It also prescribes that the precondition for application of the general time-limit is “the absence of the time limits established by special law”. This clarifies that the general default time limit shall apply only as a last resort when the sectorial legislation does not provide for a procedure-related time-limit. The reference to the special law should also here be interpreted *lato sensu* as to including both primary and secondary legislation.

## III. The triggering of the time limit for the conclusion of administrative procedure (para. 3)

Taking into account incomplete requests, para. 3 stipulates that the time-limit for the conclusion of the administrative procedure shall be triggered with the submission of a complete request only.

### 1. If the law has provided for the duty of the party to submit documents or evidence, as a part or together with the request for initiation of the procedure

#### a) If the law

The reference to “the law” in this case should be interpreted broadly. On the one hand, this again is not forming an exception to a general rule. On the other hand, the primary law principally establishes only the general categories of criteria to be fulfilled for issuing an authorization whilst the detailed criteria as well as the documents, information and declarations to be submitted in order to prove the fulfilment of the criteria are usually established by secondary legislation. Therefore “the law” that provides for the documents or evidence to be submitted as part or together with the initial request, should be read as being primary or secondary law.

#### b) has provided for the duty of the party to submit documents or evidence, as a part or together with the request

The precondition for the application of para. 3 is that the special legislation has provided for the submission of documents and evidence as a part of or together with the initial request.

The content of the initial request is regulated by art. 58 para 2 , which takes a very citizen oriented approach by establishing that the request should only be sufficient enough to determine the submitter and its objective, meaning what is requested, except when explicitly otherwise established by the law. In general the defect in content might arise when: i) the object of the request is not clear and should be clarified, mainly because the request is not sufficient enough to determine its objective; ii) the submitter is not identified or iii) the request is not complete with respect to the special law that requires a more restrictive content of the request as for example certain information or additional documents, declarations or proofs that should accompany the request. The provision in question refers to the third category of defects in the request.

“Documents or evidence” should be read in the *lato sensu* as referring to any type of information, declaration, self-declaration or any type of proof or other document the legislation requires to be submitted as part or together with the initial request.

### 2. The deadlines defined in paragraph 1 and 2 of this Article shall start to run from the date of their full submission.

This part of the regulation clarifies the legal consequence that an incomplete request has on the time-limit for the conclusion of the administrative procedure. It stipulates that the time-limit shall be triggered only with the completion of the request. There might be two possibilities:

- The party submits a complete request from the beginning. As already explored the fact of submission of the request is sufficiently enough to institute an administrative procedure by virtue of art. 41. In this case, in accordance with para. 2 of art. 57, the day of submission of the request is the “day of the event” that triggers the calculation of the time limit for the conclusion of the procedure.
- The party submits an incomplete request at first : Here the submission of the incomplete request serves to legally institute the administrative procedure and the respective obligation for the public body, but does not constitute the “day of the event” that triggers the calculation of the time-limit for the conclusion of the procedure, as provided by para. 2 of art. 57. The calculation is instead triggered with the submission of a complete request. In other words, the time from the submission of an incomplete request to its completion shall not be taken into account in the calculation of the time-limit. In a systematic interpretation, this legal effect should be correlated with art. 62 which foresees the obligation of the public body to communicate in writing to the party and require it to correct the defects, in this case being the incompleteness of the request. If the latter obligation is not met by the public body, the legal consequence of para. 3 is not produced and per consequence the time-limit for the

conclusion of the procedure shall continue running normally. In this case the “day of the event” for triggering the deadline shall be deemed the day of the first submission of the incomplete request. On the contrary case if the public body meets its obligation in accordance with art. 62, the time limit for the conclusion shall be deemed to have not been triggered yet. It shall be triggered with the submission with the full completion of the request only.

#### IV. Triggering of the time limit in case of extraordinary situation (para. 4)

Para. 4 determines the effect that an extraordinary situation has on the time-limit at the disposal of the public administration for the conclusion of the administrative procedure. It provides that the occurrence of an extraordinary situation shall stay the calculation of the time-limit and a new one *ex novo* shall be at the disposal of the administration starting from the termination of such extraordinary situation. The legal preconditions for the application of this legal consequence are (in addition to the one for the application of the entire art. 91): i) an ongoing administrative procedure (already initiated and not yet concluded) and ii) the proclamation of the extraordinary situation.

##### 1. In the event of extraordinary situation

The mentioning of the “extraordinary situation” makes the provision very restrictive and applicable exclusively in case of an “extraordinary situation” proclaimed by law in accordance with art. 81/2/dh of the Constitution. The wording logically also denotes the precondition that the extraordinary situation is proclaimed while the administrative procedure is ongoing, meaning after the submission of the request and before its conclusion.

##### 2. The administrative procedure shall be completed within 3 months from the day of the termination of the extraordinary situation

###### a) shall be completed within 3 months

In the legal consequence of the intervention of an extraordinary situation on the course of an administrative proceeding, a new *ex novo* deadline is at the disposal of the public body to complete and conclude the procedure. The 3 months’ time-limit is the same and applies indifferently to what was the sectoral legislation prescribed time-limit for that type of administrative procedure. It might also be suspended or extended when provided for by the Code.

###### b) from the day of the termination of the extraordinary situation

The moment that triggers the initiation of the new deadline is the “termination” of the extraordinary situation, to be read at *stricto sensu* as referring to the date the duration of the extraordinary situation expires, if that is established by the same law, or when its termination is formally proclaimed with the same formal instrument.

#### V. Justification of non-observance of the time limit (para. 5)

Para. 5 stipulates the duty of the public body and of the responsible official to justify the non-observance of the time limit to the respective hierarchical levels. The duty has no legal consequences at the level of administrative procedure, but rather on the public body’s performance appraisal or respectively on the performance appraisal or disciplinary remit of the responsible official. The only possible connection at the remit of the procedural law might be made with the “written report” on the silence provided for by para. 3 of art. 134 and para. 1 of art. 138. Basically the justification provided for by para. 5 might have the same content with the above-mentioned written report, but formally they are two distinctive instruments. Only the latter is within the procedural law remit.

#### Article 92 Extension of the procedure deadline

1. Except when explicitly forbidden by law, in justified cases, due to the complexity of the case, the public body may, only once, extend the deadline, as per Article 91 of this Code.
2. The extension of the deadline shall be made to the extent it is necessary for the conclusion of the procedure, in proportion to the complexity of the concrete case, but for not more than the duration of the initial deadline.
3. The extension of the deadline and the date of the expiration of the extended deadline shall be notified to the party within the initial deadline. The notification should also contain the justification of the extension of the deadline.

## A. General introduction

### I. Content and Purpose of art. 92

Art. 92 regulates the possibility of the public body to extend the time-limit for the conclusion of an administrative procedure that is instituted upon request when this is imposed by the complexity of the concrete administrative case, as well as the conditions and the procedure for such an extension.

Para. 1 recognizes the possibility of the public body to extend – albeit only once – the prescribed time-limit for the conclusion of the procedure, and regulates the legal preconditions when allowing such an exception: i) the extension is essential due to the complexity of the concrete case, for the additional time necessary to conclude it; ii) the extension must not be forbidden by law and iii) the time-limit has not been extended before.

Para. 2 regulates the criteria for determining the duration of the extension period: i) for the period necessary to conclude the procedure and ii) no longer than the original time-limit.

Para. 3 finally stipulates the obligation of the public body to notify the extension to the party as well as the content and the other conditions therefore: i) the extension should be motivated; ii) it should include the date of expiration of the new extended time-limit and iii) it should be notified before the expiration of the original time-limit.

Art. 92 is a continuation of art. 90 which provides the obligation of the administration to conclude an administrative procedure that is instituted upon request by an explicit decision. It is also a logical continuation of art. 91 which regulates the time-limit for such a conclusion and the obligation of the administration to do its best to complete the administrative procedure as soon as possible but not in any case within the time-limit established by special law or within the general time-limit, respectively. In fact art. 92 provides an exception from the general rule of art. 91. It is meant to accommodate situations in which the administration needs more time to conclude a procedure, because the prescribed time-limit results objectively insufficient due to the complexity of the concrete case. Art 92 is one of the few exceptions that are authorised explicitly by para. 1 of art. 91 (“except when otherwise provided by this Code”). The overall regulation provides for a well-balanced system of justified extension of the time limit, safeguarding on the one hand the public administration’s interest in having sufficient time to comprehensively investigate facts, examine the legal situation and take an appropriate qualitative, lawful and mature decision, while on the other hand securing the party’s interest and right to receive a response on its request within a reasonable time according to the principle of celerity of art. 18 para 2. Moreover, it ensures the public interest in legal certainty and last but not least the interest of a third party involved in or affected by the procedure.

### II. Constitution and EU Law

For the references to the constitution and the EU law please refer to the respective section regarding article 91. In addition, art. 92 is also inspired by EU Directive 2006/123/EC on services in the internal market, a directive with a strong influence on the administrative procedure legislation of the members states in terms of administrative simplification. Art. 13 para. 3 of the Directive *stipulates that “The period shall run only from the time when all documentation has been submitted. When justified by the complexity of the issue, the time period may be extended once, by the competent authority, for a limited time. The extension and its duration shall be duly motivated and shall be notified to the applicant before the original period has expired.”*

### III. Legal consequences of art. 92

When the preconditions of art 92 are met, the public body has the possibility to extent the original time-limit once. In case it decides to extend the time-limit, it should properly notify to the party the procedural act of extension. The lack of the notification would stop producing the legal consequences of the extension and would open the door to produce the legal consequences of the failure to observe the time-limit under art. 97. An incomplete notification would equal the lack of notification.

### IV. Relation to previous CAP

There were no similar provisions in the previous CAP.

### V. Scope of application of the norm

The scope of the application of art. 92 is the same with the one of article 91. It applies to any kind of a first instance of an administrative proceeding that is initiated upon request, notwithstanding whether the procedure aims to issue an administrative act or the conclusion of an administrative contract. However, the scope of art. 92 could be narrowed

down by a legal provision which explicitly forbids the extension of the time-limit for a given type of administrative procedure that is initiated upon request.

## B. The content of art. 92 in details

### I. The possibility of the public body, to extend the time-limit due to the complexity of the case (para. 1)

As said above, para. 1 recognizes the possibility of the public body to extend the prescribed time-limit for the conclusion of the administrative procedure, but also regulates the substantial preconditions for allowing such an extension: i) it needs to be necessary due to the complexity of the concrete case; ii) the extension must not be forbidden by law and iii) another extension has not been previously allowed for the same proceeding.

#### 1. Except when explicitly forbidden by law

The extension is not possible where it is forbidden by special law. Where a special law explicitly forbids the extension of the time-limit the application of art. 92 is excluded. The reference to the “law” in here, being an exception from the rule, should be interpreted as to the primary law only that is adopted by the Assembly.

#### 2. In justified cases due to the complexity of the case

The extension secondly may be justified only when and to the extent the concrete individual case results more complex than the average. On one side, as already explained, the time-limit is as a rule prescribed by the sectorial legislation. In defining such a time limit the legislator tried to find a balance between different desiderates having in regard the usual case with only average complexity. However, there always are more complex and more difficult cases which require more time for the preparation stage as well as for the decision-making stage of the administrative procedure. Such cases might be anything from *vis major* to unwarranted length of the procedures, examples of which can be manifold: the public body faces a complex factual situation that requires a more comprehensive investigation or special means of investigation; the investigation requires more time or even administrative assistance because of the physical location of the facts; the number of other involved parties is high, the parties can be hardly identified and communicated with although their interest needs to be introduced in the procedure; at an advanced stage of the procedure it becomes clear that there are new facts which need also to be investigated further, etc.

However, the extension of the time limit is an exception from the general rule prescribed under art. 91, which requires the “conclusion as soon as possible and within the prescribed time-limit”. Therefore this part of the regulation should be interpreted as restrictive as possible.

#### 3. The public body may extend

##### a) the public body

The public body is the body competent to conduct the procedure and precisely the responsible official, because he or she is the one caring out the administrative investigation and is therefore able to figure out the necessity for extension. In case the extension is necessary, he or she should justify the extension to his or hers superiors in accordance with art. 91 para. 5.

##### b) may extend

The wording “may extend” denotes the discretionary character of the competence to decide upon the extension. If the legal preconditions are not cumulatively met, the public body may not decide upon the extension, where as if the preconditions are met then the public body might decide on discretionary bases whether or not to extend the time-limit. The discretion is to be exercised in the lawful way in accordance with the discretion test enshrined by art. 11 of the Code, serving only the lawfulness and maturity of the final decision and the legal certainty.

#### 4. Only once the deadline, as per article 91 of this Code

The time-limit must not have been extended previously. The extension might be applied “only once” and not repeatedly. The extension is possible only “as per article 91 of this code”, which at the same time defines the scope of application of the entire art. 93: it applies only to administrative procedures initiated upon request and it applies notwithstanding whether the time-limit is prescribed by special legislation according to art. 91 para. 1) or is the general time limit of art. 91 para 2.

### II. Duration of the extension (para. 2)

Para. 2 regulates two additional conditions for a lawful extension of the time-limit:

1. The extension shall be made

Although the decision upon whether to extend the time-limit is at the lawful discretion of the public body conducting the procedure, the content of the positive decision is prescribed by para 1 (“only once”) and para 2, is mandatory (“shall be made”).

2. To the extent it is necessary for the conclusion of the procedure, in proportion to the complexity of the concrete case, but not more than the duration of the initial deadline

The actual period of extension should be decided in proportion with the time objectively needed to conclude the procedure with a mature decision as resulting in proportion of its objective complexity. Here the discretion of the public body on establishing the period of extension is reduced; the public body is rather under an obligation to objectively evaluate the time needed for the extension. Para 2 also provides for an upper limit of the extension period, being “no longer than the initial deadline”.

III. Notification of the extension to the parties (para. 3)

Para. 3 stipulates the obligation of the public body to notify the extension to the party as well as the content and the other conditions therefore:

1. The extension of the deadline and the date of the expiration of the extended deadline shall be notified to the party

The public body is obliged (“shall be”) to notify the extension. The decision of the responsible official in the public body to extend the time-limit is a procedural action as defined by art. 130 para. 3 and therefore cannot be challenged separately from the final decision in accordance with art. 130 para. 2. In addition the reference to “the party” is to be read in a *latto sensu* as referring to all the parties involved in the procedure.

2. Notified within the initial deadline.

The parties are to be notified before the expiration of the initial deadline. The rule is a concretization of the principle of predictability and it also ensures the legal certainty. Only an extension accordingly notified (before the expiration of the initial time limit) could stop the legal consequences of the failure to conclude the procedure within the time-limit foreseen by the Code. In addition the moment of notification should be read in accordance and correlated with art. 155, art. 156, art. 159, art. 160, art. 161, art. 162, art. 163. In case of a written notification, in envisaging the time of notification in order to observe the obligation of notification before the expiration of the original time-limit the public body should take into account the date the notification is presumed to have been made to the addressee in accordance with those articles and depending on the respective type of notification.

3. The notification should also contain the justification of the extension of the deadline.

The procedural decision to extend the time-limit should be motivated accordingly to justify the extension. The notification is possible both in written and in verbal form, in this case according to art. 98 *mutatis mutandis*, unless a more restrictive form is defined by sectoral legislation.

4. And the date of the expiration of the extended deadline

In addition the decision of notification should also specify the date when the new extended deadline shall expire. The provision is meant to ensure the transparency and predictability of the administrative actions and also serves to the application of art. 97 of this Code, in case the extended deadline is not observed.

*Article 93 Death of the party and termination of legal person*

1. If a party, a natural person, dies in the course of the administrative procedure, which is conducted in regard to an issue of personal character, the public body shall declare the administrative procedure concluded, without making a final decision on the issue. In any other case, if the public body considers that the party participation is necessary, it shall temporarily suspend the procedure until the identification of the heirs.

2. Except when otherwise provided for by law, even in the case of termination of the legal entity, the public authority shall declare the conclusion of the administrative procedure without a final decision.

## A. General introduction

### I. Content and Purpose of art. 93

Art. 93 regulates two grounds for the declaration of conclusion of an administrative procedure, related to the existence of the party: - 1) the death of a party that is a physical person and 2) the termination of a party that is a legal person, and the respective applicability conditions.

Para. 1 regulates the legal consequence the death of the party that is a physical person has on an ongoing administrative procedure. If the case is of an *intuitu personae* nature the death of the party shall cause the declaration of conclusion of the procedure. On the other hand, if the case is of an *intuit rei* nature the death of the party might cause two possible results: a) if the participation of the party is deemed necessary, the procedure is suspended until the inheritors are identified or b) if the participation of the party is not deemed necessary then the procedure shall continue. Para. 2, instead regulates the impact the termination of a party that is a legal entity has on the administrative procedure. In this case the rule is the declaration of conclusion of the procedure. An Exception from this rule may be provided by special laws.

The purpose of the legislator is evident: in case of an *intuitu personae* nature case it is useless to continue and finalize the procedure. In such a case the holder of the right or interest that is aimed to be satisfied or defended through the participation in the administrative procedure ceases to exist and the right or the interest ceases to exist with him or her. On the other hand, in case of an *intuitu rei* nature case, the said rights or interests continue to exist and are further transferred to the inheritors. The logic is similar in case of the termination of a legal person.

### II. Legal consequences of art. 94

If the case is of an *intuitu personae* nature, the public body is obliged to declare the conclusion of the procedure once the party dies. If the case is of an *intuitu rei* nature, on the other hand, the public body is obliged to suspend the procedure until the heirs are identified, if, as is generally the case, the active participation of the party is necessary. If that exceptionally is not the case, the public body is obliged to normally continue the procedure to a final decision. If the party is a legal person, the public body is obliged to declare the conclusion of the procedure if the party is terminated, unless there is a law provision that exceptionally stipulates the continuation of the procedure.

In all these cases the declaration of conclusion of the procedure is an administrative act in the sense of para. 3 of art. 90 and per consequence should be motivated accordingly and can be challenged accordingly by any affected party. On the other hand, the continuation of the procedure is a procedural action in the sense of para. 3 of art. 130 which can not be challenged separately from the final output of the procedure, according to para. 2 of art 130.

### III. Relation to previous CAP

These grounds of declaration of conclusion of the administrative procedure were not explicitly regulated by the previous CAP. Instead they were, in accordance with a common interpretation, considered as special cases of impossibility in object or intent covered by art. 103 "The impossibility" of the previous CAP.

### IV. Scope of application of the norm

Art. 93 applies to any kind of first instance of an administrative proceeding in the sense of art. 3 para 9, whether it is instituted *ex officio* or upon request and notwithstanding whether the procedure aims to issue an administrative act or to conclude an administrative contract. By analogy art 93 also applies to the legal remedies phase of an administrative procedure.

## B. The content of art. 93 in details

### I. The death of the party (para. 1)

Para. 1 regulates the legal consequences the death of the party has on the course of an administrative procedure.

#### 1. The death of the party in an *intuitu personae* case (para. 1 first sentence)

The first sentence of para. 1 regulates the legal consequence the death of the party has on the continuation of the administrative procedure in an *intuitu personae* nature case. Here the public body is obliged to declare the conclusion of the procedures. The implied legal preconditions are the following: i) an ongoing administrative procedure; ii) the procedure concerns an *intuitu personae* case; iii) the death of the party is established.

a) If a party that is a natural person dies

The main precondition is the death of a natural person having the quality of a party in the procedure.

The death should be read in its juridical sense in accordance with the provision of the Civil Code, as including the “real death” or the death declared by court decision in accordance with art. 17 of the Civil Code.

The concept of the “party” is to be read in accordance with art. 33 of this Code in conjunction with the personal character of the case. This implies that the provision applies only in the case of the death of a person upon whose request the procedure has been initiated (lit. a, para. 1 of art. 33) or against whom an administrative procedure was instituted ex officio (first part of lit. b, para. 1 of art. 33) or with whom an administrative contract has been concluded or was intended to be concluded (lit. c, para. 1 of art. 33). It should be noted that the *intuitu personae* character of the case implies by default the lack of other parties whose interests might be affected by the procedure (in accordance with para. 2 and 3 of art. 33). If such parties would exist the case would not be of an *intuit personae* nature any more.

b) in the course of the administrative procedure

Only an on-going administrative procedure may be concluded or suspended, that is any procedure which has been instituted but is not concluded yet, and only when the death intervenes during such a procedure. The wording “administrative procedure” is to be interpreted in accordance with the rule *ubi lex non distinguit nec nos distiguere debemus* as referring to any type of procedure, whether it is one that is instituted ex officio or one that is instituted upon request and notwithstanding whether the procedure aims to issue an administrative act or to conclude an administrative contract, in accordance with art. 3, para. 10.

c) which is conducted in regard to an issue of personal character

The character of the case is related to the objective of the procedure or to the cause of such procedure. An issue is of personal character (*intuit personae*) if it is indispensably related to an individual and does not concern any other person and is mainly related to the personality of the party. In rare cases it might even have a patrimonial or matrimonial object though strictly related to person. The main characteristic of these cases is that the subjective right or legitimate interests that is to be satisfied or defended through the procedure is indistinctly related to the person and per consequence ceases to exist together with its holder, as for instance the procedure for issuing of a passport, the procedure to acquire the pension, an administrative contraventional procedure (minor offences) against a physical person etc...

d) the public body

The public body is the public body competent for the administrative procedure. Within the public body, the decision shall be taken by the responsible official or shall be proposed by the latter and taken by another in charged official in accordance with art. 43.

e) shall declare

The imperative wording denotes the obligation of the public body to conclude the procedure in case the legal preconditions are met.

f) the administrative procedure concluded without making a final decision on the issue.

This wording is an explicit reference to art. 90 para 3. The procedure shall be concluded through a declaration of conclusion and not by a final decision. The conclusion is an administrative act according to art. 90 para 3.

## 2. The death of a party in an *intuitu rei* case (para. 1, second sentence)

The second sentence of para. 1 regulates the legal consequence of the death of the party on the continuation of the administrative procedure in an *intuitu rei* nature case. Here the public body is obliged to suspend the procedure if the active participation of the party is necessary. If that is not the case the procedure shall continue normally until a final decision.

a) In any other case,

“any other case” refers to the cases in which the administrative procedure is not of a personal character but instead of an *intuit rem* nature. The characteristics of these cases is that the right or the interest is not indispensably linked with the person, it “survives” the death of its original holder and per consequence is or might be passed to the inheritors. An example is a building license.

- b) if the public body considers that the party participation is necessary

Firstly, given the *intuitu rei* nature of the case, not only the death of the party that has submitted the request for the institution of the procedure is of relevance here, but instead that of every physical person that is a party to the procedure as regulated by art. 33. This includes any party that might be affected by the result of the procedure in accordance with para. 3 of art. 33.

Secondly, the wording “participation of the party is necessary” is a rather indefinite and vague term. In a systematic interpretation of the Code the participation of the party is a crucial part in the administrative procedure. Because the affected persons in the sense of art 33 para 3 need to participate in order to make their point in on factual or legal situation to satisfy or defend their subjective rights or legal interests, the public body should ensure the procedure actually creates the opportunity for the parties to exercise they procedural right. Therefore, the necessity to participate is to be read as referring to concrete actions of participation and not to the participation in general. An hypothetical case where such participation is not necessary any more may be one where the death intervenes at a very final stage of the procedure when any active behaviour from the party would not be required, because it already has exercised or have had the opportunity to exercise its procedural right, for example after the hearing but before the decision-making phase. This means that as a rule parties’ participation is necessary in the procedure, while the exceptions are very rare. In addition being an indefinite term, it denotes the need for careful assessment by the public body through objective criteria of whether the concrete actions of participation of the party are or are not necessary in the procedure. If after such assessment it clearly results that such actions are not necessary the legal consequence being the suspension shall not be produced. It should also be noted that if the assessment of the public body is wrong and leads to the continuation of the procedure without a party whose participation is actually needed, the entire administrative procedure is defective and per consequence might lead to the unlawfulness of the output of the administrative procedure.

- c) it shall temporarily suspend the procedure until the identification of the heirs

If concrete actions of participation by the party are necessary the public body is obliged to suspend the procedure until the identification of the heirs. Where the public body considers that the participation of a party is not necessary, the public body *a contrario* shall not suspend the procedure but rather continue normally and eventually conclude the procedure with a final decision.

In a systematic interpretation of the Code, the suspension of the procedure in a case where concrete actions of participation are needed is a special case of the application of art. 66 “preliminary issues”. Therefore the rules of art. 66 and their respective interpretation shall apply.

## II. Termination of the party that is a legal person (para. 2)

Para. 2 regulates the impact the termination of a party that is a legal entity has on the administrative procedure. In this case, unless a special law provides otherwise, the public body is obliged to declare the procedure as concluded.

### 1. Except when otherwise provided for by law

There might exist exceptions from the rule that the procedure is to be concluded if the party that is a legal entity is terminated during the course of the procedure. Such exception might provide for the continuation of the procedure or eventually its suspension. Three clarifications are required:

First, being an exception from the general rule established by para. 2, the reference to the “law” should be read in *stricto sensu* as referring to a primary law only. Second, there are two possible interpretation of the wording “provided by law”: a) a *stricto sensu* interpretation would require the special law to provide explicitly the continuation of the given type of administrative procedure despite the termination of the party legal person, whereas b) a *lato sensu* interpretation might read the exception as referring to cases in relation to which the law “implies” the continuation of the procedure despite the termination of one of the parties because of i) the nature of the procedure or ii) the character of “termination” which does not exclude the succession of the involved rights and interests. An example for the first type of cases might be a competitive administrative procedure like a concession procedure or a procurement); here the termination of one of the competitors could not lead to the conclusion of the procedure (as long as the minimal number of competitors required by the procedures is still met). An example for the second type of cases might be one where the rights and obligations of a terminated legal entity *ex lege* are transferred to another legal entity (for instance in case of merger by acquisition or the merger by formation of a new company regulated by art. 215 of the Law Nr.9901, date 14.04.2008 “on traders and companies”). If in such case the other legal entity acquires all the rights and obligations of the legal entity that ceases to exist, it acquires in the same time the procedural rights related to these rights and obligations, too. In order to uphold the procedural rights of legal persons,

a *lato sensu* interpretation is preferable, because a *stricto sensu* one might lead to the detriment of the rights or interest of the party without any apparent reasons related to the protection of a public or other parties interests. An example for this might be a company that has submitted an application for a bidding procedure but is subsequently merged by acquisition by another company, thereby losing its ability to continue in the procedure.

## 2. even in the case of

The phrase “even in the case of” forms a connection to para. 1, denoting the fact that the general preconditions explicitly mentioned under para. 1 applies accordingly in case of para. 2, namely i) an ongoing administrative procedure and ii) the termination of the party during the course of the procedure.

## 3. termination of the legal entity

The termination of a legal person is the main precondition for the application of para. 2. The question here is: when shall a legal person be deemed terminated? Literally, the term “termination” is used in the horizontal relevant legislation in a certain meaning, e. g. in art. 33 (termination) of the Civil Code, in art. 187 (“dissolution of the companies”) of the Law no. 9901, date 14.04.2008 “on traders and companies” as well as in art. 43 (self-dissolution) and 44 (dissolution by court decision) of the law no. 8788, date 07.05.2001 “On the non for profit organizations”. In all these cases the legal person is deemed as terminated with the publication of the termination decision in the respective public registry, i. e. the commercial registry for companies or the NFP registry at the court of law. Where the legal effects to third parties are not related to the publication in a public register, the legal person is deemed terminated with the decision of termination, be it a voluntary one or a court decision. However, it is important to note that the moment of “termination” is different from the moment of when the legal entity stops existing or disappears from the legal circuit. With the legal termination the entity enters in the process of liquidation and only at the end of this process is “cancelled” in the respective registry and stops existing. The legal termination still leaves a legal subject with rights and duties. It just terminates the legal subject's possibility to be on the market, to attract customers and creditors. It still may have many creditors to be paid, and even have some money or other assets that may be or need to be distributed. The procedural rights in an administrative procedure may well be one of the assets, as well as one of the assets could be the object of an administrative procedure. Thus the reference to the “termination” should be read in a broad sense as referring to the moment the legal entity ends and stops being part of the legal circuit with its “cancellation” from the respective registry.

## 4. when the latter is a party

The concept of party should be read in accordance with art. 33 of the Code and its different categories of parties, leading to different legal solutions:

- If the party that terminates is the one which has submitted the request for the institution of the procedure (para. 1 lit. a of art. 33) or the one against which the procedure was instituted ex officio (para. 1 lit. b of art. 33) or with whom an administrative contract has been concluded or it is intended to be concluded (para. 1 lit. c of art. 33), then the procedure should be declared as concluded.
- If the party that terminates is an eventual party meaning a party that might be affected by the results of the procedure (para. 2 and 3 of art. 33) then the administrative procedure shall not be declared as concluded. Otherwise the general principle of efficiency (art. 18) would be violated, as the public body would have to start a new procedure at the request of the primary party.

## 5. the public authority shall declare the conclusion of the administrative procedure without a final decision

The “public authority” is the public body competent for the administrative procedure. Within the public body, the decision shall be taken by the responsible official or shall be proposed by the latter and taken by another in charged official in accordance with art. 43.

The imperative wording “shall” of this part of declaration denotes the obligation of the public body to conclude the procedure in case the legal preconditions are met.

The wording “declare the procedure without a final decision” is an explicit reference to art. 90 para. 3. The conclusion without a final decision on the case is an administrative act, according to art. 90 para. 3.

Article 94 *Withdrawal or abandonment of the request*

1. As a rule, in an administrative procedure, which is initiated upon request, the public body shall declare the conclusion without a final decision on the case, if the party that has submitted the request withdraws it.
2. The public body may declare the conclusion of an administrative procedure, which is initiated upon request, also if the circumstances clearly indicate that the party, which has submitted the request, has no more interest in the continuation of the procedure and has abandoned it.
3. In any case, the withdrawal of the request or the abandonment of the procedure shall not affect its continuation, if the public body considers that the continuation of the procedure is in the public interest, except when that procedure is such that it can be initiated only upon the request of the party.
4. The procedure shall be declared abandoned if the interested party, due to its own fault, has been inactive during the timeline of the completion of the administrative procedure as per Article 91 of this Code.
5. The abandonment of the procedure shall not abolish the right, which the individual has requested to be recognized.

A. General introduction

I. Content and Purpose of art. 94

Art. 94 regulates the legal consequences of the withdrawal of the initial request (para. 1) and the abandonment of the procedure (para. 2) by the party upon whose request the administrative procedure has been initiated. As a rule, in presence of both grounds, the administrative procedure is concluded through the administrative act of declaration of conclusion, unless a public interest is at stake. In that case the procedure continues to a final decision on the merits of the request (para. 3).

The purpose of art. 94 is twofold: on one hand, art. 94 is a continuation of art. 90 and 91 which stipulate the obligation to conclude the procedure within a prescribed time-limit. More precisely it is directly related to art. 90 para. 3 which provides for the conclusion of the procedure through the declaration of conclusion. In this sense art. 94 regulates two grounds for such a conclusion and their respective applicability conditions. On the other hand, art. 94 is a continuation of art. 64 which grants the essential procedural right of the party to withdraw its request, thereby enshrining the disposition principle in case of an administrative procedures that is initiated upon request. While the withdrawal in that sense is explicit and presumes the declaration of the respective intention, the abandonment, which is also an expression of the disposition principle, is rather non-explicit and implied by inactivity. In both cases however the procedure cannot continue normally, in the first case because we have an explicit declaration of the will not to proceed further, which annuls one of the prerequisites for the administrative action, as established by art. 41, whereas in the second case because the continuation of the procedure implies a minimum level of cooperation of the party, be it a general duty of cooperation according to art. 78 para 1 sentence 1 of the Code or a special obligation of cooperation according to the second sentence of that provision. .

II. Constitution and EU Law

The normative substance of the article is implied by art. 48 of the Constitution: As anybody may address requests, complaints or comments to the public bodies, it also is entitled to withdraw or abandon such requests. Anyway the public bodies are obliged *“to answer within the time periods and under the conditions set by law”*.

III. Legal consequences of art. 94

In both these cases, for the sake of transparency and legal certainty, the administrative procedure should be concluded in one way or the other. Given the disposition principle, it is, as a rule, concluded in the sense of art. 90 by a declaration of conclusion according to art. 90 para 3 without a decision on the merits of the case. In the exceptional case that the public interest is at stake, the disposition principle is overridden by the principle of protection of the public interest and per consequence the public body continues and concludes the procedure with a final decision on the merits of the request according to art. 90 para. 2. The act of declaration of conclusion is an administrative act and could be challenged in accordance with this Code.

Hence, once a procedure is instituted, there are two options. The administration: i) could continue the proceeding by adoption a final decision or ii) declare the conclusion without such decision. In both case the party can protect its rights through different legal instruments. In the first case the party has to wait for a final decision that can be challenged by administrative appeal in accordance with art. 130. Whereas in the second case, the declaration of the

conclusion is an administrative act in accordance with para. 4 of art. 90 and as such can be challenged by the party. In addition the party may request the reinstatement of the deadline in accordance with art 54 when it has been impeded with no fault from taking certain procedural actions, leading to the abandonment of the procedure.

#### IV. Relation to previous CAP

Art. 94 covers the same normative content as art. 101 (Withdrawal of Petition or Waiver) and art. 102 (Abandonment) of the previous CAP, together. In short the substantial content is very similar with the exception of the fact that the old art. 100 links the abandonment of the request to the inactivity of the party during a period of more than 3 months, whereas the new provision links it with the inactivity during the prescribed time-limit for the conclusion of the procedure.

#### V. Scope of application of the norm

Art. 94 applies to the first phase of an administrative procedure that can be instituted upon request. It should, however, by analogy apply also to the legal remedies phase of the administrative procedure.

### B. The content of art. 94 in details

#### I. Conclusion of the procedure because of withdrawal of the request (para. 1)

Para. 1 regulates the legal consequences of the withdrawal of the initial request and part of the legal preconditions, while other preconditions are regulated by para. 2 of art. 64. The two provisions should be read systematically and together: whilst art. 64 para. 2 is meant to regulate the right of withdrawal and the legal preconditions for its exercise, para. 1 of art. 94 is meant to regulate the legal consequences of the exercise of such a right.

##### 1. As a rule, in an administrative procedure, which is initiated upon request

###### a) as a rule

As para. 1 stipulates the usual legal consequences of the withdrawal – the conclusion of the administrative procedure – this part of the provision is meant to clarify that there might be exceptions from that rule: i) the impediment to conclude the procedure because a public interest is at stake, stipulated by para. 3 of the same article, and ii) the impediment to conclude the procedure in a case of an explicit ban stipulated by special law, in accordance with art. 64 para. 2 second half of the first sentence. In relation to the latter provision, the term “law”, because being an exception from a general rule should be read in *stricto sensu* as referring to the primary law only.

###### b) in an administrative procedure, which is initiated upon request

As explained above, the scope of para. 1 is limited to administrative procedures of the kind that might be instituted upon request and that were actually instituted upon such request.

##### 2. the public body shall declare the conclusion without a final decision on the case

###### a) the public body

The public body is the public body competent for the administrative procedure. Within the public body, the decision shall be taken by the responsible official or shall be proposed by the latter and taken by another in charged official in accordance with art. 43.

###### b) shall declare the conclusion

The imperative wording denotes the obligation of the public body to conclude the procedure in case the legal preconditions as set out by art. 64 are met. The provision also stipulates the legal consequence of the withdrawal: the conclusion of the procedure.

###### c) the conclusion without a final decision on the case

The wording is an explicit reference to art. 90 para 3. The conclusion without a final decision on the case is an administrative act, according to art. 90 para. 3.

##### 3. if the party that has submitted the request withdraws it

The legal consequences depend on the withdrawal of the request that initiated the procedure in accordance with art. 41 para. 3 lit. b, so that incidental requests of other parties involved in the procedure do not suffice. “Initial request” is the request that initiated the procedure even when it has been amended and completed in accordance with art. 64

para. 1. The request may be deemed withdrawn only when the legal preconditions of art. 64 para. 2 are met; see the commentary on art. 64.

## II. Conclusion of the procedure because of abandonment (para. 2)

Para. 2 regulates another ground for the declaration of conclusion: the abandonment. It stipulates the legal consequence of the abandonment of the procedure by the party and the legal preconditions for such a legal consequence. The legal preconditions are: i) an administrative procedure that is initiated upon request; ii) the clear indication of abandonment of the procedure by the party; iii) no decision of the public body to continue the procedure because of a public interest at stake, regardless whether the public body fails to consider the continuation of the procedure to be in the public interest or whether the procedure is of the type that cannot be proceeded ex officio. The direct legal consequence is the declaration of the public body to conclude the administrative procedure.

1. The public body may declare the conclusion of an administrative procedure, which is initiated upon request, also

a) the public body

The public body is the public body competent for the administrative procedure. Within the public body, the decision shall be taken by the responsible official or shall be proposed by the latter and taken by another official in charged in accordance with art. 43.

b) may declare

The wording “may” usually denotes the discretion. In this very special case, however, the “may” is to be read in strict correlation with para. 3 of art. 90 which uses the imperative “declares/shall declare”. The discretion of the public body therefore is restricted: if the legal precondition for the conclusion of the procedure because of the abandonment are fulfilled, the public body shall conclude the procedure in accordance with art. 90 para. 3. The use of “may” in para. 2 is in fact far more related with the hypotheses of para. 3 as to when a public interest is at stake. The decision of the public body whether to continue or to conclude the procedure is at the lawful discretion of the public body, denoted by the wording “if the public body considers”. The discretion may be restricted or completely annulled in accordance with para. 2 of art. 41.

c) declare the conclusion without a final decision

The wording is an explicit reference to art. 90 para 3 and denotes that the legislator refers to the declaration of the conclusion as opposite to conclusion of the procedure with a final decision.

d) of an administrative procedure which is initiated upon request

As explained above, the scope of art 90 para. 2 is limited to administrative procedures than can be instituted upon request, and here to only such an administrative procedure that actually has been instituted upon request.

2. if the circumstances clearly indicate that the party, which has submitted the request, has no more interest in the continuation of the procedure and has abandoned it.

Another important precondition for the application of para. 2 is that the factual circumstances clearly indicate the abandonment of the procedure.

a) if the circumstances clearly indicate that

This part of the regulation almost calls for a special investigation by the public body in a case by case base in order to determine whether the factual circumstances clearly show sufficient lack of interest of the party in the continuation of the procedure. Such a lack of interest is indicated by the two preconditions regulated by para. 2. The declaration of conclusion is possible only when the lack of interest of the party is beyond any doubts. In the contrary case the public body should continue the procedure and conclude it with a final decision.

b) the party which has submitted the request

The legal consequences depend on the abandonment of the procedure from the party that submitted the request that actually initiated the procedure in accordance with art. 41 para. 3 lit. b), so that incidental requests of other parties involved in the procedure because they might be affected by it (in accordance with para. 2 and 3 of art. 33) do not suffice.

- c) has no more interest in the continuation of the procedure and has abandoned it

The lack of interest, although a non-determined legal term is at the core of the abandonment, which therefore can be understood as an implicit withdrawal. Its legal meaning is determined by para. 4.

### III. The legal meaning of abandonment (para. 4)

Para. 4 gives the legal meaning of the term “abandonment” by stipulating two conditions to be met cumulatively: i) the inaction of the party during the administrative procedure and ii) the fault of the party for the inaction.

#### 1. the interested party due to its own fault

The first condition has a subjective nature: The inaction of the party should be due to its own fault, for if the inaction is due to factors independent from the will of the party, there is no “lack of interest”. Although being of a subjective character, the assessment of the existence or the lack of fault is made by the public body based on objective criteria. The existence of certain factual situations or events that might have impeded the party to be active in the procedure indicates precisely the lack of its fault. Such cases concern unforeseen or unavoidable events like for example grave illness, hospitalization, forced isolation or accidents as well as any other situation that denotes the objective impossibility of the party to actively participate in the procedure and observe the procedural deadlines and therefore the lack of its fault. In addition the public body should establish a direct cause-effect-relation between the event and the failure. It should be noted that the presence of such circumstances also entitle the party to request the reinstatement of the time limit for performance of the lost procedural actions in accordance with art. 54.

#### 2. has been inactive during the timeline of the completion of the administrative procedure

The inactivity during the relevant time is the second condition, an objective one that should be assessed by the public body based on objective criteria. The assessment should be made on a case-by-case basis taking into account the importance of inactivity in the sense of the legal consequences the inaction has on the procedure, as well as its consistency or continuity. In order the inaction to be deemed as abandonment the inactivity should be such as to “clearly indicate” the lack of interest in the continuation of the procedure.

For instance the failure of the party to exercise the right of hearing after having been duly notified by the public body in accordance with para. 3 of art. 88 or its failure to exercise the right of inspecting the file in accordance with art. 45 should not be considered as abandonment. It should be understood that these are procedural rights and not obligations of the party that might choose to exercise them or not. This is not the case, for instance, with the failure of the party to complete a defective request within the deadline established by the public body and after having been duly notified several times in accordance with art. 62; or the inaction of the party to request the initiation of another administrative procedure related to an interim measure after it was duly warned by the public body in accordance with para. 2 of art. 66; or the failure of the party to submit the required evidence after a new notification in accordance with para. 85 of art. 86. As these are all obligations of the party, the failure to meet them might, because of their importance and the consistency of the party's failure, clearly indicate the party's lack of interest in the continuation of the procedure, as long as this due to failure of the party.

The lack of the interest might also be indicated even explicitly by the party, especially if the notice of the party does not fulfill the conditions for the withdrawal in accordance with art. 64. An example might be a simple note to the public body in which the party expresses the intention to not further proceed with the procedure.

### IV. Continuation of the procedure because of a public interest (para. 3)

Para. 3 regulates the situations in which the continuation of the procedure is in the public interest. In these cases the legal consequence is the continuation of the procedure and its conclusion with a final administrative act. Here the disposition principle cannot be absolute when there is a public interest at stake. It would violate the principle of efficiency and de-bureaucratization of art. 4 if the public body would have to first conclude the procedure and afterwards institute ex officio a new proceeding and start everything from the beginning in order to protect the public interest it is serving only because the party has withdrawn or abandoned the request.

Para. 3 establish three legal preconditions: i) the administrative procedure should not be such as to be instituted only with a party request; ii) a concrete public interest should be at stake, and iii) the public body should deem necessary to continue the procedure for the protection of such a public interest.

#### 1. the withdrawal of the request or the abandonment of the procedure shall not affect its continuation,

The legal consequence of the existence of a public interest in the continuation of the proceeding is that the abandonment or the withdrawal do not lead to the declaration of conclusion.

2. if the public body considers that the continuation of the procedure is in the public interest, except when that procedure is such that it can be initiated only upon the request of the party.

a) if the public body considers that

It is left up to the discretion of the public body to decide whether to continue the procedure for the protection of the public interest or let the legal consequences of the withdrawal and/or the abandonment be produced by declaring the conclusion of the procedure. The entire para. 3 should be seen and interpreted as a continuation of art. 41 para. 1 and 2. When it comes to an ex officio procedure the institution of such a procedure is at the discretion of the public body. The discretion is restricted in the presence of the grounds established by para. 2 of art. 41 and in any case should be exercised lawfully in accordance with art. 11. Precisely the same rules shall apply for the "ex officio" continuation of the administrative procedure in accordance with para. 3 of art. 94.

b) the continuation of the procedure is in the public interest

A necessary precondition for the application of para. 3 is the existence of a concrete legal interest within the remit of competence of the respective public body.

c) except when that procedure is such that it can be initiated only upon the request of the party.

The third precondition is a negative one for the application of para. 3: the administrative procedure in question should be one which in accordance with the law or its very nature could be instituted by upon request of the party as well as ex officio by the public body. In these specific cases the disposition principle and the public interest stand hand by hand on equal footing, which allows the procedure to be instituted by both. Otherwise if the procedure was such as to be established only upon request, the authorization for the activation of the public body would lack and consequently impede the public body from continuing the procedure. The practical examples should be rather rare. One example might be the request for the registration of a child in the elementary school. If the parents as the party that has initially submitted the registration request does not complete it with the necessary proofs for example on the residence or on the age of the child, even after a reminder by the school administration, the procedure might be deemed abandoned. However, here a public interest to continue the procedure and to register the child in the school could be considered because the elementary school is mandatory.

#### V. The legal effect of the abandonment on the material/substantial rights of the party (para. 5)

Para. 5 is the continuation of para. 3. It regulates the further legal consequences of the abandonment: it shall not extinguish the substantial right or interest which the party was aiming to satisfy through the procedure or otherwise through the submission of the request. In fact this rule is a special case of application of para. 3 of art. 90 and is intrinsically a consequence of the very nature of the administrative act of declaration of conclusion as opposed to the conclusion of the administrative procedure by final decision. As already explained, whilst the conclusion of the procedure with a final decision is a definitive solution on the substance of the request, the declaration of conclusion is not a definitive solution on the substance of the case, but rather a conclusion due to a lack of conditions or to the impossibility to normally continue such a procedure. Consequently, in the first case the final decision directly creates, modifies or extinguishes an administrative relationship of administrative law that has as its object the satisfaction of a right or of a legitimate interest. Therefore any repetition of the same request is to be declared as abusive, because it already has been decided upon. In the second case the declaration of conclusion does not affect the material rights of the party but only its procedural right in relation to the respective procedure. The party might, in case of a declaration of conclusion, may submit a new request which shall institute a new procedure with good chances to satisfy its substantial right or interest, if the other conditions of admissibility are fulfilled, and assuming the right and interests aiming to be satisfied have no time limitation in accordance with lit. a and c of art. 65.

##### 1. The abandonment of the procedure

The scope of para. 5 is limited to the cases where, following an abandonment, the procedure is declared as concluded. However, from a systematic interpretation, the substance of para. 5 applies in fact in any case of declaration of conclusion of an administrative procedure without a final decision.

##### 2. Shall not abolish the right, which the individual has requested to be recognized

a) shall not abolish

The imperative wording clarifies that the abandonment or better the declaration of conclusion of the procedure has no legal consequence on the rights involved.

- b) the right, which the individual has requested to be recognized

Two cases of clarification are needed: At first, the term “right” should be read as referring to the substantial rights and not to the procedural ones. And secondly, it should be interpreted in the *lato sensu* as referring to subjective rights and legitimate interests the party wanted to have recognized.

*Article 95 Impossibility of the object or purpose*

The public body shall declare the administrative procedure as concluded without a final decision on the case, when the object, for which the procedure was started or its intent has become impossible.

A. General introduction

I. Content and Purpose of art. 95

Art. 95 regulates the impact the impossibility in the object or in the intent of the procedure has on its course, by providing the obligation of the public body to declare the conclusion of the procedure in the presence of these grounds.

II. Legal consequences of art. 95

The public body in this case is obliged to declare the conclusion of the procedure without a final decision on the merits.

III. Relation to previous CAP

The normative content of art. 95 was similarly regulated by article 103 of the previous CAP, with the two exceptions: i) the former provision (para. 1 of art. 103) used to refer to the purpose of “the decision” whilst the new provision refers to the purpose “for which the procedure was instituted” and ii) the former provision (para. 2 of art. 103) used to provide a direct recourse to the court against the declaration of conclusion on ground of impossibility of object or intent, while art. 130 para 3 with art. 90 para 3 of the current Code allows for an administrative appeal against the respective decision.

IV. Scope of application of the norm

Art. 95 applies to the first instance of an administrative procedure notwithstanding whether it has been instituted ex officio by the public body or upon request of the party.

B. The content of art. 95 in details

1. The public body shall declare the administrative procedure as concluded without a final decision on the case

The first paragraph of art. 95 stimulates the obligation of the public body to declare the conclusion of the procedure in case of the intervention of the two grounds: i) impossibility in the object or ii) the impossibility in the intent.

3. the public body

The public body is the public body competent for the administrative procedure. Within the public body, the decision shall be taken by the responsible official or shall be proposed by the latter and taken by another official in charged in accordance with art. 43.

4. shall

The imperative wording of this part denotes the obligation of the public body to conclude the procedure in the presence of the two grounds.

5. administrative procedure

This part of the regulation clarifies the scope of art. 95 as applicable to any administrative procedure notwithstanding whether it has been instituted ex officio by the public body or upon request of the party. In addition the wording

implies the existence of an ongoing procedure and the intervention of the “impossibility” during such a procedure, that is after the institution of the procedure and before its conclusion).

6. concluded without a final decision on the case

The wording is an explicit reference to art. 90 para 3. and refers to the declaration of the conclusion as opposite to the conclusion of the procedure with a final decision.

7. when the object, for which the procedure was started or its intent has become impossible

The provision does not enumerate the grounds of the impossibility, but uses rather general indeterminate legal terms such as the “impossibility” in the “object” or “intent”.

a) the object, for which the procedure was started, or its intent

The “object” for which a procedure is started in case of an administrative procedure that is instituted upon request is the object or objective of the request or in simple words what is requested by a party. In this case the “intent” of the procedure – from the perspective of the public body – is the protection of the involved public interest, while from the perspective of the party the “intent” in this case is the cause of the request, meaning the subjective and solely internal factor that has triggered the submission of the request.

Therefore, the wording “intent” apparently relates to procedures that are instituted ex officio only, in which case the intent of the procedure is the exercise of the administrative power understood as to serve and protect a specific public interest at stake. The “object” of the procedure is here its concrete aim, as for example in case of an in site inspection of a food production establishment to see whether the establishment is in compliance with the prescribed production conditions.

b) has become impossible

The object or intent of the procedure has become impossible when the issuance of an administrative action has lost its actuality due to the changing of circumstances which might be of fact or of law. That is for example the case with a recruitment procedure for entering the civil service when the respective position has been abolished; when a building is destructed during an administrative procedure regarding a building permit for its renovation; with the procedure for the issuance of a building permit when a general ban for constructions is enacted in the meantime; with the procedure for issuance of a license, when changes in legislation allow the activity to be carried out without any prior state authorization, etc.

*Article 96 Failure to pay fees*

1. The procedure, initiated upon request, shall be declared as concluded as a result of the failure to pay within the set deadline the fees, the payment of which according to the law is a condition for making the final decision, except when otherwise provided for by this Code.

2. If the party pays the double amount within 10 days from the expiry of the original deadline for the payment of the fee, the public body shall conclude the administrative procedure through making a respective final decision.

A. General introduction

I. Content and Purpose of art. 96

Art. 96 regulates another ground to declare the conclusion of an administrative procedure without a final decision on the merits of the request. Such a ground is the non-payment of the respective fee that is a condition for the decision-making within the prescribed deadline. Para. 1 provides that the failure to pay the applicable fee within the prescribed limit shall lead to the conclusion of the procedure without a final decision. Para. 2 stipulates that it is possible for the party to avoid the production of such a legal consequence if the party pays the double of the fee amount within 10 days from the expiration of the original deadline.

The purpose of para. 1 is to clarify what happens with an administrative procedure in case the applicable fee is not paid. In this sense the provision is the concretization of the general provision on the abandonment of an administrative procedure in art. 94 para. 2 (a case of an obvious lack of interest by the party). The purpose of para. 2 on the other hand is to avoid the conclusion of an administrative proceeding without a final decision simply due to the

initial failure in the payment of the applicable fee, if the party is willing to pay the double of that fee within an additional deadline. In this sense the provision is a concrete implementation of the principle of de-bureaucratization and efficiency as set out by art. 18, and allows for a solution where the effort made by the administration and/or the party during the procedure was not made in vain.

## II. Legal consequences of art. 96

The public body is obliged to declare the conclusion of the procedure without a final decision on the merits if the party fails to pay the applicable fee that is prescribed by special law within the prescribed time limit. The latter legal consequence can be avoided if the party pays the double of the fee within an addition deadline. In the latter case the public body is obliged to continue and eventually conclude the procedure with a final decision.

The decision to declare the conclusion could be challenged by the party in accordance with the rules on the administrative appeal.

## III. Relation to previous CAP

The normative content of at. 96 was similarly regulated by article 104 of the previous CAP.

## IV. Scope of application of the norm

Art. 96 applies to the first instance of an administrative proceeding that is instituted upon request and only in cases where a special law provides for payment of a fee for that administrative procedure.

### B. The content of art. 96 in details

#### I. Conclusion of the procedure because of non-payment of the fee (para. 1)

Para. 1 regulates an additional ground to declare the conclusion without a final decision, being the failure of the party to pay off the owed fee. The legal consequence is the declaration to conclude the procedure, whereas the legal preconditions for the production of such legal consequence are: i) an administrative procedure that is instituted upon request, ii) in accordance with the special law a fee is to be paid within a prescribed deadline, iii) the payment of the fee is a condition for a positive decision-making, iv) the party fails to pay the fee within the given deadline, and finally v) a special provision of the Code does not exclude the conclusion under certain conditions and/or circumstances.

##### 1. A procedure, initiated upon request, shall be declared as concluded without a final decision

###### a) a procedure, initiated upon request

As explained, the scope of para. 1 is limited to administrative procedures that are instituted upon request.

###### b) shall be

The imperative wording denotes the obligation of the public body to conclude the procedure in case the legal preconditions are met.

###### c) declared as concluded without a final decision

The legal consequences in case the legal preconditions are met is the declaration to conclude the procedure. The wording is an explicit reference to art. 90 para. 3 and denotes that the legislator refers to the declaration of the conclusion without a final decision on the merits as opposed to the conclusion of the procedure with a final decision as provided or in para. 1 of art. 90.

##### 2. As a result of failure to pay within the set deadline the fees, the payment of which according to the law is a condition for making the final decision

###### a) as a result of failure to pay within the set deadline the fees

The main legal precondition for the application of para. 1 is the failure to pay the fee within a prescribed deadline.

###### b) the payment of which according to the law

Para. 1 applies only in the case where a special law provides for the payment of the fee. The clarification is necessary because based on the principle of non-payment of the procedure (art. 19), the rule in our administrative law is that an administrative procedure is free of charge, whilst the exception, that is the need to pay a fee for a given type of

administrative procedure, should be explicitly provided by law. As this is an exception from the rule of art. 19, “law” should be read as a reference to the primary law only.

c) is a condition for issuing the final decision

In the current legal and administrative practice, there is basically provided for two types of fees or tariffs:

- Case I: At first there are fees for the administrative procedure which are meant to cover the cost of the procedure or at least parts of it. An example might be an administrative procedure for issuing of a certain license that requires among other an in site inspection, where special law provides for a certain fee to cover the cost of such an inspection. In this case the fee should be payed upfront and submitted with the initial request for the institution of the respective procedure.
- Case II: Secondly, there are fees for the authorised activity, which are linked with a positive decision only. This kind of fees generally take the form of a unique lump sum and only in very few cases an annuity. They are to be paid only in case of a positive result of the procedure. The collection of this fees is made basically in two different ways: before or after the conclusion of the procedure. II/i) If the fee is collected before the conclusion of the procedure, basically at the end of the investigation procedure if the result is positive, then the party is required to pay the fee within a certain deadline as a condition for the positive decision. II/ii) If the fee is collected after the conclusion of the procedure, then the positive act as for example the required licence authorisation is issued and notified, but it either II/ii/a) enters into force only at the moment the fee is paid within the prescribed time or otherwise stops to exist *ex lege* as soon as the deadline expires, or II/ii/b) it enters into force upon notification but its legal effect is limited to the said deadline if the party fails to pay the fee in time, entitling the public body to annul the administrative act in case of a failure to pay the fee in time.

In the case “I”, the fee should be paid upfront and submitted with the initial request for the institution of the respective procedure. The failure to pay such a fee would be considered as a defect of the initial request in accordance with the general rules which would trigger the application of art. 44 and/ or art. 62 and would impede the public body to proceed to the next step of the procedure before the fee is payed. In these cases in accordance with the above-mentioned articles the public body should notify the party and request the payment of the fee within a reasonable dead-line (see the commentary on art. 62). If the party would fail to pay the procedural fee within that prescribed deadline the public body would eventually declare the procedure concluded on the ground of lack of interest or abandonment (see the commentary on art. 94). Given this explanation para. 1 of art. 97 cannot be interpreted as applicable to these cases, because the explicit wording “which payment is a condition for the issuance of the final decision” does not allow and a *lato sensu* interpretation would be useless because both the party’s and the public interests are protected by a different set of the provisions of the Code, which would contravene para. 1 of this article.

In the case II/ii/a, Para. 1 of art. 97 cannot be interpreted as applicable either, because, firstly, the explicit wording (“condition for making the final decision”) does not allow this, because in these cases the administrative procedure is already concluded with the notification of the final administrative act. Secondly, in these cases the public interest of receiving the payment is ensured already by the application of para. 3 of art. 104 which foresees that the administrative act enters into force at the date explicitly provided by it, which in this case is the date of the payment, assuming the payment is effectuated. In the contrary case the administrative act is *ex lege* revoked according to art. 102/1/c and ç). A special case of application in our legislation in this sense is foreseen by art. 24 of the law no. 10081 “On Licences, Authorisations and Permits in the RA” which under para. 3 of art. 25 explicitly provides that if the payment of the fee is not made within “*within a deadline of 30 calendric days from the publication of the approval decision, the title shall be deemed automatically revoked.*”

In the case II/ii/b. Para. 1 of art. 97 cannot be interpreted as applicable to these cases either, because again the explicit wording does not allow this in cases where the administrative procedure is already concluded with the notification of the final administrative act, which already started to produce the legal effects. Here the public interest of receiving the payment is protected by the application of art. 115, which foresees the annulment of the administrative act with retroactive effect in case a condition foreseen by the act as for example the payment of the fee is not fulfilled.

Per consequence this precondition of para. 1 should be read as referring only to cases II/i), in which at the end of the investigation procedure, if the result is positive, the public body requires the party to pay the fee within a certain deadline. The applicable fee or tariff should be paid for the activity that is authorised by the requested administrative act and would be a preliminary condition for the issuance of a positive administrative act only. That implies that before the conclusion of the administrative act, if it results in that the final decision would be beneficial to the party,

the public body requires the payment of the fee. This is a moment in which the procedure is not yet concluded with a final decision and the non-payment of the fee would logically led to the declaration of conclusion of the procedure. The cases should be explicitly provided for by law. The deadline for the payment might be explicitly foreseen by law or, in case of silence of the latter, is to be set by the public body in accordance with art. 53. The rules on the extension of the deadline provided by para. 3 of art. 53 shall apply as well as the rules on the reinstatement in the deadline in accordance with art. 54 para. 2 lit b).

d) except when otherwise provided for by this Code

Exceptions from the rule may be stipulated by another provision of the Code or may be based on such a provision only. One of this exception is stipulated by para. 2 of the same article. Another exception is stipulated by para. 3 of art. 19, which regulates the possibility of the public body to decide by a special procedural decision the waiver of the party from the obligation to pay the fee in case of the party's impossibility of payment.

II. The avoidance of the legal consequences of para. 1 (para. 2)

Para. 2 provides for an opportunity for the party to avoid the production of the legal consequences as stipulated by para. 1, under the following legal preconditions: 1) the party pays the double of the owed fee and ii) the payment is effectuated within 10 days from the expiration of the original deadline for the payment. If both preconditions are met the public body is obliged to continue the procedure and finalise it with a final decision, this time, on the merit of the case.

The wording "shall" denotes the imperative character of the provision, if the legal preconditions are met. If *per a contrario* one of the legal preconditions are not met, the legal consequence of para. 1 is not avoided and instead the procedure shall be declared as concluded.

#### Article 97 *Silent consent*

1. If in an administrative procedure the party has requested the issuance of a written administrative act, and the public body fails to notify its decision within the initial deadline and does not notify the extension of the deadline or fails to notify the decision within the extended deadline, the request shall be deemed approved, and the requested written administrative act shall be deemed as issued in silence (the tacit act), in the cases this has been provided for by special laws.

2. The party shall have the right to ask the public body, which has not issued the requested administrative act, for a written confirmation that its request is deemed to have been approved under Paragraph 1 of this Article. The confirmation shall consist in the text of the request, the date of submission and the fact that the public body has not notified its decision within the deadline prescribed in accordance with para. 1 of this article.

3. If the authority fails to issue a confirmation under Paragraph 2 of this Article within seven days, or, at the same time, it fails to issue the requested administrative act, the party may file a lawsuit with the competent court to clarify the rights and obligations between the plaintiff and the public body.

A. General introduction

I. Content and Purpose of art. 97

Art. 97 stipulates the rule of silent consent ("silence is consent") and related conditions for its application. Para. 1, enshrines the rule, defines the legal preconditions for it applications and, as its legal consequence, the fictitious administrative act. Para. 2 regulates another legal consequence of the application of the silent consent rule, consisting in the right of the party to ask for a confirmation of the fact of the fictitious administrative act, whereas para. 3 regulates the right of the party to submit a lawsuit in order to gain the confirmation of the fact of the fictitious act and its legal consequences directly by the court of law.

The purpose of this article is to complement art. 90 and 91 in that it is an instrument to achieve that the public body observes the obligations enshrined in those articles. Whenever the administration does not act in response to a private citizens request or fails to give a timely decision, this behaviour can generate a great discomfort in the applicant, with reference to the legal certainty, especially when the economic resources are involved. The aim of the silent consent rule is to avoid suffering the results from the inefficiency of administration; it should be seen as an

eventual “sanction” aimed at fostering the performance of the administration through the deterrence factor over the inaction, and at the same time ensuring the satisfaction of the rights of the party as a last resort.

## II. Constitution and EU Law

Although not explicitly implied by art. 48 of the Constitution, the silent consent rule contributes to its implementation. It also contributes to the implementation of para. 1 and 2 of art. 41 of the EUCHFR granting the right to good administration, and to the implementation of art. 17, para. 1 of the ECGAB.

In the EU law the principle of silent consent is explicitly enshrined in art. 13 para. 4 of the EU Directive 2006/123/EC on services in the internal market, which reads as follows: *“4. Failing a response within the time period set or extended in accordance with paragraph 3, authorisation shall be deemed to have been granted.”*

## III. Legal consequences of art. 97

Upon fulfilment of the preconditions for application of the silent consent rule, the requested administrative act shall be deemed as issued and shall produce all the respective legal effects. In other words, by the virtue of the 97 the administrative inactivity or silence becomes equivalent to an explicit affirmative beneficial decision for the requesting party, which can commence the activity for which the authorisation was asked. In addition the party might require the confirmation of the fact of the fictitious administrative act by respective public body. In case the latter does not issue the confirmation the party may present a lawsuit directly to the court to precise its rights in accordance with the fictitious administrative act. It should also be noted that these are not the only consequences of silent consent, the instruments to protect the public interests and third parties interests enshrined in the Code are also applicable to the fictitious administrative act: By the virtue of equation of the silence with the affirmative administrative act, the administration retains the power to ex officio annul or revoke the fictitious administrative act in accordance to art. 113 et sequ. In addition it may be challenged by administrative appeal by any party affected by it in accordance with Art. 130.

## IV. Relation to previous CAP

The normative content of at. 97 was similarly regulated by article 76 of the previous CAP. The latter similarly enshrined the silent consent rule under para. 1. By way of difference the new art. 97 provides for the application of the silent consent rule in the cases explicitly determined by a special law, whilst the previous CAP used to provide its application to an exhaustive list of cases numerated under para. 3. In addition the previous CAP under its art. 77 used to explicitly regulate the rule “silence is refusal” in all other cases not explicitly covered by art. 97, whereas the new provision does not explicitly regulate the latter rule. In addition, the para. 1 of art. 130 regulates the administrative appeal against the administrative silence in accordance with art. 130 para. 1.

## V. Scope of application of the norm

Art. 97 applies to the first instance of an administrative proceeding that is initiated upon request and aims at the issuing of a written administrative act only. The application of the silent consent rule in the case of an administrative legal remedies procedure is explicitly excluded by para. 3 of art. 140.

## B. The content of art. 97 in details

### I. The silent consent rule or the fictitious administrative act (para. 1)

Para. 1 regulates the silent consent rule by stipulating the legal preconditions for its application and the legal consequences. The legal preconditions are: i) an administrative procedure instituted upon request and aiming at the issuing of a written administrative act; ii) the public body fails to notify its decision within the applicable time limit; iii) the application of the silent consent rule to the respective type of administrative procedure is provided for by primary law.

#### 1. If in an administrative procedure the party has requested the issuance of a written administrative act

As already explained, the silent consent rule applies only in case of an administrative procedure that is initiated upon request and aims at the issuing of a written administrative act beneficial to the party, thereby excluding its application to administrative procedures aiming at the issuance of another administrative action or conclusion of an administrative contract. In addition the requested act, by its nature and in accordance with the law, must be a written administrative act such as for example a license, an authorisation, a permit, etc.

## 2. The public body fails to notify its decision

The other precondition for the application of the silent consent rule is the failure of the public body to conclude the administrative procedure within the time limit. As explained above, the administrative procedure is to be deemed concluded neither when the decision is made or the administrative act is issued, but rather the time of its notification or the time of presumed notification in accordance with art. 155 to 163. Per consequence if the public body fails to notify the decision within the applicable time limit for the conclusion of the procedure then the consequences of the silent consent rule apply.

In relation to the applicable time limit the regulation provides two possible alternatives:

- a) the public body fails to notify the decision within the initial deadline set forth in the law or bylaw for the conclusion of the procedure and fails to notify the extension for the decision

As already explained the public body under justified conditions and procedure might extend the time-limit for the conclusion of the procedure in accordance with art. 92. The legal consequence of the silent consent rule require that the public body has failed to notify the decision and has failed to notify the extension within the initial deadline as well; the two conditions have to be fulfilled cumulatively. The wording “set forth by law or by secondary legislation”, clarifies that the initial deadline could be prescribed by primary law, including a special sectorial law as well as the Code itself, as for example the general deadline provided by art. 92 para. 2. Additionally, a special sectorial deadline could also be established by secondary legislation.

- b) or fails to notify the decision within the extended deadline,

This precondition is alternative to precondition under lit. a, and applies in cases where an extension was decided upon and notified by the public body in accordance with art. 92 but it again fails to notify the decision within the new extended deadline.

## 3. In the cases this has been provided for by special laws

This crucial precondition establishes that in our administrative law the application of the silent consent rule is not the general rule which would be applicable across the board, but it has to be explicitly provided by law, meaning a sectorial law that applies to a given type of administrative procedure. The reference to the “special law”, envisaging an exception from the general rule, should be interpreted in the *stricto sensu* as referring to a primary law only excluding the possibility to provide its application by secondary law. Examples are the law on urban planning; the law on licenses, permits and authorization and the law on business registration.

## 4. Two other preconditions

There are authors in similar jurisdiction that add two other implicit legal precondition for the application of the silent consent rule: i) the request should be directed to the competent public body and ii) the request should be complete. Indeed the regulation refers to the “public body”, which should be read as the competent public body to conduct the procedure and decide upon the request. A request addressed to a visibly non-competent body would not produce the legal effects of the silent consent rule. In addition in order to produce the legal effect of the silent consent rule the request should be complete. Otherwise the calculation of the time-limit for the conclusion of the administrative procedure is not even triggered in accordance with para. 3 of art. 92. However, both of the two above-mentioned cases are purely theoretical: In accordance with art. 44 and art. 62, if the request is directed to the wrong public body or if the request is not complete, then the public body has the obligation to communicate in writing to the party and require it to correct the defects. If the latter obligation is not met by the public body, then the administrative procedure shall be deemed to have continued normally and it could be concluded by the virtue of art. 97 by a fictitious administrative act. Any other interpretation would be detrimental to the interests of the party.

5. the request shall be deemed approved and the requested written administrative act shall be deemed as issued in silence (the silent act)

- a) the request shall be deemed as approved

In the legal consequence of the application of the silent consent rule the request is legally deemed as approved as per its object.

Three clarifications are needed: Firstly, it should be noted that the regulation refers to the “request” of the party which instituted the proceeding by requesting a beneficial administrative act. Secondly, as already explained, the object of the request might be changed by the requesting party or completed during the course of the procedure in accordance with art. 64. In this case the approval should be deemed to have been given to the object of the request as

resulting from the procedure and not necessarily to the object of the initial request. And thirdly the request should be deemed as approved in its entirety, including everything that was requested by the party. If for example the request was aimed at the issuance of a building permit for a certain number of floors and with a given layout, then the law provides for the fictitious approval of a building permit within the proposed conditions regarding the number of floors, layout etc....

b) and the requested written administrative act shall be deemed as issued in silence (the silent act)

The other legal consequence (part of the legal consequence) is the *ex lege* production of an administrative act in the form of the “fictitious administrative act” that fully satisfies the request of the party. It should be noted that the fictitious administrative act produces the same legal consequences as a full fashioned administrative act: it entitles the requesting party to carry on the activity or to perform the action the authorization of which was required through the submission of the request. In our example it would be to proceed with the construction of the building. The fictitious act establishes a new legal reality to other concerned parties with opposing interests like for example the owners of the neighbouring properties. They could challenge the fictitious administrative act by an administrative appeal the same way as any other administrative act according to art. 130. Also, the provision of the Code on the lawfulness and validity shall apply: the fictitious administrative act might, as well as any other beneficial administrative act be annulled or revoked under the conditions and procedures set forth by the Code. In other words by virtue of this very provision the silence of the administration at the expiration of the time-limit becomes equivalent to an explicit affirmative and beneficial administrative act.

If, on the contrary, the legal preconditions for the silent consent are not met and its legal consequences are not produced, then the silence of the administration becomes not equivalent to an explicit administrative act that denies or refuses the request. In these cases (unless a fictitious negative act is explicitly provided by law) we have a mere “fact” of administrative silence which could be challenged through an administrative appeal against such a silence in accordance with art. 138 of the Code.

## II. Confirmation of “fictitious” administrative act (para. 2)

Para. 2, stipulates another legal consequence of the fictitious administrative act, consisting in the right of the party to request a confirmation of the fact that the legal effects of the silent consent were produced and that there is a fictitious administrative act. One of the main theoretical problems of the legal construction of the fictitious administrative act is the difficulty to prove its existence to third parties, meaning anyone but the public body itself. Para. 2 precisely aims to mitigate this difficulty. It also establishes the form and the content of the confirmation.

### 1. The party shall have the right to ask the public body for a written confirmation

The right of the party to request a confirmation of the fact that the legal consequences of the silent consent are approved corresponds with the obligation of the public body to issue such confirmation. Regardless of the restrictive wording “its request” “the party” is not limited to the party that has initiated the procedure, but refers to any party of the administrative procedure. The confirmation has to be “a written confirmation” that confirms the fact that the “request is deemed to have been approved”.

### 2. The content of the confirmation

Additionally, the confirmation should also contain all the necessary data for the fictitious administrative act. The three other elements of the content are:

#### a) the text of the request

The confirmation has to include the text of the request, and is meant to identify the elements of the fictitious administrative act including its object.

#### b) the date of submission and the fact that the public body has not notified its decision text of the request

The date of the submission and thereby the moment which triggers the running of the time limit for the conclusion of the procedure is also requested as part of the content of the confirmation as the confirmation of the fact of silence. Both these elements are meant to serve the identification of the date when the fictitious administrative enters into force and starts producing its legal effects. This is the day of the expiration of time-limit for the conclusion of the procedure in accordance with para. 2 of art. 104. The date is relevant for the beneficiary party, because from that time it might start exercising the activity. The date is relevant, however, also for other affected parties that need to calculate the deadline for the administrative remedies, as well as for the public body for the calculation of the eventual time-limits for the annulment or revocation.

However, confirmation is not an administrative act itself. It is just to certify the “fact” that the legal consequence is produced *ex lege*. The silence of the public body or its refusal to issue such a confirmation should be read as the non-performance of another administrative action provided by law in accordance with art. 126.

### III. The right to claim the confirmation to the court of law (part. 3)

Para. 3, stipulates the right of the party to present a lawsuit in the competent court, the precondition for the exercise of such a right and the type of the lawsuit.

#### 1. The authority fails to issue a confirmation

The party may introduce a lawsuit if these preconditions have been fulfilled cumulatively: i) the silent consent rule applies in accordance with para 1; ii) the party has requested the confirmation of the competent public body, being the one competent for the original act, in accordance with para. 2, and iii) the request has neither been satisfied within 7 days from the submission nor has the public body issued the initially requested administrative act in the meantime.

It should also be noted that by way of exception the necessity to exhaust the administrative legal remedies, which the rule in our administrative law as is provided by art. 120 of the Code, is not applicable in this case; instead the wording denotes a direct action to the court.

#### 2. Competent court for administrative issues

The competent court to deal with this lawsuit, in accordance with the law no. 49/2012 “On the organization and functioning of the administrative courts and the adjudication of administrative disputes”, is the Administrative Court of First Instance. The territorial competence of the court shall be determined in accordance with the rules on territorial competence provided for by art. 11 of the said law.

#### 3. To clarify the rights and obligations between the plaintiff and the public body

The wording “to clarify the rights and obligations between the plaintiff and the public body” refers to the special type of lawsuit regulated by art. 17 para. 1 lit. dh) of the said law. This type of lawsuit is brought neither to oblige the silent public body to issue the originally requested act nor to oblige it to issue the confirmation of the fictitious administrative act as requested in accordance with para. 2. Instead the court is asked to “make precise the rights and obligations” of this party, which in this very case would mean to establish the legal consequence of art. 97 para 1 in the sense that the fictitious administrative act is produced and *ex lege* has the legal effects of a full fashioned administrative act so that consequently the party has for instance the right to exercise the activity for which it has requested the issuance of the respective license.

## **PART FIVE**

# **ADMINISTRATIVE ACTIVITY**

## PART FIVE ADMINISTRATIVE ACTIVITY

### CHAPTER I ADMINISTRATIVE ACT

#### Section 1 Formal requirements of the administrative act

##### Article 98 Form of administrative act

1. Unless otherwise provided for by law, the administrative act shall have a written form in paper, electronic form, verbal form or any other suitable form.
2. A verbal administrative act shall be confirmed in writing in paper or in an electronic form when the party requests this immediately.
3. The public body shall be obliged to confirm, without delay, the content of the verbal act in written form in paper or in an electronic form.
4. The confirmation as per Paragraphs 2 and 3 of this Article, even though it is not an administrative act, shall be in line with the requirements specified in Article 116 of this Code.
5. Acts of collegial bodies shall be made in writing. These acts shall be registered in a record, without which they bring no legal effects.

#### A. General Introduction

##### I. Content and purpose of Art. 98

Art. 98 establishes the principle of freedom of form for the issuance of an administrative act and provides some procedural rules in case the public body uses the verbal form.

Para. 1 stipulates that an administrative act may be expressed in any form, be it in written including electronic, verbal, or any other suitable form, subject to the requirement of any specific form laid down in any law. According to this, the principle of freedom of form leaves the choice of the form of an administrative act at the discretion of the public body, unless the law (primary legislation) explicitly prescribes a specific form for the respective act or the very nature of the administrative measure undertaken (*e.g. traffic-controlling hand signals of the police*) determines the form by itself.

If the public body has opted for the verbal form, acc. to para. 2 and 3 it must without delay confirm the verbal act in writing (i.e.. either by paper or electronic document) if the addressed person makes a request for this immediately.

General guidelines for the use of this discretionary power to choose between one of the possible forms of an administrative act are provided – among others - by art. 4 “Legality principle”, art. 18 “De-bureaucratization and efficiency principle”, para 1 of art. 10 obliging the public body to “ensure that all parties and other persons involved in the procedure shall be able to follow and protect their rights and legal interests as effectively and easily as possible”, and, last but not least, by para. 2 of art. 10 emphasising the public administration’s openness for the use of modern communication means.

The latter principle laid down in para. 2 of art. 10 finds its particular expression in the reference of art. 98, para. 1 to electronic or any other suitable form. In this way, the legislator opens the space for the public administration to respond to an unprecedented speed of technological development of information and communication technologies and their wide-ranging utilisation possibilities we have been witnessing over the last few years. This development has been causing a dramatic upheaval of communication behaviour within the society, in particular among the younger people. With art. 98 the legislator provides not only the legal opportunity for but also imposes a mandate on the administrative practice to keep pace with technological and societal developments for its communicating with the citizen.

Even though the legislative doors are opened for using all contemporary communication means, in the vast majority of administrative cases of today, however, the public body when issuing an administrative act will have to choose between the two traditional ways of communication, namely either using the verbal form of the act or putting the act down on paper. For this discretionary decision the advantages and disadvantages and the different functions of the two possible forms are to be taken into consideration.

The functions of the written/electronic form are first of all the legal clarity of the act, which is all the more relevant the more complex the case is, and secondly the suitability of a written document for securing evidence about both the content of the act and its procedural circumstances. Either function serves the interest of the addressee as well as the public body. Furthermore, a paper-based form of communication facilitates the public body's record keeping as long as a completely IT-based and paperless public administration is still a way off. It may also be argued that the written form protects the public body against hasty decisions and thus contributes to good quality administrative measures, because preparing written documents decelerates the decision-making process and leaves time to more intense dealings with the matter to be decided upon. Last but not least the written form protects the interest of the addressee also in the way that it provides more information (reasoning and explanation of rights of appeal) and ensures a better comprehension of the act by allowing sufficient time to the addressee to thoroughly study its content and evaluate its legal, economic or other relevant consequences. For these five reasons the written form is still and for a while will remain the "classical" form of administrative behaviour.

On the other hand, in comparison to the written form the verbal act is the much quicker and clearly more cost-efficient form. It is therefore recommended as the adequate and preferable measure in all not too complex and clear cases. Moreover, in many cases a verbal act might be not only recommendable but even legally required, if the circumstances demand a very quick settlement of the matter, e.g. in emergency cases.

As it will be explained in the following paragraphs the legal character of the public body's response to the request for a written confirmation of a verbal act and the appropriateness of the administrative remedy against this response depend on the content of how the body has responded to the request.

Firstly, para. 4 clarifies that the written confirmation of a verbal administrative act "is not an administrative act", with the consequence that it has the legal character of "other administrative action" in the meaning of para. 10 of art. 3 respectively art. 126. But for the formal requirements of the written confirmation para. 4 refers to the elements stipulated under art. 99 for the issuance of a written administrative act. But nevertheless, the written confirmation is merely a real act that repeats the verbal administrative act as it was issued in the moment of its notification (art. 147, 148).

Secondly, if the content of the written text is not congruent with the verbal act but the addressee can recognize that the public body had the intention to issue a congruent confirmation, the incorrect confirmation falls also under "other administrative action". Thirdly, the public body's rejection of the addressee's request to confirm the verbal administrative act in writing is also to be seen as "other administrative action". So, each of these three possible reactions of the public body can be challenged by administrative objection acc. to art. 128, para. 1 and art 141, para. 1 lit. b. Finally, the same consequence in terms of administrative remedies takes effect in the case of the public body's non-action (silence) on the addressee's request to confirm the verbal act. It can also be challenged by administrative objection.

In contrast to these four aforementioned cases, however, if the public body's written response is not congruent with the verbal act and its content is, however, to be understood as replacement of the verbal act (which is usually to be understood also as annulment resp. repeal of the previous act acc. to art. 113), the notification of the written document constitutes a new administrative act, which acc. to art. 130 can be challenged by appeal.

## II. Constitution and EU-Law

The principle of freedom of form of administrative acts does not unconditionally apply in the context of EU-Law. For the indirect application of EU Law through national Albanian law art. 98 of this Code is applicable, unless special EU norms stipulate stricter requirements such as art. 6, para2 of the EU Customs Code or art. 8, para. 1 of the European Services Directive.

The direct application of EU Law, however, requires for administrative decisions the written form, which already follows from the duty to state the grounds of decisions (c.f. art. 18 of ECGAB).

### III. Relation to previous CAP

Art. 106 of the previous CAP stipulates the written form of an administrative act as the rule but allows exceptions, which includes also the verbal communication of administrative acts in art. 57. A reference to electronic or any other suitable forms of communication cannot be found in the previous Code.

### IV. Scope of application

Art. 98 applies to the procedure aimed at the issuance of administrative acts only. Special material laws might regulate the subject matter differently.

## B. Form of administrative act in details

### I. The principle of freedom of form (para. 1)

#### 1. Three possible categories of forms of administrative acts

Para. 1 lists three alternative categories of forms for the issuance of an administrative act, whereby the category “written form” includes also the electronic form. The equal status of “written on paper document” and “electronic document” is doubtlessly given through provisions such as art. 98 para. 2, art. 99 para. 2, art. 100 para. 1, 101, art. 119 para 2 and 3, art. 156 and especially art. 58 para. 3 which explicitly equates electronic documents with ones that are written on paper (see for the latter also the detailed explanation of under B. III.), even if the wording of para. 1 itself could be considered as being not completely clear in this respect.

##### a) Written form

As already mentioned above (under A. I.), the written document is the most frequently used form of communicating an administrative act, mainly due to its high level of clarity and evidential value in comparison to the other possible forms.

The electronic document differs from the paper document only in the material of the data media and therefore fulfils the same function as the traditional paper document does. The reason of the nowadays much more frequent use of paper documents is merely the “digital divide” that still exists in both public administration and civil society. But it is not difficult to predict that the group of “non-digitalized” administrative bodies resp. citizens will constantly shrink and the paper will sooner or later become the exceptional material for carrying the data of an administrative act.

Electronic documents in the meaning of this Code are all documents that are saved and/or transmitted in electronic form. This includes computer files that are stored electronically and transmitted online by upload, download or electronic mail as well as computer files that are transmitted in electronic form but together with a data storage medium like a DVD or a USB stick. It does, however, also include a document that at first sight is a paper document but actually has been transmitted electronically, like a fax message. Electronically stored documents fall under the scope of the Law No. 10 273 of 29 April 2010 on the Electronic Document. An electronic document in the meaning of this law must, in order to be legally valid, contain an electronic signature according to the legislation on digital signature. This refers to the Law No 9880 of 25.2.2008 on Electronic Signatures which defines several quality levels of electronic signatures, from the simplest name mentioned in the electronic message up to qualified electronic signatures based on qualified certificates. Without a law requiring a special quality of the electronic signature, the simplest form is sufficient to make the document legally valid, that is the name of the author stated. This is taken up by art. 58 para. 3 sentence 1, which only requires the written request to clearly indicate its author. In order to fulfil the necessary written form. This general rule applies to all instances of “electronic documents” in this code, save for an explicit request of a more qualified electronic signature by special law.

The requirements of a written administrative act regarding both material and formal elements are listed in detail in art. 99 (see explanation on art. 99 below).

##### b) Verbal form

An administrative act is issued verbally, if it is spoken through a natural person in the presence of the addressee, i.e. speaking and receiving happens in the same moment (see also below explanation of art. 148 under B.I.). In larger halls or outdoors the voice of the speaker may be amplified through loudspeaker or megaphone, a direct line-of-sight between speaker and addressee is not required. It is required that

The message spoken through telephone is equal to the verbal statement made in the face-to-face situation, if the addressee can recognize the identity of the speaking person as the responsible official through which the public body

acts (art. 43). The same applies to a statement made through other forms of digital telecommunication using web-based software such as Voice over Internet Protocol (VoIP), which allows individuals and groups from around the globe to facilitate audio and video conferences without physically travelling to an agreed upon location, provided there are no doubts that the speaker is the responsible official.

In contrast to telephone or digital telecommunication, the audio (sometimes plus video) message left on an answering machine or on voicemail systems using digital data storage on computer or smart phone does not fall under verbal act for lack of simultaneity of speaking and receiving. But sending such message could meet the requirements of “other suitable form” (see explanation below).

c) Any other suitable form

With the legal concept any other suitable form para. 1 contains a “catchall” clause for all forms of communication that are neither covered by the written/electronic nor by the verbal form. The only legal requirement for the use of any other form is its suitability. The concept suitability is determined by the effect the chosen form can obtain, i.e. any means of communication is suitable, if the addressee can clearly understand the communicated information as the expression of a public body’s will to issue an administrative act.

According to this, the concept any other suitable form includes actions of a person such as the traffic-controlling hand signal of the police or the optical “STOP POLICE” or “PLEASE FOLLOW” signal shown from a police vehicle but also the non-personal traffic lights and signs.

As the purpose of this catchall clause is to allow sufficient space for using upcoming communication technologies (see detailed explanation above und A. I.), there is no reason to exclude the use of answering machine or computer/smart phone data storage as medium for conveying an audio or audio-video message, provided the information communicated is clear and understandable, meets the substantive requirements of an administrative act, reaches the right addressee, and the circumstance of the case clearly allow the identification of the public body resp. its responsible official. This way of communicating an administrative act is particularly suitable if the addressee has specifically requested this in advance, because this would be the most appropriate and easiest form the public body could reach him or if for other reasons the public body can be sure that the addressee will receive the message left on the data carrier.

d) Minimum requirements regarding the content of an administrative act communicated verbally or in any other form

An express provision does not exist that - similarly to art. 99 for the written administrative act – would stipulate the minimum requirements of an administrative act communicated verbally or in any other form. However, such legal requirements can be derived from the definition of an administrative act in para. 1 of art. 3 (see explanation above on art. 3 para. 1, particularly the sections under B.I.), the rule-of-law principle “legal certainty and clarity”, and a systematic interpretation of this legal question in light of para. 4 of art. 98 and art. 99, the latter two provisions clarifying that not all of the requirements of a written act shall also apply to acts issued in a different than written form.

Accordingly, the minimum requirements for the validity of an administrative act that is communicated either verbally or in any other suitable form should be as follows:

i) Clarity about the public body that issues the act

There must not be any doubt that the person communicating the act is acting on behalf of a public body, which has the power (art. 108, para. 1 lit. a. sub-para. i.) to issue such act, and that the acting person is the responsible official (art. 43). This fact may either explicitly or conclusively indicated by her/him; it may also be proven if readily recognizable either through uniform (e.g. the acting person is police officer) or other circumstances of the respective case.

ii) Clarity about the addressee of the act

The act must clearly determine its addressee or group of addressees. This can happen either expressly by the spoken text or at least by the circumstances of the respective individual case.

iii) Clarity about the regulatory content of the act

The addressee or group of addressees must be in the position of completely and clearly comprehending the regulatory content of the act from either the spoken text or any other form expressing a public body's will (e.g. non-verbal personal behaviour or acoustic or visual signals). The addressees must be able to readily recognise how the administrative act has changed the legal situation (see the seven kinds of legal consequence that could be caused by an administrative act as explained under B.I.5. for art. 3 para. 1), in other words to what extent they are either entitled or obliged to conduct themselves in terms "how, where, and when".

2. Unless otherwise provided for by law

Exceptions from the principle of freedom of form for the issuance of administrative acts require a legal basis, provided by formal law. In contrast to other legal reservations stipulated in this Code (see art. 43 para. 3 second sentence; art. 45 para. 2; art. 53 para. 2) this cannot be done through secondary legislation.

Exceptions can be stipulated by special (material) administrative law, but also within this Code itself (such as done in para. 5 of art. 98; art. 103 para. 1; art. 113 para. 3; art. 136 para. 4 in conjunction with art. 113 para. 3; art. 137 para. 4 in conjunction with art. art. 113 para. 3; art. 139 in conjunction with art. 100 because the latter logically requires written form; art. 157; art. 169 and art. 172 both in conjunction with art. 157).

If the law requires written form for an administrative act issued upon request of a party, the rejection of the requested act also requires written form.

II. Right of the party to receive a written confirmation of a verbal administrative act (para. 2)

The addressee of a verbally communicated administrative act can have an interest in receiving the content of the act materialized on paper or as electronic document mainly for three reasons. Firstly, because the written form provides by law (para. 4 in conjunction with art. 99) more information in particular about the legal and factual reasons why it was issued and about the administrative remedies by which the addressee can challenge the verbal act. This information when given by paper or electronic document allows, secondly, a better comprehension of the act, due to the addressee's opportunity to reading and weighing it thoroughly. Finally, the documentary form facilitates the presentation of evidence if needs be in the future, e.g. for lodging an appeal against the act. Para. 2 provides the addressee's claim to a written confirmation under two legal preconditions.

1. Verbal act

The wording of para. 2 mentions only the verbal act in the meaning of the explanation above (under B.I.1.b.). That would allow the conclusion that acts issued in other suitable forms are not included. Such result is certainly appropriate for traffic signs or traffic-controlling signals given by the police, otherwise every citizen who drives by a traffic sign could request a written confirmation. However, the use of other admissible forms (e.g. leaving a message on an answering machine) can cause the same interests on the part of the addressee as the verbal act. Therefore for other suitable forms the application of para. 2 by analogy must be taken into consideration, if the circumstances of the case are comparable and the interests of the party require the same protection, as if the act would have been issued in verbal form *stricto sensu*.

2. Immediate request of the party

The party must immediately request the confirmation. For the form of the request para. 1 of art. 58 applies, i.e. it can be declared in writing, verbally or in any other (suitable) form.

The addressee must declare the request immediately after he/she has received the verbal act. The strict requirement "immediately" serves mainly the interest of the acting public body. The requirement immediately does, however, not necessarily mean that the request must be declared in the same situation during which the verbal act is expressed, although such direct reaction of the addressee might happen quite frequently. But in general, the concept "immediately" means in legal terms "without any undue delay", i.e. in the here relevant context it leaves some time to the addressee to react. The addressee must be given sufficient time to consider whether or not a confirmation should be requested for and the given time (days; maybe a week but not a month) should allow to consult with a lawyer.

III. Public body's obligation to confirm the verbal act (para. 3 and 4)

1. Public body's obligation

If the addressee has immediately requested the confirmation of a verbal administrative act, there is no margin of discretion for the public body. A rejection of such request is unlawful.

## 2. Form of the confirmation

Confirmation means here to repeat in written or electronic form (c.f. explanation above under B.I.1.a) the same content that was expressed by the verbal act (e.g. prohibition, order, rejection, etc...; for details see explanation on art. 3 para. 1 under B.I.5.).

However, the content of a verbally expressed administrative act is usually confined to the absolute essentials that are required for the validity of the act. Under the typical circumstances of a verbal act (e.g. simple cases, emergency measures) the explanation of reasons as well as information on legal remedies will mostly not be provided, be it for lack of time, be it that longer elaborated spoken texts would not be needed because the case is simple and clear or for the reason that the addressee would hardly understand and remember them.

As stipulated in para. 4 the confirmation is not an administrative act. The same applies (as explained in detail above under A.I.) to a confirmation that contrary to the public body's intention does not correctly repeat the verbal act and also to the rejection of a requested confirmation. In contrast to that, if the response of the body to the addressee's request is to understand as replacement of the verbal act (usually then in conjunction with its annulment/repeal) the response is (a new) administrative act.

Although the written confirmation is not an administrative act, para. 4 refers for the requirements of the confirmation to the list of elements provided by art. 99 for a written administrative act (explained in detail below on art. 99)

## 3. The public body's right to confirm a verbal administrative act ex officio

The obligation to confirm a verbal administrative act according to para. 3 does not exclude a confirmation ex officio, if – for example – the public body has recognized that a legitimate interest exists on the part of the addressee but the latter is not aware of his/her right to request a confirmation. A written confirmation could also be in the interest of the public body when it may be supposed that a written and more elaborated explanation of reasons could convince the addressee of the lawfulness of the verbal act and facilitate its acceptance and thus avoid a lengthy administrative appeal procedure.

## IV. Form requirements for acts of collegial bodies (para. 5)

This Code does not define the concept collegial body. But some other article articles (see art. 29, 30, 43 para. 5 ) as well as para. 5 of this article are dealing with collegial bodies that owe their existence to the establishment by various special administrative laws. In comparison to a monocratic body collegial bodies' particularities are that administrative decisions of the latter are usually of prominent importance, the members of a collegial body bring different points of view, sometimes divergent interests into the administrative decision-making process, and finally that administrative decisions very often subject to special procedural rules.

These particularities imply the need for using the functions and advantages of the written/electronic form as detailed above under A.I. In addition acts of collegial bodies must be registered in a record otherwise they would not bring legal effects.

## V. Legal consequences

- The legal consequences of an administrative act that was not issued in the legally prescribed form will be dealt with in detail below in the explanation of art. 99, 108 and 109 and, furthermore, of the provisions stipulating specific formal requirements for the issuance of an administrative act.
- The moment of notification of the written confirmation, when including a correct explanation of the right to appeal (art. 99 para. 2 lit. c sub-para. iii), triggers the 30-day deadline provided in art 132 para. 1, within which the verbal administrative act can be challenged by appeal. Beyond that the written confirmation has no effect on the verbal act.
- The following four cases: i) a confirmation that does not fulfil the formal requirements stipulated in art. 99; ii) a confirmation that contrary to the public body's intention does not correctly repeat the content of the verbal act; iii) the rejection of a requested confirmation; iv) the omission of a requested confirmation ("administrative silence") have no effect on the validity of the verbal administrative act. But the three actions and the non-action can be challenged acc. to the general rules on administrative objection (art. 141 et. sequ.).
- If the public body in response to the request of a written confirmation replaces the verbal act (usually in conjunction with its annulment/repeal) the replacement is to be considered to be a new administrative act that can be challenged by administrative appeal (art. 130 et sequ.).

Article 99 Formal requirements of the administrative act written on paper or electronic

1. At any case the administrative act shall indicate its purpose.
2. An administrative act, which is written on paper or electronic, shall contain:
  - a) the introductory part, which consists of:
    - i) the name of the public body issuing the act;
    - ii) parties, to which the act is addressed;
    - iii) the date when the act is drafted;
    - iv) the legislation.
  - b) the reasoning part;
  - c) the disposition part, which indicates the following:
    - i) the ordering part, indicating what has been decided;
    - ii) the time of entry into force of the act;
    - iii) the right to appeal, including the public body or the court where the appeal may be filed, the remedies, the deadline for lodging an appeal and the way of its calculation.
3. If not provided otherwise by law, the administrative act, which is written on paper, shall contain the signature, written name and surname of the responsible official, or the head and secretary of the collegial body, respectively.
4. The electronic administrative act shall be electronically signed under the legislation in force. In such cases, the requirements of Paragraph 3 of this Article shall be replaced with the electronic signature of the public body under the legislation in force.

A. General Introduction

I. Content and purpose of art. 99

The overall purpose of this provision is to put the principle of legal clarity and certainty, which is a constitutional principle derived from the rule of law, into administrative procedural practice.

Clarity and certainty of an administrative act means that its addressee as well as any other person resp. public body that might be affected by or involved in the implementation of the act can completely and clearly comprehend its regulatory content, so that they can conduct themselves according to the regulation. The regulatory content of an administrative act is primarily determined by its ordering part but, if necessary, to be interpreted in the context of the reasons provided in the act and of all the other relevant circumstances of the case known or readily recognisable by all affected resp. involved persons.

Purpose of this provision is to stipulate the material and formal legal requirements every administrative act must satisfy, no matter whether it is issued in and individually formulated for one single case or adopted for a large quantity of similar/equal cases by using prefabricated templates (*e.g. for fines for traffic offences*).

As the principle clarity and certainty is of importance not only to protect the public interest but also equally the individual interest of the addressee, a purpose of all elements is also to ensure that the addressee is able to understand the content of the administrative decision and its factual and legal reasons. It follows from this the legal mandate imposed on a public body is not only the fulfilment of the list of requirements in a merely formal sense. As important is that the text is formulated in plain and intelligible language. The use of any formalistic and bureaucratic phrases and technical jargon must be avoided as well as in any way possible, whilst an incomprehensible reasoning text can make the administrative act unlawful.

II. Constitution and EU-Law

The rule of law, from which the principle of legal clarity and certainty derives, is laid down in the preamble of the Constitution. Legal clarity and security is also a general principle in EU Law.

### III. Relation to previous CAP

The subject matter was regulated in Article 107 but with slightly different content as far as para. 1 and two of the new CAP is concerned, and in a different structure. The content of para. 3 and 4 of the new CAP is missing in the previous Code.

### IV. Scope of application

Art. 99 is applicable for all administrative acts issued by a public body unless special material law stipulates different formal requirements for the act.

## B. Formal requirements of the administrative act written on paper or electronic in details

### I. Mandatory indication of the purpose of the administrative act (para. 1)

This paragraph emphasises that the indication of the purpose of the administrative act is a major and general requirement that must never be missing in a written act. Usually this indication shall be done either by referring to the legislation relevant for the issuance of the act (see below explanation of para. 2 lit. a, sub-para. iv under II. 4.) or in the reasoning part of the act (para. 2 lit. b of this article and art. 100 and their explanations) or by both elements that need to be read together.

In so far paragraph 1 does not provide a special requirement to be satisfied in addition to the other elements stipulated in para. 2 and 3, but provides a guideline for the way how the two elements "reference to legislation" and "reasoning" shall be executed, namely in a way that in no case the indication of the purpose of the administrative act would remain unclear for every addressee and other readers of the act.

### II. The mandatory elements of a written administrative act (para. 2)

Para. 2 provides a list of mandatory elements every written administrative act should comprise in order to be fully in line with the law. The list contains both material as well as formal legal requirements.

#### 1. Name of the public body issuing the administrative act (para. 2, lit. a. sub-para. i.)

The name of the public body issuing the administrative act is required in order to identify the legal character of the measure as administrative act (see B.I.1. explaining the first element of the definition of an administrative act in art. 3 para. 1) and for evidence purposes. It is moreover relevant with respect to lodging an appeal against the act, which would be much more difficult, if the body that issued the act would not be recognizable from the written document.

The name of the public body is recommended to appear in the header line of the document, but could also be integrated in the text of the document or indicated through a stamp or official seal placed at the end or somewhere else on the paper.

This requirement is of fundamental importance, its missing makes the measure absolutely invalid.

#### 2. Parties, to which the act is addressed (para. 2 lit. a, sub-para. ii)

The disclosure of the addressee resp. addressees is another fundamental element required by the rule-of-law principle of legal clarity and certainty.

In the case of an individual administrative act (art. 3 para. 1 lit. a) the usual and most appropriate way in the administrative practice is to write the complete and correct name (first name(s) and family name) of each addressee in the document. The Code, does, however, not require this in para. 2 lit. a, sub-para. ii. Therefore the disclosure of a wrong name, the use of pseudonyms, stage names or nicknames, as well as the case when a letter is addressed to an individual but two persons of the same name (e.g. mother and daughter) live in the same flat, all those cases are not harmful, as long as the content of written administrative act - if necessary interpreted in conjunction with the overall context and all relevant circumstances of the case - makes it possible to identify each addressee unambiguously and without any doubt.

Legal persons can be addressed with their corporate (business) name, the (correct) indication of the legal form of the company is not required, if the identity of the legal person is otherwise readily recognizable. But it must be clear that it is the legal person and not one or more natural persons (e.g. employees of the company) whom the administrative act is addressed to.

The collective administrative act (see explanation on art. 3 para. 1 lit. b under B.II.) differs from the individual act through the indefiniteness of the number of persons that belong to the group, but – despite of the indefiniteness of the number of members belonging to the group - each member is or at least can be “individually determined on the basis of general characteristics” (wording of the legal text) or, in other words, the number of addressees is ascertainable through their common characteristics to which the administrative measure refers. (*Example: The competent body issues an order asking the people, who find themselves in a certain area of the town, not to use a specific street because of danger of explosion. More examples under B.II. of the explanation on art. 3 para. 1 lit. b*)

This requirement of clarity of the addressee is of fundamental importance. An administrative act without a clear addressee is absolutely invalid acc. to art. 108. The act addressed to a “wrong” addressee (*e.g. order of payment for an administrative fine to a person who did not commit the traffic violation*) is, however, in line with the requirement “parties, to which the act is addressed” stipulated in para. 2 lit. a, sub-para. ii, but unlawful (art. 109) for material reasons.

### 3. Date when the act is drafted (para. 2 lit. a, sub-para. iii)

The date when the act is drafted is usually the date when the decision-making process within the public body is completed by the signature of the responsible official or other person authorized to sign the act. This date is not of legally relevant, because decisive for both the administrative act’s coming into legal effect (art. 104 para. 1) as well as the deadline for administrative appeal (art. 132 para. 1) depends on the notification (art. 147 et sequ.).

In very cases the date could be helpful (*e.g. if the public body has issued more than one administrative acts in the same case and under the same official file number and the date of the act is helpful to prove which act was notified on what day and what time*), so that one could attach to it a certain organizational rather than legal relevance.

### 4. Legislation (para. 2 lit. a, sub-para. iv)

“Legislation” required to be included in the introductory part of the written administrative act means the legal provision(s) authorizing in general the public body to decide on the administrative matter the administrative act is dealing with, in other words means the legislation on the public body’s subject-matter and territorial jurisdiction (art. 23 para. 1) for issuing the respective administrative act.

The concrete legal basis for the administrative act and other legislation relevant for the public body’s decision will acc. to art. 100 para. 1 lit. c be included in the reasoning part of the act (see explanation below on art. 101 B. I.).

### 5. Reasoning (para. 2 lit. b)

In principle, every administrative act issued or confirmed (art. 98 para. 2) in writing must contain written reasons unless one of the exception in art. 101 applies.

The statement of reasons must give the main factual and legal grounds, which the public body has considered in arriving at its decision. In case of discretionary administrative acts the reasons must also include the aspects, on the basis of which the public body has exercised its discretion.

The Code underlines the importance of the reasoning part of the administrative act by dedicating with art. 100 an extra article to this topic. Therefore, related to practical details of writing the reasoning part it is referred to the explanation of the following article.

### 6. The ordering part (para. 2 lit. c, sub-para. i)

The ordering part, in other words the regulatory content of the public body’s decision is the centrepiece of the administrative act that must meet the highest demands as to definiteness and clarity of the written text of administrative act. At the same time this part must not only be clear but also comprehensible, i.e. the ordering part must express the will of the public body in a simple language that avoids – to the best extent possible - any unnecessary bureaucratic, legal or other technical jargon. The addressees must be able to readily recognise how the administrative act has changed the legal situation by expressing one or more of the following regulations (for details of the seven kinds of legal consequence that could be caused by an administrative act see explanation above under B.I.5. for art. 3 para. 1):

prohibition      public body requires from the addressee an inaction (*e.g. prohibition of continuing the operation of a factory, whose manufacturing process emits harmful gases, dust, and smoke*)

order      public body imposes an obligation to undertake an action (*e.g. order to remove a car that blocks a fire rescue access*)

granting a right public body grants a permission or another advantageous legal position or gives the right to claim performance (*e.g. issuance of a driving licence*)

rejection public body denies to grant a right the address applied for (*e.g. rejection of an applied construction permit*)

modifying a right public body modifies an existing legal relationship, i.e. through revocation or repeal of a right (*e.g. withdrawal of a pension entitlement that was issued on the basis of false data provided by the applicant*)

declaratory act public body confirms with legally binding effect the existence of a legal situation (*e.g. appointment or dismissal or retirement of a civil servant*)

act in rem public body decides on the public-law status of a movable or immovable good (*e.g. registration of a building as state protected document*)

An ambiguous wording of the ordering part that leaves the addressee uncertain as to how he/she is either entitled or obliged to conduct him-/herself in terms of “how, where, and when” is unlawful (art. 109): the absence of any ordering part leads to absolute invalidity (art. 109).

#### 7. The time of entry into force of the act (para. 2 lit. c, sub-para. ii)

The time of entry into force of an administrative act is stipulated by article 104. Therefore, the public body will satisfy this requirement either by the reference to the date of notification acc. to para. 1 of art. 104 or by the explicit set of a later date acc. to para. 3 of art. 104.

#### 8. Advice on the right to appeal (para. 2 lit. c, sub-para. iii)

##### a) Legal requirements

The contents of an administrative act issued in writing must also include a statement advising the addressee about the appeal against the act (art. 130), and the body where the appeal is addressed (art. 134) resp. the court before whom legal remedy can be sought (cases of art. 129 or rejection of an appeal, art. 137 para 3 and 4).

Of high importance for an addressee, who is usually not very familiar with administrative and legal matters, is the correct indication of the deadline, within which legal protection against the administrative act can be attained - for the administrative appeal the 30-day deadline of art. 132 applies - as well as the way of calculating the deadline – articles 56 and 57 - .

##### b) Legal consequence of the absence of a correct advice on the right to appeal

Due to the importance of correct awareness of the parties about their fundamental right to legal protection against unlawful administrative actions, an incorrect or missing advice on the right to appeal does not trigger the 30-day deadline of an administrative appeal stipulated in art. 132. This follows from the application of art. 54. Acc. to para. 2 lit c and para. 3 of art. 54 the addressee may request a reinstatement of the deadline for lodging an appeal, because an incorrect information - and here it needs to be stressed that an incomprehensible text is to be considered equal to a missing or incorrect advice – is to be understood as a reasonable reason that has prevented the addressee to comply with a procedural deadline in the meaning of art. 54 para. 1.

#### III. Name and surname of the responsible official resp. the head and secretary of the collegial body (para. 3)

##### 1. Legal requirement

The name of the responsible official follows from the application of art. 43 para. 1 – 4, the names and secretary of a collegial body from special law. Purpose of disclosing their names is on the one hand to ensure the identification of the person, who conducted the administrative procedure and therefore is familiar with the subject matter and accountable for the administrative decision, which in turn facilitates the addressee’s approach of the public body if there is a need for additional clarifying inquiries in the aftermath of the issuance of the act.

In addition – though not prescribed in the Code – it could in many cases be useful be to mention contact details of the responsible official resp. secretary of the collegial body (e.g. telephone number resp. email address and possibly office hours)

##### 2. Legal consequence

This requirement is of practical-organizational relevance.

#### IV. Special requirements of an electronic administrative act (para. 4)

While the law in para. 2 of this article does not differentiate between written administrative acts that are written on paper and those that are stored electronically with regard to its content, it does so, necessarily, with regard to the form of the authorization. Written administrative acts on paper in general need to be signed manually in accordance with para. 2. As this is technically impossible with electronically stored documents, the law in para 3 requires here the manual signature to be replaced by an electronic signature “under the legislation in force”. This refers to the Law No 9880 of 25.2.2008 on Electronic Signatures. This law in its art. 3 defines several quality levels of electronic signatures, from the simplest name mentioned in the electronic message (para. 1) up to qualified electronic signatures based on qualified certificates (para. 3). While art. 4 of the said law principally requires electronic documents in order to be legally valid to bear a qualified signature in the latter sense, it is open to the special law requiring the electronic signature to also determine the necessary quality of the electronic signature.

The second sentence of para. 4 does so by requiring an “electronic signature of the public body”. The wording is technically not completely correct as there is no such thing as a fixed and definite “electronic signature” of someone, as an electronic signature always is an electronic reference to both a person and to a document. Therefore the named law on electronic signatures defines the “electronic signature” as data in electronic form that is affixed to or logically associated with other electronic data (read: the document), which may be used as a means of identifying the signatory (read: the person) and authenticating the signed document. It would therefore be better to speak of an electronic signature that may be used as a means of identifying the public body as the one the signatory belongs to. The law should be read in this respect.

The common technical means are signature creation devices in the form of a chip card that are able to produce qualified electronic signatures. The law does, however, allow for an electronic signature of a lesser quality, as long as it is secured that the electronic signature may be traced back to the public body.

#### Article 100 Reasoning of the act

**1. The administrative act, which is written on paper or electronic, as well as the confirmed administrative act, should be reasoned. The reasoning of the administrative act should be clear and consist in the following:**

**a) An explanation of the factual situation, upon which the acts was issued;**

**b) A summarized explanation of the result of the administrative investigation and evaluation of the evidence;**

**c) The legal base of the act;**

**ç) In case of discretion, explanations why discretion was used in the determined way;**

#### A. General Introduction

##### I. Content and purpose of art. 100

Article 100 specifies art. 99 para. 2 lit. c, sub-para. i by providing a list of four formal elements applicable for writing a statement of reasons that fulfils the legal requirements of a lawful written/electronic administrative act. The subparagraphs a) and b) provide the details for giving the factual grounds that includes the main results of administrative investigation and taking of evidence in case such investigation proceedings have taken place. Acc. to lit. c) the statement of reasons must also include the legal grounds, which the public body’s decision is based upon. In case of discretionary administrative acts the reasons must also explain the aspects, on the basis of which the public body has exercised its discretion, lit. ç). This list of four formal requirements is preceded by the legal precondition “clarity” that applies to each of them and thus underlines the purpose and functions of the statement of reasons.

The obligation of the public body to explain how and why it came to the decision as it is laid down in the written administrative act is one of the basic requirements of “good administration”. They have the following functions:

- Firstly, the obligation to provide a statement of reasons derives from the role of the citizen as a partner of the public body. This partner-ship function has been becoming increasingly important in the course of the development of a citizen-oriented public administration, where public body and party of an administrative procedure encounter on an equal footing. A decision without reasoning degrades the citizen to just recipients of orders, a role that should be overcome in a democratic system.

- Secondly, the reasoning serves the parties' acceptance of an administrative decision. The party, who knows the reasons of the public body is more inclined to understand, that the public body was right to decide as it did, even if the addressee dislikes the result.
- The third function is legal protection, since with the reasoning the addressee gets the opportunity to assess the chances of success of a legal remedy while the public body deciding on an appeal and the administrative court have a better basis for the review of the challenged administrative act.
- The fourth function is transparency vis-à-vis the public in general, which in a democratic state has the right to control the public administration with regard to lawfulness, objectivity and expediency of administrative behaviour. In so far, the reasoning is also an instrument to impede corruption.
- Finally, the public body's obligation to provide reasons is an appropriate means of administrative self-control because this obligation does not allow to decide by applying patterns but forces the responsible official to carefully consider each individual case, in particular the parties' argumentation.

## II. Constitution and EU-Law

The obligation to give reasons for an administrative act is derived from the constitutional principles of rule of law and democracy. It is also one of the essentials of "good administration" as stipulated in EU-Law (Art. 296 TFEU, Art. 41 EUCHFR, Art. 18 ECGAB; see also Towfigh, *Die Pflicht zur Begründung von Verwaltungsentscheidungen nach dem deutschen und englischen Recht und ihre Europäisierung* [The duty to give reasons for administrative decisions in German and English Law and its Europeanization], 2007).

## III. Relation to previous CAP

The obligation of reasoning administrative act was also stipulated in art. 108 and 109 of the previous CAP.

## IV. Scope of application

The obligation of reasoning is to be applied to the issuance of written administrative acts or the written confirmation of a verbal act. For the application of this obligation – as a general administrative law principle – to "other administrative actions" in the meaning of art. 126 see explanation of this provision below.

## B. Reasoning of the act in details

### I. The scope of application of the obligation to give reasons (para. 1, 1<sup>st</sup> sentence)

Para. 1 repeats in its first sentence, what was already stipulated in art. 99, para. 2, sub-para. b) for the administrative act written on paper or electronic, and in art. 98, para. 2 and 4 in connection with art. 99, para. 2, sub-para. b) for the written confirmation of a verbal act, namely that those acts must be reasoned.

In its following sub-paragraphs the article specifies the necessary content by listing four areas that should be covered by the reasoning text and emphasizes for these areas that the written text must be clear.

The requirement "clarity" implies that the addressee is able to understand the content of the administrative decision and its factual and legal reasons. It follows from this that the legal mandate imposed on a public body is not only the fulfilment of the duty to give reasons in a merely formal sense. As important is that the text is formulated in plain and intelligible language. The use of any formalistic and bureaucratic phrases and technical jargon must be avoided in any way possible. An incomprehensible reasoning text can have the same consequence as the complete absence of a reasoning, i.e. can make the administrative act unlawful.

### II. Explanation of the factual situation, upon which the acts was issued (para. 1, sub-para. a)

This part of the reasoning shall contain all undisputed facts the public body had taken into consideration for its decision (for disputed facts see explanation in the following section.) If from the side of the parties objectively undisputable facts were presented (e.g. in the course of the hearing, art. 87, or by submission of written documents) which the public body considered to be irrelevant for the decision, for each of those facts the public body must explain in the reasoning, why it was not decisive for the case and therefore not taken into consideration.

### III. Explanation of the result of the administrative investigation and evaluation of the evidence (para. 1, sub-para. b)

If the body performed administrative investigation acc. to Chapter X, Section 1 of Part IV in order to determine the relevant factual situation, it has to describe the results, i.e. the relevant facts, and explain that they were determined

through administrative investigation. It is not necessary that the body discloses methods and sources of information, if the facts are not contested by the party.

If the factual situation was unclear and disputed and therefore had required the application of means for search of evidence as provided in Chapter X, Section 2, of Part IV the body is obliged to disclose the applied means and give reasons why for example an expert's opinion was or was not convincing or a witness statement was or was not credible.

#### IV. The legal base of the act (para. 1, sub-para. c)

The requirement of including the legal base requires more than just the reference to the number of the article, paragraph and sub-paragraph of the applied provision(s) the reproduction of their wording(s). Even formulaic phrases do not fulfil the requirements.

Required is a substantiating application to the concrete case (subsumption), in other words the public body must explain in a way comprehensible also to a non-lawyer, why the facts determined and explained according to sub-para. a and if necessary sub-para. b fulfils in the concrete case the legal preconditions of the applicable legal base of the administrative act.

#### V. Explanation, why discretion was used in the determined way (para. 1, sub-para. ç)

Of particular importance is the justification of a decision that was taken on the basis of a discretionary norm (for the definition of discretion see explanation on art. 3, para. 3, for the requirements of lawful exercise of discretion art. 11).

The reasoning of a discretionary decision must include:

- The legal provision that authorizes the public organ to exercise discretion in decision making and the explanation why in this concrete case the determined factual situation satisfies the legal requirements of this provision;
- The legal limits, within which the authorizing provision allows discretion, in other words the range of possible decision-making options;
- The reasons, why the chosen option was appropriate for the particular case and does not exceed the limits;
- An explanation, why the chosen option is in compliance with the general principles of law such as equal treatment and non-discrimination and proportionality; related to the latter why the decision maintains a proper balance between any adverse effects which the decision has on the rights or interests of the addressee and the purpose the effects pursue.

#### VI. Legal consequences

The total absence of a reasoning as well a reasoning that does not satisfy all necessary requirements of this article as explained above make the administrative act unlawful (art. 109, para. 1 lit.b). The act can be challenged by administrative appeal (Part Six, Chapter II).

#### *Article 101 Acts that are not required to be reasoned*

1. The administrative act, which is written on paper or electronic, as well as the confirmed administrative act, under Article 98, Paragraphs 2 and 3 of this Code, shall not be required to be reasoned in the cases when:

- a) it is explicitly excluded by special law;
- b) the administrative act, which is issued upon request of the party, consists of a fully acceptance of the request and does not affect the rights or interests of the parties;
- c) acts approving decisions of boards, juries or commissions as established by public bodies, as well as superiors' orders, which have to do with issues of internal organization and functioning, except when the law has provided otherwise;
- ç) the act publicly announces a general administrative act;
- d) the body issues an administrative act following the practice followed for the resolution of objectively same cases;

## A. General Introduction

### I. Content and purpose of art. 101

The exemption rule of art. 101 lists five areas of cases to which the rule of art. 99, para 2 li. b) in connection with art. 100 does not apply. Major purpose of this article is to contribute to efficiency of public administration, by avoiding unnecessary work resp. technically almost unfeasible work on the part of the public body. As explained in detail further below under section B. this is true at least for the regulations of para. 1 lit. a), b), ç), and d), whilst the purpose of the regulation in lit. c) is of different character.

The exceptional character of all of the five provisions underlines that the list is exhaustive and each regulation requires strict and restrictive interpretation and does not allow application of other cases by analogy.

Art. 101 does not apply to the appeal procedure. This follows from this provision's systematic position in the Chapter on (first instance) administrative acts and the fact that art. 139 para. 1 refers only to art. 100. An exemption from the reasoning requirement would also be in total contradiction to the overriding purpose of the appeal procedure for two reasons. One reason is that for protection of his/her rights and legal interests the party needs to know the grounds of an appeal decision for taking into consideration the further pursuit of his/her rights in the administrative court. The other aspect is that for effective and comprehensive judicial control of an appeal decision the court requires the knowledge of its factual and legal reasons.

The decision whether or not using the exceptional possibility of issuing an act without reasoning is for every concrete case at the discretion of the public body. It is not forbidden to give reasons, if the body sees a sensible cause for doing so. There might be cases, for example, where it is more expedient and sensible to add reasons to the administrative act, even if the legal requirements of an exemption are satisfied, for example if this could the party convince that an appeal has no realistic chance of success.

### II. Constitution and EU-Law

As the obligation of the public body to give reasons for an administrative act derives from the principle of rule of law and democracy and also from the principle of "good administration" as stipulated in EU-Law (Art. 296 TFEU, Art. 41 EUCHFR, Art. 18 ECGAB, there is a tension between the exemption from this obligation in art. 101 and the constitutional principles, that can be justified only if in individual cases the discretionary decision of the public body to issue the act without reasoning has no considerable negative impact on the legal position of the party.

### III. Relation to previous CAP

The way how art. 108 and 109 regulated this matter left lack of clarity about both the obligation to give reasons and its exemptions.

### IV. Scope of application

The exemption of the obligation to give reasons is always connected to the issuance of an administrative act.

## B. Acts that are not required to be reasoned in details

### I. Scope of the provision (para. 1, first part of the sentence)

Para. 1 repeats in its first part the content that the rules on reasoning apply to administrative acts written on paper or electronic and to the written confirmation of a verbal act (see above explanation under B. I on art. 100).

In its following sub-paragraphs the article specifies the necessary content by listing for types of administrative act and one measure, for which a reasoning is not required.

### II. Exemption from the obligation to give reasons explicitly stipulated so by special law (para. 1. lit. a)

This exemption is an application of the legislative principle "*lex specialis derogat legi generali*". This exemption, however, requires "explicit" regulation. It cannot be concluded by wide interpretation of a provision. Instead, the wording of the special provision(s) must clearly prescribe the relevant cases and doubtlessly express for these cases that an administrative act may be notified without reasoning.

### III. Decision in full conformity with the request (para. 1 lit.b)

This provision is dealing with cases where on the side of the parties there is no interest that requires legal protection through a reasoning. It is the case if the following three legal requirements are satisfied:

#### 1. Request of a party to issue an administrative act

The first requirement is that the administrative act was issued upon request of a party. This requirement clarifies by its unambiguous wording that the exemption does not apply to ex-officio acts, even if the acts are of beneficial character in the meaning of see art. 102 and therefore the interest situation is seemingly the same as in cases when acts were issued upon request.

#### 2. Fully acceptance

Para. 1 lit.b) is applicable only if the outcome of the administrative procedure is in full conformity with what the requestor has obviously expected from the public body's response to his/her request.

#### 3. Administrative act does not affect rights and interests of other persons

This negative criterion protects not only other parties of the respective administrative procedure in the strict meaning as defined in art. 33, but also any other person, who does not resp. not yet have the status of a party in the moment, when the administrative act in question is notified.

The question whether or not an act might have a third-person effect depends sometimes on complicated factual resp. legal questions that sometimes cannot not easily and finally be answered by the public body. Therefore, meaning and purpose of art. 101 requires that the exemption from giving reasons is already excluded, if there are sensible reasons that the act in question could have a third-person effect. In other words, if such a third-person effect is likely, the public body must give reasons for the administrative act.

### IV. Approvals of decisions of collegiate bodies and superiors' orders (para. 1 lic.c)

As it will be explained in the two following sections the two administrative actions this provision is dealing with do not have the legal quality of an administrative act, because both actions are of merely internal character without direct external legal effect to the party (see explanation on art. 3 para. 1 lit. a under B.I.5.d) of an administrative procedure. Consequently, it already follows from art. 99 and 100 that the application of the obligation to give reasons for such approval does not apply. In so far, this provision is of merely declaratory character clarifying and confirming what already results from the application of art. 99, 100.

#### 1. The approval of a collegiate decision

The approval of a decision taken by a board, jury or commission by a public body can happen in three contexts. All the three situations have in common that there are three entities involved: the collegiate entity, the approving authority and the party of the procedure who is in the end the addressee of an administrative act. In this triangle - relation the measures undertaken between the two public entities are always internal measures, by which the relationship to the addressee is never directly affected, and which therefore are not administrative acts.

- One situation is that both the collegiate entity and the approving authority belong to the same public body and the collegiate entity is the one who issues its decision - usually an administrative act - vis-à-vis the party of the administrative procedure but requires for this the approval from another authority of the same public body. Here, the approval is an internal preparatory contribution to the procedure necessary for its finalisation before the collegiate entity can notify the act. The approval does not have a direct external legal effect vis-à-vis the party (addressee of the decision).
- In the second situation, the approving authority – again part of the same body as the collegiate entity - is the one that outwardly acts as the body issuing the administrative act. Substantial part of the content of this act is the decision of the collegiate entity, which is to be approved before the approving authority will notify the act. Again, also in this situation the approval is an internal preparatory measure does not have a direct external legal effect vis-à-vis the party. (*Example: The dean of a faculty is the one who issues a diploma and the positive decision of the examination committee is the key element for this. The dean needs to approve the decision with regards to the formal correctness of the examination procedure before he/she hands over the certificate, in other words notifies the administrative act. The collegiate decision as well as its approval do not have a direct external legal effect in relation to the examinee/graduate.*)
- The third possible situation is the case of inter-related decision-making acc. to art. 70 para. 3 (see explanation on art. under B. III. Here, the two or more involved entities belong to different bodies, but only one issues the

administrative act, i.e. is in direct legal relationship with the party (addressee of the act). The contributions of the others (“prior consent, confirmation or approval”) are merely internal measures without direct external legal effect vis-à-vis the party.

- However, it needs to be clearly emphasised that the action taken vis-à-vis the party in this triangle-relationship is usually an administrative act, to which, of course, the rules on reasoning acc. to art. 99 to 101 apply.

## 2. Superiors’ orders

“Superiors’ orders, which have to do with issues of internal organisation and functioning” serve as typical examples of measures, who do not satisfy the legal criterion “direct external legal effect” of an administrative act (see explanation on art. 3 para. 1 lit. a under B.I.5.d).

## 3. Unless the law has provided otherwise

It is hard to imagine that the law would explicitly prescribe the obligation to give written reasons for those internal measures that are covered by para. 1 lit. 3.

## V. Collective administrative acts, publicly announced (para. 1 lit. ç)

### 1. Collective administrative acts

The exclusion of collective administrative acts from the obligation to give reasons to the act applies to those administrative acts that are addressed to a group of persons, but they differ from the individual act through the indefiniteness of the number of persons that belong to the group. One can term them “person-related” collective acts (for practical examples see explanation on art. 3, para. 1 lit. b) under B. II.).

Collective acts, however, are also “matter-related” acts, which are acts regulating the public-law status of a matter (administrative act “in rem”), e.g. the use of public property or thing by the public at large (typical example: traffic signs; for more practical examples see explanation on art. 3, para. 1 lit. b) under B. II.). These acts fall also under the concept collective, since they also cause a legal effect to a group of an indefinite but due to general characteristics identifiable number of addressees (e.g. everybody who enters into relationship with the matter like for example the road user approaching a stop sign).

### 2. “publicly announced”

Both types of collective acts have in common that individual notification is not possible or only with disproportionately high administrative-technical expenditure. Therefore, art. 163 para. - 1 lit.a) requires – as a rule – (exception should be provided for traffic signs) for these acts publication in the Official Journal, and acc. to art. 163 para. in connection with art. 162 para. 5 this official publication does not require a reasoning part (for art. 162 para. 5 see explanation under B. IV).

The regulatory content of para. 1 lit. ç refers to this “publication in the Official Journal”, though the legislator uses here the wording “publicly announced” in a non-technical way. But in line with a systematic and teleological interpretation the phrase “publicly announced”, which is not used somewhere else in a legislative context, must here be understood as official publication in the meaning of art. 163.

## VI. Administrative practice for the resolution of objectively same cases

This exemption derives from the principle of procedural efficiency. Acc. to this principle the remarkable administrative effort required for giving reasons to an administrative act may not be taken, if the addressee of the is fully aware of the reasons the administrative act is based on. The legislator understands that such awareness on the part of the addressee exist when the following legal preconditions are satisfied.

### 1. Administrative practice

“Administrative practice” requires a larger number of cases continuously resolved over a certain period of time. Both the number as well as the temporal aspect are to be determined in every individual case but the crucial criteria for this determination is that both aspects give the certainty to the public body that the addressee of the individual act is already fully informed about the reasons.

### 2. Same cases

“Sameness” means a higher level of homogeneity than similarity. It includes that the administrative act is based on essentially the same factual situation regulated by the same legal provision(s) and establishes essentially the same

legal consequence. This is always the case if plenty of administrative acts are issued by using a standard form. (*typical examples might be the order to submit a tax declaration, to appear for enrolment at the university, to come to the military medical inspection, but also monthly recurring salary statements for civil servants or monthly pension pay statements*).

### 3. Objectively

Objectively is here to understood as recognizable for the addressee. This is in particular the case if in an individual case the same act is repeatedly sent to the same addressee, so that this addressee was already informed about the reasons by the first administrative act on the same matter. But this is also the case, if the reasons of a particular case are a matter of common knowledge.

#### Article 102 Additional conditions for the beneficial administrative act

1. A beneficial administrative act may be associated with one or more of the following additional conditions:

- a) An event, which is not sure that will happen, and on the occurrence of which depends the beginning or end of a right, benefit or obligation (condition);
- b) A date or a time period, in which a right, benefit or obligation shall begin, end or last respectively;
- c) A reserve by the public body regarding abrogation; and/or
- ç) An additional condition requiring the beneficiary to perform, to cease or stop a certain action or allow a certain action.

2. The additional condition as per Paragraph 1 of this Article shall be permitted only in the cases when:

- a) It does not conflict with the purpose of the administrative act; and
- b) It is not prohibited by law.

#### A. General Introduction

##### I. Content and purpose of art. 102

Art. 102 gives the opportunity to the public body of adding to a beneficial administrative act (hereinafter also referred to as “main” administrative act) one or more clauses that aim at restricting the legal or legally important advantage that the addressee would obtain in full by issuance of an unrestricted act. The article defines four kinds of additional measures:

- condition (para. 1, lit.a),
- time-limitation (para. 1, lit.b),
- reservation of annulment and repeal (para. 1, lit, c),
- requirement of additional action or omission (para 1, lit. ç).

In the beginning of para. 1 the legislator calls them “additional conditions” but does not use here the term “condition” in its narrow legal meaning as it is done by para. 1 lit. a). In order to avoid confusion with the term “condition” in its specific legal meaning, in the following text we will use for the four restricting measures the collective term “ancillary clause”.

The addition of one or more ancillary clauses serve the adjustment of the regulatory content of the main administrative act to the particularities of the individual case with respect to three major spheres of interests, which are

- the public interest,
- the protection of rights and legitimate interests of a third person affected by the main act,
- and the interest of the addressee.

The interest of the addressee is concerned, if an unrestricted act had to be refused for the legal reason that it conflicted with overriding public or third-person’s interests. In such situation, it is not only in the addressee’s interest but, in application of the principle of proportionality, even his/her right to receive – as a “minus” of the beneficial act

in full - at least the legal advantage of a beneficial act issued together with ancillary restricting clauses, if in this way also the public and third-person's interest can sufficiently be safeguarded.

## II. Constitution and EU-Law

The provision is an application of the constitutional principle of proportionality.

## III. Relation to previous CAP

The previous CAP did not address this problem.

## IV. Scope of application

The article is applicable to administrative procedures aiming at issuance of beneficial administrative acts.

## B. Additional conditions for the beneficial administrative act in details

### I. Additional "conditions" associated to a beneficial administrative act (para. 1, first half of the sentence)

#### 1. Beneficial administrative act

The term beneficial administrative act is used in art. 102 and 114, but not defined. According to the common administrative law understanding we can define that an administrative act is beneficial, if it establishes or confirms a right or a legally relevant advantage (see also explanation on art. 3 para. 1 a) under B. I. 2. "classification of administrative acts).

The advantage must be of legal character, merely factual, economic or immaterial advantages are not relevant.

Not beneficial are onerous acts, e.g. all ordering and prohibiting acts, acts depriving a right, and the refusal of a request to issue a certain administrative act.

#### 2. Additional "conditions" associated

Additional "conditions" – in the following instead of the term "condition" we will use the collective term ancillary "clause" – are those that are connected to a main administrative act in a way that they are meaningless without the main act without being integral part of its regulatory content (short formula: The main act could exist without the ancillary clause(s), an ancillary clause could not!).

#### 3. Discretion

The decision on adding an ancillary clause to a beneficial act is at the lawful discretion of the public body. The discretion is to be exercised from two different though interconnected perspectives. One perspective is oriented to the question whether or not to add one or more ancillary clauses to the main act (exercise of resolution discretion) the other to the question what kind(s) of measures to be employed ("selection discretion").

The discretion must be exercised by applying the principle of proportionality (art. 12). According to this principle a certain measure that interferes with an individual right or legal interest shall be suitable and necessary. Suitability must be determined from objective standards and not from the subjective judgement of the public body. The principle of necessity, also called the principle of mildest means, requires that out of several suitable means available for achieving the purpose of law only those should be pursued, which when a beneficial act is in question cause minimum injury to the individual while safeguarding the public interest and protecting individual rights and legal interests of third persons.

Here, the public body is recommended to examine the principle of proportionality by the following two-step approach:

#### Step 1 (exercise of resolution discretion by answering three questions)

- Is the concerned administrative act beneficial, i.e. does the party apply for granting a right or legal interest? (*Example: The party applies for granting a permission to establish and operate a discotheque.*)
- Would the unrestricted regulatory content of this act be contrary to another persons' interest or contrary to public interest? (*Continuation of the example: Noise emissions from the discotheque would disturb neighbours' sleep after 22 hrs.*)

- Would the refusal of the applied act interfere with the rights of the addressee? (Continuation of the example: Here the fundamental freedom to pursue a business is affected. )

If the answers to these questions are affirmative the public body has to go the Step 2.

Step 2 (exercise of selection discretion by answering two questions)

- Are there restricting measures that, when added to the main beneficial act, are suitable to safeguard both public and third-persons' interest? (*Continuation of the example; three different measures could be taken into consideration: 1. The permission covers only the time period from Monday to Saturday between 10hrs and 22 hrs. 2. The permission is granted under the resolving condition that it will terminate automatically, once the first neighbour has a reason to complain about noise emission after 22hrs. 3. The permission will be granted under the additional requirement to install soundproof windows. All three measures are suitable to avoid disturbing noise emissions at night.*)
- Which one out of the three suitable measures is necessary? (Continuation of the example: No. 1 and 3. are necessary, whilst no. 2 is not, because the extreme strong measure of a resolving condition already in the very first case of violating the peace of the night is not necessary for the purpose to keep the noise emission on a tolerable level.)

## II. Definition of the term "condition" (para. 1, lit. a)

Elements of the definition:

- A public body issues a beneficial administrative act
- In addition to the act the public body determines an uncertain future event.
- The public body connects the legal effect of the beneficial act to either the happening or not happening of the event.
- The event either happens or not does not happen
- Legal consequence: The happening resp. not happening of the event triggers either the beginning or the termination of legal effect of the beneficial administrative act.

The legal consequence is triggered automatically when the event occurs. The occurrence of the event might depend on the will of the addressee (*Example: Construction permit comes into effect, once the addressee has created new car parking lots.*) The condition that triggers the beginning of a right, benefit, or obligation is called "condition precedent" the condition that terminates a legal relationship is called "condition subsequent".

## III. Definition of time-limitation (para. 1 lit.b)

Elements of the definition:

- A public body issues a beneficial administrative act.
- The body determines a specific date.
- The public body connects the legal effect of the beneficial act to the determined date with the clause stipulating that on this date the effect of the administrative act shall either begin or end on the date set.
- Legal consequence: The legal effect of the administrative act takes hold or ends on the determined day.

The date might be determined either by a precise date or by criteria allowing the precise determination (e.g. on the second day of the school summer holidays 2020; after two years of notification of this administrative act). The time-limitation related to the begin of the legal effect is called "suspensory time-limit", related to the end "resolving time-limit". A time-limit

## IV. Reservation of "abrogation" (para. 1, lit. c)

Elements of the definition:

- The public body issues a beneficial administrative act.
- The body adds to the act a reservation clause stipulating that the body retains the right to annul or repeal the administrative act.
- The reservation clause specifies circumstances that must be occur to give the body the right to either annul or repeal the act completely resp. partly.
- The circumstance must not be those that are already stipulated by law, in particular by art. 113 – 118 of this Code.

- Legal consequences: The decision on either the annulment or repeal of the act is at the lawfully exercised discretion of the public body.

The legislator uses the term “abrogation” that is not used elsewhere in the Code. It is to be understood as a collective term covering the two instruments annulment and repeal provided by this Code in art. 113 to 118.

Until the public body has not notified a decision on either annulment or repeal the beneficial act remains fully valid. The reservation provides only the opportunity to abrogate the act and, furthermore, restricts the addressee’s legitimate expectation of continuation of the legal relationship caused by the beneficial administrative act.

The annulment or repeal of the beneficial act is a new (onerous) administrative act, which can be challenged by appeal.

#### V. Additional requirement to act, cease and desist, or acquiesce (para, lit. ç)

Elements of the definition:

- The public body issues a beneficial administrative act.
- The body connects to the act an ancillary clause imposing a separate obligation on the addressee.
- Content of the obligation can be a clearly specified action, acquiescence, or omission.
- Legal consequences: By notification of the beneficial act an obligation of the addressee arises as prescribed by the additional clause.

The additional requirement is to be qualified as separate administrative act that can be separately challenged by appeal. Its annulment (as a result of the appeal) does not affect the validity of the main administrative act. Nevertheless, the obligation imposed is closely connected to the main act with the consequence that the obligation lapses when the main administrative act will be annulled or repealed.

#### VI. Additional legal preconditions (para. 2)

This paragraph provides two prohibitions. The para. a) provides the fundamental rule for the public body’s lawful exercise of the discretion related to the decision on adding an ancillary clause to a beneficial act (see above B.I. 3), which actually already derives from the general principles applicable to the exercise of discretion, namely the prohibition of considerations that do not clearly relate to the purpose of the administrative act and its legal basis.

Para. 2, lit. b) refers to a prohibition of adding an ancillary clause by primary legislation. The prohibition may derive from spirit, reason and purpose of the respective piece of legislation, an explicit provision on ancillary clauses to beneficial acts should not be required.

#### VII. Legal remedies

All kinds of ancillary clause can be separately challenged by appeal acc. to Part Six, Chapter II of this Code. For the appeal procedure the review of the exercise of the discretion (see above B.I. 3) is of particular importance.

#### Article 103 Act of assurance

1. Act of assurance shall be issued by the competent public body only upon request of the parties and it shall in any case be in a written form.
2. If prior to the issuing of the act of assurance\* the competent public body considers that a hearing should be conducted with one or more persons or, the participation of another public body is required under the law, the act of assurance shall be issued after the hearing of the person or persons or the participation of the public body.
3. If after the issuance of the act of assurance, the facts or the legal basis of the case change in such an extent that if the body would have been aware of this change, it would not have issued the act of assurance, the latter shall no longer be binding on the public body.

\*(editorial error of the Albanian legal text; instead of” act of assurance” it should read “assured act” – see below explanation under B. II)

## A. General Introduction

### I. Content and purpose of art. 103

For an act of assurance art. 103 provides four procedural rules - request of the party and written form requirement in para 1 and hearing of the parties and participation of another public body in para. 2 –and a special regulation related to the ceasing to exist of its binding effect (“*clausula rebus sic stantibus*”).

Art. 103 is neither dealing with the definition of an act of assurance nor stipulating the material legal requirements that are to be satisfied for the issuance of an act of assurance. The definition is provided by art. 3 para 1 lit. c, the material legal requirements are to be provided by special law (see explanation below on art. 3 para. 1 lit. c).

The act of assurance is an administrative act, by which the public body regulates with legally binding effect its future behaviour. The special legal requirements of such measure – in addition to those provided in art. 3 para. 1 lit. a) resp. b) are as follows:

- Provision by special law

Due to its exceptional character the issuance of the act of assurance requires the explicit authorization through special law. This should be interpreted *stricto sensu* as referring to a primary law only (law approved by Parliament) excluding the possibility to provide its application by secondary legislation.

- Assurance

Assurance is the public body’s expression of will vis-à-vis the party that an objective recipient must understand as the body’s clear and explicit legally binding commitment to perform at a later date a certain administrative measure.

#### *Examples*

*The explicit will of the public body to bindingly commit itself does not exist in cases such as i) the body’s general announcement of intention; ii) explanation of legal matters that sound favourable for the recipient; iii) the public official’s promise to support the request of the applicant; iv) political statement of the government even if it could rise reasonable expectations with respect to future administrative practice of public bodies.*

- Issuance of a certain administrative act or refrain from issuing such act

Object of the commitment undertaken through an assurance must be to issue or not to issue in the future a certain administrative act (hereinafter referred to as “assured administrative act”. The assurance must specify the subject matter (*e.g. construction permit for a concrete project*) that will be regulated by administrative act resp. the measure that will not be undertaken (*e.g. omission of the order to demolish a certain illegal building*). However, it is not necessary that all details of the future act that shall be issued or refrained from are already put into concrete terms.

### II. Relation to previous CAP

The legal institution of an act of assurance was not part of the previous CAP.

### III. Scope of application

The act of assurance is applicable only related to administrative acts. An application by analogy to other administrative actions is not possible.

### IV. Legal consequences

The act of assurance is an administrative act that entitles the addressee to claim the issuance resp. non-issuance of the assured act. The addressee may enforce his/her rights by lodging an administrative appeal (art. 130) against the public body’s non-issuance of the assured act resp. against the issuance of an act, which the public body has assured not to issue.

## B. Act of assurance in details

### I. Request for and written form of the act of assurance act (para. 1)

An act of assurance cannot be issued *ex officio* but only upon request of a party (for the term “request” see explanation of art. 41 under B.I.2., for its form explanation on art. 58 under B. III.). The use of the plural “Parties” in

the text of para. 1 does not mean that all parties involved must submit the request. In cases when there are more parties involved in the administrative procedure, it is sufficient if one out of the group of parties does so.

Furthermore, para. 1 prescribes for the act of assurance the written form, i.e. is *lex specialis* to art. 98 para. 1 that establishes the principle of freedom of form for administrative acts (for the written form see below explanation on art. 98 under B. I. 1. a). Furthermore, the written form requires the application of art. 99 and 100.

## II. Hearing of the party and participation of other public bodies (para. 2)

Para. 2 clarifies that two procedural requirements that are connected to the assured administrative act also apply to the act of assurance by which the public body binds itself to issue the assured act. (Here an editorial error of the legal text is to be pointed out: The first act mentioned in the beginning of the sentence of para. 3 must be understood as “assured act” – otherwise the content of this provision would not make any sense.) One requirement is the hearing, that must be conducted also before the decision on the act of assurance is taken (for the hearing see art. 87 – 89 and the explanation thereof) if a hearing for the assured act will be mandatory. The second requirement relates to the involvement of other public bodies. If the issuance of the assured act is a decision for to which other public bodies have the right or obligation to involve, the public body issuing the act of assurance must involve these other bodies in the same way in the procedure of the act of assurance. Here any form of participation of other bodies is relevant, not only those forms of participation that fall under art. 70.

## III. Ceasing to exist of the binding effect (para. 3)

Para. 3 is an application of the legal principle of “ceasing to exist of the basis of the transaction” (*clausula rebus sic stantibus*). This principle – be it codified or not – is recognised in most of the European national contract law systems as a legal institution (also called frustration of purpose or frustration of contract), to adjust a binding legal relationship to a new factual or legal situation, because the adherence to the principle “*pacta sunt servanda*” would lead on the part of at least one of the contractual partners to a simply unfair and unreasonable outcome.

In the context of the binding effect of an act of assurance, para. 3 stipulates the following legal preconditions that must be interpreted and applied very strictly, since it para. 3 provides an exceptional breach of the rule of the continuous validity of administrative act.

1. A public body issued an act of assurance.
2. After the issuance of the assurance facts or the legal situation have changed that have been relevant for its issuance.

For the examination of this legal requirement the public body shall proceed by answering the following questions:

- Question 1: What were the facts and legal provisions the public body has considered and applied for the question, whether or not the assured administrative act will be lawful and – in case the assured act is at the body’s discretion – without abuse of discretion?
- Group of questions 2 relates to the factual resp. legal basis:
  - Question 2.1: Have – in comparison the facts considered under question 1 - new or different facts arisen that are now after the issuance of the act of assurance applicable to the assured act?  
or
  - Question 2.2: Are facts that were considered related to the assured act no longer present and does the non-existence of facts now after the issuance of the act of assurance affect the assured act?  
or
  - Question 2.3: Does – in comparison to the legal provisions that were applied under question 1 – new legislation exist that is now after the issuance of the act of assurance applicable to the assured act?  
or
  - Question 2.4: Have after the issuance of the act of assurance one or more legal provisions been abolished that were applied for the assured act?
- Question 3 is to be asked if at least one out of the alternatives under question one is to be answered affirmatively: Is the new factual or legal situation now after the issuance of the act of assurance relevant for an administrative act as it was assured?

The relevance of the new legal situation follows from the applicability of the provisions. Relevant of facts is to be determined on the basis of objective consideration; the subjective will resp. opinion of the responsible official does not matter.

3. The public body when issuing the act of assurance was not or could not have been aware that the relevant change will occur.

If the public body knew that the relevant change will happen, an essential requirement for the application of para. 3 is missing and thus must not be applied. Furthermore, para. 3 does not apply, if the assurance was also or exactly given for the purpose of providing legal security to the addressee in case the development related to facts and legislation is uncertain. Finally, para. 3 does not apply, if the public body did not know but on the basis of dutiful consideration of all circumstance of the case could have known that the change might occur.

If the body has erroneously given the assurance on the basis of wrong or not existing facts or legislation and discovers this error subsequent to the issuance of the ac of assurance, para, 3 does not apply. In this case, however, the body might examine the legal requirement of annulment or repeal (art. 113 to 118) of the act of assurance.

4. In case of the public body's awareness the assurance would not have been issued.

This requirement is clearly satisfied, if due to the change of facts or legislation the assured act would be unlawful. Furthermore, if there is a discretionary margin, the examination of the hypothetic will of the body requires an objective consideration of concrete circumstance of the case, for example the public body's present administrative practice of equal or similar cases.

5. Legal consequences

If all requirements of para. 3 are satisfied, the binding effect of the act of assurance ceases to exist. This legal consequence takes effect "automatically", i.e. without any special additional action or declaration from the public body.

However, the public body should inform the addressee about the new legal situation, in particular if it is likely that the addressee for good reason still may rely on the continuous validity of the act of assurance.

## Section 2 Legal effects of the administrative act

### *Article 104 Commencement and ending of the legal effects of the administrative act*

1. An administrative act shall start to bring legal consequences against the party, to which it is addressed or, the interests of which are affected by the act, upon the notification of the parties about the content.
2. The administrative, which is passed in silence, shall begin to bring legal effects on the day of the expiry of deadline of its notification under Article 97 of this Code.
3. An administrative act may start legal effect at another date, which is expressly set by the act, but in no case prior to the notification of the party, under Paragraph 1 of this Article. In this case, the date of commencement of legal effects shall be explicitly determined in the disposition clause of the administrative act in writing.
4. An administrative act shall generate legal effects:
  - a) as long as it has not been cancelled or repealed, either ex officio or as a result of the exercise of administrative or judicial remedies;
  - b) as long as the deadline of the act has not expired or, its purpose has not been fulfilled; or
  - c) for any other reason as prescribed by law

#### A. General Introduction

##### I. Content and purpose of art. 104

Art. 104 provides the criteria for determining begin, duration and end of the legal effect of an administrative act.

## 1. No definition by law of the concept “legal effect”

The content of the concept legal effect is neither defined in this article nor elsewhere in this Code. Nevertheless, a systematic interpretation done on the basis of para. 1 of art. 104 in connection with the definition of an administrative act (art. 3 para. 1) allows the following two conclusions:

### a) With respect to the substance of the effect (“substantive legal effect”)

The substance of the legal effect is determined by the regulatory content of the concrete administrative act. Accordingly, the substantive legal effect covers the content of relationships as the administrative act “establishes, modifies or ceases” (wording of art. 3 para. 1) and as it is expressed by the “ordering part” of the act (see for the written act art. 99 para 2, c, i, as well as the explanation under B. II.6.). The reasoning of the act is of explanatory and informative character and does not trigger a legal effect.

### b) With respect to the scope of the effect (“external legal effect”)

Firstly, the legal effect relates to the concerned addressee(s) and, where applicable, to third persons, “the interests of which are affected by the act” (para. 1). Moreover, an administrative act is obligatorily binding and therefore its legal effect relates to on all state authorities and organs. Finally, the public body, which has issued the act, is also bound by its legal effect. However, binding on the public body, which has issued the act, is restricted, because under certain conditions it can revoke the act either by annulment or repeal (art. 113 et sequ.) or as result of the exercise of an administrative legal remedy

## 2. The timeframe of the legal effect

As a rule, the legal effect starts from the moment when the act is notified (para. 1) resp. on the day, when the legal assumption of art. 97 on administrative silence takes effect and remains in force until its cancellation (para. 4 lit. a) or completion (para. 4 lit. b), unless explicitly stipulated otherwise by the regulatory content of the administrative act itself (para. 3) or by law (para. 4 lit. c). The criteria are of formal-procedural character, which underlines that the legal effect of the administrative act does not depend on its lawfulness (which is also clarified by the juxtaposition of art. 109 and art. 110: the latter stipulates that absolutely invalid acts cannot become legally effective whilst for unlawful acts such regulation does not exist, i.e. they retain legally effective as long as they are not annulled).

The legal preconditions for begin, duration and end of the legal effect are not only provided by art. 104 but also by the provisions on Part Seven on notification and, if applicable, by art. 97 on administrative silence.

The concept “legal effect” of an administrative act (as explained below under B. I.) is to be distinguished from the concepts “administrative act that is uncontestable” and “administrative act that is executable”. The first means that an administrative act cannot be challenged anymore by administrative remedy or by lawsuit before the administrative court (see explanation on art. 132) whilst the latter is partly but not completely congruent with finality, because under the exceptional preconditions of art. 164 para. 2 lit. c to d.) administrative acts can become enforceable though they are still constable.

## II. Constitution and EU-Law

The rule that an administrative act becomes legally effective through notification derives from the principle of rule of law. It would not comply with this principle if an administrative act could have a legal effect vis-à-vis a party or a third person without giving the opportunity to those person of gaining knowledge of the act and, if necessary, seeking legal protection.

## III. Relation to previous CAP

The previous CAP connects in art. 111 the beginning of the legal effect to the “date of approval”, i.e. does not require a notification.

## IV. Scope of application

Art. 104 applies only to administrative acts.

## B. Commencement and ending of the legal effects of the administrative act in details

### I. Begin of the legal effect (para. 1)

An administrative act comes into effect as soon as it is brought to the notice of the person(s) concerned. Para. 1 covers two separate cases.

- First alternative: addressee of the administrative act (party in the meaning of art. 33 para. 1)
- Second alternative: third parties affected by the act (party in the meaning of art. 33 para. 3)

In either case the act brings legal consequences, in other words becomes legally effective, in the moment of notification vis-à-vis the respective party. Consequently, it is possible that the binding effect of an administrative act arises only in relationship to the addressee, because the act was notified, whilst third parties, who were not notified, are not affected – and vice versa.

### II. Cases of administrative silence (para. 2)

With the wording “administrative act passed in silence” para. 2 refers to cases covered by art. 97. Therefore, all the legal preconditions of art. 97 para. 1 must be satisfied when applying para. 2 of art. 104 (see below explanation under B.I.). Acc. to art. 97 in connection to 91 resp. 92 the public body is obliged to respond to a Party’s request for issuing an administrative act within a certain deadline, be it the regular (art. 91) or the exceptionally extended one (art. 92). The response the body is obliged to give consists of the notification of the body’s decision on the party’s request. If the body does not respond within the deadline of either art. 91 or art. 92, on the day of expiry of the respective deadline the approval of the request is deemed to be issued or – in the wording of para. 2 of art. 104 – the approval is deemed to be “notified”. In this way by using the term notification para. 2 of art. 104 is connected to para. 1, where “notification” is the key requirement to determine the moment when the legal effect of the administrative act arises.

### III. Special determination of the begin of the legal effect

The preconditions for a special determination of the begin of the legal effect are as follows:

1. A public body issues a written administrative act.
2. The administrative act stipulates a date, at which the legal effect of the administrative act shall begin.

This can be done either

- by setting a specific date (e.g. 31.12. 2017)
- or by clear criteria that allow to determine the date (e.g. “4 weeks after notification of this act” or “on the day following Easter Sunday 2018”)

3. The stipulated date is subsequent to the date of notification.
4. The stipulation of the special date is integrated into the disposition part of the act (art. 99 para. 2 lit. c sub-para. ii, explanation under B.I.7).

### 5. Legal Consequence

The legal effect of the administrative act begins on the specially determined date.

### IV. Duration of the legal effect (para. 4)

Para. 4 regulates in the sub-para. a) to c) three alternative categories of cases, when the legal effect of an administrative act ceases to exist. It follows from this that beyond the spheres of application prescribed by these sub-paragraphs – as a rule – the legal effect of an administrative act retains for an indefinite period of time. The cases of ending the legal effect are as follows

1. Annulment or repeal of the administrative act (para. 4 lit. a)
  - a) by first-instance administrative measure acc. to art. 113 to 118;
  - b) by appeal procedure acc. to 137 para. 4;
  - c) by judicial remedies;
2. Limitation of the period during which the legal effect of the administrative act shall retain due to its regulatory content of (para. 4 lit. b)

This provision covers two cases:

- a) The duration is stipulated by the administrative act itself, either by setting a specific date or by describing clear criteria that allow to determine the date, at which the legal effect shall cease to exist (*Example: "The requested permission to operate this industrial facility shall end on 1. April 2020" or "The requested permission is granted for three years beginning with the notification of this administrative act."*)
- b) The purpose of the administrative act does no longer exist

*Examples: The person entitled or obliged by the act died. The building the owner is obliged to demolish, was destroyed by a natural disaster.*

3. Limitation of the duration of the legal effect by law (para. 4 lit. c)

*Examples: The law could stipulate that a construction permit loses its legal effect if the requested project was not commenced within a certain period of time. The legal effect of a licence to operate a restaurant in a nature reserve must be renewed after three years.*

#### Article 105 Retroactive effects

1. The administrative acts shall have retroactive effect in the following cases:
  - a) when the act is issued pursuant to a court decision, which in turn has declared an administrative act as invalid;
  - b) when the law itself gives retroactive effects.
  - c) the competent body may confer a retroactive effect to the act when this is allowed by law and it is in favour of the interested parties and does not damage the rights of a third party.

#### A. General Introduction

##### I. Content and purpose of art. 105

As a matter of rule an administrative act has only prospective effect. This follows from the principles of legal security and certainty and the protection of legitimate expectations derived from the rule of law. Art. 105, however, is by its character a derogation of these principle by admitting by exception three kinds administrative acts with retroactive effect:

- acts implementing a court decision to replace replaces an earlier act from the time of its inception (lit. a);
- acts issued in application of a legal provision that expressly provides the issuance of administrative acts with retroactive effect (lit. b);
- acts, to which the parties agree, and which does not affect the rights of third persons (lit. c).

The major purpose justifying the exception of lit. a) and b) is to "repair" an unlawful situation and thus give precedence to principle of legality over the protection of legitimate interests both principles derived from the rule of law.

##### II. Constitution and EU-Law

Since the purpose of the exception from the rule that an administrative act has only prospective effect are very tightly drawn in order to favour another rule of law principles of similar weight, art. 105 is to be seen as being in accordance with constitutional and European law.

### III. Relation to previous CAP

The new provision replaces the previous art. 112 that provided six cases of exemption. The new provision is more precise and contributes to more clarity.

### IV. Scope of application

Art. 105 applies to administrative acts only.

### B. Retroactive effects in details

#### I. Administrative act implementing a court decision, lit. a

This exception requires the satisfaction of the following legal preconditions:

##### 1. The competent court declares an administrative act invalid

“Invalid” should not only be understood in its narrow sense of art. 110. The legal precondition should also be satisfied if the competent court annuls an administrative act on the ground of its unlawfulness.

##### 2. The court decision includes the obligation of the public body to replace the abrogated act from the time of its inception by a new act;

The administrative court has the competence to take decisions of this content according to the Law on Administrative Dispute.

#### II. Administrative acts with retroactive effect provided by law (lit. b)

The two major cases provided by this Code are the annulment of an administrative act acc. to art. 113 para. 2 and art. 137 para. 4. Other cases may be regulated by special material law. This should be interpreted *stricto sensu* as referring to a primary law only (law approved by Parliament) excluding the possibility to provide its application by secondary legislation.

#### III. Administrative acts in favour of the parties ( lit. c)

The requirements are as follows:

##### 1. Administrative act with retroactive effect

Any kind of administrative acts with retroactive effect could fall under this requirement, beneficial as well as onerous ones. As to the latter, also the reception of an onerous administrative act could bring not only a legal disadvantage to the addressee but could bring to the addressee also – i.e. outside of the legal relationship established by the onerous act - an economically or even legally favourable situation.

##### 2. In favour of the parties

The term “in favour” requires interpretation. With a view on the exceptional character of art. 104 and in order to protect the addressees - “parties” is here to be understood as addressees - against “undesired benefactions”, the fact whether or not an act will be “in favour” of the addressees can be assessed only by the addressees themselves. It follows from this that the issuance of such retroactive act requires either a request of the addressee or – in cases of ex officio decisions –the clear and voluntary approval of the parties after the public body has dutifully informed them about the legal and factual consequences.

##### 3. No damage of the rights of a third party

This requirement makes clear that an act favourable to the parties must not be issued, if a third person (“parties”

### Article 106 Publication of the acts in the Official Journal

1. The publication of the administrative acts is compulsory only when such a thing is required stipulated by the law.
2. Failure to publish the act, when this is explicitly requested by law, shall lead to the non-entry into force of the act.

This article has become obsolete through Part Seven “Notification” of this Code. Its wording is a copy of the previous art. 114 that was replaced by the new art. 163 “Official publication”.

### Section 3 Legality, invalidity and correction of the administrative act

#### Article 107 *Legality of the administrative act*

**1. An administrative act is lawful if it was issued by the competent public body, in accordance with the legal principles and requirements, as contemplated in this Code and the legislation in force.**

#### A. General introduction

##### I. Content and purpose of art. 107 within the context of Section 3

General purpose of this Section of the Code is mainly to provide resolutions to the problem of defective administrative acts. This is done below in the articles 108 to 112.

However, those articles dealing with defective situations are preceded by this art. 107, which commences the Section with a more positive perspective on the normality of public administration by referring to three key requirements for an administrative act one could call “good and correct”. Art. 107 is based on art. 4, by which the law constitutes the basis and boundaries of all activities of the state, which means all activities of public bodies and other entities (see above explanation on art. 4 “Legality principle”). The provision of art. 107 specifies this principle of legality and underlines the all overriding importance of the rule of law by saying that it is the law that determines the preconditions for a good and correct administrative act. In other words, an administrative act is good and correct if it is lawful.

According to art. 108 – 112 an act becomes defective if either it is illegal or erroneous. The Code distinguishes two kinds of illegality. It calls illegal acts are either acc. to art. 108 absolutely invalid or acc. to art. 109 unlawful depending upon the seriousness of illegality. With respect to its legal consequences for the first acts the term void is also in use, whilst for the latter the term voidable indicates a further consequence of unlawfulness (see below explanation on art. 109). Illegal acts are subject to administrative and judicial remedies. Erroneous acts are not illegal (art. 112) and therefore do not lead to court action.

An administrative act may be void or voidable if it is either issued by an incompetent body, or is issued without observing the required form or procedure prescribed by this Code, or its content is not in compliance with material law. The discretionary administrative act may also be void or voidable for the excess or abuse of discretion

##### II. Constitution and EU-Law

As already stated above (see explanation on art. 1), it is art. 4 para. 1 of the Albanian Constitution that lays down the principle that the Law constitutes the basis and the boundaries of all activities of the state. Art. 41 of the European Charta of Fundamental Rights comprises the right to good administration which comprises the legality principle of art. 4 specified in art. 107.

##### III. Relation to the previous CAP

The art. 115 – 120 of the previous CAP address the same matter but with significant differences related to structure and regulatory content.

##### IV. Scope of the norm

The art. 107 as well as all provisions of the Section apply only to administrative acts.

#### B. Legality of the administrative act in details

##### I. Competent public body

Art. 107 mentions the competence of the public body at the first place. This can be understood, on the one hand, as expression of the importance of this requirement for a lawful administrative act. Since, it is a fundamental part of the principle of legality as stated in art. 4 and 7 of the Albanian Constitution and of the European principle of the rule of law as well that all entities exercising executive power must keep the boundaries of their jurisdiction as stated in the law and bylaws (sub-legal law). This utmost important principle is the reason for the jurisdiction concept of the CAP

stated in art. 3 para. 5, specified by the criteria for the competence of an acting public body as provided in art. 22 et sequ.

On the other hand, their might also by a very practical reason, why the legislator gave this legal requirement such a prominent position. The public body, when commencing or even before commencing an administrative procedure acc. to art. 41 has to answer the question whether or not it has the competence to act in a certain situation. If the public body (by its responsible official) cannot doubtlessly answer this question affirmatively, no further procedural activity must be taken. Accordingly, the matter of competence of the public body should also be the first criteria for an ex-post examination of the legality of an administrative act in the framework of administrative or judicial remedy, when the reviewing administrative body or court follows a systematic and logical approach. So, the requirement of competence can be seen as the door that opens access to the second and all the following steps of an administrative procedure as well as of its review.

## II. Principles and requirements of this Code

The wording “principles and requirements” underlines that preparing the issuance of a legal administrative act requires more than literally observing the text legal provisions. It also requires that every rule of this Code must be interpreted and applied in accordance with the spirit, meaning and purpose of not only the rule itself but also the key principles as reflected by the Code as a whole and, particularly, its principles stipulated in Part One Chapter II of this Code.

## III. Legislation in force

This Code provides the procedural instruments that serve to take an administrative decision in accordance with the material law, in other words the compliance with procedural rules is a precondition for the correct application of material law. The content of the administrative act, however, is determined by material law. Material law is provided not only by applicable special legislation (such as construction law; civil service law; legislation on public security, health, consumer protection, environment, or road traffic). The concept legislation in force covers also the Constitution of the Republic of Albania and ratified international agreements and moreover, in accordance with art. 116 et sequ. of the Albanian Constitution, also any other normative act, which acquire legal effect (see art. 117 et sequ. of the Constitution).

### *Article 108 Absolutely invalid administrative act*

1. An administrative act shall be absolutely invalid in the following cases:

- a) it is in an open and flagrant contradiction with an ordering provision of this Code, and the legislation in force regarding the following:
  - i) the power of the public body;
  - ii) the procedure of issuing the act;
  - iii) the mandatory form or other elements of the act;
- b) it has been issued under fraud, threat, bribery, conflict of interest, counterfeit, or any other criminal offence;
- c) the execution of the act may cause a punishable action under the criminal law; ç) In any other case explicitly provided by law.

## A. General Introduction

### I. Content and purpose of art. 108

As an exceptional rule laid down in art. 108, an administrative act is absolutely invalid (hereinafter also called void) if it suffers from extremely grave and serious defect and such defect is obvious on the consideration of the relevant circumstances.

The provision lists four areas, within which such obvious and grave and serious defects may occur:

- the act was made on account of non-compliance with procedural or material law provisions (lit. a);
- the act is the result of a criminal offence (lit. b);

- the act requires performance from the addressee, which may result in a criminal offence (lit. c);
- the act is explicitly forbidden by law (lit. ç).

As it will be explained further below, the cases of lit. b and c must be understood as special application examples for non-compliance with “legislation in force”, i.e. are actually already covered by the more general lit. a.

The legal preconditions of the norm must be interpreted in the narrowest way possible, not only due to its exceptional character and the serious legal consequence “absolute invalidity” (explained below under V.) but also in contradistinction to the cases of unlawfulness in art. 109 (see below), with which the cases of 108 overlap.

## II. Constitution and EU-Law

The norm is a breach of the rule-of-law subprinciples “legal certainty” and “stability of legal relationships (legal peace)” ensured by the continuous binding effect of an administrative act (see explanation on art. 3 para. 1 a. on functions of an administrative act under A.I 1 and on finality of the act under A.III. 2). But nevertheless, it is admissible to consider that art. 108 does not violate the principle of the rule of law, as laid down in the Albanian Constitution and EU-Law, because in cases of obvious grave and serious legal defects the principle of material legality of public administration that likewise derives from the rule of law may be considered the overriding principle.

## III. Relation to previous CAP

The norm partly reflects the content of the previous CAP in art. 116.

## IV. Scope of application

The norm applies only to administrative acts.

## V. Legal consequence

As all cases covered by the special legal preconditions of art. 108 can also be subsumed under one of the seven categories of legal defects listed in art. 109, it should be noted that the cases of either article share the same legal consequence, that is to say also the special cases of defectiveness covered by art. 108 are unlawful and therefore can be challenged by appeal according to art. 130.

The difference consists in the further legal consequences. An administrative act that satisfies one of the situations referred to in art. 108 is not only unlawful but beyond that becomes absolutely invalid, whilst the unlawfulness of cases that do not fall under the special provision of art. 108 but on the general rule of article 109 leads to voidability of these cases (see below explanation on art. 109). Voidability means that the act – although unlawful - remains valid, as long as they are not annulled as a result of a legal remedy (art. 130 et sequ. or court decision) or of annulment or repeal acc. to art. 113 et sequ.

The concept “absolutely invalid” referred to in art. 108 as well as its specification in art. 110 para. 1 means that with respect to its legal consequence an obviously and seriously defective act is simply null and void. A void act is no act. It is a complete nullity, a still-born act, which never comes into effect.

A void act may be completely ignored by the concerned addressee(s), third parties, other administrative bodies. Even the public body’s non-fulfilment of its obligation to declare the absolute invalidity of such act imposed by art. 111 does have any effect the hypothetical nullity.

So, anyone at any time in any matter may assert the nullity of the act. That is, the absolute invalidity need not be asserted in any time-bound proceedings. Whenever the public body wants to enforce a void act, the addressee(s) or third parties can point out its nullity to the public body, which has taken it.

This is, so far, the theoretic legal situation. And the situation seems clear. Legally the addressee has nothing to fear from a void act. However, even an absolutely invalid act is not in any case absolutely free of fatal practical consequences, for example when public body and addressee have different legal opinions on the defectiveness of an administrative act. In such case, even forceful execution of a null and void act cannot be ruled out. (In so far, we agree with Wade, H.W.R., Forsyth, C.F., Administrative Law, note 34 at 343, who with a very pragmatic view admits: “Void is ... meaningless in any absolute sense.”) Therefore, in order to avoid the risk implied in the different assessment of the nullity of an administrative act, the addressee of a void act resp. any other interested third person is always well advised to either appeal the act acc. to art. 130 or request the declaration of absolute invalidity acc. to art. 110 para. 2 and, if necessary in the latter case, appeal a public body’s rejection to declare the invalidity,

## VI. Critical comment on the legal doctrine on absolute invalidity of administrative acts – proposal *de lege ferrenda*

In numerous continental European countries generations of law students have been taught and need to understand the legal theory on “absolute invalidity of administrative acts”. They have to accept, how and why it should be possible that according to legal doctrine something shall be deemed not to exist, but nevertheless could heavily affect the real life of persons and institutions and therefore needs to be challenged by its addressee and made to disappear by administrative or judicial declaratory activities.

The practical relevance of this hypothetical nullity, however, is more than marginal and from our point of view completely disproportionate to the theoretic, legislative and judicial efforts expended. In principle, all of the cases covered by art. 108 can be resolved without problems by applying the legal institute of unlawfulness of an administrative act (art. 109) and its voidability. The addressee finds satisfactory legal protecting by administrative and judicial legal remedies, whereby also the deadline of an administrative remedy should not play a role due to the possibility of reinstatement (art. 54). The public body, on the other hand, has got the instrument of ex-officio annulment (art. 114) for the purpose of aligning the act with the law.

Conclusion: It should be considered to delete this norm without substitution.

### B. Absolutely invalid administrative act in details

#### I. Administrative act (para. 1 first half of the sentence)

Art. 108 requires firstly an administrative act. It follows from this, that this provision applies only to an act fulfilling all elements of an administrative act as defined in art. 3 para. 1 a) and - as explained above (see art. 98 under B.I. b. and d.) – in addition to that satisfies the minimum requirements of an act communicated verbally or in any other form. These minimum requirements are the following:

- A public body (the concept public body includes any natural person or legal entity which is entitled by the law to exercise administrative functions- art. 3 para. 6) issues the act.
- The act indicates the addressee(s).
- A content of an administrative act is recognizable.

If the act does not have the “appearance” of an administrative act by showing the necessary elements of an administrative acts as explained above, art. 108 is not applicable. We cannot call an act without the appearance of an administrative act “absolutely invalid administrative act” but just “non-act”. However, for reasons of legal protection of the person affected by such “non-act” the analogue application of art. 110 para. 2 and the administrative legal remedies should be considered.

#### II. The legal preconditions of para. 1 lit. a

##### 1. Ordering provision of this Code

Despite the tautology of the wording – since every provision of a Code is by its nature “ordering” – the meaning of this requirement is clear: it covers all provisions of the CAP.

##### 2. Legislation in force

As explained above (art. 107 under B.III.) the concept “legislation in force”, when juxtaposed with “provision of this Code”, covers not only special material administrative law but furthermore also the complete corpus of legislation including the Constitution of the Republic of Albania and ratified international agreements and finally, in accordance with art. 116 et sequ. of the Albanian Constitution, also any other normative act that acquires legal effect (see art. 117 et sequ. of the Constitution).

##### 3. Open and flagrant contradiction

###### a) Contradiction

The concept “contradiction” requires much more than merely non-compliance with any legal provision. Otherwise the article 109 that lists a variety of unlawful administrative acts would become completely meaningless. In the light of the relationship between art. 108 and art. 109 as well as under consideration of the legal consequence of absolute invalidity, the legal term “contradiction” requires an extremely grave and serious defect. Such defect can be defined as a defect that is in total contradiction to the legal order and the community’s fundamental values, which the legal

order is based on, so that it would be completely intolerable, if the act had the intended legal effects. Decisive is not the non-compliance with a certain legal provision as such but the offence against the legal order as a whole and its constitutional principles.

Examples of extremely grave and serious defects could be the dismissal of a civil servant because of his religious confession; the military conscription order addressed to a boy of 10 years; a positive decision on examination though the addressee, who has never participated in an exam.

b) Open and flagrant

In addition to the level of gravity the provision requires that the defect was “open and flagrant”. This legal precondition relates to the recognizability of the defect. Open and flagrant means that both the defect as such as well as its extreme gravity and seriousness are easily recognizable at everybody’s first sight. It is necessary that every average citizen without any investigation or particular legal consideration must come to the conclusion, that it is impossible that such act could be in line with the legal order.

4. Three explicitly mentioned areas of applicability of the requirement open and flagrant contradiction

The provision mentions three areas where open and flagrant contradiction may occur. This list cannot be exhaustive, since it covers only jurisdiction and procedural rules whilst in the beginning of the paragraph the general term “legislation in force” covers the whole legal order. Consequently, the three mentioned areas are to be understood as special examples that do not excluded other defects, in particular not those related to the content of the administrative act.

a) Defects regarding the power of the public body

Possible examples of extreme and easily recognizable gravity:

Custom administration issues construction permit; municipal administration imposes a prison sentence.

b) Defects regarding the procedure of issuing the act

Possible examples of extreme and easily recognizable gravity:

Here the law provides examples in sub-para. b (see explanation below) and their gravity at the same time gives a general indicator for the level of gravity required for absolute invalidity of an act.

Apart from the cases of sub-para. b, however, it is hardly imaginable that a procedural defect should lead to “absolute invalidity” of the act, except, maybe, the case, when an obviously mentally ill responsible official conducts the administrative procedure. All the other possible procedural defects will in all likelihood fall under art. 109.

c) Defects regarding the form of the act

Two examples of relevance could be imaginable: i) A verbally communicated administrative act shall be void, for which written form is explicitly prescribed by law and this form requirement is commonly known. ii) An act would suffer the same consequence of nullity, when it is scribbled on a small piece of paper torn off a newspaper. As a rule, however, all formal requirements laid down in art. 99 and 100 should lead to unlawfulness in the meaning of art. 109.

5. Defects regarding material content of the act

As said above lit. a) does not mention material defects under i), ii), and iii), but includes them by the term “legislation in force” provided in the beginning of the sentence of para. 1 lit. a). One example of a material defect is provided by lit. c (see explanation below) that beyond this concrete case once again serves also as general indicator for the gravity of other material defects. Accordingly, under defects regarding the material content of an act that would lead to its nullity, might be those, which obviously lack any legal authorisation or establish completely absurd orders (e.g. municipal administration issues an administrative act ordering forced marriage of a couple of minors). The same could apply for acts whose content is absolutely nonsensical or completely incomprehensible. Finally, acts imposing an obligation that is objectively impossible to fulfil (e.g. obligation to climb the Mount Everest) should be considered void.

III. The cases of lit. b

This provision regulates as legal requirement for absolute invalidity that the act was the outcome of fraud, threat, bribery, conflict of interest, counterfeit or any other criminal offence. This provision covers three situations. On the one hand it regulates the case, when the addressee was the one, who committed the crime, whilst the public body (responsible official) was the victim of this action; the second situation could be that the responsible official is the

offender and the addressee of the act was unaware of this; finally, the crime could be committed in complicity of both addressee and responsible official. Nevertheless, it will easily find everyone's consent that an act issued as a result of a situation covered by this provision, is in total contradiction to the legal order and the community's fundamental values, which the legal order is based on (see definition above under B.II.3. a).

The practical problem, however, is for an average citizen to recognise the circumstance and capture all the sometimes quite complex legal aspects of the situation without any investigation or particular legal consideration. Because it is not only true, that crimes are usually not committed in a way that the criminal activities are easily visible for other persons. It is also a matter of fact that for some activities an intensive and complicated legal consideration is required in order to come to the conclusion that a factual situation is illegal and punishable (e.g. because of a conflict of interest)

So, in practice the application of this provision will frequently fail for lack of recognizability of the criminal offence, be it for factual or legal reasons.

#### IV. The case of lit. c

Whilst under lit. b the period of decision-making is covered and the way and circumstances of processing before the act was issued, lit. c) is dealing with the situation related to the implementation of the issued act through the parties. It stipulates that an act is void, which imposes an order on the addressee that would bring the addressee - in case of observance - into the conflict of taking an action, that fulfils the objective elements of a criminal offence. Here we have the same problem as explained above for cases of lit. b. For an average citizen it is not possible to easily recognize at a first glance, whether or not an action fulfils all objective elements of punishability. And even if so, the address would very rarely succeed to receive from the public body the declaration that confirms the nullity of its act on the grounds that the act imposes the commitment of a crime. Once again, also this provision will be of only very marginal relevance in administrative practice.

#### V. Any other case explicitly provided by law (lit. ç)

Lit. ç applies to acts that do not fall under the provisions of lit. a – c, neither due to the circumstances, under which they were drawn up, nor due to their outcome.

### *Article 109 Unlawfulness of an administrative act*

#### 1. An administrative act shall be unlawful when:

- a) the public body, which has issued the administrative act, has acted without having the jurisdiction;
- b) it is an outcome of the infringements of provisions related to the administrative procedure;
- c) it contradicts the provisions regulating the form or the compulsory elements of the administrative act;
- ç) it was issued without authorization by a law, under Article 4, Paragraph 2 of this Code;
- d) it violates substantive law;
- e) it is a result of the discretion, which was unlawfully exercised; or
- ë) it fails to comply with the principle of proportionality.

#### A. General Introduction

##### I. Content and purpose of art. 109

Art. 109 lists seven areas of legal defects that lead to unlawfulness of the administrative act. In this way, it pursues among others the purpose to provide specifying guidelines for the administrative practice to implement the principle of legality of public administration as stated in art. 4.

The first three areas (lit. a. – c. ) comprise legal defects related to jurisdiction and procedural rules of this Code. These three areas are also covered – though with similar wording - by art. 108 para. 1lit. a, sub-para. i. – iii.

The other four areas are dealing with statutory violations against material rules. Three of those (lit. ç, e, and ë) relate to special cases of material-law defects – lack of legal base, excess or abuse of discretion, infringement of the principle

of proportionality - whilst the general or residual clause (also called “omnibus” clause) of lit. d serves as “catch-all” provision that applies to any other substantive defect.

## II. Constitution and EU-Law

This article implements the principle of the rule of law.

## III. Relation to previous CAP

The previous CAP did not provide such a list of kinds of legal defects an administrative act could suffer from.

## IV. Scope of application

Art. 109 applies to procedural actions aimed at the issuance of an administrative act as well as to form and regulatory content of an administrative act.

## V. Legal consequences

### 1. Voidability

The defects of the cases that fall under one of the seven categories of art. 109 lead to unlawfulness of the respective administrative act. However, in contrast to the cases of art. 108, here the unlawfulness of the act does not immediately affect their validity. Administrative acts suffering from unlawfulness as a consequence of art. 109 do not become null and void (see above explanation on art 108 under A.V.) but voidable. Voidability means that the act – although unlawful - remains valid, that is implementable and enforceable - as long it is not annulled as a result of an appeal procedure (acc. to art. 130 et sequ. or on the grounds of a court decision) or of ex-officio annulment or repeal acc. to art. 113 et sequ.

### 2. No irrelevant unlawfulness but particularity for appeal procedure

Art. 109 does not provide any indications of differentiation related to gravity or relevance of unlawfulness, be it a jurisdiction-related, procedural, formal, or substantive legal defect. Nevertheless, though art. 128 para. 2 connects the admissibility of administrative remedies to the precondition “unlawfulness” without restricting wording, there is a difference for the appeal procedure: An alleged affection of procedural rights cannot be challenged separately. It can be filed only in the context of an appeal against the (final) administrative act, unless a separate appeal against a procedural action is provided by law (see below explanation on art. 130 para. 2 under B.II.)

## B. Kinds of unlawfulness of an administrative act in details

### I. Lack of jurisdiction (lit. a)

A basic principle of administrative law derived from the rule of law states that a public organ must confine to the functions, which fall within its competence; it shall not exceed its territorial or substantive competence. The matter of both territorial and substantive jurisdiction is mainly subject to special (sectoral) material law, whilst this Code provides in art. 22 – 29 the general legal framework for determining the jurisdiction and power of public bodies.

As to the particular relevance of the jurisdiction with respect to both the underlying legal principles as well as the way how to deal with this matter in the course of processing an administrative procedure see the explanation on art. 107 above (under B.I.).

### II. Infringement of procedural rules (lit. b) and disregard of form (lit. c)

All rules on procedure and form provided by this Code are in principle of equal relevance. Art. 109 does not indicate any distinction between mandatory provisions, whose non-observance led in any case to unlawfulness of the act, and merely directory (organizational) rules of less relevance with respect to their legal consequences.

With this legislative solution art. 109 is fully in line with the rule of law. Every provision on procedure and form – even if not serving the direct interest of an individual involved – may in the end have an impact of the substantive result of the procedure, i.e. to the content of the administrative act. It follows from this that every non-observance of such legal provision imposes a burden on an individual and does not correspond with his/her legitimate expectations in a faultless treatment. And finally, every case of non-compliance affects general trust in the administration.

### III. Lack of legal authorisation to issue an administrative act

The requirement of law as a pre-condition for the exercise of any administrative powers (also called positive legality) derives from the rule of law. Requirement of law in this context means that every administrative act must be based on authorisation through a formal law (primary legislation) enacted by a competent legislative body, or through a subordinate (secondary) legislation authorised by a formal law. The major justification of this fundamental rule for public administration lies in the principle of parliamentary democracy, according to which the administration must act not on itself. Administrative bodies should be allowed to interfere with the rights and freedoms of the people only on the basis of the will the people expressed through legislation adopted by the people's representatives. An additional justification is given in the requirement of the rule of law that the legal relationship between the state and the citizen must be regulated through general law, which not only confines the administrative activities but also makes them foreseeable and calculable.

The principle of the requirement of a legal authorisation applies also in the sphere of benefits for the members of the society, in other words for beneficial administrative acts (see explanation on art. 3 para. 1 lit. a under A.). Here, the rule of law requires the distribution of state resources (e.g. subsidies) to be made only under law, because the law makes such distribution foreseeable and definite and also procures or ensures a corresponding right to the individual to claim the benefit if he/she satisfies all the requirements of that law.

### IV. Violation of substantive law

Observance of substantive law means firstly the precise and professional application of the legal preconditions of legal basis authorizing the issuance of the respective administrative act. But, as explained above (art. 107 under B.III.) the concept "substantive law", - elsewhere in this Code also referred to "legislation in force" - covers not only special material administrative law but furthermore also the complete corpus of legislation including the Constitution of the Republic of Albania and ratified international agreements and finally, in accordance with art. 116 et sequ. of the Albanian Constitution, also any other normative act that acquires legal effect (see art. 117 et sequ. of the Constitution). It follows from this that violation of substantive law includes the non-observance of constitutional commands and prohibitions, and moreover requires the observance of all valid laws, including the observance of such legal principles as equality, impartiality, non-arbitrariness, and compliance with the budgetary provisions. It prohibits gifting out benefits to individuals dependent "on quid pro quo". And finally, it requires cooperation in the exercise of the functions and in the achievement of the objectives of the other organs of the state.

### V. Excess and abuse of discretion

This Code defines and specifies the concept discretion in art. 3 para. 3 and art. 11 (see explanation ibidem). The unlawful exercise of discretion can be categorized by non-use, misuse and excess of discretion as follows:

#### 1. Examples for non-use of discretion

- The public body - due to erroneous interpretation of the relevant legal provision or it mistakenly sees itself bound to some other law or administrative order - considers that it has no discretion in the matter and proceeds as if the decision were to be adopted in the exercise of circumscribed powers and not as a matter of discretion.
- The body fails to exercise its discretion because it does not exercise it due to idleness.

#### 2. Examples for misuse of discretion

- The public body uses discretion for an unlawful purpose and not for the purpose laid down in the norm granting discretion.
- Not all or wrong facts are taken as basis of the decision.
- The body decides all cases of a particular class schematically in a fixed manner without regard to the facts of individual cases.
- Irrelevant considerations are taken into account.
- The exercise of the discretion is based on improper motives or bad faith (personal subjectivity of the public body such as personal enmity or friendship, economic interests, party affiliations etc. must not play a role in the decision making process) .

#### 3. Examples for excess of discretion

- The public body does something, which is clearly not authorized to do under the enabling law such as imposition of a fine beyond the upper limit set out by law.

- In some specific cases a restriction of the discretion (“reduction to zero”) could lead to a failure. Reduction to zero means that in spite of the theoretical choice given by the discretionary power to act one way or the other, only one course of action may be legal. For example, assuming – according to the law - inspectors of buildings have full discretion to intervene if the owner of a building misuses his building. But in the case of material danger to the legally protected interests of neighbours by such misuse, inspectors are under an obligation to intervene.
- The requirement of equality of treatment in the exercise of discretion is not observed. This will be the case, if the public body deviates in a single case from an established lawful administrative practice without there being any objective substantive justification for that difference in treatment.
- Of highest importance for the dutiful exercise of discretion is the observance of the principle of proportionality that will be explained in the following section.

## VI. Infringement of the principle of proportionality

The principle of proportionality is defined in art. 12. The principle requires that an administrative act must not interfere with rights and freedoms of a citizen beyond what is necessary to achieve the purpose of the respective administrative act and its legal basis. Administrative acts that could interfere with rights and freedoms are those that cause a disadvantage to the affected person such as commands or prohibitions, but also rejecting a request (*e.g.* denial of a licence). An administrative action of such disadvantageous effect may restrict an individual right only if it is suitable to attain the purpose prescribed by law, strictly necessary to obtain the purpose, and adequate, i.e.. the administrative intervention does not imply a disadvantage that is out of proportion with the designed end.

### 1. Suitability

In the enforcement of a law the public body can employ only suitable means for the accomplishment of the purpose of that law. The suitability of the means must be determined from objective standards and not from the subjective judgement of the public body.

Example: Assuming, neighbours of a factory complain about the emission of unpleasant smell from the factory. The only reason for this is the insufficient height of the industrial chimney. In order to prevent the nuisance, the competent authority imposes the obligation on the operating company to build a higher chimney and in addition keep the windows of the factory always closed. The additional part of the administrative order dealing with the windows is unsuitable to attain the intended purpose and therefore violates the principle of proportionality and is unlawful.

### 2. Necessity

The principle of necessity is also called the principle of the mildest means. It requires that out of several suitable means available for achieving the object of law only those should be pursued, which in the case of onerous measures (orders, prohibitions) cause minimum injury to the individual and in the case of beneficial measures cause minimum loss to the community. For the application of the principle it is necessary that several suitable means must be open to the body to achieve the end of the purpose of the law. In the absence of such a choice the question of application of milder means does not exist.

Example: In the case of the assumed example above, the administrative act orders to build a chimney of a height of 100 m, a height of 50 m was sufficient to prevent the nuisance caused by the unpleasant smell. The height of 100 m is unnecessary (disproportionate) and therefore the administrative act unlawful.

### 3. Adequacy

The principle of adequacy or of prohibition against excessiveness is also called the principle of proportionality in the narrow sense. It requires a proper balancing between the injury to an individual and the gain to the community caused by an administrative act. It prohibits those acts, whose disadvantages to the individual outweigh the advantages to the community. In short, the principle of adequacy insists that the administrative body cannot exercise its discretion as it likes. The body is under obligation to make a judicious balance between the community and individual interests and must abstain from taking an action, which will put substantial burden on the existence of an individual.

Example: In the case of the assumed example above, the factory emits the unpleasant smell only twice a year for two hours, when a special production process is carried out, and the smell is marginally noticeable but not dangerous to health. The costs for the construction of a higher chimney would lead the company into significant financial trouble and could force the company to close the factory, which would also cause job losses. An administrative act ordering the construction of a chimney of 50 m height was inadequate (disproportionate) and therefore unlawful.

*Article 110 Effect and ascertainment of the absolute invalidity*

1. The absolutely invalid administrative act shall not bring any legal effect, regardless of whether it is ascertained as such or not. It shall be considered as inexistent.
2. The absolute invalidity of the act may be declared at any time, either ex officio or upon request of any interested person, by the public body that has issued it, its superior body, or the body, which is competent to review the administrative appeal, as well as the competent court, under the law.
3. In case only a part of the act is absolutely invalid, and such part is so important that the public body would not have issued the act without it, the whole act shall be invalid.

A. General Introduction

I. Content and purpose of art. 110

Art. 110 specifies the legal consequence of the cases art. 108 is dealing with by describing in its para. 1 the meaning of the concept “absolute invalidity”. Supplementarily, para. 3 regulates how partial defectiveness affects the validity of the rest of the act.

Acc. to para. 2

- the public body that has issued the defect act,
- as well as its superior body,
- the body competent for the appeal procedure, and
- the court competent for the legal remedy against the public body’s administrative acts

may declare the absolute invalidity of an act. Here the word “may” be declared does not grant discretion (see below B. II.4.) but provides the authorising legal base for issuing such declaratory administrative act. The authorisation also covers the partial nullity of an act acc. to para. 3.

Despite the rule in para. 1, according to which the nullity does not depend on whether or not it was ascertained, there is frequently, in particular in cases of doubt, a practical need of clarification, not only in the interest of addressee(s), third parties and the public body, which has issued the act, but also in the interest of other administrative authorities and legal subjects participating in legal transactions.

II. Constitution and EU-Law

There are no thorough doubts about the constitutionality of the norm (see above explanation on art. 108 under A.II.)

III. Relation to previous CAP

The norm corresponds to the previous CAP in art. 117.

IV. Scope of application

The norm applies only to defective administrative acts.

Para. 2 applies to declarations that aim at declaring its absolute invalidity of those acts. The wording does not include the application of this norm with the aim to declare the opposite, i.e. the validity of an act (affirmative declaration). Significant grounds exist and speak against application by analogy, in particular the reason that such affirmative declaration would force the addressee to challenge it by appeal (which in turn is subject to deadlines and other requirements), whilst without any declaration the right of the addressee to claim nullity would never expire.

V. Legal consequence

The declaration of absolute invalidity as well as the rejection of the request to issue such declaration are administrative acts, i.e. both can be challenged by appeal, but the declaration of absolute invalidity only if issued ex officio or upon request of another party.

The parties’ right to request the declaration of nullity does not exclude their right to lodge an appeal (art. 130) against the act in question. Within the deadline of an appeal (art. 132) the parties have the right to choose between the two options.

## B. Effect and ascertainment of the absolute invalidity in details

### I. Consequences of absolute invalidity (para. 1)

For the detailed explanation of the term absolute invalidity including the critical comments on its practical relevance see above the explanation on art. 108 under A.

#### 1. No legal effect

As explained above (see art. 108 under A. V.) an absolute invalid act is null and void with respect to its legal character. In other words and legally speaking: a void act is no act. It is a complete nullity, a still-born act.

However, a void act is not nothing. As a matter of fact, what the public body has put into the world by producing an act with an obvious, grave, and serious defect, that can have very significant practical effects on the situation of the parties and others, at least as long as it is not declared null and void acc. o para. 2 of art. 110 (see above explanation on art. 108 under A. V.).

#### 2. Shall not bring

“Shall not bring” means that an act with an obvious, grave, and serious defect never comes into effect. It is legally treated as null and void from the moment of its notification.

#### 3. Regardless of whether it is ascertained as such or not

The nullity of the defective act occurs automatically, the declaration that it is absolutely invalid does not have any effect on the nullity as such. The declaration is just transcribing with words what was already caused by legal order, which is the nullity.

#### 4. Shall be considered as inexistent

The second sentence of para. 1 does not provide any regulatory content in addition to what was already said by the first sentence.

### II. Declaration of absolute invalidity (para. 2)

#### 1. Bodies or court

The following authorities listed in para. 2 are authorised to declare absolute invalidity of an administrative act:

- the public body that has issued the defect act,
- as well as its superior body,
- the body competent for the appeal procedure, and
- the court competent for the legal remedy against the public body’s administrative acts.

#### 2. declare at any time

The article does not provide any deadline for the declaration of absolute invalidity.

#### 3. ex officio or upon request

- a) Administrative bodies may undertake ex-officio initiatives or respond upon request. The requester has the right to choose between one of the three bodies, in other words may also involve directly the superior resp. appeal body instead of opting for the first instance public body. Para. 2 does not require to observe prescribed stages of appeal, otherwise the alternative choice between superior body and appeal body, which the norm provides, would not make any sense.

This solution meets a practical need, since it is not very likely that the public body that has issued the defective act would willingly admit that it produced a null and void act. This is in particular unlikely, when the defect falls under lit. b) or c) of art. 108.

- b) The competent administrative court, of course, cannot act *ex officio* but only in response to an action for a declaratory judgment. But it is to underline that para. 2 allows such action without preceding involvement of an administrative body for the same reasons as explained above in the previous section.

#### 4. Any interested person

Not only parties of the administrative procedure that led to the defective act but also any other person, which can claim the affection of its own rights or legal interests through the defective act, falls under the legal requirement “any other person”. For the interpretation of “own (subjective) rights or legal interests” art. 128 applies (see explanation *ibidem* under B.I.3.).

#### 5. Legal consequence

The legal consequence of a request as well as of initial indications about a seriously defective the public body has acquired otherwise *ex-officio* is the obligation to enter a thorough investigation all relevant facts and circumstances (art. 77) that could have led to the nullity of the act and undertake a dutiful legal assessment of the factual situation.

The request of any interested person as well as the fact that the public body became *ex officio* aware of initial indications about a seriously defective, both impose the obligation on the body to enter a thorough investigation of all relevant facts and circumstances (art. 77) that could have led to the nullity of the act and undertake a dutiful legal assessment of the factual situation.

The word “may” be declared does not express any discretion of the bodies but just the authorisation to declare an act null and void. A declaratory administrative act without such authorisation in this Code lacked the necessary legal basis (see art. 109 para. 1 lit. ç).

If the thorough investigation of facts and the legal assessment have consolidated to “cognizance”, the further legal consequence, namely the mandatory declaration of the absolutely invalid act, is provided by art. 111 (see explanation below).

### III. Partial absolute invalidity (para. 3)

Acc. to para. 3 an administrative which is partly void becomes void in full if the void part is so vital that without it the public body would have not taken the administrative act. Whether the body would have done so is decided on the basis of objective criteria of the legal provisions under which the act is taken and not on the subject will if the body.

#### Article 111 Mandatory declaration of absolutely invalid act

**1. The public body, in case it comes to the cognizance of the cases foreseen in art. 108 of this Code, has the obligation to declare the absolute invalidity of an administrative act.**

#### A. General introduction

##### I. Content and purpose of art. 111

Article 111 is actually a continuation of art. 110 para. 2 by providing the legal consequences, when a public body has received a request to declare the nullity of an act or has otherwise acquired initial indications related to the possibility of absolute invalidity of an administrative act (see above explanation on art. 110 under B.I.4.).

##### II. Legal consequences of art. 111

- Art. 111 imposes in case of cognizance of the cases foreseen in art. 108 of this Code the obligation on the public body to declare the absolute invalidity of the act.
- The public body’s inaction - despite its cognizance of all relevant circumstances that fulfil the legal requirements of one of the cases regulated in art. 108 - does not affect the nullity of the concerned act.
- Every interested person (see above explanation on art. 110 under B.II.3) has the subjective right of declaration against the public body. The body’s omission (administrative silence) can be challenged by appeal acc. to art. 130, 132 para. 2, and 138.
- If the public body fails to fulfil its obligation to declare nullity of the defective act, disciplinary sanctions against the responsible official could be applicable under civil service legislation.

## B. Mandatory declaration of absolutely invalid act in details

### I. The public body

All three public bodies listed in art. 110 para. 2 (see above explanation on art. 110 under A. I) fall under this legal requirement. If the legislator had wanted to oblige only “the public body that has issued the act”, it would have expressed that by using also here this wording as done elsewhere in this section of the Code.

This interpretation is also in conformity with meaning and purpose of this provision, since there is no noticeable legal reason why the superior body or the appeal body should not bear the same consequence of cognizance as the public body that has issued the act.

### II. Cases foreseen in art. 108

This cross-reference relates to the complete group of objective elements that acc. to art. 108 entail the legal consequence of absolute invalidity of the act.

### III. Cognizance of the cases

Cognizance relates to both the facts as well as to the legal assessment.

The public body has got cognizance of the cases, if it is fully aware of all circumstances relevant for the legal consequence of nullity of the act. In other words, if there are indications for the existence of reasons for nullity of the act, the body can only invoke ignorance (lack of cognizance), when dutifully undertaken ex-officio investigations (see art. 77) have proven fruitless.

Similar applies to the legal assessments of the circumstances: The legal precondition “cognizance” is not satisfied, if the body - after dutiful legal examination of the circumstances - comes to the conclusion, that the legal requirements of art. 108 are not satisfied.

## *Article 112 Correction of material errors in an administrative act*

1. A public body may, at any time, correct either ex officio or upon request of the parties, the spelling mistakes, calculation errors, or other obvious inaccuracies in an administrative act.

2. A public body shall be entitled to request the return of the written administrative, which is corrected, as well as any unified copy of it.

## A. General introduction

### I. Content and purpose of art. 112

Art. 112 is dealing with obviously erroneous administrative acts, mentioning spelling mistakes and calculation errors as typical examples for such inaccuracies and in this way leaving it open that there may be other errors of the same kind which are covered by this provision. Erroneous resp. inaccurate is an administrative act, if the inconsistency between what the authority intended and what has appeared in the act can be known without anything more or is apparent in the act.

As a rule, an administrative act that was issued can be only amended either as a result of an appeal procedure (art. 130 et sequ.) or through ex-officio annulment or repeal (art. 113 et sequ.). For spelling and calculating and other obvious mistakes, however, the exceptional provision of art. 112 allows the public body to correct such mistakes by clarifying by less formal administrative means what was already doubtlessly recognisable from the uncorrected version of the act. In this way the provision pursues the purpose to ensure both the principle of legal clarity as well as efficiency of administrative procedure (art. 18).

### II. Relation to previous CAP

Art. 120 of the previous CAP regulates the matter similarly.

### III. Legal consequences

The public body is authorised to correct the mistake either by correcting the original document as well as any unified copy of it, for which the body may request its resp. their return, or through informal letter.

The correction, be it done by note on the original document or additional letter, is not an administrative act, unless the correction modifies the content as it has appeared in the inaccurate act.

## B. Correction of material errors in an administrative act in details

### I. Legal requirements of para. 1

#### 1. Written administrative act

Art. 112 is applicable to written administrative act.

#### 2. Obvious spelling mistake or calculating error

Obvious does not only relate to the fact that something has been misspelled or miscalculated. The correct content as intended by the public body must also be obvious, i.e. can be known without anything more despite the mistake.

#### 3. Other obvious inaccuracies

Other obvious inaccuracies could be the use of a wrong expression, which cannot be used in the context of the intended legal sense, the absence of one or two words, an obviously wrong identification of a person or subject matter.

#### 4. Initiation of the correction

The correction may be initiated either *ex officio* or upon request of the parties.

### II. Return of the written administrative act.

The public body is entitled to request the return of the written act and, if necessary, all of its unified copies, in order to either replace the first written act by a corrected one or put a correcting note on the mistaken act. This right does not exclude to undertake the correction by writing a simple letter informing about the inaccuracies and the corrections.

## **Section 4 Annulment and repeal of the administrative act**

### *Article 113 Procedure and legal effects of annulment and repeal*

1. An administrative act may be annulled or repealed, *ex officio* by the public body that has the power to issue the act, by its superior body or by another body explicitly determined by law.
2. The annulment of an administrative act shall have retroactive effect, whereas the repeal of the administrative act shall produce effects for the future only. Both the annulment and repeal may be partial or total.
3. The annulment or repeal shall be done by a new written act, which annuls, repeals, amends, or supplements the first act.

## A. General introduction

### I. Content and purpose of art. 113

#### 1. General regulatory content

A public body, its superior body, or any other body explicitly determined by law may *ex officio* either annul or repeal an administrative act (para. 1). Both administrative actions have in common that the competent body expresses the will that the concerned act (cf. explanation on art. 3 para. 1 under B.I.5.) shall lose its legal effect. But they differ in that an annulment is retroactive, whilst a repeal produces its effect for the future only (para. 2). Both, annulment and repeal, are to be done by a new written administrative act (para. 3).

#### 2. Terminological aspects

The legal text does not provide one generic term for the two actions. However, in the following we will use the term “abrogation” to cover both annulment and repeal when in the respective context their difference in terms of either

*ex-tunc* resp. *ex-nunc* effect doesn't matter. Accordingly, for the administrative act that is to be annulled or repealed we will use the term "object of abrogation", whilst "abrogating administrative act" for the final act of the annulment and repeal procedure.

### 3. Deciding between conflicting interests

#### a) Principle of legal certainty and continuity

The rules of articles 113 et sequ. on abrogation of an administrative act correspond to the rules on ending of the legal effects of an administrative act (para. 4 of art. 104) and represent a departure from the principle of administrative finality.

Finality is one of the essential functions of an administrative act (cf. below explanation on art. 3. under A.I.1. c.). It may be either formal or material. Formal finality means that the final administrative act is beyond challenge through legal remedies before an administrative body or through an action in the court, no matter whether or not the administrative act is lawful. It is equivalent to unreviewability of the act. Material finality means *res judicata*, i.e. an administrative act is obligatory or binding on the concerned addressee as well as the administrative body that has issued it; and like a court decision it has factual effect in the sense that all state authorities and organs including judiciary must recognise it. Major purpose of finality of an administrative act is to ensure legal certainty and continuity, which in turn is a prerequisite for a well-functioning system of legal and economic transactions. Legal certainty is of particular relevance for the addressee of a beneficial administrative act, because it protects his/her interest in the continuity of his/her rights or legal relationship acquired by the act.

#### b) Weighing up against other principles, in particular the principle of legality of public administration

However, the principle of legal certainty is not unconditional. Articles 114 – 116 restricts the administrative act's binding by stipulating three cases, in which the competent administrative body may abrogate an administrative act, if this is necessary to protect other overriding legal values and principles. Protection of the principle of legality of public administration is the purpose of art. 114 that applies to administrative acts which are unlawful. The art. 115 provides a means to enforce an individual's obligation imposed in connection to a beneficial act. The art. 116 aims at protecting life and health of the people and public security. In all of the three situations an abrogation conflicts with the principle of legal certainty and continuity of the legal effect of the concerned administrative act. For the process of weighing up the conflicting interests the articles 114 to 116 stipulate the criteria the competent administrative body must observe when deciding whether or not the protective goods of these norms shall have priority over the principle of legal certainty and the interest of an individual in the continuity of acquired rights.

### 4. Procedural and material character of the norms

The provisions of Section 4 dealing with annulment and repeal of the administrative act (art. 113 et sequ.) contain on the one hand procedural rules, e.g. when stipulating the restriction of the principle of legal certainty. Furthermore, articles 114 to 116 also provide the material law authorisation for the abrogation of an administrative act, unless special material law does not provide the material legal basis. Acc. to art. 4 para. 2 such authorising legal basis is required, if an abrogating administrative act interferes with subjective rights or legal interests of an individual.

### 5. Systematology of cases

The different legislative solutions, which the articles 113 et sequ. provide, can be systemised as follows:

- For unlawful onerous acts:
  - annulment or repeal of the act for the purpose of aligning it with the law is at the public body's dutifully exercised discretion-without particular restriction (art. 114 para. 1); no conflicting legitimate interest of the addressee is affected, because it favours the addressee; deadline: within 30 days after gaining knowledge of facts providing the grounds for annulment ("which lead") but no later than 5 years after notification (art. 117 para. 2)
- For lawful onerous acts:
  - Ex officio abrogation of the act is not restricted by articles 113 to 116, because no conflicting legitimate interest of the addressee is affected; public body may annul or repeal a lawful onerous administrative act, if its issuance is at the body's discretion and reasonable grounds, such as suitability or other practical aspects, would recommend to modify the legal relationship established by the act.
- For unlawful beneficial administrative acts when the addressee is not in good faith:

- annulment or repeal of the act is at the public body's dutifully exercised discretion (art. 114 para. 1 and 2); annulment is not excluded because the affected interest of the addressee is not legitimate; deadline: within 30 days after gaining knowledge of facts providing the grounds for annulment ("which lead") but no later than 5 years after notification (art. 117 para. 2)
- For unlawful beneficial acts when the addressee is in good faith:
  - only the repeal of the act is at the public body's dutifully exercised discretion (art. 114 para. 1 and 2); margin of discretion is limited because the legitimate interest of the addressee is affected; deadline: within 30 days after gaining knowledge of facts providing the grounds for repeal ("which lead") but no later than 5 years after notification (art. 117 para. 2)
- For lawful beneficial administrative acts when the addressee does not fulfil obligations connected to the beneficial act:
  - annulment is at the public body's dutifully exercised discretion (art. 115); deadline: within 30 days after gaining knowledge of facts providing the grounds for annulment ("which lead") but no later than 5 years after notification (art. 117 para. 2)
- For unlawful beneficial administrative acts when the addressee does not fulfil obligations connected to the beneficial act:
  - Art. 115 is also applicable (by analogy): annulment is at the public body's dutifully exercised discretion (art. 115); deadline: within 30 days after gaining knowledge of facts providing the grounds for annulment ("which lead") but no later than 5 years after notification (art. 117 para. 2)
- For lawful beneficial acts when no other means exist for hazard prevention:
  - repeal of the act in exceptional case of art. 116 para. 1 is at the public body's dutifully exercised discretion, if under particular consideration of the specified criteria of proportionality the public interest overrides the individual interest of the addressee; deadline: at any time (art. 116 para. 1)
- Administrative act combines a lawful beneficial and an unlawful onerous element that can be separated:
  - annulment of the onerous element of the act acc. to art. 114 para. 1 is at the public body's dutifully exercised discretion without particular restriction, because no conflicting legitimate interest of the addressee is affected since it favours the addressee; deadline: within 30 days after gaining knowledge of facts providing the grounds for annulment ("which lead") but no later than 5 years after notification (art. 117 para. 2)
- Administrative act inseparably combines a lawful beneficial and an unlawful onerous element:
  - only repeal of the whole act acc. to art. 116 para. 1 is possible at the public body's dutifully exercised discretion, if under particular consideration of the specified criteria of proportionality the public interest overrides the individual interest of the addressee; deadline: at any time (art. 116 para. 1);
- Administrative act inseparably combines an unlawful beneficial and an unlawful onerous element and related to the beneficial element addressee is not in good faith:
  - annulment or repeal of the act is at the public body's dutifully exercised discretion (art. 114 para. 1 and 2); annulment is not excluded because the affected interest of the addressee is not legitimate; deadline: within 30 days after gaining knowledge of facts providing the grounds for annulment ("which lead") but no later than 5 years after notification (art. 117 para. 2)
- Administrative act combines an unlawful beneficial and a lawful onerous element that can be separated and related to the beneficial part the addressee is in good faith:
  - only the repeal of the beneficial element of act is the public body's dutifully exercised discretion (art. 114 para. 1 and 2); margin of discretion is limited because the legitimate interest of the addressee is affected; deadline: within 30 days after gaining knowledge of facts providing the grounds for annulment ("which lead") but no later than 5 years after notification (art. 117 para. 2)

## II. Constitution and EU-Law

Both involved principles, legality of public administration on the one side and legal certainty and protection of the party's confidence in continuity of acquired rights (cf. explanation above under I.) on the other, derive from the constitutional principle of the rule of law. The regulatory system of articles 114 to 116 provides well-balanced

legislative solutions for cases when these principles come face to face. In particular the discretionary power given to the administrative body in connection with the applicability of the principle of proportionality ensures that the constitutional rights and legitimate interests of the addressee of the object of abrogation are adequately observed.

EU legislation does not provide general rules on annulment and repeal of administrative acts, but ECJ jurisprudence (ECJ 1965, 893, 911 – Lemmerz) developed principles for the abrogation of unlawful administrative decisions similar to the rules provided by this Code.

### III. Abrogation procedure is a **new** administrative procedure

The abrogation procedure acc. to the articles 113 to 118 is a new, separate procedure (see para. 3 of art. 113) initiated ex officio by the competent body acc. to art. 41. It is **not** – in contrast to the appeal procedure of art. 130 et sequ. - a continuation of the administrative procedure that has led to the issuance of the object of abrogation. It follows from this that all procedural rules of this Code apply to the abrogation procedure, in particular the rules on hearing (articles 87 et sequ.) and reasoning (art. 100).

As the abrogation procedure is a new procedure, art. 185 does not apply if it started on the day of the entry into force of this Code or later, irrespective of the fact that the procedure that resulted in the issuance of the object of abrogation started before this Code came into force.

### IV. Relation to other legal institutes

#### 1. Administrative appeal

##### a) No application of articles 113 et sequ. within the appeal procedure

An appeal procedure can result in “annulment, repeal or amendment” of the challenged administrative act, in other words the competent body decides that the special relationship created by the concerned act shall no longer be in place. That means that both appeal and abrogation procedure aim at the same legal consequence. For the appeal procedure, however, i.e. for the examination of legality and suitability of an administrative act in the context of a legal remedy the para. 3 of art. 136 resp. para. 4 of 137 are *leges speciales*. The rules of articles 113 to 118 do not apply (see below explanation on art. 136 under A.II.). It follows from this that in an appeal procedure there is no space for weighing up between legal certainty and legality of the challenged act.

The final result of the appeal procedure itself, however, i.e. “the new administrative act” acc. to para. 4 of art 136 resp. para. 4 of 137, can be subject to abrogation acc. to articles 113 et sequ. (see also below B.I.1. ).

##### b) Abrogation and appeal procedure can run in parallel

Abrogation procedure (articles 113 to 118) and appeal procedure (art. 130) do not exclude each other, but can be carried out in parallel. This results from the fact that - irrespective of the similarity of the legal consequences related to the concerned administrative act - there are essential differences between the two procedures, such as different protective purposes (art. 130 serves to protect individual rights of the citizen, protective purpose of art. 113 is the public interest in legality of public administration); different ways of initiating the procedure (art. 130 is initiated upon request of a party, art 113 is initiated ex officio; different preconditions for admissibility; and different deadlines.

The applicability in parallel, however, implicates various situations related to the legal relationship between the body dealing with the appeal procedure (hereinafter: “appeal body”) and the body conducting an annulment or repeal procedure (hereinafter: “abrogation body”) that require clarification:

##### i) Case 1: First instance body and appeal body are identic - procedural rights of the first instance body?

Appeal procedure. art. 130 et sequ.	Abrogation procedure, art. 113 et. sequ.
Public body has issued an administrative act (hereinafter: first instance body)	
<ul style="list-style-type: none"> <li>The party lodges an appeal against the administrative act, art. 128 para. 1, 130 para. 1</li> </ul>	<ul style="list-style-type: none"> <li>First instance body ex officio initiates in the meaning of art. 41 an abrogation procedure, art. 113, 114 , either                             <ul style="list-style-type: none"> <li>o before the appeal was lodged</li> <li>o or after the appeal was lodged</li> </ul> </li> </ul>
<ul style="list-style-type: none"> <li>First instance body is the “competent body” to deal with the appeal and therefore has the</li> </ul>	<ul style="list-style-type: none"> <li>First instance body is the “body that has the power to issue the act” and therefore has the</li> </ul>

competence for the appeal acc. to art 136 para. 1	competence for the abrogation acc. to art. 113
<ul style="list-style-type: none"> <li>• First instance body considers that administrative act is unlawful (art. 128 para. 2)</li> </ul>	<ul style="list-style-type: none"> <li>• First instance body considers that administrative act is unlawful (art. 114)</li> </ul>
<ul style="list-style-type: none"> <li>• The other legal preconditions of para. 4 of art. 136 are satisfied</li> </ul>	<ul style="list-style-type: none"> <li>• The other legal pre-conditions of art. 114 are satisfied</li> </ul>
<p>Legal consequences:</p> <p>The first instance body has the <u>right to choose</u> between one of the following legal consequences on the basis of dutiful exercise of its procedural discretion, because appeal and abrogation are separate and independent procedures</p> <p>The exercise of discretion, however, would be unlawful if the public body opted for the abrogation procedure for the purposes of evading the duty of costs reimbursement (case of misuse of discretion, see above explanation on art. 109, under B.V.2). Such duty of costs reimbursement would be the consequence of annulment of an <u>unlawful</u> act acc. to para. 4 of art 136 in connection with para. 2 of art. 139 and art. 116, para. 2 and 3, whilst in the abrogation procedure the consequence of the duty to reimburse costs acc. to art. 116, para. 2 and 3 applies only to the repeal of a <u>lawful</u> act.</p>	
<p>Further consequences of the appeal procedure</p> <ul style="list-style-type: none"> <li>• Annulment of the administrative act</li> </ul> <p>or</p> <ul style="list-style-type: none"> <li>• Amendment of the administrative act</li> </ul>	<p>Further consequences of the abrogation procedure</p> <ul style="list-style-type: none"> <li>• Annulment of the administrative act</li> </ul> <p>or</p> <ul style="list-style-type: none"> <li>• Repeal of the administrative act</li> </ul>

ii) Case 2: The supervisory body is conducting the appeal procedure - procedural rights of the first instance body during the pending appeal procedure?

Appeal procedure. art. 130 et sequ.	Abrogation procedure, art. 113 et. sequ.
Public body has issued an administrative act (hereinafter: first instance body)	
<ul style="list-style-type: none"> <li>• The party lodges an appeal against the administrative act, art. 128 para. 1, 130 para. 1</li> </ul>	<ul style="list-style-type: none"> <li>• First instance body ex officio initiates in the meaning of art. 41 an abrogation procedure, art. 113, 114, either <ul style="list-style-type: none"> <li>○ before the appeal was lodged</li> <li>○ or after the appeal was lodged</li> </ul> </li> </ul>
<ul style="list-style-type: none"> <li>• Supervisory body has jurisdiction to deal with the appeal because the first instance body has forwarded the appeal acc. to art 136 para. 5</li> </ul>	<ul style="list-style-type: none"> <li>• First instance body is the “body that has the power to issue the act” and therefore has the competence for the abrogation acc. to art. 113</li> </ul>
<ul style="list-style-type: none"> <li>• The appeal procedure is still pending</li> </ul>	<ul style="list-style-type: none"> <li>• First instance body considers that administrative act is unlawful (art. 114)</li> <li>• The other legal pre-conditions of art. 114 are satisfied</li> </ul>
<p>The <u>first instance body has still the right to abrogate</u> its administrative act on the basis of dutiful exercise of the discretion provided by art. 114, because appeal and abrogation are separate and independent procedures</p>	
<p>Legal consequences of the appeal procedure</p> <ul style="list-style-type: none"> <li>• In case of annulment of the challenged act acc. to art. 114: the appeal procedure has become obsolete and shall be terminated acc. to art. 94 para. 2, in connection with art. 95 (“object of the procedure has become impossible”)</li> </ul> <p>or</p> <ul style="list-style-type: none"> <li>• In case of repeal of the challenged act acc. to art. 114:</li> </ul>	<p>Legal consequences of the abrogation procedure</p> <ul style="list-style-type: none"> <li>• Annulment of the administrative act</li> </ul> <p>or</p> <ul style="list-style-type: none"> <li>• Repeal of the administrative act</li> </ul>

<ul style="list-style-type: none"> <li>○ if the appeal aimed at annulment of the challenged act <u>the appeal procedure continues</u> as far as the party's appeal pursued the retroactive effect.</li> <li>○ if the aim of the appeal is fully satisfied by the <i>ex-nunc</i> effect of the repeal, the appeal procedure has become obsolete and shall be terminated acc. to art. 94 para. 2, in connection with art. 95.</li> </ul>	
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iii) Case 3: The supervisory body has notified a "new act" acc. to art. 137 para. 4 – procedural rights of the first instance body?

Appeal procedure. art. 130 et sequ.	Abrogation procedure, art. 113 et. sequ.
Public body has issued an administrative act (hereinafter: first instance body)	
<ul style="list-style-type: none"> <li>• The party lodges an appeal against the administrative act, art. 128 para. 1, 130 para. 1</li> </ul>	
<ul style="list-style-type: none"> <li>• Supervisory body has jurisdiction to deal with the appeal because the first instance body has forwarded the appeal acc. to art 136 para. 5</li> </ul>	<ul style="list-style-type: none"> <li>•</li> </ul>
<ul style="list-style-type: none"> <li>• Supervisory body decides on the appeal and notifies "a new act", art. 137 para. 4</li> </ul>	<ul style="list-style-type: none"> <li>•</li> </ul>
<ul style="list-style-type: none"> <li>•</li> </ul>	<ul style="list-style-type: none"> <li>• Can the first instance body abrogate its (first instance) administrative act?</li> <li>• First instance body - as the "body that has the power to issue the act" - has regained the jurisdiction for the abrogation acc. to art. 113, since the appeal body has lost its jurisdiction for the matter by concluding the appeal procedure</li> <li>• The other legal pre-conditions of art. 114 are satisfied</li> </ul> <p>Legal consequences for the first instance body</p> <ul style="list-style-type: none"> <li>• <u>In principle:</u> The first instance body, though having jurisdiction, is bound by the decision of the appeal body. Subsequent to the notification of the appeal act the first instance is <b>not</b> entitled to abrogate the (first instance) act that was partly or fully confirmed by the appeal body. Reason: the first instance body shall not be entitled to force through a legal interpretation the supervisory body has rejected due to unlawfulness; this would be a misuse of discretion provided by art. 114.</li> <li>• <u>Exception:</u> If the act, as it was issued by the first instance body, satisfies the legal preconditions of art. 114 for legal or factual reasons, which the appeal body has not taken account of, the first instance body may abrogate its act.</li> </ul>

iv) Case 4: The supervisory body has notified a “new act” acc. to art. 137 para. 4 – procedural rights of the supervisory body?

Appeal procedure. art. 130 et sequ.	Abrogation procedure, art. 113 et. sequ.
Public body has issued an administrative act (hereinafter: first instance body)	
<ul style="list-style-type: none"> <li>The party lodges an appeal against the administrative act, art. 128 para. 1, 130 para. 1</li> </ul>	
<ul style="list-style-type: none"> <li>Supervisory body has jurisdiction to deal with the appeal because the first instance body has forwarded the appeal acc. to art 136 para. 5</li> </ul>	<ul style="list-style-type: none"> <li></li> </ul>
<ul style="list-style-type: none"> <li>Supervisory body decides on the appeal and notifies “a new act”, art. 137 para. 4</li> </ul>	<ul style="list-style-type: none"> <li></li> </ul>
<ul style="list-style-type: none"> <li></li> </ul>	<ul style="list-style-type: none"> <li>Can the supervisory (appeal) body abrogate its own “new act”?</li> <li>First instance body - as the “body that has the power to issue the act” - has regained the jurisdiction for the abrogation acc. to art. 113, since the appeal body has lost its jurisdiction for the matter by concluding the appeal procedure</li> <li>The other legal pre-conditions of art. 114 are satisfied</li> </ul> <p>Legal consequences for the supervisory (appeal) body</p> <ul style="list-style-type: none"> <li><u>In principle</u>: Due to absence of jurisdiction the supervisory body is bound by its own appeal act and is not entitled to abrogate it by application of art. 114.</li> <li><u>Exception</u>: If the appeal act causes an additional and separate onerous effect on one of the parties, the supervisory shall be entitled to abrogate the whole appeal act in application of art. 114.</li> </ul>

v) Case 5: The first instance body has notified a “new act” acc. to art. 136 para. 4; procedural rights of the first instance body?

Appeal procedure. art. 130 et sequ.	Abrogation procedure, art. 113 et. sequ.
Public body has issued an administrative act (hereinafter: first instance body)	
<ul style="list-style-type: none"> <li>The party lodges an appeal against the administrative act, art. 128 para. 1, 130 para. 1</li> </ul>	
<ul style="list-style-type: none"> <li>First instance body has jurisdiction to deal with the appeal acc. to art 136 para. 4</li> </ul>	<ul style="list-style-type: none"> <li></li> </ul>
<ul style="list-style-type: none"> <li>First instance body decides on the appeal and notifies “a new act”, art. 136 para. 4</li> </ul>	<ul style="list-style-type: none"> <li></li> </ul>
<ul style="list-style-type: none"> <li></li> </ul>	<ul style="list-style-type: none"> <li>Can the first instance (appeal) body abrogate its own “new act”?</li> <li>First instance body - as the “body that has the power to issue the act” - has the jurisdiction for the abrogation acc. to art. 113 and the jurisdiction for the appeal procedure.</li> <li>The appeal act satisfies the other legal pre-</li> </ul>

	<p style="text-align: center;">conditions stipulated in art. 114</p> <p>Legal consequences for the first instance body</p> <ul style="list-style-type: none"> <li>• The first instance body is entitled to abrogate the appeal act (“new act”), because both jurisdictions do not fall apart</li> </ul>
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## 2. Revision

The provisions of articles 144 et sequ. on revision are *leges speciales* for the situation when the party requests the annulment or amendment of an administrative act on the grounds that he/she has not been able to submit the written evidence or specific circumstances within the first instance administrative procedure or in the appeal procedure. The articles 113 et sequ. do not apply in the context of the revision procedure (cf. explanation on art. 144 under A.III.).

However, the right of the competent body remains unaffected to ex officio initiate and conduct - related to the same administrative act – in parallel to the revision an abrogation procedure acc. to articles 113 – 118.

## 3. Correction acc. to art. 112

The correction of minor errors acc. to art. 112 is not an abrogation of an administrative act.

## 4. New dealing with the same matter

The new dealing with the same matter in cases of substantial differences in the facts or legal circumstances is not an abrogation of the act that was issued as the result of the previous procedure. *Examples: Granting a new driving licence after the previous licence was withdrawn or passing the exam in the second round; both new decisions do not include the abrogation of the previous administrative act acc. to articles 113 et sequ.*

## 5. Reservation of abrogation, art 102

If an administrative act was associated with a reservation of abrogation acc. to art. 102 (see explanation above on art. 102 under B. IV.), the public body has two options. It may on the one hand base the abrogation on the reservation, but in this case can abrogate the act only if the preconditions stipulated by the reservation of abrogation associated to the act are satisfied. If also the general preconditions of articles 113 et. sequ. are satisfied, the public body may, on the other hand, also choose the application of these general rules for abrogation, unless the reservation of abrogation acc. to art. 102 must be understood as the binding beneficial decision of the body not to use for the concerned act the option of abrogation on the basis of the general rules but only the option provided by the associated reservation acc. to art. 102.

## V. Relation to previous CAP

The abrogation of administrative acts is dealt with in art. 121 – 129 of the previous CAP, but structure and content of these provisions differ significantly from the new regulation.

## VI. Scope of application

Object of abrogation can only be an administrative act. However, articles 113 et sequ. do not apply to those acts, for which material administrative law provides specific rules for abrogating them.

Administrative contracts or other administrative actions do not fall in the scope of application of art. 113 et sequ.

## B. Procedure and legal effects of annulment and repeal in details

### I. Competence and power for annulment and repeal, para. 1

#### 1. Administrative act

Generally, art. 113 covers any type or kind of administrative act, irrespective of

- form (art. 98),
- beneficial or onerous (cf. explanation on art. 3 para. 1 under A.I.2. b.),

- commanding, structuring, or declaratory (art. 3 para. 1 under A.I.2.a.)
- mandatory (non-discretionary) or discretionary (art. 3 para. 1 under A.I.2.c.)
- reviewable or uncontestable (c.f. above A.I.).

The fictitious administrative act acc. to art. 97 para. 1 as well as the “new administrative act” issued acc. to para. 4 of art. 136 or para. 4 of art. 137 as the result of an appeal procedure (cf. above A. IV.) can be annulled or repealed.

However, in the context of an appeal procedure the articles 113 et sequ. do **not** apply for the examination of the challenged administrative act (cf. above A.IV.1a).

The wording of art. 113 does not cover absolutely invalid acts (art. 108, 110), because they are no acts (complete nullities; “shall be considered as inexistent” acc. to second sentence of para. 1 of art. 110). Therefore, it seems to be consequent to argue that there is neither need nor space for abrogating them, on the grounds that with the declaration of an act absolutely invalid as provided by art. 110 para. 2 a special and final regulation exists that suffices for the purpose of aligning the situation with the law. However, with a view of the questionability and lack of clarity of the legal doctrine on absolute invalidity of administrative acts as explained above (art. 108 under A.VI.) at least the question of applicability of art. 113, 114 by analogy is to be raised. In particular in cases of doubts whether or not an act is absolutely invalid the annulment is frequently the more appropriate means of the administrative body in order to ensure legal and factual clarity.

## 2. Annulment or repeal

Para. 1 operates with two different legal concepts without clarifying in this paragraph the differences between them. The clarification is provided late, namely in the following para. 2. But the legal text obviously expects that on the part of the reader of para. 1 a certain pre-understanding exists on the content both terms have in common and which is usually covered by the generic term abrogation. Accordingly, we have to understand here “annulled or repealed” as “abrogated with the legal consequence that the special relationship created by an administrative act shall no longer be in place” (see above under A.I.).

## 3. Competent body

Para. 1 lists three possible administrative bodies with the competence to abrogate an administrative act:

- public body that has the power to issue the act,
- its superior body,
- another body explicitly determined by law.

### a) Public body that has the power to issue the act

As a rule, the competence for abrogating an administrative act is given to “the body that has the power to issue the act”. “The act” is here the object of abrogation (cf. above under 1.).

- “The body that has the power to issue the act” is in most of the cases the body, which has in fact issued the administrative act that is now object of the abrogation procedure.
- Object of an abrogation procedure can be not only a first instance administrative act but also a “new act” that was issued as a result of an appeal procedure. The “new act” can be issued either in the case of para. 4 of art. 136 or of para. 4 of art. 137. In the latter case the appeal body does not abrogate the new act in its function as “superior body” in the meaning of art. 113 para. 1 but as the first instance “body that has the power to issue the act”.
- In cases, when meanwhile the jurisdiction for issuing the concerned matter has changed to a different body, the jurisdiction for the abrogation of acts that were issued by the previously competent body moves to the body, to which the jurisdiction of the concerned matter has changed.
- The public body, which has the power to issue the act, in the case when it has forwarded acc. to para. 5 of art. 136 the concerned act for review and decision to the superior body, loses its jurisdiction for the abrogation of the act, once the superior body has notified acc. to para. 4 of art. 137 its decision on the appeal – see above explanation for case 2 under A.IV.1.b.ii. -. As long as the appeal procedure is still pending, however, the first instance body remains competent to abrogate the act; if it does so the appeal procedure becomes fully or partly obsolete depending on the scope of the abrogating decision (for details see the above mentioned case 2).

b) Its superior body

The legal requirement “or its superior body” must not be misunderstood as authorisation of a superior body to take over at any time the jurisdiction from its subordinate body. Instead, this legal precondition is to be interpreted in the light of the rule-of-law principle of clearly pre-defined and transparent responsibilities of administrative bodies. According to this principle, a supervisory body shall, as a rule, not be involved in dealing with matters, for which first instance body has got the jurisdiction. In the case, when a supervisory body sees the need for supervisory measures related to an individual administrative procedure, it may exercise its supervisory function by giving instructions to the subordinate body on how to decide in the concerned individual case. But the subordinate body, though in relation to the superordinate body obliged to act in line with the internally received instructions, still remains in relation to the parties the acting and deciding body.

But the legal requirement “or its superior body” allows exceptions of this rule. In two cases the supervisory body itself may abrogate an administrative act that was issued by its subordinate body. The first exception is that the law expressly stipulates the possibility of taking the decision on a first instance matter instead of the first instance body. The second exception from the rule could be that in an urgent case the first instance body clearly declares its unwillingness to decide the matter in line with the instruction given by the superior body or the first instance body is for factual reasons (e.g. lack of capacity) temporarily not in the position to decide on the matter.

The pronoun “its” specifies that only the next higher body of the chain of command satisfies this legal requirement “its superior body”.

c) another body explicitly determined by law

This clause clarifies that special law (primary legislation) may determine jurisdiction for abrogating an administrative act divergently from the two other alternatives.

4. may ex-officio

The word “may” indicates that the initiation (art. 41) of the abrogation procedure as well as the choice of the adequate means provided by paragraphs 2 and 3 is at the public body’s discretion.

The wording of para. 1 of art. 113 itself does not provide criteria for the public body’s discretionary decision, neither for the question whether or not an abrogation procedure shall be conducted - exercise of the resolution discretion- nor for the choice between annulment or repeal - exercise of the selection discretion- (explanation of resolution discretion and selection discretion see above under B.I. 3 of art 102. That does not mean, however, that these decisions are at the body’s unlimited discretion. Such criteria result from the application of the following articles 114, 115 and 116 and differ depending of the respective circumstances and purposes covered by these provisions (see detailed explanations below under the respective article).

The competent public body performs the abrogation procedure ex officio. The party does not have the right to initiate an abrogation procedure by request in the meaning of art. 41, i.e. in case the party sent such submission to the body this did not oblige the public body to start an abrogation procedure. However, the ex-officio character of the procedure does not exclude that a public body that has received such submission from a party may – in dutiful exercise of its discretion - ex officio initiate an abrogation procedure, when through the submission the body gains knowledge of facts and circumstances that raise the question of ex-officio abrogation of the concerned act.

II. Legal consequences stipulated in para. 2

5. The legal effect, which annulment and repeal have in common

a) Loss of legal effect

The legal consequence of abrogation through either annulment or repeal is that in the moment of notification of the abrogating act the administrative act that is object of the abrogation loses its legal effect. With the abrogating act the competent body expresses the will that special relationship created by the abrogated act (cf. explanation on art. 3 para. 1 under B.I.5.) shall no longer be in place.

b) Partial or total loss

The public body may decide that the abrogation shall affect either the complete object of abrogation or only a part of its regulatory content. Partial abrogation means that its regulatory content of the act is modified but apart from the modification continues to remain legally effective. Para. 3 lists amendment and supplement as possible kinds of modification (see explanation below under III.).

## 6. Retroactive effect of annulment

The annulment has by definition always retroactive (*ex-tunc*) effect. Retroactive means that the object of abrogation shall lose its legal effect from a moment that lies in the past. In most of the practical cases this will be the moment when the object of abrogation came into legal effect, i.e. in the moment of its notification (para. 1 of art. 104) or at a later date expressly set in the act (para. 3 of art. 104). In these cases the annulment will have the effect as if the object of abrogation never had existed. The meaning of the word retroactive, however, includes also, that the competent body may in dutiful exercise of its discretion determine any other moment for the retroactive effect that lies between the commencement of the legal effect of the object of abrogation and the notification of the abrogating “new act” (para. 3).

## 7. Prospective effect of repeal

The repeal produces by definition effects for the future only, in other words has always prospective (*ex-nunc*) effect. That means that the object of the obligation loses its legal effect at the earliest in the moment when the abrogating “new act” (para. 3) is notified or at any other later moment expressly set by the “new act”.

## III. Content of the abrogating “new act” and procedural rules stipulated in para. 3

### 1. Administrative act

Para. 3 clarifies that the final decision of the abrogation procedure is an administrative act and is therefore subject to all those legal requirements, which apply also to the object of abrogation.

### 2. New act

As explained above under A.III., the legal term “new act” implies that the abrogation procedure is a new administrative procedure that is to be seen separate from the procedure that had resulted in the issuance of the object of abrogation. Consequently, all procedural rules of this Code apply to the abrogation procedure, in particular the rules on hearing (articles 87 et sequ.) and reasoning (art. 100)

### 3. Written act

The requirements of a written act stipulated in art. 99 apply to the abrogating act.

### 4. Content of the act

a) Annulment is the abrogating measure with retroactive effect (see above B.II.2.) The effect can be:

- Complete abrogation of the first act, i.e. no regulatory content does exist anymore.
- Amendment of the first act, i.e. removing or changing of the regulatory content.
- Supplement to the first act, adding of regulatory content

b) Repeal is the abrogating measure with prospective effect (see above B.II.3.) The effect can be:

- Complete abrogation of the first act, i.e. no regulatory content will exist anymore.
- Amendment of the first act, i.e. removing or changing of the regulatory content.
- Supplement to the first act, adding of regulatory content

### 5. Addressee of the new act

Addressees of the abrogating act shall be always, who were addressed by the object of abrogation, i.e. by the first act. Moreover, the abrogating new act shall also be notified to those individuals who were not addressees of the first act but to whom the abrogating new act causes for the first time an additional and separate onerous effect.

Article 114 Discretionary annulment and repeal of an unlawful administrative act

1. Except for the cases provided for in Article 108 of this Code, an unlawful administrative act may be either annulled or repealed for the purpose of aligning it with the law.
2. If the beneficiary party is in good faith, the unlawful beneficial administrative act may not be annulled, but only repealed.
3. The beneficiary party shall not be deemed in good faith when it was aware of the grounds of unlawfulness of the act or was unaware thereof due to gross negligence or the act is issued based on substantially incorrect or incomplete information culpably provided by the party.

A. General introduction

I. Content and purpose of art. 114

1. General regulatory content

Art. 114 in connection with art. 113 regulates the abrogation (for the terminology see above art. 113 under A.I.2.) of unlawful administrative acts, in contrast to articles 115 and 116, which are dealing with lawful administrative acts. Para. 1 of art. 114 provides i) both options of abrogating an unlawful act, which are the annulment with retroactive effect and the repeal with prospective effect (see above art. 113 under B.II.); ii) stipulates that - as a rule - the choice between the two is left to the competent body's dutifully exercised discretion; and iii) underlines that the return to lawfulness is the general objective of either kind of abrogation. Para 2 limits the discretion to choose between the two abrogating measures by excluding the annulment of an unlawful beneficial administrative act, if its beneficiary addressee is "in good faith", whilst the third paragraph defines the concept "in good faith" *ex negativo* by specifying three examples when the beneficiary party shall not be deemed in good faith.

2. Purpose of the regulation

Art. 114 provides legal limitations for the exercise of the discretion that is left to the public body's decision on abrogating an unlawful administrative act. The limitations result from the public body's duty to consider for its decision three conflicting fundamental administrative law principles, in other words to find an adequate balance between three legally protected interests that can be affected by the abrogation of such act (see detailed explanation under A.I.3. of at. 113). The three principles are the following:

a) Legality of public administration

Firstly, para. 1 expressly underlines that the only purpose that could justify the abrogation of an unlawful administrative act (see various versions of abrogation specified in art. 113) shall be to align such act with the law, in other words to safeguard the rule-of-law principle "legality of public administration".

b) Legal certainty

The justification that the unlawful act is abrogated for the purpose of re-establishing a lawful situation is required, because the abrogation of any administrative act is a breach of another fundamental principle derived from the rule of law, which is the principle of legal certainty and continuity (see above art. 113 under A.I.3.).

c) Individual interest in the continuity of vested rights

However, the abrogating public body must not only balance the principles legality and certainty, both of them being principles to protect primarily the public interest. Para. 2 includes in the range of principles, which the abrogating body must take into consideration, also the interest of the individual to whom the object of abrogation, i.e. the unlawful administrative act, was addressed and distinguishes for this between onerous and beneficial administrative act (see explanation under A.I.2.b. for art. 3 para. 1).

Only very little restrictions in terms of individual interests could apply to the abrogation of an onerous act because it favours the addressee of the unlawful act (see below B.I.3.) But the abrogation of beneficial acts operates to the disadvantage of an individual. Therefore, para. 2 stipulates that they cannot be annulled but only repealed, and even the latter shall be done only subject to certain legal aspects limiting the discretion.

II. Constitution and EU-Law

For constitutional and EU-law aspects see above explanation of art. 113 under B.II.

### III. Relation to previous CAP

The abrogation of administrative acts is dealt with in art. 121 – 129 of the previous CAP, but structure and content of these provisions differ significantly from the new regulation.

### IV. Scope of application

Art. 114 applies to the abrogation of unlawful administrative acts. By analogy it should also apply to absolute invalid acts (explanation for this see above under B.I.1.d. of art. 113 and below under B. II. 1 this article.

## B. Discretionary annulment and repeal of an unlawful administrative act in details

### I. The choice between annulment and repeal, para. 1

#### 1. Unlawful administrative act

##### a) Onerous administrative act

Para. 1 covers, in principle, any type and kind of administrative acts (for classification of administrative acts see above explanation on art. 3 para. 1 under A.I.2.), irrespective of:

- form (art. 98),
- commanding, structuring, or declaratory (art. 3 para. 1 under A.I.2.a.)
- mandatory (non-discretionary) or discretionary (art. 3 para. 1 under A.I.2.c.)
- reviewable or final (art. 113 under A.I.).

However, only onerous administrative acts (cf. explanation on art. 3 para. 1 under A.I.2. b) fall under this precondition. This is not expressly said by the wording of para. 3, but follows from the *lex specialis* rule because para. 2 and 3 provide special provisions for unlawful beneficial administrative acts.

Not onerous but beneficial are to be considered

- acts that inseparably combine unlawful onerous and unlawful beneficial elements,
- Onerous acts with beneficial effect to a third party.

In both cases the beneficial effect deserves legal protection and therefore para. 2 resp. 3 shall apply.

##### b) Unlawful

With the legal requirement of unlawfulness the provision refers to art. 109 that provides a list of the possible reasons for unlawfulness of an administrative act. Relevant is unlawfulness in its objective sense, a violation of a subjective right or interest of an individual is not required (for the concept of subjective right see explanation of art. 128 under B.I.3.).

As far as its legal preconditions are concerned, art. 114 does not differentiate between serious and minor legal defects. The gravity of unlawfulness, however, may come into being relevant for the public body's balancing of involved principles and interests (see above A.I.2.) in the frame of the exercise of the discretion (see b below under B.I.3.).

Relevant time for the unlawfulness is the moment when the object of abrogation was issued, i.e. notified. An administrative act that was lawful in the moment of its notification, does not become unlawful, even if the factual or legal situation has subsequently changed and therefore became in conflict with existing legislation, unless the new legislation has, exceptionally, retrospective effect.

##### c) Exclusion of acts that are absolute invalid acc. art. to 108?

The question arises how the wording in the beginning of para. 1 "except for the cases provided for in Article 108 of this Code" is to be understood, in particular whether it strictly and totally excludes the analogous application of art. 114. A systematic interpretation leads to the conclusion that the exclusive effect of this phrase is not related to the legal preconditions of this norm but to its legal consequence. And the latter is the discretionary choice between annulment and repeal. It is obvious, however, that by definition an absolute invalid act cannot be abrogated only with prospective effect. Therefore in case of analogous application of art. 113-114 to absolute invalid acts, this phrase confirms that the annulment is the only possible means of abrogation.

## 2. for the purpose of aligning it with the law

This legal precondition clarifies that the only justification for the abrogation of an unlawful act is the reinstatement of a lawful situation. Aspects of suitability or expediency of the administrative act as well as fiscal or commercial interest of the public body must be disregarded as purpose of action.

## 3. Legal consequence: may be either annulled or repealed

Para. 1 leaves the decision to the public body's discretion for the question whether or not an abrogation procedure shall be conducted - exercise of the resolution discretion- as well as for the choice between annulment or repeal - exercise of the selection discretion- (explanation of resolution discretion and selection discretion see above under B.I. 3 of art 102).

### a) Exercise of resolution discretion

As we have seen above (A.-I.), the legislator considers the principle of legality of public administration to be a justification for breaching the principle of legal certainty. Therefore, as a rule, in case of the existence of an unlawful onerous administrative act that neither includes any beneficial element for its addressee nor provides a beneficial effect to a third party, that is to say if no reason exists to consider individual interests in continuation of this act because it favours the addressee of the act, there is almost no discretionary margin not to abrogate the act (a case of reduction of discretion).

Exceptions of this reduction of discretion might be taken into consideration for unreviewable (final) administrative acts, if in particular cases a special public interest in legal certainty prevails, or in cases, when the level of unlawfulness and the onerous effect of the act have been so marginal that the administrative expenses connected to an abrogation procedure were disproportionate and thus against the public interest in efficient public administration (art. 18). These exceptions, however, should not apply to administrative acts that are still reviewable, since here the public interest in legal certainty resp. in administrative efficiency is less worthy of protection.

### b) Exercise of selection discretion

Para. 1 grants for onerous unlawful administrative act the discretion to choose between annulment and repeal of the act. As a rule, annulment should be chosen, in particular in the light of art. 118. Choosing the repeal with the intention to circumvent the legal consequence of the public body's obligation of reimbursement stipulated by art. art. 118 would be unlawful.

## II. No annulment but repeal, if beneficiary party is in good faith, para. 2

### 1. Unlawful administrative act

For the legal precondition "unlawful" the explanation above under B.I.1. b) applies.

### 2. Beneficial act

In relation to para. 1, for beneficial acts the provision of para. 2 is *lex specialis*. Purpose of this precondition is to protect the interest of the addressee of a beneficial act, who trusts that the legal effect of a beneficial act will continue as it was stipulated in the act.

A beneficial act establishes, upholds or confirms a legal or legally relevant advantage such as grant of a fellowship or permission to construct a house (see above explanation of art. 3 para. 1 under A.I.2.b). Beneficial is also an administrative act that abrogates an onerous act.

In case of an administrative act that combines onerous and beneficial elements, it is crucial as to whether the two parts are separable or inseparable.

- Inseparable are the elements, if they are legally or substantively interlinked in a way, that one of them cannot not reasonably exist without the other one (*Example: The citizen requests the permission for the construction of a six-storey office building. On the basis of the applicable construction legislation the administrative act grants the permission for a four-storey building only. The onerous rejection of a part of the request cannot be separated from the beneficial permitting part.* ) In this case, due to the beneficial character of one the elements, the whole administrative act is deemed to be beneficial and thus falls under para. 2 and para. 3 respectively.
- Separable are the elements that are combined into one act just for procedure related efficiency reasons but have no inherent legal or substantive connection, so that one of the element can reasonably exist without the other one. In this case, for the onerous part para. 1 applies, whilst the latter falls under para. 2 resp. 3.

If an administrative act has a legal effect also to a third party and at least for one of the affected parties the legal effect is beneficial, the whole act is to be considered beneficial and para. 2 applies to it, no matter whether it is the addressee of the act or the third party, who benefits from the favourable legal effect.

### 3. Beneficiary party

Beneficiary party is always the addressee of a beneficial administrative act. It can be also a third party that benefits from a favourable legal effect of the act.

### 4. In good faith

The beneficiary party is protected by para. 2, if it is in good faith. Good faith means here, that the beneficiary party has been relying on the lawfulness of the concerned administrative act and on the continuation of its legal effect. Due to the principle of legality of public administration a beneficiary party has always good reasons to expect that the concerned administrative act was issued in accordance with the law and its legal effect will continue in accordance with the regulatory content of the act. However, reliance of the beneficiary party is not worth protecting, when the beneficiary knew or must have known that the act is unlawful act. Para. 3 stipulates three categories of cases when the beneficiary party is not worth protecting (for details see below under III.), i.e. those cases also define *ex negativo* the content of the concept “in good faith”.

Particularly worth protecting are beneficial acts, which grant or are precondition for the grant of a solitary or recurring payment in cash or a divisible payment in kind. According to para. 2 they shall not be annulled if the beneficiary has relied upon the administrative act. As a rule, reliance of the beneficiary on the administrative act must be protected if he has either consumed the granted benefit as is always the presumption in case of maintenance grant such as pension, scholarship, etc. or has made financial arrangements, which he cannot cancel or can cancel only subject to unreasonable detriment to him.

### III. *ex negativo* definition of “in good faith” in para. 3

Para. 3 provides 3 alternative legal preconditions, which negatively define the fulfilment of the “in good faith”-requirement of para. 2.

#### 1. Awareness of the grounds of unlawfulness

##### a) Unlawfulness

Unlawfulness is here to be understood in the meaning of art. 109 (see explanation on art. 114 under B.I.1.b). Furthermore, for application of para. 3 to cases of art. 108 by analogy the same reasons apply as for para. 1 (see explanation on art. 114, under B.I.1. c).

##### b) Awareness of the grounds

The wording clarifies that awareness shall be required only to the grounds of unlawfulness, that means to the factual situation. Awareness of unlawfulness as the result of a clear and fully correct legal assessment of the facts is not required, as long as the addressee from his/her individual perspective and on the basis of his/her specific level of law-related knowledge could not have had a reasonable doubt that the factual situation has led to “legal defectiveness” of the concerned administrative act. But of course, the legal requirement “awareness of grounds” as a “minus” is also satisfied, if the addressee has not only serious doubts of the lawfulness of the concerned act but is fully aware of its unlawfulness.

Awareness of a representative (in the meaning of art. 35 et sequ.) of the addressee is equivalent to his/her own awareness, but not the Awareness of third persons such as relatives, business partners or friends.

Awareness of the grounds of unlawfulness includes by analogy all grounds that lead acc. to art. 108 absolute invalidity (*argumentum a majore ad minus*), such as obtainment the act by fraudulent behaviour, threat, or bribery.

#### 2. Unawareness due to gross negligence

##### a) Unlawfulness (see above 1.a)

##### b) Unawareness

Gross negligence can be defined here as a conscious and voluntary disregard of the need to use reasonable care to become aware of all relevant factual circumstances that led to the regulatory content and the procedure of the concerned administrative act.

### 3. Culpable provision of incorrect or incomplete information by the beneficiary party

- a) Unlawfulness (see above 1.a)
- b) Provision of incorrect or incomplete information by the beneficiary party

The legal requirement “provision of incorrect information by the beneficiary party” reflects the legislator’s legal assessment that the addressee is not worth being protected, if the cause of the legal defectiveness lies in the sphere of the addressee. This should apply, even if the public body that has issued the act is co-responsible for the unlawfulness of the act.

Provision of incorrect or incomplete information includes also the omission of any information, if the addressee had the legal duty to provide information.

- c) Issuance of the act was based on the information provided

This legal requirement stipulates that the addressee’s provision resp. omission of information was causal for the issuance of the act. This is the case, if the concerned public body would not have issued the concerned act if the information had been correctly or completely provided by the addressee.

- d) Culpability

Culpability relates only to the incorrectness resp. incompleteness of the information. The intention, awareness or negligent unawareness that the information provided would lead to unlawfulness of the concerned administrative act is here not required, because those cases are already covered by the first or second alternative of para. 3.

Culpability means wilful intent, gross and slight negligence, the latter – in contrast to the second alternative of para. 3 requiring gross negligence, because the circumstances of the provision of information lie exclusively in the sphere of the addressee.

#### IV. Legal consequences

The public body does not have the selection discretion to choose between annulment and repeal but is restricted to the option of repealing the unlawful administrative act with effect for the future.

#### *Article 115 Annulment of a lawful administrative act*

1. A lawful administrative act may be annulled, if the party of an administrative act subject to an obligation, as provided for by Paragraph 1, letter “ç” of Article 102 of this Code, has not met fully the obligation or has not done so within the given deadline.

#### A. General introduction

##### I. Content and purpose of art. 115

The Code provides two exemptions from the strict rule, that an addressee of a lawful beneficial administrative act can rely on the continuity of the legal effect as stipulated in the act. The exemptions, which must be interpreted restrictively, are Art. 115 and art. 116. Art. 115 allows the annulment of a lawful beneficial administrative act in case its addressee does not fulfil an obligation, which acc. to para. 1. sub-para. ç of art. 102 was connected to the act and requires from the addressee the performance, omission or acquiescence of a certain action (see also explanation on art. 102 under A.I. and B.V.).

The wider purpose of art. 115 is also to protect the rule-of-law principle of legality of public administration, here however not with respect to the legality of the object of abrogation, i.e. the beneficial act, but related to the compliance with the additionally imposed obligation. The particular purpose of this provision is to secure a certain behaviour expected from the addressee of a beneficial act through the “threat scenario” that non-compliance with the obligating annex could lead to the sanction of losing the legal advantage of the beneficial act itself. The legislator assumes that – beyond the instruments of Part Eight of this Code on execution of an administrative act - the warning of a potential annulment of the beneficial act with its quasi penalty character gives an additional leverage for the fulfilment of the obligation annexed to the act.

## II. Constitution and EU-Law

For constitutional and EU-law aspects in general see above explanation of art. 113 under B.II. Art. 115 is of particular EU-law relevance in cases when a beneficiary of European subsidies uses the granted aid not properly, i.e. not in accordance with additionally imposed obligation (such as making a co-financing contribution to a subsidised project) connected to the act granting the subsidy.

## III. Relation to previous CAP

The abrogation of administrative acts is dealt with in art. 121 – 129 of the previous CAP, but does not provide a provision similar to art. 115 of this Code.

## IV. Scope of application

According to the wording, art. 115 is applicable to lawful administrative acts. The purpose of art. 115, however, also requires its (analogue) application to unlawful administrative acts, whenever the other legal requirements of art. 115 are satisfied and the annulment of the unlawful act is in the public interest. This can be of practical relevance, either in cases when the competent body cannot base the intended annulment of the act on art. 114 because the addressee is related to the unlawful act in good faith acc. to para. 2 (see below explanation on art. 114 under B.III), or because the assessment of the unlawfulness of the act as the legal precondition for art. 114, para. 1 is very complicated (e.g. would require extensive administrative investigation) and the body comes quicker and easier to the same intended result of annulment by application of art. 115.

## B. Discretionary annulment of a lawful administrative act in details

### I. Legal preconditions of art. 115

#### 1. Lawful administrative act

The requirements for lawfulness of an administrative act are regulated in art. 107.

However, as explained above under A.IV. the legal precondition “lawful” does not preclude the (analogue) application of art. 115, if the concerned administrative act is unlawful.

#### 2. Beneficial act

The requirement “beneficial” is not explicitly mentioned in art. 15 but is clear from the *ratio legis* (see above A.I.) and also derives from the reference to art. 102 that applies only to beneficial administrative acts.

#### 3. Valid additional obligation connected to the act

According to the reference of art. 115 to art. 102, para. 1, subpara. ç the additional obligation imposed on the addressee of the beneficial act can comprise the obligation to act, cease and desist, or acquiesce (see above explanation on art. 102 under B.V.). It is not necessary that the imposition of the additional obligation is lawful as long as it is valid, i.e. enforceable.

#### 4. No full compliance with the obligation

Required is full compliance with the obligation. The addressee cannot avoid the legal consequence of art. 115 with fulfilling the obligation in part, even if the part is very close to full compliance. The public body, however, must take a partly fulfilment into consideration when dutifully exercising its discretion, in particular under the aspect of proportionality of an annulment (see below under II.).

#### 5. No full compliance within a given deadline

If for the fulfilment of the additional obligation a deadline is determined, the addressee of the beneficial act must fully meet the obligation within this deadline. Compliance after the expired deadline does not preclude the legal consequence of art. 115 but the public body must consider a delayed fulfilment when dutifully exercising its discretion, in particular under the aspect of proportionality of an annulment (see below under II.).

## II. Legal consequences

The public body has both the resolution discretion and the selection discretion (explanation of resolution discretion and selection discretion see above under B.I. 3 of art 102). The resolution discretion to select between annulment and

repeal is not explicitly mentioned in the wording of art. 115 but is covered by the concept annulment, which includes the repeal as a measure of minor legal burden (*argumentum ex maiore ad minus*).

Of crucial importance for the lawfulness of the public body's discretionary decision is the correct application of the principle of proportionality. The body must carefully consider and then in the reasoning part of the abrogating administrative act clearly explain whether the intended measure is necessary, suitable and adequate (for the examination of proportionality see explanation under B.VI: of art. 109) to pursue the intended and admissible purpose of securing the addressee's compliance with the additionally imposed obligation.

The consideration of the principle of proportionality might - for example – lead the public body to the conclusion that not the annulment but repeal or even none of the two measures would be proportionate in a case, when the addressee has met almost 100% of his/her obligation, or has fully met the obligation shortly after expiry of a set deadline.

As to the alternative of no full compliance "within a given deadline", in many of those cases the application of principle of proportionality will most probably require that after the expiry of the deadline initially "given" for the fulfilment of the obligation the public body sets an additional, adequate deadline, combined with the warning of annulment (or repeal) of the beneficial act if also the additional deadline will elapse fruitlessly.

#### Article 116 Repeal of a lawful administrative act

1. Unless otherwise provided for by law, a lawful administrative act may be repealed only if it is necessary in order to prevent serious danger to the life and health of people or to public safety and this could not be done by other means, which have a less effect on the acquired subjective rights or legitimate interests of the party.
2. The beneficiary party, in the case of repeal referred to under Paragraph 1 of this Article shall be entitled to compensation when it has entered into financial relations, from which it can no longer withdraw or, it may withdraw only by suffering damages, which would not be reasonably be asked from it.
3. The compensation amount shall be to an amount, which does not exceed the reasonable interest of the party on the continuation of legal effects of the repealed act. The party shall not benefit compensation for the lost profit.

#### A. General introduction

##### I. Content and purpose of art. 116

This article provides, beside art. 115, the other exemption from the rule that the addressee of a lawful beneficial administrative act enjoys a very strong protection of his/her confidence in the continuity of the legal effect as it is stipulated in the act (see above explanation on art. 115 under A.I.). Art. 116 allows as a means of last resort ("*ultima ratio*") the repeal of a beneficial lawful for the purpose of preventing future events that could lead with a certain level of probability to a serious danger to the life and health of people or to public safety.

##### II. Constitution and EU-Law

When balancing the two rule-of-law related conflicting principles "legal certainty and continuity of the legal effect of an administrative act" on the one hand and other constitutional principles or legally protected rights or interests, the previous principles requires strictest protection with the view on lawful beneficial administrative acts. Art. 116 addresses this by emphasising that the breach of this principle is justified only under the particular restriction of a carefully balancing application of the principle of proportionality. Under this condition, it is in line with the rule of law that the legislator considers the protective purpose of art. 116 (see above under II) to have priority over the interest of the addressee of the beneficial act

##### III. Relation to previous CAP

The abrogation of administrative acts is dealt with in art. 121 – 129 of the previous CAP, but does not provide a provision similar to art. 116 of this Code.

##### IV. Scope of application

According to the wording of para. 1 art. 116 is applicable to any lawful administrative act, be it beneficial or onerous. The application to an onerous act, however, is relevant only in cases, when a third party has obtained a legally

advantageous effect through the issuance of the act and therefore requires protection. For the repeal of a lawful onerous act without third-party involvement art. 116 does not provide any restriction, because no conflicting legitimate interest of an individual is affected by a repeal.

According to the wording, art. 116 is applicable to lawful administrative acts. The purpose of art. 116, however, also requires – besides the application of art. 114- its (analogue) application to unlawful beneficial administrative acts, whenever the other legal requirements of art. 116 are satisfied. This can be of practical relevance, in cases when the competent body cannot base the intended repeal of the act on art. 114 because the assessment of the unlawfulness of the act as required for art. 114, para. 1 is very complicated (e.g. would require extensive administrative investigation) and the body comes quicker and easier to the same intended result of annulment by application of art. 116.

## V. Legal consequences

The repeal of the beneficial act is at the dutifully exercised discretion of the public body. Further legal consequences are the addressee's right to compensation of financial damages as stipulated in para. 2 and 3.

## B. Repeal of a lawful administrative act in details

### I. Preconditions for the repeal of a beneficial act in exceptional cases of emergency, para. 1

#### 1. Lawful administrative act

According to the wording of art. 116 the existence of a lawful administrative act is required. For the examination of the requirement "lawfulness" the legal preconditions of art. 107 apply (see explanation above on art. 107).

However, as explained above under A.IV. the legal precondition "lawful" does not preclude the (analogue) application of art. 116, if the concerned administrative act is unlawful.

#### 2. Act, by which the party acquired subjective rights or legitimate interests ("beneficial" act)

The legal requirement "beneficial" is apparent from the from the wording in para. 1 "acquired subjective rights or legitimate interests of the party", the concept "beneficiary party" in para. 2, and from the overall purpose of the norm, which is to allow the infringement of the interest of the addressee of an administrative act in the continuity of the legal benefit provided by the lawful act only for very exceptional overriding values such as life and health of individuals or public safety.

As explained above, (A.IV.) the requirement "beneficial" is also satisfied when an onerous administrative act has a beneficial effect to a third party.

#### 3. Serious danger to the life and health of people or to public safety

Para. 1 requires a serious danger to the life and health of people or to public safety. The interpretation of this legal requirement needs to be consistent with a similar legal precondition provided in art. 67 (see also explanation on art. 67 above under B.I. 2. and 3.)

##### a) Serious danger to life and health of people

Danger to life and health describes a situation that is imminent and likely to cause death or irreparable damage to health of individuals.

According to the exceptional character of this norm, "seriousness" of the danger means a damage of considerable gravity. Relevant in the meaning of serious and irreparable are always damages on body and life as well as health impairments on body and soul of greater gravity than slight physical and psychological discomforts, in case of health impairments independently whether they are of permanent or temporary nature.

The exceptional character of the norm also requires an imminent as well as a concrete risk that the danger will materialise, unless certain measures are taken to prevent the damage. The likeliness of the risk should not only be abstract but concrete, i.e. for the concrete individual situation to be dealt with by the public body it can be assumed with reasonable certainty that the damage will be caused. In this context, imminent means that the materialisation of the danger could happen at any moment during the period of time before the final decision can be taken.

##### b) Serious danger to public safety

The other alternative precondition for the repeal of a lawful beneficial administrative act is the serious danger to

public safety.

The protection of “public safety” falls under the fundamental tasks of the state. Here, when it is mentioned in addition to the danger of life and health, public safety is expressed as the object of the responsibility of the state to protect the public from dangers such as crimes or disasters.

For the concept serious danger, the definition of the previous section under a) also applies.

#### 4. Necessary in order to prevent the danger

This legal precondition has a similar function as the wording “for the purpose of aligning it with the law “ in para. 1 of art. 14 (see above explanation under B.I.2.), namely to clarify that the protection of life and health of people or the public safety are the only purposes that would justify the repeal of a lawful beneficiary act, and that any other intention or interest of the public must be disregarded as purpose of action.

The concept “necessary” should not be misunderstood as reference to the criteria necessity as the second one of the three criteria that are to be considered in the frame of examining the proportionality of an administrative measure, which are suitability, necessity, and adequacy (see above explanation on art. 12). However, in the further course the text of para. 1 reads “could not be done by other means, which have a less effect”, which is exactly a legal description of the proportionality criteria necessity of a measure. So, if the phrase “necessary in order to prevent the danger” would also be understood as expression of the proportionality criteria “necessity”, para. 1 would simply duplicate this criterion, which would not make sense. Therefore, a meaningful interpretation should come to the conclusion as it was done above.

#### 5. Unless otherwise provided for by law

This legal reservation refers to the possible case that material administrative law could provide a special regulation for the same purpose of protecting life and health of people or public safety. However, due the exceptional character of the art. 116, the other regulation this cannot be done through secondary legislation.

#### 6. Legal consequences: discretionary decision limited by the principle of proportionality, in particular by “no less severe means available”

- a) The margin of discretion is very limited, if the legal preconditions are satisfied. The proportionality aspect “suitability” is decided by the legal text providing the repeal as a possible measure.
- b) The proportionality aspect necessity is expressed by the wording “no less severe means available”. This underlines that the public body must carefully consider other means suitable to protect in the concrete situation life and health of people or public safety than the repeal of the concerned administrative act. The art. 116 provides the repeal only as a means of last resort. Any other means of the same suitability that has no or less negative effect to the rights or interests of the addressee than the repeal is to be given priority.
- c) The adequacy of the repeal is the final criteria. Here the legal precondition “serious danger” will already ensure the adequacy in most of the cases. However, it may be that in some cases the disadvantage for the addressee caused by the repeal might also be related to his/her health or even life and therefore a repeal of the lawful beneficial act were inadequate and thus unjustified, in other words unlawful.

#### II. Beneficiary party’s right to compensation for financial damages, para. 2

In the case of repeal of a lawful beneficial administrative act the public body must make good any financial loss suffered by the beneficiary of the act due to his/her reliance on it if such reliance deserves protection. The detailed legal preconditions for such claim for compensation are as follows:

##### 1. Beneficiary party

Beneficiary party could be the addressee of a beneficial act or a third party, who received a legal advantage through the issuance of an onerous administrative act (see above B.I.2.).

##### 2. Repeal acc. to para. 1

It is required that either a beneficial act or an onerous act with beneficial effect to a third party was repealed based on para. 1. The lawfulness of the repeal is not necessary. The entitlement starts with the day, when the repeal becomes valid and unreviewable.

### 3. Beneficiary's reliance deserves protection

This legal requirement derives from the general purpose of the provision, that is to protect the beneficiary's confidence. The protected confidence does not only end with the issuance of the repeal but also ends already, when the beneficiary has gained knowledge of the public body's intention to repeal the act.

Another case of might exclude the protected confidence of the beneficiary might be the situation, when the beneficiary should have been aware of the unlawfulness of the repeal but has omitted to lodge an appeal against the repeal.

### 4. Alternatives of financial loss

- a) Alternative 1: Beneficiary has entered into financial relations, from which it can no longer withdraw

Such "financial relation" could for example be the purchase of machinery and equipment for operating an industrial facility, which the beneficiary has done relying on the continuity of the industrial operating licence.

- b) Alternative 2: Beneficiary can withdraw from financial relations, but the withdrawal of the financial relations causes disproportionate damages

This alternative might be satisfied, when the beneficiary has financed the investment above by means of a bank loan and the withdrawal from the loan contract entails a contractual penalty equal to several times of the total contract.

### 5. Request of the beneficiary

The entitlement to seek compensation requires a request of the beneficiary to be lodged with the competent body that has repealed the act.

### 6. Legal consequences:

The public body decides on the request by administrative act issued as the result of a separate administrative procedure.

### III. Amount of compensation, para. 3

The amount of compensation is determined by the "negative interest", i.e. the beneficiary is to put into the position, which would have prevailed if he/she had not placed his/her confidence in the continuity of the repealed administrative act. Compensation for lost profit (e.g. through loss of revenues expected from the operation of a licenced industrial facility) is not included.

### *Article 117 Deadline of annulment and repeal*

1. The repeal in the case described in Paragraph 1 of Article 116 of this Code may be done at any time.
2. The repeal or annulment in any other case other than the one referred to under Paragraph 1 of this Article may be made within 30 days from the date when the public body gains knowledge of facts, which lead to the annulment or repeal, but not later than 5 years of the notification of the administrative act.

#### A. No deadline for repeal in the case of para. 1 of art. 116

It is only naturally, that with a view on the gravity of the exceptional reasons justifying acc. to para. 1 of art. 116 the repeal of a lawful beneficiary act (e.g. natural disasters, etc...; see above explanation on art. 116 under A. I), no deadline applies for the public body's application of the means of repeal.

#### B. Regular deadline of annulment and repeal

The 30-day deadline para. 2 prescribes for the public bod's action, is to be calculated from the date, when the body gains knowledge of facts justifying either annulment or repeal. This deadline shall be considered adequate for the body's exercise of both the resolution and section discretion and its preparation of the written administrative act including the reasoning. The deadline is met with the notification of the annulling or repealing act to the concerned parties.

The 5-year deadline is absolute and includes the time the public body requires for the preparation of the annulling or repealing act and its notification. After the expiry of the period of 5 years the principle of legal certainty prevails over all the other interests relevant for the application of the articles 113 to 115.

#### *Article 118 Reimbursement in case of annulment*

1. Any payments or contributions, which have been made either by the party and/or by the public body based on an annulled act, shall be returned.
2. The amount of reimbursement of payments and contributions, provided for in Paragraph 1 of this Article shall be included in the act of annulment and estimated by the public body, according to the relevant provisions of civil legislation on surrendering of undue enrichment.

#### A. General introduction

##### I. Content and purpose of art. 118

Art. 118 provides that if an administrative act is annulled, the benefits drawn from it must be refunded. The refund obligation is incumbent to both sides, be it the party or the public body, who has received a payment or other contribution from the other side. The refundable benefit must be determined in the annulment act (written administrative act, art. 113, para. 3, which is subject to administrative appeal) and fixed in accordance with provisions of civil legislation on surrendering of undue enrichment.

##### II. Constitution and EU-Law

The provision follows from the principle of legality of public administration and at the same time protects the bona fide recipient, who under certain conditions is entitled to claim the omission of enrichment.

##### III. Relation to previous CAP

The abrogation of administrative acts is dealt with in art. 121 – 129 of the previous CAP, but does not provide a provision similar to art. 118 of this Code.

##### IV. Scope of application

Art. 118 is applicable to cases of annulment of an administrative act according art. 114 or 115. For the question whether or not the recipient of a benefit did so bona fide, the para. 3 of art. 114 applies.

#### B. Reimbursement in case of annulment in details

##### I. The party's and public body's refund obligation, para. 1

###### 1. Alternative 1: Benefits received by the party

###### a) Payment made by the public body

The concept payment includes all kinds of delivery of money, be it made in cash or by non-cash transfer of funds, as one-time, from-time-to-time, or periodical (annual, monthly) payment. The most frequent applications are done in the area of remuneration of civil servants, pensions, subsidies, and social aid.

###### b) Other contribution made by the public body

The concept contribution covers the delivery of any other countervailing benefit such as provision of public goods and services or advantages from use of a thing (e.g. official car).

###### 2. Alternative 2: Benefits received by the public body

The preconditions "payment or contributions" also relate to either delivery of money (e.g. payment of administrative fees, v Electricity-, gas-, water- and sewage system fee, or fines) or any other countervailing benefit (e.g. free-of-charge lease of land or provision of unpaid work).

### 3. Based on the annulled act

It is required that the payment or contribution was made for the purpose of fulfilling a legal obligation that was established by the annulled administrative act.

### 4. Rightful claimants vis-à-vis obligated parties

#### a) Alternative 1: Benefits received by the party

The refund obligation is incumbent, on the one side, upon the individual who received the payment resp. contribution, mostly the addressee of the annulled act, sometimes a benefitting third party. Entitled to the reimbursement is the public body that made the payment resp. contribution as execution of the annulled administrative act, mostly – but not necessarily - the body that issued the annulled act and is also the competent body for the annulment.

#### b) Alternative 2: Benefits received by the public body

On the other side, obliged for the refund is the public body that received the payment resp. contribution, mostly – but not necessarily - the body that issued the annulled act and is also the competent body for the annulment. Right claimant is the individual that made this payment resp. contribution the addressee of the annulled act.

#### c) Netting off

If the annulment of an administrative act entails ion a refund obligation incumbent upon either side, receivables and payables arising there from are to be netted.

## II. Procedure and applicable legislation

### 1. Ex officio decision as part of the annulment act, para. 2

The wording of para. 2 clarifies that the annulment act must ex-officio include a decision on reimbursement if payments or contributions were made on the basis of the annulled act by one or either side of the concerned administrative procedure.

### 2. Civil legislation on surrendering of undue enrichment

For the decision on reimbursement those provisions of the civil legislation on surrendering of undue enrichment, which are relevant for the determination of the amount of reimbursement, apply accordingly.

## **CHAPTER II**

### **ADMINISTRATIVE CONTRACT**

#### *Article 119 Conditions and requirements of administrative contracts*

1. A public body in order to fulfil an interest of the public, to which it serves, but without hurting the interests or rights of the other parties, may conclude an administrative contract, provided that the following conditions are met:
  - a) the contractual form is not explicitly prohibited by law, or does not come against the nature of the administrative case itself; and
  - b) the public body is authorized by law to decide on the case with discretion;
2. The administrative contract shall be concluded in writing, save for cases when the law has provided another special form.
3. The contract shall be signed by the parties or representatives manually or electronically, in conformity with the modalities, which are set forth in the legislation in force. Signing on behalf of the public body shall be based on an authorization of the respective body.

#### A. General introduction

For the exercise of administrative tasks the law provides a variety of forms of actions to be used by a public body with different procedural rules and legal consequences for every form. This system of actions can be categorised in unilateral and consensual form of actions.

Unilateral form of actions:

The most characteristic and frequent mode of exercising administrative powers and functions is still the unilateral measure, for which this Code provides two types:

- the administrative act (para. 1 of art. 3), as regulated (and explained) in the previous Chapter I of this Part of the Code,
- and the form of any other action (para. 10 of art. 3), regulated in art. 126 and 127.

Consensual form of actions:

Increasingly in modern public administration, a public body may also avail itself of consensual actions to resolve administrative matters, for which the legal system distinguishes between three different types:

- Explicitly stipulated in this Code is the administrative contract (para. 4 of art. 3).
- In addition, this Code does not exclude other consensual approaches, which in the following explanation will be referred to as “informal administrative agreement”. The admissibility and necessity of those informal consensual actions is to be concluded from articles 5, 10 and 18, and particularly from para. 11 of art. 3 when mentioning “exercising public functions, which fails to meet the criteria for qualifying as an administrative contract.
- Finally, though not expressly dealt with in this Code, it is commonly acknowledged that the Albanian – and beyond that the European - legal and administrative tradition and practice do not exempt public bodies from entering into private law contracts.

Art. 119 and the following articles of Part II of Chapter V provide the procedural rules and legal consequences of an administrative contract.

#### I. Purposes of art. 119

Art. 119 has three regulatory purposes.

- It supplements the definition of a new legal concept of administrative contract, provided by para. 4 of art. 3 and demarcates – in derogation from the previous legislation - the administrative contract from other consensual forms of administrative actions.

- It provides in para. 1 as a general norm the legal preconditions for the admissibility of an administrative contract that are applicable for the two types of administrative contract specified in art. 120 and 121 (in mathematic terms: provides a ground rule set outside the brackets).
- It stipulates in para. 2 and 3 general rules on the formal requirements for any administrative contract.

## II. The new concept of the administrative contract

### 1. Purpose of the administrative contract

Although the unilateral action, particularly the administrative act governed in Chapter I of Part V of this Code, is still the traditional and most characteristic instrument of exercising administrative functions, it is not always the adequate tool to regulate the relationship between public body and citizen. A changed, more democratic understanding of this relationship demands additional, consensual forms of administrative actions to enable a more citizen-oriented administrative service. More extensive participation of citizen is of particular need for dealing with administrative matters that require co-operation between citizen and administration. A formalised instrument for such participation of the citizen is the administrative contract.

The instrument of an administrative contract can offer several advantages. In a contract relationship, the citizen is not merely object of public power but seen as partner, who is proactively involved in the process of resolving an administrative case, acting almost on an equal footing with the public body. Moreover, as a partner of a contract the citizen can more effectively assert his/her interests than through other forms of participation. e.g. through the hearing (art. 87, 88). The form of a contract also provides a higher degree of flexibility and the chance of optimising the resolution of a conflict between citizen and public body, in particular in atypical situations and circumstances. Finally, the process of negotiation increases transparency (art. 5) and acceptance of the consensually reached agreement, which also reduces the number of lodging administrative remedies.

The inevitable advantages of the instrument of an administrative contract, however, are contrasted by disadvantages, too, e.g. the risk of monetisation/commercialisation of administrative services resp., vice versa, selling off of public power. There are also concerns that a contractual resolution found by the two parties could interfere with rights or interests of third persons or the general public. The provisions in art. 119 et sequ. address both risks adequately.

### 2. Definition

In this section, the new definition of an administrative contract will be explained. The defining elements result from the general definition provided by para. 4 of art. 3 (see above explanation on para. 4 of art. 3) in conjunction with a systemic and teleological interpretation of art. 119, art. 120 and art. 121. If an activity of a public body satisfies these defining legal preconditions are, the procedural rules and legal consequences of the art. 119 et sequ. apply.

#### a) Agreement, para. 4 of art. 3

Agreement in the meaning of para. 4 of art. 3 can here be defined as a negotiated mutual assent of two or more parties to do or refrain from doing something.

#### b) Public body, para. 4 of art. 3

At least one of the parties must be a public body in the meaning of para. 6 of art. 3 (see above also explanation on para. 1 of art. 3 under B.I.1.). This requirement makes clear that an administrative contract cannot be concluded by two or more subjects of private law, unless one of the subjects of private law “has been entitled to exercise public functions” (para. 6 of art. 3).

#### c) Establishes, modifies or ceases a specific legal relation, para. 4 of art. 3

Target of the agreement between the contracting parties must be to establish, modify or cease a specific legal relation. Establishing means creating a new specific legal relation, whilst modifying measures as well as ceasing measures deal with an existing legal relation (see also above explanation on para. 1 of art. 3 under B.I.5.).

Para. 4 of art. 3 uses here the same wording, as the para. 1 of the same article does for the administrative act (see above explanation on para. 1 of art. 3 under B.I.5.). Differences with respect to its interpretation, however, derive from the bi-lateral sometimes multi-lateral character of a contract. Therefore, in contrast to the administrative act, whose legal effect is the legal consequence of the public body’s unilateral expression of will, “specific legal relation” means here a relation that is jointly created through an agreement of the contract parties that results in mutually interconnected rights and duties of the contracting parties.

Creating a specific legal relation requires that either contract party commits itself with legally binding effect to do or refrain from doing something, whereby doing can also include the confirmation resp. recognition of the existence or non-existence of a certain factual or legal situation.

It follows from this that “informal administrative agreements” are not administrative contracts, because they lack the will to enter a legally binding relationship. The following cases, for example, fall under informal administrative agreements: Intensive consultations between public body and addressee or third person prior to the issuance of an administrative act; arrangements about the date of a hearing (art. 88); agreements about the sequence of steps of the administrative investigation process (art. 78); or the political consensus between state and representatives of the industrial sector on compliance with certain emission limit values in order to avoid adoption of legislation in this field (“norm-avoiding conventions”).

d) Under public (administrative) law, para. 4 of art. 3 in conjunction with para. 1 of art. 119

As part of the Continental European legal system the Albanian law distinguishes between private and public law contracts. The two types are governed by different sets of rules and the remedy for their breach also lies in different sets of courts (for the dichotomy of public and private law see also explanation on para. 1 of art. 3 under B.I.2.).

This Code as well as the legal and administrative tradition and practice do not exempt public bodies from the principle possibility to conclude private law contracts.

So, whenever a public body entered into an agreement related to a specific legal relation or intends to do so, the question arises, whether it shall be done resp. has been done through a private or public law contract.

i) Two common types of private law contracts in public administration

Public bodies commonly use the instrument of a private law contract in two typical areas.

With the first type of activities, a public body may avail itself of private law instruments like any other natural or legal person. It can enter into private law contracts for getting some services or some work done, procuring some goods or creating tenancy. It can also own and possess property, have usufructuary rights and form companies or partnerships. Those activities, even exercised in the private law form, are part of public administration, also called fiscal administration, which of course always serves, respectively has to serve, in a general and wider sense the public interest of the community. But nevertheless, in those cases there is no close factual connection between the activity and the exercise of administrative function in a concrete case and thus the public body is neither acting as the occupier of public power nor availing itself of sovereign means. It acts like a private person, enjoying, on the one hand, in principle the same autonomy and freedom, but is also, on the other hand, subject to the public law in the same manner as any other person, e.g. must operate subject to the industrial and trade law, planning law, construction law, or taxation laws as any other person and must avail itself of the same legal remedies that are available to private persons. This first type of activities is also being exercised by two public bodies when entering into a private law contract

Besides activities of the first group of so called fiscal administration, the public administration may also use the private law for pursuing public law functions such as provisions for transport, water, gas, electricity, sewage, removal of garbage and granting subventions. Those activities might be carried out either directly by the public body or through a sub-contracted agency of someone else. However, the difference between these cases and the first type of a public body's activities is that the instrument of the private law contract is used to deliver a public service, in other words the contract partner is beneficiary of a public service. As a consequence, even if the relationship between the public body and the citizen is based on a private law contract, the public body's activities of this second type do not enjoy the same autonomy and freedom of a private law subject. In contrast to any other private person, in this area of activities the public body cannot escape from fundamental public law rules and principles, particularly from the principle of equal treatment and proportionality. Public administration cannot be allowed to diminish the legal protection of the citizen by resorting to private law. The fundamental constitutional principles and individual rights must also apply in the frame of those private law contracts between the public body and the citizen. But nevertheless, the contractual basis of these relationships as such is a private law contract and not a contract “under public law”.

ii) Interpretation of the term “under public law”

By providing the requirement “under public law” the art. 3, para. 4 stipulates that one distinctive factor between the private law contract and contract under public law is the legal nature of the subject-matter of the contract, which in turn is determined by the legal nature of the legislation governing the respective subject-matter. Accordingly, if the

concerning matter is governed by legislation that belongs to the sphere of public law the private law contract is the wrong instrument.

However, a further specification of the term “public law” is required. Usually, the term public law is used in its wider sense comprising beside the sphere of administrative law also other areas such as constitutional and international law as sub-parts of public law. But it is to be considered, that acc. to art. 2 para. 1 the provisions of this Code apply only in the sphere governed by administrative law (see above explanation on art. 2 para 1 under B.I.2.). It follows from this that here in para. 4 of art. 3, when the legislator uses for the definition of the administrative contract the term public law, the term is not used in its wider sense but synonymously with administrative law. Consequently, contracts in the sphere of constitutional and international law are not covered by this Code.

To sum up, it is to say that with a view on the legal precondition “under public law” a contract is an administrative contract when its subject-matter is governed by administrative law.

Clearly governed by administrative law are the following cases:

- The administrative law explicitly prescribes the conclusion of an administrative contract as the only or at least a possible way of settling a certain subject-matter.
- The contract modifies an existing legal relation, which derives from the application of administrative law.
- The contract imposes an obligation on the public body that can be fulfilled only through issuance of an administrative act.

For remaining, less un-ambiguous cases the provision of para. 1 of art. 119, provides a further criterion explained below under the following sub-section iii).

iii) in order to fulfil an interest of the public to which it serves, para. 1 of art. 119

According to the wording of para. 1 of art 119 administrative contracts are those, whose purpose it is “to fulfil an interest of the public, to which it serves”. Purpose of this requirement can be understood as the demarcation criterion whether for a contract, in which a public body is involved, either private law or administrative contract law applies. For this purpose, however, para. 1 of art. 119 requires restrictive interpretation, because in its literal meaning the wording applies in principle to every administrative action. Whatever a public body does, it must in the end be exercised in line with the interest of the public. This follows from para. 6 of art. 3, according to which it is, by definition, the overall task of a public body to “perform (exercise) administrative (public) functions”. So, when every legal action, i.e. also when every contractual measure of a public body, be it exercised under public or private law, is to be done in the public interest, the wording “in order to fulfil an interest of the public” - understood in its literal interpretation - is merely an empty formula and unsuitable as distinctive characteristic for an administrative law contract.

Therefore, restrictive interpretation of this requirement is needed in order to make it meaningful. A systemic interpretation comes to the conclusion that purpose of this criterion is twofold. On the one hand, it is the purpose of this criterion to supplement the definition provided by para 4 of art. 3, in order to clarify those subject-matters that do not clearly fall under the defining criterion “under public law” as explained above in the previous sub-section under ii), but nevertheless require in the light of rationale and purpose of an administrative contract (see explanation above under A.II.1.) the same treatment in law. At the same time the restrictive interpretation of the very wide and general wording must avoid overlap with the two types of private law contracts (as explained above under A.II.-2.d.i).

Based on these considerations, a contractual measure of a public body is to be understood as exercised “in order to fulfil an interest of the public to which it serves” and thus satisfies also the legal precondition “under public law”, if the contract has resp. is intended to have direct impact on a subject-matter governed by public law, even though the subject-matter of the contract itself is not governed by public (administrative) law.

A typical example of applying the criterion in the appropriately interpreted sense is the case of subvention in form of a low-interest loan contract through which a public body intends to support an industrial operator’s efforts to comply with certain emission limit values stipulated by public law provisions.

The criterion “in order to fulfil an interest of the public to which it serves” as interpreted above is also relevant for administrative contracts between public bodies acc. to art. 121, in order to distinguish between private law contracts such as contracts for sale of used fire engines or tenancy agreements on office space and the contract on the joint operation of a bus line for the transportation of schoolchildren, which is an administrative contract because the subject matter school-system is governed by administrative law.

iv) Public-private-partnership – “PPP”

The term public-private-partnership originates from the American and British legal practice and refers to cooperative relationships between a private law subject and a public body with respect to the performance of public tasks. Although increasingly used, particularly in the context of privatisation-policy, the term is - legally seen - not particularly meaningful. It denotes a wide range of various forms of cooperation without precisely expressing the legal character and the intended purpose of the relationship between the public and the private partner. With respect to its legal character, the relationship can comprise informal forms of co-operation, exchange of political commitment, declarations of general consensus – all of them lack the legally binding effect - but can also have the binding character of a contract. If it has the legal character of a contract, it depends on the criteria explained above whether it is a private law contract or an administrative contract; frequently, it is a type of a private law contract of the second group explained above under i).

e) the two alternatives of administrative contract: art. 120 and the special case of art. 121

The articles 120 and 121 provide the only two types of administrative contract this Code provides. The art. 120 relates to the situation, when – as a rule – on the one side the public body and on the other a citizen is involved. This can be seen as the “normal” situation; at least it is the one, for which administrative contracts are legally and practically of predominant relevance. Art. 121, on the other hand, is dealing with a special situation of two public bodies encountering each other as equal partners.

So, apart from the special case of art. 121, the art. 120 sets the limits for the use of an administrative contract. This is not only confirmed by the wording of art. 120 and the lack of any other provision opening the possibility of using other types of administrative contracts. It is the whole set of rules of art. 119 et sequ. that is shaped for the application to a subordination relation, as it is characteristic for a situation regulated through administrative act.

It follows from this that the scope of applicability of an administrative contract is much narrower than the one provided in the previous CAP.

v) to whom it would otherwise address an administrative act – “subordinate administrative contract” – para. 1 of art. 120

Para 1 of art. 120 provides the final element for the definition of an administrative contract. This element relates to the legal character of the relationship between the competent public body on the one side and the contract partner, be it a private law subject or a public body. The provision stipulates this defining requirement by the wording “with a party, to whom it would otherwise address an administrative act”.

This phrase, however, cannot be understood in a way that a contract is only an administrative contract, when a legal authorisation exists for resolving in the concrete individual situation the concerned subject-matter by issuance of an administrative act. Such understanding of the wording in its literal meaning would be contrary to the rationale and purpose of the instrument of an administrative contract. It is the purpose of the administrative contract to offer a suitable and flexible solution particularly and exactly in cases, for which the strictly binding and thus less resilient instrument of an administrative act would fail.

So, a necessary, systemic interpretation of the wording “to whom it would otherwise address an administrative act” leads to a more abstract view. Accordingly, if the relationship between the competent public body and the contract partner in general is of the legal character that is typical of the relationship between a public body and the addressee of an administrative act, this requirement of para. 1 of art. 120 is satisfied. And typical of such relationship is one of subordination.

So, a contract concluded on the basis of art. 120 can be called subordinate administrative contract.

vi) public bodies carrying out activities of common interest – “co-operate administrative contract” - art. 121

The alternative to the contractual relationship characterised by subordination is the administrative contract concluded between public bodies in cases, if their relationship does not fall under the first subordination-alternative. The final defining criterion for this type of administrative contract is the intention of “carrying out activities of common interest” by co-ordinating their fulfilment of public tasks.

So, a contract concluded on the basis of art. 121 can be called “co-ordinate administrative contracts”.

### III. Constitution and EU-Law

Concerns about the compatibility of the administrative contract with the Constitution do not exist. The legal framework provided by this Code, particularly the set of provisions in art. 119 et sequ. and the applicability of the principles stipulated in Part One Chapter II of this Code ensure the compliance with the overall principle of legality of public administration that is derived from the rule of law and laid down in art. 4 of this Code.

Also, the EU-Law recognises the instrument of an administrative contract (e.g. for the recruitment of staff of the Union institutions)

### IV. Relation to previous CAP

With the provisions of this Code the legislator has adopted a new concept of the administrative contract that fundamentally differs from the concept provided by the previous CAP, even though the definition in art. 6 of the previous CAP is almost equal to para. 4 of art. 3 of this Code. The previous art. 151, however, not only differs in its casuistic legislative approach as a method to “define” the administrative contract. It is also the regulatory content, expressed by the list of cases addressed in para. 2 of the old art. 151, which cannot be compared with the new legislation. Finally, beyond the two definitions in art. 6 and 151 the previous legislation does not provide any norm dealing with procedural or material law requirements for an administrative act.

All in all, it is to say that the new concept and its regulatory set up provided by this Code must be seen as a clarifying improvement of administrative law that has been of most urgent necessity.

### V. Scope of application

In contrast to the previous CAP and also differently from other national legislation in Europe (e.g. in France), the scope of application of an administrative act is comparatively narrow and clearly demarcated either by art. 120 – all subordination relations between public administration and parties of an administrative procedure – or by art. 121 – relations between two public bodies cooperating as partners having equal rights. Beyond these two types, the Code does not provide the space for other forms or types of administrative contracts.

### VI. Legal consequences

#### 1. Principle of legality of public administration

The administrative contract is – as any other kind of administrative action – subject to the principal of legality of public administration (see art. 4). It follows from this that the contract partners, particularly the public bodies involved in an administrative contract, be it a subordinate contract (art. 120) or co-ordinate contract (art. 121), do not enjoy the same freedom and autonomy about the contents of the contract, which they have about the contents of a private law contract. One of the restrictions of the contract partners is that for the legal relation established by the contract the principle of lawfulness.

#### 2. Applicable legislation

For the judgement of procedural as well as material lawfulness, primarily the special rules in Chapter II of Part V and the principles of Chapter II of Part I apply.

Furthermore, all procedural rules as far as they are suited to the bi-lateral and consensual character of a contractual relationship. Consequently, not directly applicable are the provisions dealing with the issuance of an administrative act (Chapter I of Part V) as well as Chapter II of Part VI, Part VII and Part VIII of this Code. This does not mean, however, that for certain individual cases application of one of these norms by analogy should not be taken into consideration.

Applicable shall be in particular the provisions on:

Jurisdiction, Chapter I of Part II

Participation, Chapter I of Part IV

Rights of parties, Chapter III of Part IV

Impartiality of the public administration, Part III

Documents, Chapter IV of Part IV

Administrative assistance, art. 71 et sequ.

### Administrative investigation, Chapter X of Part IV

In all other respects – in particular those related to formation of a contract; declarations of intent including absence of consent and an absence of freedom; invalidity of contracts; (temporary) non-performance or defective performance; surrendering of undue enrichment – the provisions of the Civil Code apply (para. 1 of art. 122 and art. 124).

### 3. Enforcement only by action in the court

If one of the parties fails to perform its part of the contract the other party may enforce it by an action in the appropriate court for administrative matters (art. 125). The public body, in the case of a subordinate contract acc. to art. 120, does not have the power to enforce the performance of a contract. Part. VIII of this Code does not apply to administrative contracts.

### B. Conditions and requirements of administrative contracts in details

#### I. Definition and admissibility of an administrative contract, para. 1

Para. 1 provides one element of the definition of an administrative act (see above explanation under A. II. 2.d.) and 4 legal preconditions for the admissibility of using the form of an administrative contract.

##### 1. List of the elements of the definition

The elements of the definition of an administrative act, derived from para. 4 of art. 3, para. 1 of art. 119 and para. 1 of art. 120 and explained above in detail under A. II., shall be here repeated at a glance:

- a) agreement, art. 3 para. 4
- b) between a public body and another contract partner, be it a private law subject or another public body, art. 3 para. 4
- c) on establishing, modifying or ceasing a specific legal relation, art. 3 para. 4
- d) under administrative law, art. 3 para 4 in conjunction with art. 119 para. 1; after systemic and teleological interpretation, this requirement is satisfied in one of the following alternative situations:
  - Administrative law explicitly prescribes the conclusion of an administrative contract as the only or at least a possible way of settling a certain subject-matter.
  - The contract modifies an existing legal relation, which derives from the application of administrative law.
  - The contract imposes an obligation on the public body that can be fulfilled only through issuance of an administrative act.
  - the contract has resp. is intended to have direct impact on a subject-matter governed by public law, even though the subject-matter of the contract itself is not governed by public (administrative) law
- e) subordinate relation between contract partners, art. 120 para. 1

or

- f) co-ordinate relation between public bodies, art. 121

##### 2. Admissibility of an administrative contract, art. 119 para. 1

- a) no interference with interests and rights of other persons

This requirement ensures that the contract must not have a negative impact on the rights and interests of a third person, unless the person is also partner of the contract and agrees in a free will decision. The requirements go beyond the Civil-Code ban of a contract at the expense of a third party, since it protects not only the rights but also the legitimate interest of the third person.

- b) contractual form not explicitly prohibited by law

The requirement just refers to a fundamental legal principle. The prohibition does not only relate to the formalities but shall also apply to the concrete content of the agreement. A law need not literally prohibit a contract; it is enough if such prohibition clearly results from the object and meaning of such law. Thus, contracts are not permissible for example for the use of police for purposes not covered by the law, for exemption of taxes under conditions not contemplated by law, or for conferring a benefit not falling within the law.

c) not against the nature of the administrative case itself

Some subject-matters are due to their nature precluded from being a possible object of a consensual approach. Subject-matters whose nature does not allow to be dealt with through a contract are, for example the appointment of a civil servant, the employment of a person in defence services, the imposition of duties, or the result (grade) of an examination performance.

d) discretionary power of the public body

This requirement makes clear that space for a public body's flexible response to an untypical administrative case is only allowed when the public body has got the choice between two or more options of resolving an administrative case, in other words if the public body is by law granted a margin of discretion related to the resolution of the case (for the concept discretion see explanation on art. 3 para. 3 and art. 11). An administrative contract must not be concluded on a subject-matter that belongs to the area of mandatory public administration, i.e. to the area where an administrative act must be taken, resp. can be taken or not taken only, if preconditions laid down in the law are satisfied.

## II. Written form and manual or electronic signatures, para. 2 and 3

The written (para. 2) administrative contract needs to be signed by all parties to the contract or their representatives in order to be legally valid and binding. As "written" includes here as generally the electronic form (see *inter alia* art. 58 para. 3 and art. 99 para. 2), paragraph 3 also provides for the electronic signature of the electronic document that contain the administrative contract.

The norm requires "the parties" to sign the relevant documents. This term refers not to the parties of the administrative procedure (see art. 33) but to the parties of the contract, including the public body. In order to bind all involved parties, the documents have to be signed by each one of them. A representative may act on behalf of the party, especially in the case of art. 35. Where one party is not a natural person, the document needs to be signed by its representative. Art. 119 does not define or regulate the representation of the party, but presupposes the representation as with art. 35.

In case the documents are prepared as paper documents, they have to be signed manually. Electronic documents need to be signed electronically. It is not possible to mix both ways of signature formats. The electronic signature must be "in conformity with the modalities, which are set forth in the legislation in force". This refers to the Law No. 10 273 on the Electronic Document, dated 29.4.2010, as amended by Law No. 101/2015, dated 23.9.2015. According to art. 6 of this law, an electronic document in order to be legally valid needs to bear a digital signature, according to legislation on digital signature. The Law No 9880 of 25.2.2008 on Electronic Signatures in its article 5 regulates the use of electronic signatures in the context of contracts. According to this provision, each of the parties has to sign the same document with each respective qualified electronic signature, if the legal transaction is a contract.

According to the third sentence, the signature given on behalf of a public body shall be based on a qualified certificate issued to the respective public body rather than to single civil servants. This takes up art. 99 para. 4. It takes into account that the authority lies with the public body as a whole and not a single person acting on behalf of that body. It adds to the necessary transparency that already the signature and the underlying certificate make clear that the signature was given on behalf of that body. *De lege ferenda* it should be considered to allow for qualified electronic seals to be used on behalf of public bodies. Such seals are introduced by art. 35 ff of the eIDAS Regulation No 910/2014 EU. They allow for electronic "signatures" not on behalf of a natural person but on behalf of an organisation, much in a way that seals are used on paper documents. In very many aspects they share the legal prerequisites and the consequences of electronic signatures, as defined by the mentioned Law on Electronic Signatures.

*Article 120 Substituting administrative contract*

1. A public body may conclude a substituting administrative contract with a party to whom it would otherwise address an administrative act, if the public interest is better accomplished through an administrative contract.
2. In the substituting contract, the other party, which is a non-public body, may be bound to perform or not to perform an act, or give something in exchange of performing a function by the public body, this obligation shall help the public body to accomplish an administrative public function, according to the purpose defined in the contract.
3. The text of the substituting administrative contract shall include the reasoning why the public interest is better protected through the conclusion of the said contract.

A. General Introduction

I. Content and purpose of art. 120

Art. 120 has – similar to art. 119 (see above explanation on art. 119 under A.I.) - three regulatory purposes.

- It supplements the definition of a new legal concept of administrative contract, provided by para. 4 of art. 3 and art. 119 para. 1 by another defining element and thus demarcates the subordinate contract from the other type of administrative contracts, namely the co-ordinate contract provided in art. 121
- It provides in para. 1 - in addition to art. 119 para. 1 - another legal precondition for the admissibility of a subordinate administrative contract.
- It stipulates in para. 2 and 3 formal and substantive legal requirements for the conclusion of a subordinate contract.

1. The defining element of the subordinate administrative contract

As explained above under A. II. 2. e. of art. 119 the appropriate interpretation of the defining element of para. 1 of art. 120 “to whom it would otherwise address an administrative act” requires an abstract view with the result that the relationship in general between the competent public body and the contract partner is of the legal character that is typical of the relationship between a public body and the addressee of an administrative act. Such relationship is characterised by subordination of the citizen vi- à-vis the superior sovereign power of the public body. Accordingly, the term subordinate administrative contract is used for the type of contract provided by art. 120.

2. Purpose and function of the subordinate contract

For the administrative practice the subordinate contract is the more relevant type of administrative contracts. It is increasingly used, when public bodies want resp. need to avail themselves from the advantages (explained above under A. II. 1. of art 119) a consensual approach has in comparison to the strict instrument of the administrative act.

Such are contracts, for example, for the grant of permission to construct, for the refund of money paid to a civil servant for pursuing further studies, for the payment of subventions, for the use of a public institution or establishment.

3. Classification into compromise and reciprocal contracts

Subordinate contracts can further be classified into reciprocal and compromise and contracts.

a) Reciprocal contract

Through a reciprocal contract parties to the contract agree to carry out reciprocal obligations. In such contract the party to the contract binds itself to give the administrative authority a counter or reciprocal consideration for a definite purpose, which serves the authority in the fulfilment of its public tasks. The consideration must be adequate or in proportion to the overall facts and circumstances of the matter in issue and should be content wise be connected with the contractual performance of the administrative authority.

b) Compromise contract

A compromise contract is made to remove a factual or legal uncertainty on a matter through mutual yielding of the parties if the administrative authority in its discretion decides that the making of the contract is appropriate to remove the uncertainty.

## II. Relation to previous CAP

As explained above (under A. IV. on art. 119) the legislation in the previous CAP cannot be compared with this new concept. A provision similar to this article did not exist.

## III. Scope of application

As explained above (under A. V. on art. 119) there is a *numerus clausus* of types of administrative contracts. Beyond these two types, subordinate contract (art. 120) and co-operative contract (art. 121), the Code does not provide the space for other forms or types of administrative contracts.

## IV. Legal consequences

For details of legal consequences, the explanation on art. 119 under A. VI. apply.

## B. The subordinate contract of art. 120 in detail

### I. Definition and admissibility requirement of a subordinate contract, para. 1

Para. 1 of art. 120 stipulates a special demarcating defining element of the subordinate contract and an admissibility requirement.

#### 1. Contract with a party to whom it would otherwise address an administrative act – “subordinate contract”

As explained above in details (see under section A. I. 1. of this article 120 and A. II. 2. e. of art. 119) art. 120 para. 1 defines a substituting administrative contract as a contract, whose subject-matter belongs to a kind, for which the law authorises in general a public body to regulate such matters by exercising unilaterally sovereign power, in the words of art. 120 by administrative act. “In general” means that the general character of the relation is crucial; it is not necessary that in the concrete individual case the legal requirements for issuing an administrative act are satisfied. The legal relation of such matters can be called subordinate, the contract subordinate administrative contract.

#### 2. May conclude a contract

This requirement makes clear that the choice of the contractual form for resolving an administrative case is at the discretion of the public body.

#### 3. Better suited for the public interest

The margin of discretion is limited by two aspects.

On the one hand the only admissible motive for the public body to opt for the contractual form is the public interest.

On the other hand, there is also a comparative element, expressed by the word better. Although a quite general wording, we can derive from it three more aspects for the dutiful exercise of the discretion. “Better” is to be understood

- either in comparison to the use of using the unilateral form of an administrative act,
- or – if in the concrete case the law would not provide the issuance of an administrative act because its legal requirements would not be satisfied – in comparison to inaction;
- for the comparison, the public body’s reason-based ex-ante assessment of the overall situation and circumstances is required, because “good intention” alone is not enough.

### II. Reciprocity of the contract and further legal requirements, para. 2

Acc. to para. 2 the contract between the competent public body on the one and the other party (parties) on the other side are reciprocal, i.e. the commitments entered stand in mutuality relationship.

#### 1. Performing a function by the public body

With the wording “performing a function by the public body” para. 2 refers to para. 1 according, to which the subject-matter of the committed entered by the public body is something what it would have otherwise done by an administrative act in order to serve the public interest.

## 2. Doing or refraining from doing something by the other party

The text of para. 2 clarifies that “doing something” also includes “giving” something. Moreover, a systemic interpretation of this norm results in the following legal requirement for the validity of the contract:

### a) Public purpose

It is crucial that, what the other party commits itself to do or not to do, fulfils a definite purpose, which serves the public body in the performance of its public tasks.

### b) Defined in the contract

Furthermore, this purpose must be either expressly or at least in substance, but in any case, clearly “defined in the contract”.

### c) Connection with public body’s performance

The content of counter or reciprocal consideration given by the other party must be materially connected with the contractual performance of the public body.

### d) Proportionality

The consideration of the other party must be in proportion to the overall facts and circumstances of the matter in issue.

## 3. Compromise contract

In a compromise contract the parties agree to remove a factual or legal uncertainty on a matter relevant for the legal relation of the parties through mutual yielding if the parties of the public body in its discretion decides that the making of the contract is appropriate to remove the uncertainty.

## 4. Special legal limits to reciprocity

The parties to a reciprocal administrative contract do not have the same freedom and autonomy about the contents of the contract, which they have about the contents of a private contract. There is a danger of commercialisation of administrative services if the parties to an administrative contract are given the same freedom, which the parties to a private contract have. Some limits have to be observed so that an administrative contract does not turn into a pure bargaining on the question of reciprocal benefits.

It follows from this that public services or benefits cannot be subjected to or made dependent on counter-benefits from a citizen except when under strict conditions laid down in the law. Further, if a person has a right to a benefit or service from the administration than a *quid pro quo* or counter-benefit or service on his part in favour of the administration is admissibly only if it is specifically provided in the law.

## III. Requirement of reasoning, para. 3

The predominant importance of the public interest as a legal precondition for making an administrative contract is underlined by the requirement of justifying the use of the contractual form through expressing in the contractual text the reason why it was better to choose the form of a contract instead of issuing an administrative act resp. omit any action.

### Article 121 Administrative contract between public bodies

1. Public bodies may conclude contracts between themselves for governing the relations in terms of carrying out activities of common interest.

## A. General introduction

### I. Content and purpose of a co-ordinate contract - art. 121

Art. 121 allows the conclusion of an administrative contract between public bodies of equal (or almost equal) status or rank. Such co-ordinate contracts are the contracts between two (or more) bodies either for the establishment of a partnership for financing a school, for the maintenance of common bridges or roads or for the maintenance of flow of water.

With this norm, the Code provides a legal framework for cooperation between public bodies, which under the previous CAP clarifying legislation was lacking for.

## II. Scope of application

As a matter of fact, co-ordinate contracts relate to those relationships, which could not be regulated through one of the parties by an administrative act addressed to the other party. Subordinate contracts and co-ordinated contracts are mutually exclusive. This follows from art. 120 para. 1. So, if two public bodies are parts of a subordinate legal relation, art. 121 does not apply.

## III. Legal consequences

An important consequence of this legislation is the clarifying art. 125 that provides a judicial conflict resolution.

## B. Article 121 in details

The art. 121 provides as only legal requirement that the contract governs activities of common interest. The legal text does not repeat what is clear, namely that “interest” must always be understood as public interests.

The interest is common, if the bodies’ public task is related either to the same subject-matter (operation of schools) or to two different matters that would both benefit from co-ordination (one municipality provides fire-fighting vehicles, the other one school buses, both operating on the territory of both bodies). In either alternative case the specific common interest is to ensure or increase good quality public services in the respective area, for which they have the responsibility, while achieving efficient (economic) use of resources.

### *Article 122 Invalidity of an administrative contract*

1. The invalidity of an administrative contract shall be governed according to the provisions of the Civil Code on the invalidity of the legal action. Besides, administrative contract shall be invalid in the following cases:

a) when the requirements under 119 of this Code have not been respected.

b) when the requirements concerning the conclusion of a substituting administrative contract provided for in Article 120 of this Code have not been respected;

## A. General introduction

### I. Content, purpose and legal consequences of art. 122

The administrative contract is – as any other kind of administrative action – subject to the principle of legality of public administration (see art. 4). It follows from this that the parties, particularly the public bodies involved in an administrative contract, be it a subordinate contract (art. 120) or co-ordinate contract (art. 121), do not enjoy the same freedom and autonomy about the contents of the contract, which they have about the contents of a private law contract.

Therefore, prior to entering into an administrative contract, both partners of the contract are faced to the question of admissibility of making an administrative contract, the compliance with all procedural rules, and the lawfulness of its content (see for the legislation applicable for this question also explanation on art. 119 under A. VI. 1. and on art. 124). Subsequent to the conclusion of a contract, however, the perspective is not only directed to the legal preconditions for the lawfulness resp. unlawfulness of the contract, but the view now changes mainly towards the question about the legal consequences of a legally defective administrative contract.

For the legal criteria, under which an administrative contract suffers from a legal defect, the art. 122 refers on the one hand to provisions of the Civil Code, on the other hand to applicable provisions of this Code.

With respect to the legal consequence of a legally defective administrative contract, the article art. 122 does not distinguish, unlike the articles 108 and 109, between unlawful but voidable and absolutely invalid administrative contracts. According to art. 109 the unlawful and thus voidable administrative act remains valid, that means is implementable and enforceable, as long it is not annulled as a result of an appeal procedure or on the grounds of a court decision, or of ex-officio annulment or repeal acc. to art. 113 et sequ. The act, however, that is absolutely invalid acc. to art. 108, no act, a complete nullity, a still-born act, which never comes into effect (see above detailed

explanation on art. 108 and 109). In contrast to these rules on defective administrative acts, this Code uses in art. 122 only the single term invalidity for stipulating the legal consequence of legally defective administrative contracts.

That raises the question about the meaning of invalidity. Since the term invalidity as used in the art. 122 cannot be understood as absolute invalidity in the meaning of art. 108, otherwise any legal defect of an administrative contract would have the most serious and exceptional consequence of nullity, it must be assumed that art. 122 uses the term invalidity with the same consequences, as it is done *mutatis mutandis* in the Civil Code.

That means that a breach of any provision stipulating the requirements for the lawfulness of an administrative contract referred to in art. 122 entails the voidability of the contract. This means also that any defective administrative contract remains legally effective as long as it is not annulled or repealed by the appropriate court for administrative matters acc. to art. 125 or withdrawn by the competent public body acc. to para. 2 of art. 123.

Partial invalidity of a contract would make the entire contract invalid only, if the contract could have not been made without the invalid part. Otherwise the legally correct part remains effective, if this is reasonable.

## II. The relation of art. 122 to art 124

The articles 122 and 124 overlap. Art. 124 covers the wider scope of application; its wording logically comprises also the scope of art. 122. On the other hand, the art. 122 is to be understood as the special rule governing the invalidity of an administrative contract. Besides that, one could give a certain declaratory relevance to art. 124, when it is seen as a severability clause, though for the administrative practice the necessity of this duplication might be questionable.

## III. Relation to previous CAP

A similar norm did not exist in the previous CAP (see above explanation on art. 119 under A. IV.).

## B. Invalidity of an administrative contract in details

### I. The applicable legislation and the systemic relation between the provisions

For the legislation applicable, the art. 122 refers on the one hand to provisions of the Civil Code, on the other hand to applicable provisions of this Code.

Explicitly mentioned as applicable provisions of this Code are only the art. 119 and art. 120. However, as result of systemic interpretation of art. 122 this norm must not be misunderstood as precluding the co-ordinate contract regulated in art. 121. Furthermore, as already explained above (see explanation on art. 119 under A. VI. 1.) numerous other provisions of this Code, which are not exclusively connected to the issuance of an administrative act, also apply to the administrative contract.

This raises the question of priority of application. Contrary to the wording of art. 122, according to which the provisions of the Civil Code seem to take precedence over the provisions of this Code (the provisions of this Code shall apply "besides" the provisions of the Civil Code), the systemic and logic relationship between the applicable provisions must be as follows as follows:

- Directly and with first priority the articles of Chapter II of Part V on the administrative contract apply.
- In addition, the other procedural rules and principles of this Code apply, when appropriate not only for a unilateral administrative action such as the administrative act but also for the factual and legal circumstances of a contractual relationship.
- Finally, where this Code leaves regulatory gaps, the provisions of the Civil Code on the invalidity of the legal action apply.

### II. Main applicable provisions

For the judgement of procedural as well as material unlawfulness, primarily the special rules in Chapter II of Part V and the principles of Chapter II of Part I apply.

Furthermore, all procedural rules as far as they are suited to the bi-lateral and consensual character of a contractual relationship. Consequently, not directly applicable are the provisions dealing with the issuance of an administrative act (Chapter I of Part V) as well as Chapter II of Part VI, Part VII and Part VIII of this Code. This does not mean, however, that for certain individual cases the application of one of these norms by analogy should not be taken into consideration.

Applicable to an administrative contract shall be in particular the provisions on:

Jurisdiction, Chapter I of Part II

Participation, Chapter I of Part IV

Rights of parties, Chapter III of Part IV

Impartiality of the public administration, Part III

Documents, Chapter IV of Part IV

Administrative assistance, art. 71 et sequ.

Administrative investigation, Chapter X of Part IV

In all other respects – in particular those related to formation of a contract; declarations of intent including absence of consent and an absence of freedom; invalidity of contracts; (temporary) non-performance or defective performance; surrendering of undue enrichment – the provisions of the Civil Code apply. This follows from para. 1 of art. 122 and art. 124.

#### *Article 123 Amendment, termination or withdrawal from an administrative contract*

1. If due to circumstances arising after the conclusion of the contract, and unforeseeable at the time of its conclusion, the continuation of the execution of the contract obligations becomes extremely difficult for one of the contracting parties, they may agree on the amendment, or termination of the contract.
2. The public body may unilaterally withdraw from the administrative contract in order to avoid or stop the violation of the public interests.
3. The withdrawal shall be made through a written and reasoned administrative act against compensation for the damage suffered by the other party.

#### A. General introduction

##### I. Content and purpose of art. 123

As explained above (art. 122 under A. I. the private law contract that is characterised by a large extent of freedom and autonomy of the contract partners, including the freedom to agree on amending, adjusting, or terminating the contract in principle for any reason and at any time. In contrast to that and similar to the administrative act (see explanation on art. 113 und A. I. 3.), for the administrative contract not only the principle of legality of public administration but also the principle of the public confidence and the expectation of the parties in the continuity of a legal relation established by the contract apply.

However, after the making of an administrative contract the circumstances or conditions, under which the contract was made, may change so much that the performance of the contract becomes unreasonable or impossible for any one of the contract partners. To meet such situation art. 123 para. 1 provides in the first instance for the consensual modification of the contract according to the changed conditions. If a consensual modification fails the law gives a general power to the public body to modify the terms of the contract for the purpose of protecting the public interest. The conditions for either way of modification are strictly governed by law, the public body's unilateral measure in particular by the principle of proportionality in order to protect the individual rights of the other contract partner(s).

##### II. Scope of application

The para. 1 of art. 123 apply to both the subordinate contract of art. 120 and the co-ordinate contract of art. 121, whilst the unilateral withdrawal of para. 2 and 3 apply only to subordinate contracts.

##### III. Relation to previous CAP

(see above explanation on art. 119 under A. IV.).

##### IV. Legal consequences

In both cases of modification, consensual acc. to para. 1 or unilateral acc. to para. 2, the administrative contract may either continue with amended terms or the contract as a whole ceases its validity. Para. 3 provides for a right of the other party to compensation for the damage suffered from the unilateral modification.

## B. Amendment, termination or withdrawal

### I. Amendment or termination, para. 1

The para. 1 implements for the administrative contract the legal concept that is known in the private contract law derived from the principle of good faith, according to which contracts are usually based on the expectations of the parties that the material conditions essential for the conclusion of the contract will continue (contracts always comprise, either expressly or impliedly, the *clausula rebus sic stantibus*). The legal preconditions for the amendment or termination are explained in this section.

#### 5. Existence of a contract

The first legal precondition of para. 1 is that a valid administrative contract exists. It can be either a subordinate contract (art. 120) or a co-ordinate contract (art. 121).

#### 6. Unforeseeable change of circumstances after the conclusion of the contract

##### a) Circumstances

The contract was based on circumstances, which were at least for one of the partners recognisably substantial for entering into the contract. Circumstances may be factual, such as price or cost level, technical, scientific or medical know-how, but also relate to the personal (e.g. health) situation of a contract partner or his/her relative. Circumstances may also be legal, such as coming into force of a new legislation, or judicial decision or administrative practice as far as it has a direct bearing on the performance of the contract.

##### b) Substantial change after the making of the contract

Those circumstances must have changed after the making of the contract. Furthermore, changes must – objectively judged – so substantial that they would make it unacceptable that the parties would have made the contract with the same contents had they known the changes at the time of making the contract.

##### c) Unforeseeability

The changes must be those, which were not taken and could not have been taking into account by the parties at the time of making the contract. The requirements for the unforeseeability should not be too high. Foreseeable are only those changes that were generally expected and came for the general public as no surprise.

#### 7. Severe consequences of the change

As a consequence of the substantial change the change must be so severe that the performance of the contract becomes extremely difficult for at least one of the contract parties. Extremely difficult means that sticking to the original contract would cause a severe immaterial or material damage that goes beyond the risk that is typically connected to any contractual situation and thus would amount to the contravention of the principle of good faith.

#### 8. Agreement on amendment or termination

A party to the contract, for whom the terms of the contract have become unreasonable, may ask the other party to modify the contract. Modification may be either amendment or termination of the contract.

#### 9. Legal consequence if agreement cannot be reached

If the other party does not agree with the modification, the party that has asked for it, be it – in case of a subordinate contract - the public body or the other party, may go to the administrative court praying for such modification. The administrative court may order either its amendment or its termination if such amendment is either not possible or would be unreasonable for one of the parties.

### II. The public body's unilateral withdrawal, para. 2

#### 1. Applicability for subordinate contracts

A final and unilateral power of withdrawing a contract at any time is given to the public body. However, this power is given only for subordinate relations between a public body and the other contract partner. Para. 2 is not applicable to co-ordinated contracts of art. 121.

## 2. Unilateral withdrawal

The unilateral measure is at the dutifully exercised discretion of the public body directed to withdrawal (rescission) from the administrative contract. Withdrawal leads to termination only. A unilateral amendment of the contract is not permitted.

## 3. Protection of public interests

The unilateral power of terminating a contract is given to the public body if purpose of such termination is to prevent or eliminate a grave harm to the common good of the society.

## 4. Proportionality

The decision of the public body is subject of the principle of proportionality. Accordingly, the withdrawal is lawful only if it is suitable and necessary for the protection of the public interest and if the disadvantage caused to the other party through the termination of the contract is not disproportionate to the gravity of the harm to the common good of the society.

The principle of proportionality also requires that the public body before taking the unilateral decision makes a serious attempt to come to a consensual solution of the matter by making an agreement with the other party on the modification of the administrative contract, unless the urgency of the case does not allow any delay of the unilateral measure or the other party has already made it plain that he/she will oppose it when it comes to the public body's attempts of finding the party's agreement.

## III. Form and further consequence of the withdrawal, para. 3

Para. 3 clarifies that the unilateral termination of an administrative contract is an administrative act, for which the written form is prescribed. The administrative act must be supported with reasons.

Para. 3 also stipulates that the other party can make a claim for damages without specifying legal preconditions for that. However, due to the comparability of the situations the para. 2 and 3 of art. 116 (see explanation under B. II.) shall apply by analogy. The decision on the compensation shall also be part of the administrative act

The administrative act can be challenged by appeal acc. to art. 130 et sequ.

### *Article 124 Applicability of other legal provisions*

**1. With regard to matters not explicitly regulated by this Code in relation to the administrative contract, the corresponding provisions of the Civil Code of the Republic of Albania or special legal provisions shall apply.**

Since art. 122 regulates the invalidity of an administrative contract as a consequence of a breach of one or more provisions, which the art. 122 refers to, and as, in the reversal conclusion, every contract that is not invalid is in compliance with all legal requirements provided by this Code and the applicable provisions of the Civil Code, the article 124 only confirms the regulatory content and purpose of art. 122 (see explanation above on art. 119 under A. IV. and on art. 122.

### *Article 125 Settlement of disputes*

**1. Any dispute between the contracting parties, which stems from an administrative contract, shall be settled directly by the competent court for administrative matters.**

The article 125 makes clear that there is no administrative legal remedy provided against a dispute between the contracting parties. Both the public body as well as the other party have to go directly to the administrative court. However, this does not apply to the administrative act, by which the public body unilaterally terminates an administrative contract. Here, the addressed party has to unsuccessfully lodge an appeal acc. to art. 130 et sequ. before it may bring an action into the court competent in administrative matters.

## CHAPTER III

### OTHER ADMINISTRATIVE ACTIONS UNDER THE REGIME OF ADMINISTRATIVE LAW

#### *Article 126 Other administrative actions under the regime of administrative law*

1. The other administrative actions under the regime of the administrative law are any unilateral form of the activity of the public body when exercising its public functions that fail to meet the criteria to be an administrative act or administrative contract and that bring legal effects on subjective rights and legitimate interests.

2. The other administrative action under the regime of the public law shall be lawful if it is in line with the principles of this Code and within the jurisdiction of the public body.

#### A. General introduction

The public administration may avail itself numerous and multifarious kinds of activities for the performance of public functions. The unilateral measure of an administrative act is the traditional and still most frequently used mode of exercising public power (see definition in para. 1 of art. 3). Besides, the law provides also for a consensual approach through making an administrative contract (see definition in para. 4 of art. 3). Both instruments, the previous one dealt with in Chapter I of Part V and the latter in Chapter II of Part V, have in common that they are directed to establish, modify or cease a specific legal relation (see explanation on para. 1 of art. 3 under B. I. 5. c. and on art. 119 under A. II. 2. c).

In Chapter III, now, the Code governs through the art. 126 those unilateral activities of a public body, which are aimed at factual results rather than legal consequences that follow from an administrative act or administrative contracts, and calls them “other administrative actions”.

#### I. Content and Purpose of art. 126

In its para. 1 the art. 126 repeats (almost identically) the definition of “other administrative actions” as it is also provided for by para. 11 of art. 3. The major function of this definition is threefold: firstly, to demarcate other administrative actions from administrative act and administrative contract; secondly, to preclude those activities public bodies perform related to internal affairs with no effect to the citizen; and finally, to distinguish from activities performed under private law (for the latter see above explanation on art. 119 under A. II. 2. d.).

In its para. 2 the art. 126 clarifies that other administrative actions are subject to the principles of legality of public administration (art. 4) and thus opens not only the application of material administrative law and the procedural rules of this Code to the exercise of those actions but also ensures, in contrast to the previous CAP, now a complete legal protection of citizens against unlawful administrative activities by providing in Part. VI, Chapter III of this Code” the objection as a special administrative remedy against other administrative actions. These two functions of art. 126 is of increasing relevance for a modern, citizen-oriented public administration due to both the wide range of variety of administrative services comprised by the definition as well the frequency of use of this flexible kind of administrative performance.

As the explanation of the elements of the definition will show below under the following section, other administrative actions – sometimes also called real acts - can be classified into acts, which are explanatory and actions in the form of factual functions. To the first category belong such actions as

- provision of information;
- recommendation or advice upon or without a citizen’s request;
- warning of a group of people or the general public related to the risk of using a certain type of a product;
- reporting;
- publication of expert opinion;
- announcement of a potential measure;
- etc.

The second category includes such actions as

- supply of energy and water;

- sewage disposal; payment of money;
- teaching at school or university; treatment in hospitals;
- giving of protective inoculations;
- use of police instruments such as water cannon and tear gas, baton, and firearm;
- driving an official vehicle;
- construction, maintenance and cleaning of roads;
- construction of an administrative building.

This classification, however, is not of legal significance. Of legal significance is the fulfilment of the defining legal preconditions explained in the following section II.

## II. Definition of “other administrative actions” in details

The elements of the definition of “other administrative actions” are the following:

### 1. Activity of the public body

An activity of a public body in the meaning of para. 6 of art. 3 (see above also explanation on para. 1 of art. 3 under B.I.1.) is required. Activity can also be the omission of an action, if the body has got the legal obligation to act.

### 2. Unilateral form

Whilst the bi- or multi-lateral administrative contract is addressed by one of the following elements (see below element under 5.), the defining requirement “unilateral form” serves to preclude bi-lateral informal consensual consultations prior to the issuance of an administrative act or other (e.g. political) conventions. Those informal measures are useful for both the public body and the party for the preparation of a good quality administrative decision and contributes to acceptance of the outcome by either side of an administrative procedure. However, it is to be assumed that art. 126 shall not apply to those informal measures in order to avoid that they might lose their informal character and thus their suitability for achieving a consensual solution, if the parties of an administrative procedure and particularly the public body must be aware that every initiative of this informal kind of voluntary cooperation is subject to the law and finally the judicial control.

### 3. Exercising public functions

The legal precondition “exercising public functions” requires a narrowing interpretation, since in its literal meaning the wording applies in principle to every administrative action. Whatever a public body does, it must in the end be an exercise of its public functions. This follows from para. 6 of art. 3, according to which it is, by definition, the overall task of a public body to “perform (exercise) administrative (public) functions”.

However, here the legal precondition serves the demarcation of activities relating to the public body’s internal affairs from those activities that have external effect to one or more citizens. Only the latter shall be governed by art. 126. Merely internal activities are for example the cleaning of the administrative building or internal instructions vis-à-vis the public body’s administrative or technical staff within the scope of the supervisory right to give directives. Such internal measures do not fall under the defining element “exercising public functions” in its reasonable meaning.

### 4. Under administrative law

Rationale of this precondition is to preclude actions that fall under private law (see also explanation of the term public law on art. 119 under B. II. 2. d.). Other administrative actions are only those actions, which fall within the province of administrative law or implement those functions which are allocated to the public law. So, activities such as the rental payment for a building the public body has leased for offices or the use of an official car for private use after work do not fall under administrative but private law.

### 5. Fail to be an administrative act or administrative contract

Whenever for an administrative action the preconditions of either an administrative act or an administrative contract are satisfied, the application of art. 126 is precluded.

The distinctive criteria between the administrative act and administrative contract on the one hand and, on the other hand, the other administrative action is that both the administrative act and the administrative contract express the public body’s will (in other words: the body’s intention or goal) to directly affect the legal position of the addressee resp. contract partner (see explanation on para. 1 of art. 3 under B. I. 5. a. and on para. 1 of art. 119 under A. II. 2. e. i.). In contrast to that, other administrative actions are those, whose declaratory or factual content does not aim at triggering an immediate legal consequence for the addressee but pursues a different purpose, such as providing

information or advice, making recommendations, delivering warnings, issuing press releases, giving lessons at universities.

## 6. Legal effects on subjective rights or legitimate interests

This defining requirement implements the principles of art. 1 and art. 4, according to which the administrative procedures must be conducted in a way that subjective rights and legal interests of all persons involved are respected and protected.

### a) rights or legitimate interests

The term “rights and legitimate interests” comprises the fundamental human rights and freedoms as stipulated in art. 15 ff. of the Albanian Constitution and moreover all rights and legal interests granted by special law. (see explanation on art. 1, art. 4 and particularly on art. 128 under B. I. 3)

### b) legal effects

Administrative actions, even if they are not intended to have a direct effect on the legal position of the addressee resp. contract partner (see above under 5.) but are aimed at factual results, are not legally meaningless or irrelevant. The defining requirement “legal effects” makes clear that the principle of legality of public administration (art. 4) applies as much to them as to administrative acts or administrative contracts, if the factual results or the process, through which it came into being, interfere - not as directly intended result of the actions but - practically as a “side effect” with the rights or legitimate interests of an individual, in other words have a legal effect in the meaning of art. 126.

## III. Constitutional and EU Law

Art. 126 implements the legality principle of art. 4 that is directly derived from the rule of law laid down in art. 4 of the Albanian Constitution.

The completion of the legal protection through art. 126 implements art. 41 of the European Charter of fundamental rights that comprises the right to good administration including good administrative procedures.

## IV. Relation to previous CAP

A similar norm did not exist in the previous CAP.

## V. Scope of application

Art. 126 apply to all procedural rules governed by this Code, except the special rules on the administrative act resp. administrative contract, though single provisions of Chapter I of Part V of this Code might in an individual case be applied by analogy.

## VI. Legal consequences

Other administrative actions can be challenged by objection on accordance with Chapter III of Part VI of this Code.

## B. Other administrative actions in detail

The requirements of lawfulness on other administrative actions are stipulated in para. 2.

### I. In line with the principles of this Code

This unprecise phrase should not give rise to the mistaken interpretation that the requirements for the lawfulness of “other administrative action” are provided only on the abstract level of principles as laid down in Chapter II of Part I of this Code. Instead, it should be rightly understood as “in line with the provisions this Code”. This comprises through art. 4 also all material law requirements laid down in the Constitution of the Republic of Albania and in special administrative law.

#### 1. Constitutional Law

It is the constitutional principle of proportionality (see art. 12 and its explanation under B.; and explanation on art. 109 under B. VI.) that is of highest relevance for every administration action having a legal effect to an individual or a group of individuals (i.e. when interfering with individual rights).

Of the same practical relevance is the principle of equal treatment.

Furthermore, all fundamental rights such as the right to freedom from physical and mental harm, right to freedom of movement, or the right of assembly and demonstration, personal rights including right to data protection and right of personal honour or the right of ownership are applicable with the consequence that their breach makes an “other administrative action” unlawful.

## 2. Material administrative law

For material lawfulness, special legislation in the area of administrative law is applicable. As a rule the jurisdiction of a public body for the performance of the concerned “other administrative action” is determined in special material law, as well as the legal authorisation for the concerned action that is always required in cases, when the public body’s other administrative action interferes with human rights of an individual.

## 3. Provisions of this Code

In principle all procedural rules of this Code, except those provided for in Chapter I and II of this Part V, form the corpus of directly applicable legislation, moreover in individual cases it might be necessary to apply a single administrative act - provision by analogy to an “other administrative action”.

### II. Jurisdiction of the public body

This requirement is already covered by the previous requirement when referring to the provisions of this Code (that includes the provisions of Part II, Chapter I on Jurisdiction). Its explicit mentioning in the legal text is without additional regulatory relevance.

### III. Legal consequences

Unlawful other administrative actions are challengeable by objection pursuant to Chapter III of Part VI of this Code.

## CHAPTER IV INDIRECT PROVISION OF PUBLIC SERVICES

### *Article 127 Indirect provision of public services*

1. In the case of an activity in favour of the public benefit or of public services, which are delivered by public or private entities, under the regime of private law, the regulatory, supervisory or licensing body under the law should ensure by means of exercising the supervision the continuity, universality, affordable cost, adequate quality of the service, objectiveness and transparency of procedures and non-discrimination of the public service beneficiary.
2. The indirect provision of public services should not provide the beneficiary of the service with less legal protection compared to the situation when the service is directly delivered by the public body.

#### A. General Introduction

##### I. Content and purpose of art. 127

In the past, it was exclusively the public sector that provided vital public services for fulfilment of citizens' basic needs. But this paradigm has changed. In recent years, all over Europe governments have increasingly transferred the provision of "services of general interest" to the private sector. In political terminology, such transfers are known as "privatisation" measures, "deregulation" or "liberalisation" policies, or "public-private-partnership" approach. This development has included areas such as supply of water, electricity and heating energy, waste disposing, telecommunications, transport, radio and television, postal services, but sometimes even the education sector and social services. The privatisation policy has been a trend that needs to be seen as a fact, at least for the time being, even though in some EU member states the privatisation euphoria is declining due to non-satisfactory results of such policy and in some areas a counter-tendency can be observed.

With art. 127 the legislator undertakes an innovative attempt to provide a normative solution in order to mitigate the problem of inferior legal protection of citizens that is connected to the delivery of multiple public services by private entities.

The reasons for the inferiority of legal protection result from the organisational and legal set up of a privatised system that is usually characterised by a triangle-relationship. The triangle consists of the service provider (mostly a private law legal person sometime also a public body, hereinafter called "provider"); the beneficiary of the service (mostly an individual citizen, sometimes a legal person, hereinafter called "beneficiary"); and a superior public body (hereinafter called "superior body").

In this triangle situation, there is, firstly, the legal relationship between provider and citizen. This relationship is typically based on a supply contract governed by private law. Through the swift from public law that was in the past applicable for those service provisions to the applicability of private contract law and particularly through the civil procedure law, however, the citizen loses his/her strong and effective legal protection that is usually granted by public law. In particular the administrative procedure law provides legal benefits such as assistance and advice through a public body, transparent decision-making processes, reasoned decisions, administrative legal remedies, and finally the administrative court review, which are not provided by private law. In a private-law relationship the contract partner is limited to relying on the relatively weak legal position of a "customer" on the market. In case of a conflict with the provider her/she only depends on the very costly and lengthy civil proceedings, through which an individual citizen will barely find a level playing-field vis-à-vis an entity that is legally well informed, professionally represented and economically superior.

As to the second relationship, usually, a superior body is in place, be it a ministry or one of its subordinate bodies, an independent regulatory agency, or any other kind of public body with supervisory function over the provider. In any case, there is a kind of supervisory body in place and the legal relationship between such body and the provider is normally governed by special administrative law. Generally, such administrative legal framework provides not only rules related to the licencing procedure of the provision of services – the licence might be issued either by administrative act or administrative contract -, but also on the empowerment of the superior body to take various supervisory (e.g. monitoring or controlling) measures including – as ultima ratio – the abrogation of the licence.

As far as the third relationship between the citizen and the superior body is concerned, before this Code entered into force no legal relationship had existed.

Purpose of art. 127 is to fill the gap of the legal protection of the citizen that is typically caused by privatisation of a public service. This article does it in two respects:

- The norm establishes a direct legal relation between superior body and beneficiary.
- It specifies the legal relation between provider and beneficiary related to the quality of the provided service.

#### 1. Establishing a legal relationship between superior body and beneficiary

A systemic interpretation of art. 127 comes to the conclusion that this norm establishes a legal relation between the superior body and the beneficiary. The content of this legal relation is characterised, on the one side, by the superior body's obligation to ensure the continuity, universality, affordable cost, adequate quality of the service, objectiveness and transparency of procedures and non-discrimination of the public service beneficiary by means of exercising the supervision over the provider.

On the other side, in correspondence to this obligation, the norm is to be understood also as a legal basis constituting a subjective right of the individual beneficiary vis-à-vis the superior body that is directed to the body's dutiful performance of the aforementioned supervisory obligation. This interpretative result follows, firstly, from the overall rationale of this Code, which is to govern administrative-law relationships between the public body and the party of an administrative procedure (see art. 2, in particular para. 2 lit. c). In its Part V the Code provides different administrative actions a public body can exercise. They have in common that – by definition – those actions or omissions have an effect on subjective rights or legitimate interest of the party (for the term “subjective rights and interests” see also explanation on art. 128 under B. I. 3.). So, the location of art. 127 in Chapter IV of Part V makes clear that also this provision relates to an administrative action, which in turn is sensible only if this action has also an effect on an individual subjective right or legitimate interest of the party, whereby in this particular case the subjective right is provided by art. 127. So, the art. 127 is of both procedural-law as well as material-law character.

This systemic-interpretative result is also confirmed by the fact that the legal text at the end of para. 1 refers to the individual public service beneficiary as the person, who is protected by the legal requirements of the public services and consequently also protected by the superior body's obligation to ensure the provider's compliance with these requirements.

Finally, para. 2 stipulates that indirect fulfilment of public tasks on the basis of private law contracts must not lead to less legal protection of public service beneficiary. As explained above, without a subjective right vis-à-vis the superior body that is directed to the fulfilment of the body's supervisory obligation there is a high risk that the beneficiary ends up practically without effective legal protection.

#### 2. Legal relation between provider and beneficiary related to the quality of the provided service

The second purpose of art. 127 is to provide general standards for the delivery of public services. The legal requirements continuity, universality, affordability and adequate quality of the service, transparency of procedures and non-discrimination of the public service user.

#### II. Constitutional and EU Law

The art. 127 strengthens the constitutional rights of the individual citizen derived from the rule of law without diminishing the constitutional legal situation of the provider and is also in line with the public functions of a public body.

The terminology used in art. 127 refers to the terminology of the EU related to the overall concept of public services (see the number of communications of the European Commission such as: Services of general interest in Europe [2001] OJ C17/4; Report to the Laeken European Council—Services of general interest COM(2001)598 final; Green Paper on services of general interest COM(2003) 270 final; White Paper on services of general interest COM(2004) 374 final; Implementing the Community Lisbon programme: Social services of general interest of the European Union COM(2006) 177 final. 12 Services of general interest, including social services of general interest: a new European commitment COM(2007) 725 final and the accompanying Commission Staff working documents, published in the context of a single market for 21st century Europe COM(2007) 724 final.

#### III. Relation to previous CAP

The previous CAP did not provide such norm.

#### IV. Scope of application

Art. 127 applies within the triangle-situation related to the provision of public benefit or public services to the legal relation between the superior body and an individual beneficiary of such benefit or service.

#### V. Legal consequences

The art. 127 constitutes an individual right of a beneficiary to demand from the superior body a particular course of action. The content of the action comprises the exercise of the supervisory function, to which the body is obliged in the relation to the provider of the benefit or service in order to ensure in the individual case the compliance of the provider with the legal requirements of para. 1 applicable to the provision of the respective benefit or service.

The exercise of the supervisory function is at the dutiful resolution and section discretion of the superior body (explanation of resolution discretion and selection discretion see above under B.I. 3 of art 102).

The exercise of such action as well as its omission is subject to an administrative objection acc. to art. 141 – 143.

#### B. Indirect provision of public services

##### I. The legal requirements of para. 1

##### 1. Activity in favour of a public benefit or public service

###### a) Public benefit

Activity in favour of a public benefit can be defined as an activity of a non-profit organisation (e. g. association or foundation) that was granted the legal status of a public benefit organisation, if the activity pursues the specific purpose that is deemed to serve the common good, for which the public benefit status was granted. Public benefit purposes could include public health care, general welfare, environmental protection, education, culture, amateur sports, science, or support of persons unable to care for themselves.

###### b) Public service

Public service is an ambiguous term since it may refer either to the actual body providing the service or to the general interest role assigned to the body concerned. There is often confusion between the term public service, which relates to the vocation to render a service to the public in terms of what service is to be provided, and the term public sector (including the civil service), which relates to the legal status of those providing the service in terms of who owns the services. In addition, in the EU context (see above references to numerous EU documents under A. II.) other similar terms are in use such as “services of general interest”(this term covers market and non-market services which the public authorities class as being of general interest and subject to specific public service obligations); “services of general economic interest” (EU legal category that provides an exception to the competition rules for the proportionate pursuit of legitimate public interest goals by private undertakings); or “non-economic services of general interest” (covering for instance traditional state prerogatives such as police, justice and statutory social security schemes).

Here in the context of art. 127, however, we can describe a public service as

- a specific service
- performed with a view to promoting or facilitating the general interest
- in fulfilment of an obligation
- imposed by the public legislative respectively executive authorities
- on the body rendering the service.

Among others, a reliable indicator of a public service in the meaning of art. 127 is the fact that in the past the service used to be delivered by a public body under public law but was transferred to either a private sector body or another public body, now acting under private law conditions.

The range of services that can be provided is subject to technological, economic and societal change and has evolved over time. Given that, the distinction is not static in time but a fluid one. It would neither be feasible nor desirable to provide a definitive a priori list of all services of general interest that are to be considered. Therefore, the following list of such services merely serves by way of example: Services of general interest are typically delivered in areas such as supply of water, electricity and heating energy; waste disposing; telecommunications; transport; radio and television; postal services, but could also include even the education sector and social services. All these services have in

common the general interest criterion, which in turn requires the operators' obligation to make sure that everyone has access to certain essential services of high quality at prices they can afford.

## 2. Delivered by a public or private entity

This legal requirement of art. 127 clarifies that the activity in favour of a public benefit or public service can be performed either by a public or private entity.

## 3. Under the regime of private law

Decisive for the application of art. 127 is that the performance of the public service is governed by private law on the basis of a private law contract made between the provider and the beneficiary

## 4. A regulatory, supervisory or licencing body exists

Art. 127 assumes that by virtue of material administrative law a regulatory, supervisory or licencing body exists, whereby in any case the latter exists, namely the administrative body that imposed the obligation of the public service on the provider.

## 5. The superior body has the competence to supervise the provider's compliance with the principles of public benefit or service provision stipulated in para. 1

Art. 127 also assumes that at least one of the bodies has got the competence to supervise the performance of the provider. This competence might be specified by material administrative law and given to a certain body. If not, there is always the obligation at least of the licencing body, i.e. the administrative body that imposed the obligation of the public service on the provider, to ensure that the provider meets his/her imposed obligations vis-à-vis the beneficiary in line with the principles stipulated in para. 1 of this article (see explanation below in the following section). As the last supervisory means the licencing body may – after warning - repeal the licencing act on the basis of art. 115 of this Code.

## 6. The principles of public benefit or service provision stipulated in para. 1

The list of principles reflects the legal standards for the provision of services of general interest established by EU legislation (The Lisbon Treaty creates a legal basis for services of general economic interest with article 14 TFEU and for all services of general interest with Protocol 26, which is annexed to TEU and TFEU.)<sup>22</sup> By virtue of art. 127 these principles became part of applicable national administrative law.

### a) Continuity (see Green Paper on services of general interest COM(2003) 270 final, p. 17)

The legal continuity requirement imposes the obligation on the provider to ensure that the service is provided without interruption.

### b) Universality (see Green Paper on services of general interest COM(2003) 270 final, p. 16)

The concept of universal service shall ensure that certain services are made available to all consumers and users throughout the territory of the country, independently of geographical location. It has been developed by the EU specifically for some of the network industries (e.g. telecommunications, electricity, and postal services). The concept establishes the right for every citizen to access certain services considered as essential and imposes obligations on industries to provide a defined service at specified conditions, including complete territorial coverage.

### c) Affordable cost (see Green Paper on services of general interest COM(2003) 270 final, p. 17)

The concept of affordability was developed by the EU in the context of the regulation of telecommunications services. Subsequently, it was also introduced into the regulation of postal services. It requires a service to be offered at an affordable price in order to be accessible for everybody. Application of the principle of affordability helps to achieve

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<sup>22</sup> See also the barrage of communications from the Commission: Services of general interest in Europe [1996]OJ C281/3; Services of general interest in Europe [2001] OJ C17/4; Report to the Laeken European Council—Services of general interest COM(2001)598 final; Green Paper on services of general interest COM(2003) 270 final; White Paper on services of general interest COM(2004) 374 final; White Paper on services of general interest COM(2004) 374 final; Implementing the Community Lisbon programme: Social services of general interest of the European Union COM(2006) 177 final. 12 Services of general interest, including social services of general interest: a new European commitment COM(2007) 725 final and the accompanying Commission Staff working documents, published in the context of a single market for 21st century Europe COM(2007) 724 final.

economic and social cohesion within the State. Relevant criteria could be linked, for example, to the penetration rate or to the price of a basket of basic services related to the disposable income of specific categories of customers. Particular attention should be paid to the needs and capacities of vulnerable and marginalised groups. Finally, once an affordable level has been set, the Government should ensure that this level is effectively offered, by putting in place a price control mechanism (price cap, geographical averaging).

d) Quality (Green Paper on services of general interest COM(2003) 270 final, p. 17)

The monitoring and enforcement of quality requirements by public authorities have become key elements in the regulation of services of general interest. In general, it is for the Government to define quality levels for services of general interest. They include, for instance, safety regulations, the correctness and transparency of billing, territorial coverage and protection against disconnection. objectiveness and transparency of procedures.

e) Objectivity and transparency of procedures (Green Paper on services of general interest COM(2003) 270 final, p. 17)

Objectivity of procedures means decision-making processes guided by appropriate and not by irrelevant, extrinsic considerations. Transparency of procedures includes full information on tariffs, terms and conditions of contracts, choice and financing of providers, quality performance indicators and customer satisfaction indexes, complaint handling and dispute settlement mechanisms.

f) Non-discrimination of the public service beneficiary

The non-discrimination principle requires the equal treatment of an individual or group irrespective of their particular characteristics. All people have the right to receive the same treatment, and must not be discriminated against on the basis of criteria such as gender, sexual orientation, age, disability, nationality, racial or ethnic origin, and religion.

## 7. Legal consequence

a) Ex officio initiative

The competent body - be it the regulatory, supervisory, or licencing body – is obliged to perform its competence to ensure the provider's compliance with the principles stipulated in para. 1 by means of exercising the supervision (see explanation above in the previous section). It follows from this, that the competent body, when having gained knowledge of the provider's incompliance with one of the principles, is obliged to investigate the relevant facts. The decision on whether or not intervention is required as well as the selection of the appropriate means are at the body's dutifully exercised discretion.

b) Initiative upon request of the beneficiary

The competent body is obliged to act upon request of the beneficiary, who complains about the provider's non-compliance with the principles. The activity shall include:

- Thorough investigation of facts
- Discretionary decision on whether or not intervention vis-à-vis the provider is required
- Discretionary decision on the selection of the interventional means; the principle of proportionality requires a graduated approach of suitable supervision measure such as recommendation, rebuke, warning, order, abrogation of licence
- Information of the complainant about the measures performed and their results (a request must not remain unanswered – art. 16 -!).

## II. Guidelines for the exercise of discretion in para. 2

Para 2 sums up the general purpose of art. 127, namely to ensure that the indirect fulfilment of public tasks will not lead to less legal protection of public service users. This shows the legislator's will to obstruct the possibility that the public administration escapes from public to private law to the disadvantage of the citizens. It furthermore provides a general objective standard for the interpretation of the principles of para. 1 and guidelines for the dutiful exercise of the discretion granted to the competent supervisory body.

## **PART SIX**

# **ADMINISTRATIVE REMEDIES**

## PART VI ADMINISTRATIVE REMEDIES

### CHAPTER I GENERAL PROVISIONS

#### Article 128 *Legitimacy and administrative remedies*

1. The party shall have the right to exercise the administrative remedies against any administrative action or omission, if it claims that its legitimate rights or interests are affected by such an action or omission.
2. Unless otherwise provided for by the law, the administrative appeal remedies may be exercised due to unlawfulness.
3. The administrative appeal remedies are:
  - a) the administrative appeal, which includes:
    - i) the administrative appeal against an administrative act or omission of a public body to issue an act within the prescribed deadline and/or the procedural action of a public body during the administrative procedure (appeal against an administrative act); or
    - ii) the administrative objection against another administrative action under the regime of the administrative law (Administrative objection);
  - b) revision.
4. The party shall not have the right to exercise for the second time the administrative appeal remedies for the same case.

#### A. General introduction

##### I. Content and purpose of art. 128

Article 128 contains (together with art. 129) general provisions for administrative remedies within the scope of the CAP. It is of high importance that the law provides administrative remedies because it opens the way to protect rights and legal interests of the parties faster and cheaper than an administrative dispute could do. The provision of administrative remedies does not exclude the way to the competent courts. But, as stated in art. 129 the exhaustion of administrative appeals is a precondition for bringing a lawsuit to the competent court.

Firstly, art. 128 para 1 contains a highly important precondition for exercising any kind of administrative remedies by stating that the party must claim that its legitimate (subjective) rights or interests are affected by a specific administrative action or omission.

Secondly, art. 128 para 2 restricts the scope of the control in remedy procedures to the full compliance with the law applicable to the case. Discretionary decisions have to be in alignment with art. 11. As a rule, a new exercise of discretion is not required and not permitted in remedy procedures.

Thirdly, art. 128 para 3 defines three different kinds of remedies and three different scopes: The administrative appeal, regulated in art. 130 – 140, the administrative objection, regulated in art. 141 – 143, and the administrative revision, regulated in art. 144 – 145. And fourthly, art. 128 para 4 clarifies that there is no right to exercise remedies in the same case for the second time. If a remedy procedure is completed the only way to go further is the way to the competent court.

##### II. Constitution and EU Law

The right to exercise remedies does not restrict the right to bring a lawsuit to a competent court, as guaranteed in art. 42 para 2 of the constitution, although – as a rule – the exhaustion of administrative remedies is a precondition (see art. 129 para 1). Administrative remedy procedures are not required by the constitution. Even art. 48 of the constitution does not guarantee administrative remedy procedures because it deals with informal petition mainly. Remedy procedures must be seen as effective and less expensive instruments to protect subjective rights and lawful

interests in addition to the judicial procedures. art. 128 ff. put the control principle stated in art. 21 lit. a) in concrete terms. Since administrative remedy procedures must be completed within due time and undue delay the start of lengthy court procedures can be avoided.

By restricting the right to exercise remedies to parties who claims that their legitimate rights or interests are affected art. 129 para. 1 refers to the principle that the main objective of administrative procedures and of judicial proceedings as well is the protection of subjective rights and legal interests, as stated in art. 42 of the constitution.

Para. 2 of art. 41 of the EU Charter of Fundamental Rights presupposes the existence of and citizen's participation in an administrative procedure.

### III. Legal consequences of art. 128

art. 128 contains the basic legal framework for remedy procedures. It must be read and applied together with the following regulations of the specific forms of remedies, appeal, objection and revision.

### IV. Relation to previous CAP

The previous CAP comprises regulations of administrative review and appeal in art. 135 – art. 146. Compared with the actual regulations are to be seen many similarities.

### V. Scope of application of the norm

In general, remedy regulations stated in art. 128 ff. are applicable within the scope of the CAP as described in art. 2 of this code. As stated in art. 128 para. 1 administrative remedies can be launched against any administrative action or omission within the scope of the CAP, except if otherwise stipulated by special law. Legitimacy and administrative remedies in details

### VI. Claiming legitimate rights or interests are affected (para. 1)

As a basic rule para. 1 restricts the right to exercise remedies to parties who claim that their legitimate rights or interests are affected by an administrative action or omission within the scope or the CAP. This is to avoid the introduction of so called popular remedies (and of popular actions as well) and applies if not otherwise stipulated by special law, especially in cases mentioned in art. 33 para. 2.

#### 1. The "party" shall have the right to exercise remedies

Para 1 refers to "the party" which shall have the right to exercise remedies against any administrative action or omission. It is decisive that the persons exercising the remedies having held (and are holding) the status of a party (art. 33) already in the specific procedure the remedy is related to, in which the administrative action has been taken or the omission of such an action has taken place. Only parties of this administrative procedure are entitled to exercise administrative remedies against the outcome of the procedure.

Problems may arise if a person who has fulfilled the preconditions or art. 33 para. 2 or 3 to become a party is not been granted a party's position (see explanation of art. 33). If in these cases a request to join the procedure as a party has been rejected by the public authority the person is entitled to exercise a remedy only against the administrative decision by which this request was rejected. This person must not act as a party in the procedure before this position has been granted. If its remedy is successful it become a party in the procedure and the right to act as a party and even to exercise remedies against the actions or omissions.

#### 2. If the party "claims" affection

Precondition of the right to exercise remedies is that the party claims that its rights or legal interests are affected by an action or omission in the procedure. For the admissibility of a remedy procedure it is not necessary that the party already proves the affection of its subjective right. It must be seen sufficient that the party claims its rights or legal interests in a substantial way. Claiming means here a credible submission of sufficient facts on the basis of which an infringement appears possible and likely.

Therefore, at the beginning of the remedy procedure the concerned public body examines only the possibility and likeliness of the affection of a right or legal interest as submitted by the party, which includes the question whether or not the party can in general be holder of the potentially infringed rights or legal interests (example: a male party cannot claim the affection of a right that is granted to female individuals only). If the answer to those questions is in the affirmative, the legal precondition "claiming an affection) for starting the conduct of the examination of the merits case is satisfied.

The establishment of infringement or non-infringement of a right or legal interests based on proofs comes – according to purpose and function of a remedy - at the end of the procedure.

a) Subjective rights

Subjective rights are granted by legal order only. Although the Albanian Constitution guarantees fundamental human rights and freedoms (art. 15 ff.) the public authority has to apply the regular law firstly and to look if this law grants subjective rights to the party. Special law contains for instance rights to get permissions, licenses etc., rights to get identity papers, rights to get social subsidies etc. It is not necessary that a legal norm grants these claims expressly. It is sufficient that the right can be deduced by interpretation of the norm.

Subjective rights can also derive directly from constitutional law. This can be the case, if an administrative act – on the basis of authorisation through special administrative law - imposes the obligation of a particular behaviour or the obligation to refrain from doing something or to let something happen. The addressee of such onerous administrative act (see above explanation of art. 3 para. 1 under A. I. 2. b.) can often claim that the act – even though based on special law authorisation - affects in the individual case one of his/her fundamental rights and freedoms of art. 15 ff. of the Constitution because the concrete act violates the principle of proportionality.

Furthermore, fundamental rights and freedoms rights might also be affected by other forms of administrative actions such as real acts (see below explanation A. I. on art. 126). The warning of a group of people or the general public related to the risk of using a certain type of a product can affect the producer's constitutional right of private property granted by art. 41 para. 1 of the Constitution.

b) Legal interests

Legal interests are a specific kind of subjective rights. Not all personal or private interests can be seen as legal interests. To qualify interests as legal interests it is necessary that special law provides the obligation of public authorities to take these interests into account when taking specific decisions.

## VII. Exercising appeal remedies due to unlawfulness (para. 2)

Para. 2 makes clear that – as a rule – the remedy procedures regulated in Art 128 ff. can be successful only if the administrative actions or omissions subjected to the remedy may be proofed as unlawful. Unless it is stipulated otherwise by law the administrative actions or omissions are not to be proofed to be unsuitable or suboptimal. Remedy inquiries are restricted to unlawfulness. The complained administrative actions or omissions have to be in alignment with the law.

Unfortunately, the wording of para. 2 leaves it unclear whether the public authority has to prove the objective unlawfulness only but also the affection (and in case of unlawfulness the violation) of subjective rights and legal interests. Since according to para. 1 the party must claim the affection it must be seen as a consequence that even the violation of subjective rights or legal interests are a precondition for the success of a remedy.

## VIII. Kinds of administrative appeal remedies (para. 3)

Para. 3 distinguishes three different kinds of remedies, the administrative appeal, the administrative objection and the revision and describes the scopes of application.

### 3. Administrative appeal (para. 3 lit. a)

According to para. 3 lit. a) the administrative appeal is permitted in 2 different cases: Firstly if the remedy is directed against an administrative act or omission of an administrative act, secondly if the remedy is directed against a procedural action of a public body during the administrative procedure.

a) Appeal against an administrative act

As stipulated in art. 3 para 1 lit. a) an administrative act is every expression of will by a public body when exercising its public function towards one or more individually determined subjects of law, which establishes, modifies or ceases a specific legal relation. Collective administrative acts as stated in art. 3 para. 1 lit. b) are included.

There is the question whether or not administrative assurances are comprised. The administrative act of assurance is regulated in art. 103 in the chapter I which deals with administrative acts. Furthermore the act of assurance has most elements in common with the administrative act. For these reasons there are good arguments that Art 129 para. 3 lit. a) comprises the act of assurance as well, notwithstanding that it is covered by a special definition in art. 3 para. 1 lit. c).

b) Appeal against a procedural administrative action

There is the question in which cases the infringement of procedural regulations can lead to an affection of subjective rights, especially regarding art. 109 para. 1 lit. b). The law doesn't make explicitly differences between procedural regulations which contains subjective rights and others, which violation can be complained only by exercising remedies against the final administrative act by which the procedure is completed. This question must not be answered because art. 130 para 2 restricts the admissibility of an appeal against procedural action to those expressly provided by law. If the law provides an appeal against a procedural action it is quite clear that it grants a subjective right to appeal so far.

4. Administrative objection (para 3 lit. b)

According to the wording of para. 3 lit. b) an administrative objection can be exercised against any other administrative action which is not comprised by para 3 lit. a). This differentiation is in line with art. 3 para. 10, which contains the definition of an administrative action by listing the administrative act, the administrative contract and "any other administrative action".

The distinction between administrative acts and "other administrative actions" is of high importance for the application of the code, especially for the application of the remedy regulations. For instance, art. 129 shall not apply to other administrative actions. The reason is that an appeal doesn't fit properly to administrative actions because "other actions" often lack the character of a decision which can be annulled or corrected.

a) Any kind of "other actions"

art. 128 para 3 lit. b) comprises any kind of other actions under the regime of administrative law. This provision refers to the definition of art. 3 para 11 and to the parallel definition in art. 126 para 1. According to the latter other administrative actions under the regime of the administrative law are "any unilateral form of the activity of the public body when exercising its public functions that fail to meet the criteria to be an administrative act or contract and that bring legal effects on subjective rights and (better: or) legitimate interests."

b) Administrative objection

Although the administrative objection is – like an appeal – a form of an administrative remedy there are some important structural differences: The administrative appeal deals with the lawfulness and effectiveness of administrative acts and leads – as a rule – to the suspension of the execution (art. 133). Since the objection is directed against other forms of administrative actions different regulations are provided: According to art. 141 there are various consequences the party can require from the competent public body (such as the cessation of the performance of an action, withdrawal or amendment of a declaration, or the performance of another action).

5. Administrative revision (para 3 lit. c)

According to para. 3, an administrative revision is another form of an administrative remedy. In fact, systematically it is not a remedy but a form of procedural reaction or answer to the relevant change of circumstances an administrative act is based on. Nevertheless, the regulation in para. 3 lit. c) makes clear that in these cases a party has the opportunity to get a revision of an administrative act if the deadlines for filing an appeal (or an action to the competent court) have expired.

The preconditions for requesting a revision are stipulated in art. 144, 145.

IX. No repetition of remedies (para. 4)

Para. 4 makes clear that exercising remedies in one case is restricted to only one time. If the remedy is not successful and the appeal or objection are rejected there is no room for exercising the remedy again in the same case. Para 4 is expressing the One-Time-Principle (Ne bis in idem).

The One-Time-Principle applies only if the party exercises the very same remedy in the same case. It remains possible for instance to exercise an objection or a revision after completing an unsuccessful appeal.

Furthermore, the One-Time-Principle applies only if the remedy refers to the very same public action or omission a second time.

*Article 129 Exhaustion of the administrative appeal remedies*

1. Exhaustion of the respective administrative appeal is a precondition for bringing a lawsuit to the competent court for administrative matters, except for cases when:

- a) the law does not provide for a higher body for filing the administrative appeal, or when the highest administrative body is not constituted;
- b) the law has expressly provided for the right to directly complain to the court;
- c) the highest body of reviewing an administrative act has violated by its decision the personal rights or legitimate interests of a person who was not a party in administrative procedure.

A. General introduction

I. Content and purpose of the norm

Art. 129 stipulates a precondition for bringing a lawsuit to the courts. As a rule, no lawsuit may be filed before the provided administrative appeal remedies are properly exercised and completed. Therefore, the direct way to bring a case to the competent court is blocked. In this respect, art. 129 is a norm of a genuine processual character and should be better situated in the Law on Administrative Disputes.

Art. 129 provides three exceptions from the general rule that administrative remedy procedures must be exhausted.

II. Constitution and EU-Law

Art. 129 must be seen as being in accordance with both constitutional and European requirements. To state the exhaustion of the remedy procedures as a precondition for filing an action to the competent court is neither an unfair nor an inappropriate processual regulation. It is no infringement of the right to a fair and public trial as stated in art. 42 para. 2 of the constitution because the right to filing a lawsuit is fully granted if the appeal doesn't have a result in favour of the party.

It may arise the question whether or not art. 129 is in accordance with European law by stating that failing the deadline to appeal will lead to serious consequences because the door to bring the case as a lawsuit to the competent court is not open any more. Notwithstanding some decisions of the EU-Court, it can be assumed as a rule that blocking the lawsuits after failing the deadline for an appeal is in accordance with EU law.

III. Legal Consequences

Firstly, the legal consequence is that a party cannot admissibly bring a case to the competent court without having exercised the remedy-procedure before. If a party brings its case to the court directly the court will refuse its lawsuit as not admissible without reviewing the lawsuit substantially.

Secondly, if the party failed to keep the deadline stated for exercising an appeal in art. 132 it is not entitled to file a lawsuit to the competent court instead and skip the appeal procedure. The court must refuse the lawsuit as not admissible without reviewing the administrative act substantially. Therefore, failing the deadline to appeal leads to serious consequences.

IV. Scope of the law

As art. 129 stipulates explicitly, the exhaustion principle is applicable to administrative appeals (art. 128 para. 3 lit a.) only. If a party fails to meet the deadline for the objection stated in art. 142 the way to bring a lawsuit to the competent court cannot be seen as blocked by this regulation. If not regulated by law otherwise, a party can go to the court directly without exercising an objection before. An application of art. 129 *mutatis mutandis* is not possible because the constellation is regulated explicitly.

B. Exhaustion of the administrative appeal remedies in details

I. The rule - exhaustion of the respective appeal

As mentioned above the exhaustion of the respective appeal procedure takes place if the appeal which has been submitted properly in due time has been refused by the competent body. If the appellant has achieved his aim in the

remedy-procedure there is no need for going to court. Bringing a lawsuit to the court would not be admissible any more.

If the party has failed to submit its appeal within the deadline stated in art. 132 or if the party would withdraw its appeal the appeal procedures are not exhausted. A lawsuit to the competent court cannot be successful and the court will refuse the legal action as not admissible without a substantial decision.

## II. Exceptions from the Exhaustion-Principle

### 1. No higher public body provided (lit. a)

The first exception applies if there is no higher public body provided by law to decide on the remedy. The same applies if the highest body is not established. The reason for this exception is that according to art. 137 it is up to the superior body to decide on the remedy (except in cases of art. 136 para. 4).

### 2. Direct complain expressly provided by special law (lit b)

If special law provides that an exhaustion of remedies is not required before a lawsuit can be launched, a party can bring its case to the competent court directly. Art. 129 lit. b) clarifies that special law may override the general rule stated in art. 129 of this code. Although according to the wording of art. 129 lit. b) an explicit regulation (expressly) is required, it must be seen sufficient the exception is made clearly.

### 3. Affection of a person who has not a party position (lit c.)

No prior appeal procedure is required if by conducting and concluding the appeal procedure the highest body which has to review the administrative act or action or omission within the appeal procedure violates by its decision the subjective rights or legal interests of a third person which has not the position of a party in the procedure.

The reason for this exemption is that it wouldn't make any sense to start another appeal procedure to review decisions taken in an appeal procedure by the highest body involved.

## **CHAPTER II**

### **ADMINISTRATIVE APPEAL**

#### **Section I**

#### **Formal Requirements of the administrative appeal against the administrative act**

*Article 130 Administrative appeal against the administrative act and its purpose*

1. Except when otherwise provided by law, the administrative appeal may be filed against an administrative act or omission of a public body to issue the act within the deadline provided (the latter hereinafter: "the appeal against administrative silence").
2. A procedural action of a public body during the administrative procedure may be appealed separately, only when the appeal is expressly provided by law.
3. The procedural action under paragraph 2 of this Article shall be any act, action or omission of a public body during the administrative procedure, which is not a final administrative act or administrative act of the completion of the administrative procedure provided for in Article 90 of this Code.

#### A. General introduction

##### I. Content and purpose of art. 130

Art. 130 ties with the basic norm of art. 128 and contains some preconditions of a party's right to file an appeal. Para. 1 is as a kind of basic or introductory norm. It repeats the right to appeal against administrative acts and concretes the right to appeal against the omission of a public body to issue an administrative act a party has applied for within the deadline provided. This type of remedy is defined legally as "appeal against administrative silence". Although para. 1 does not repeat the preconditions stated in art. 128 para. 1 it is clear that it refers to the preconditions in art. 128. Therefore, the party must claim the affection of rights or legal interests.

Para. 2 contains important restrictions to the right to appeal against procedural acts issued in the administrative procedures, while para 3 clarifies the difference between administrative acts referred to in para 1 and procedural acts referred to in para 2.

##### II. Relation to previous CAP

The previous CAP contains similar regulations.

##### III. Scope of application of the norm

According to the explicit wording and its systematic position art. 130 is applicable to appeal-remedies only and furthermore only if not otherwise stipulated by law.

The norm is in compliance with constitutional provisions and with EU-law as well. Even there is no doubt that the restrictions of appeal remedies against procedural actions meet constitutional requirements and is in accordance with EU-law. Neither the constitution nor EU-law requires remedies against procedural actions.

#### B. Administrative appeal against the administrative act and its purpose in details

##### I. Appeal against an administrative act or omission (para. 1)

###### 1. Except when otherwise provided by law

Para. 1 makes clear that the right to appeal may be restricted by special law. This relates to the principle of subsidiarity: The regulations of the CAP shall apply only if special law does not provide other (different) regulations.

###### 2. Appeal may be filed against an administrative act

art. 130 para. 1 grants the right to appeal against actions only if these actions have the character of administrative acts due to the legal definition in art. 3 para 1 of this code. It does not make any difference between administrative

acts with burdening regulations and administrative acts which refuse an application for an administrative act in favour of the party. In both cases the right to appeal is granted.

### 3. Appeal against administrative silence

Para. 2 makes clear that an administrative appeal may also be filed against the omission of the public body to issue an administrative act a party has applied for. Precondition is that the public body has failed to issue the act within the legally provided or extended time limit. This regulation is important only if the silent consent rule is not applicable. In cases the silent consent rule stated in art. 97 is applicable there is no need for an appeal against an omission because the administrative act the party has applied for shall be deemed as issued in silence.

#### II. Exercising an appeal against procedural acts (para. 2)

Para. 2 stipulates a very important restriction to the right of appeal against procedural actions in administrative procedures legally defined in para. 3: Against procedural actions a separate appeal can be filed only when it is expressly provided by law. In other cases, an alleged affection of procedural rights can be filed only in the context of an appeal against the (final) administrative act. It is up to the legislator to define procedural actions (or omissions of such actions) which can be object of a separate appeal procedure.

The consequence of this regulation is: If the final administrative act does not affect the rights or legal interests of the party there is no way to appeal against procedural actions that have taken place within the procedure, which has led to the final act. Violations of procedural rights lose their relevance if the party agrees with the final administrative act and does not file an appeal against the final act.

According to the wording of para. 2 the possibility to file an appeal against a procedural action must be provided by law "expressly". It is to be questioned if expressly means explicit or clearly in a sufficient way. Since there are no reasons for requesting an explicit legal provision in the wording it should be sufficient that the regulation is clear enough.

#### III. Definition of procedural acts (para. 3)

Para. 3 provides a legal definition of procedural actions in order to differentiate these actions regulated in para. 2 from administrative acts mentioned in para. 1. The legal definition is necessary for clarifying reasons because there is no definition in art. 3. It is quite clear that dependent procedural actions within an administrative procedure have only the meaning to promote the procedure in order to achieve the completion by the final administrative act.

According to para. 3, a procedural action is any act or omission of a public body during the administrative procedure provided for in art. 90. There is a wide scope of action comprised by this definition. Especially, there is no difference between important actions and others. Such a difference is not required since a separate appeal against procedural actions can be filed only if expressly provided by law (see para. 2).

The crucial precondition of the procedural action is that it must not be the final administrative act (art. 3 para. 1) or the administrative act of the completion of the administrative procedure (art. 90). The wording of para. 3 excludes not only final administrative acts but also declarations by which an administrative procedure is declared as concluded without a final decision in cases provided for in art. 93 and 96. If a public body declares an administrative procedure concluded in the cases regulated in art. 93, 96, the declaration cannot be seen as a procedural action; the restriction of para. 2 does not apply.

No procedural action in the sense of para. 3 is the written confirmation of a verbal administrative act in cases stated in art. 98 para. 2, because it is not a procedural step in the procedure in order to issue an administrative act. On the contrary, according to art. 98 para. 2, a party having been notified a verbal administrative act is entitled to raise an independent claim to get a written confirmation of this act.

*Article 131 Content of the administrative appeal*

1. The administrative appeal against the act shall define the following:

a) the subject that exercises the administrative appeal;

b) the body, which reviews the administrative appeal;

c) the administrative act, which is being challenged or the administrative act, which is required but is not issued.

ç) the object and causes, for which the appeal is made;

2. Regardless of the provisions of the Paragraph 1 of this Article, any request addressed to the public body shall be assessed as an administrative appeal, even if it is not expressly named as such in the law. In this case, the purpose to complain against an administrative act or, to ask for issuing of an act, should be sufficiently clear.

A. General introduction

I. Content and purpose of the norm

1. Formal requirements for filing appeals.

Firstly, it is necessary to define the subject that exercises the appeal (the appellant) in a proper way. Therefore it is important that the subject that exercises the appeal can be defined easily.

Art. 131 para 1 describes the different formal requirements an administrative appeal must comply with. It is quite clear that these requirements are necessary for the public organ to deal with an appeal in a proper way.

Para 2 makes clear that these formal requirements must not be seen as preconditions for the admissibility of the appeal in the sense of art. 135 lit. d), if it is sufficient clear that the party intends to file an appeal as prescribed in art. 130.

2. Other than written forms permitted?

Art. 131 and the other articles dealing with remedies don't provide the written form explicitly, nor does art. 42 contain such a provision for the initiation of procedures. The term "filing" as such does not indicate that a submission of the appeal must be in writing. On the other hand the submission of requests is regulated in art. 59 of this code. This norm differentiates between oral requests (art. 59 para. 5) and requests in other forms (art. 59 para. 6). According to the latter, a written request can also be submitted by certified mail, electronic means or fax. An oral request must be recorded in writing by the public body. This regulation should be applicable to the remedy procedures *mutatis mutandis*.

II. Constitution and EU-Law

It can be seen as an element of good administration that failing the formal provisions of an appeal stated in para. 1 will not lead to the rejection of the appeal as unlawful. Formal requirements are only to classify the submission properly and to define the competent public body to deal with the appeal. If it is possible to decide on these issues properly without the compliance with the formal requirements a refusal of the appeal is not necessary.

III. Legal Consequences

As stated above already: If an administrative appeal does not meet the formal requirements stated in para. 1 no direct legal consequences are provided. On the contrary, para 2 makes clear that an appeal which does not meet the requirements must not be refused for formal reasons if the will of the party to file an appeal is expressed clear enough. As a consequence, the provisions required in art. 131 para. 1 must not be met within the deadlines stated in art. 132. For keeping the deadline stated in art. 132 the submission of a request must be "sufficiently clear" that an appeal against a defined action should be filed.

Art. 131 does not provide any regulation how to complete or rectify an appeal which does not meet the formal requirements. In these case art. 62 must be applied *mutatis mutandis* because the public body must have the opportunity to complete or correct the appeal. That means: The public body must try to complete or correct the appeal by own means firstly. If it is not possible to do so the public body is entitled to set a deadline for completion or correction of the appeal by the party (art. 62 para 2). If finally the party fails to complete its appeal within the deadline the public body can reject the appeal as not admissible.

#### IV. Scope of the law

Art. 131 is applicable to administrative appeal-remedies only. It covers the appeals against administrative acts and against procedural actions as well. But in the latter cases the subject and the body are normally clear since the action has been taken within a running administrative procedure.

Furthermore, the scope of the norm can be restricted by special law.

#### B. Content of the administrative appeal in details

##### I. The formal requirements (para 1)

The formal requirements stated in para 1 comprise the minimum information which is necessary to deal with the appeal in a proper way and to review the administrative act in a substantial procedure.

##### 1. Define the subject (para 1 lit. a)

Firstly, it is necessary to identify the appellant correctly. Therefore, it is necessary that the person submitting the appeal can be determined by examining the submission. Otherwise, the appeal does not meet the preconditions stated in art. 135 lit. d) and must be rejected as not admissible.

In the system of the CAP an appeal can be filed only by a person, who has the status of a party in the sense of art. 33. Problematic is whether a person is entitled to file an appeal without being granted the status of a party in accordance with art. 33 para. 2, 3. If the public body failed to grant this status to a person during the administrative procedure the person is entitled to request to get this status even after the administrative act has been issued in accordance with art. 33 para. 2, 3. If a person submits an appeal against an administrative act the appeal must be seen as comprising the request of becoming a party as well.

##### 2. Define the competent body (para 1 lit. b)

The appeal must be directed to the competent body. According to art. 136 para. 1 the competent body is normally the same body which has issued the administrative act or taken the procedural action because these actions are to be reviewed firstly by the competent body itself except when otherwise provided for by law.

##### 3. Define the administrative act or the omission (para 1 lit c)

Of high importance is that the party defines the administrative act or procedural action which is being challenged or the administrative act or action which is required but not issued. To define the object of the appeal it can be seen as sufficient if the public body can find and determine the act or action by reading the request of the party. The object of the appeal must be clear to the public body within the deadline stated in art. 132, otherwise the appeal cannot be seen as admissible in the sense of art. 135. Even para 2 doesn't lead to another conclusion: If the object of an appeal is not defined in a sufficient way by the party itself the purpose to complain cannot be discovered by the public body.

##### 4. Define the object and causes of the appeal (para 1 lit d)

Since the object of an appeal is the administrative act which affects the party or the omission of an administrative act the party has requested, para. 1 lit. d) does not mean the object but the reasons and causes of the appeal. The party must give an explanation why it doesn't agree with the issued administrative act or why the public body is obliged to issue the requested administrative act.

#### II. Legal consequences (para 2)

As mentioned already above the formal provisions of para. 1 must not be seen as preconditions for admissibility of the appeal stated in art. 135. Only if the purpose to complain against an administrative act or against the omission of such an act is not sufficiently clear the appeal cannot be seen as admissible. In all other cases there is the possibility to amend, complete or rectify the appeal in order to meet the formal requirements.

*Article 132 Deadlines of administrative appeal against an administrative act*

1. The administrative appeal should be filed within 30 days of the day when the appellant has received notification on the issuing or rejection to issue the administrative act.
2. In the case of administrative omission, except when silent approval is applicable, the appeal should not be filed earlier than 7 days and no later than 45 days of the date of expiration of the set or extended deadline for the completion of the administrative procedure.

A. General introduction

I. Content and purpose of the norm

Art. 132 states deadlines for filing appeals. An appeal filed after expiry of the stated deadline is not admissible (see art. 135 lit. c) and will be refused without a substantial review of the administrative act or action. Therefore, meeting the applicable deadline is a crucial precondition not only for the administrative remedy but also for bringing a lawsuit to the competent court. This is because the precondition of the exhaustion of the remedy as stated in art. 129 cannot be fulfilled if the appeal must be refused for formal reasons without a substantial review. In the effect, by failing the deadline the party loses completely the right to appeal and to file a lawsuit as well. For these reasons, keeping the deadline is a crucial precondition for the entire reviewing process.

II. Constitution and EU-Law

As mentioned already in the commentary of art. 129 stating formal requirements for remedies are – as a rule – in compliance with constitutional and EU law, if the requirements meet the principle of good administration and of proportionality. Since the time limits stated in art. 132 must be seen as sufficient and adequate, there are no arguments against the validity of the regulation. A period of 30 respective 45 days should be as long enough to file an appeal in a formally proper way.

As stated in art. 99 para. 2 lit. c) the administrative act has to contain the information of the right to appeal and the deadline for lodging an appeal. Therefore it is reasonable and acceptable if meeting a deadline is a precondition for filing an admissible appeal.

III. Legal Consequences

1. Loss of the right to appeal and to file a lawsuit

As mentioned already above, missing the stated deadline for lodging an appeal may lead to serious consequences, because meeting the deadline is a precondition for the admissibility of an appeal and, finally, even for the admissibility of a lawsuit to the competent court (see art. 129).

2. Reinstatement

If a party has failed to file an appeal within the stated period of time it may ask for the reinstatement of the deadline in accordance with art. 54, 55 if for reasonable grounds it has been prevented to comply with the stated deadline. The request for reinstatement must be lodged within a time period of 15 days, starting from the day the obstacles are eliminated, but not later than one year (see commentary to art. 54).

As a reason for reinstatement in cases the appeal is directed against an administrative act it must be seen if the public body has failed to add information on the right to appeal and the deadline for lodging the appeal. According to art. 99 para 2 lit. c) an administrative act has to provide information on the right to appeal and the deadlines. If an administrative act doesn't provide for this information failing the deadline must be seen "for reasonable reasons."

IV. Scope of the law

The deadlines stated in art. 132 applies to appeals against administrative acts as defined in art. 3 para. 1 and mentioned in art. 130 para. 1. Moreover, it seems clear that it applies also to appeal against procedural actions regulated in art. 130 para. 2. Although the headline of art. 132 mentioned only the administrative act for systematic reasons the same must apply to the appeals against procedural actions defined in art. 130 para. 3.

## B. Deadlines of administrative appeal against an administrative act in details

### I. The 30-days-deadline (para 1)

According to para 1 the administrative appeal should be filed within 30 days of the day when the appellant has received notification on the issuing or rejection to issue the administrative act he has applied for. art. 56 stipulates the calculation. According to art. 56 para. 2 the day of notification shall not be included in the calculation. Moreover, art. 56 para. 4 sent. 1 must be observed: Saturdays, Sundays and public holidays shall not impede the starting and duration of the deadline. But according to art. 56 para. 4 sent. 2 the deadline shall expire on the next working day if the last day of the deadline is a Saturday, Sunday or a public holiday.

### II. Deadline in case of administrative omission (para 2)

If an appeal is directed against an administrative omission of an administrative act or procedural action the deadline cannot start to run on the day of notification. For this reason a different regulation is required, if no silent consent approval is applicable.

According to art. 132 para 2 the connecting date is the day of the date of expiration of the set or extended deadline for the completion of the administrative procedure. This regulation refers to art. 91, which states the deadline for issuing and notifying an administrative act a party has applied for. Therefore, in the case of para. 2 of art. 91, the appeal against an administrative omission shall be lodged no earlier than 67 days and no later than 105 days after the date of full submission (para. 3 of art. 91) of the party's request for initiating the procedure.

This Code does not explicitly provide a connecting date for the deadline, within which an appeal is to be lodged against the omission of a procedural action. The use of the legal term omission, however, indicates the way how this regulatory gap is to be filled. The term omission in the meaning of administrative procedure law always requires from the party the expression of a request on issuing the concerned administrative action. Without such request there is nothing that can be omitted. This requirement derives from the rationale of art. 91, according to which legal preconditions and legal consequences of any omission always require the party's initiative. There is no reason to exclude procedural actions from the application of this general rationale. Consequently, the exercise of the right to an administrative remedy against the omission of a procedural action requires always the expression of a request of the party for undertaking the omitted procedural action through the concerned public body. In further consequence, for such remedy the 60-day deadline of para. 2 of art. 91 applies *mutatis mutandi* for the determination of the date, to which then the period of art. 132 para. 2 is connected.

### 3. The deadline for notification of an administrative act

According to art. 140 para. 1 the notification must be taken place within 30 days of the filing of the appeal. This deadline may be extended under the circumstances of art. 140 para. 2. To the formal and material preconditions of an extension of the deadline art. 92 shall apply.

### 4. The time period set in para 2

According to para 2 an appeal against an administrative omission should (better: must) not be filed earlier than 7 days and no later than 45 days of the date of expiration of the set or extended deadline for the completion of the administrative procedure.

If an appeal will be filed earlier than 7 days before the expiration it may be rejected as not admissible. But when the time period of 7 days is reached before the early appeal is rejected the appeal might be seen as within the deadline. In this case, a rejection can no longer be justified any more with deadline-reasons.

Even in cases of para 2 the party can apply for a reinstatement of the deadline for "reasonable reasons" (see para 1 above).

*Article 133 Effects of an administrative appeal against an administrative act*

1. Except when otherwise provided for by the law, the administrative appeal, which is filed under the requirements of Articles 130-132 of this Code, shall suspend the execution of the act until the notification of the appeal decision.
2. If two or more parties with the same interest are included in the administrative act, the administrative appeal, which is filed by one of the parties, shall extend its suspending effects to all the parties involved.
3. The application of an administrative act shall not be suspended in the following cases:
  - a) the administrative act aims to collect taxes, fees and other budgetary revenues;
  - b) the administrative act relates to police measures;
  - c) the public body, which reviews the appeal, considers that the immediate application is in the interest of the public order, public health and other public interests.
4. A direct appeal against the act, which decides to stop the suspending effect of the appeal, may be filed with the competent court for administrative matters within 5 days of the date of notification of the decision.

A. General introduction

I. Content and purpose of the norm

The content of art. 133 is of high importance because the norm contains the principle of the suspension effect of administrative appeals. According to para 1, as a rule, an administrative appeal shall suspend the execution of the administrative act until the notification of the appeal decision. Para. 2 extends the suspension effect to all parties included in the regulation of the administrative act if these parties do have the same interest. Para 3 prescribes the exceptions of the suspension principle.

II. Constitution and EU-law

Since the purpose of the suspension effect is to protect the rights and legal interests of the parties during the appeal procedure there are no doubts that para 1 and 2 are in accordance with constitutional and European law.

III. Legal Consequences

The legal consequence of the suspension effect is according to the wording of para. 1 that no "execution" must take place during the appeal procedure. The term "execution" refers to art. 164 ff. of this code meaning the execution procedures regulated in Part Eight of the code. Although execution procedures of administrative acts are regulated in art. 164 ff., the term "execution" in art. 133 must be understood in a broader way: Administrative acts may determine rights or legal relations or alter legal relations, for instance. There are good reasons to assume that an administrative appeal should suspend all kinds of effect regardless whether or not they are to execute or not. If execution procedures shall be suspended this must apply a fortiori to other effects of administrative acts.

IV. Scope of the law

The suspension effect applies only to administrative acts only. Although the regulation in para. 1 is not restricted to administrative acts explicitly (wording: act) it derives from the systematic of the article that only administrative acts are comprised: Both para. 2 and 3 refers to administrative acts explicitly and it is quite clear that both procedural actions and omissions of administrative acts or action cannot be executed. Therefore in these cases a suspension of an execution wouldn't make any sense.

There is the question whether or not the suspension effect does apply only to admissible appeals in the sense of art. 135. Since para 1 refers explicitly to appeals "filed under the requirements of art. 130 to 132" it must be assumed that appeals submitted after expiry of the deadline stated in art. 132 shall not lead to a suspension effect. The same applies to an appeal filed by a party without legitimacy required in art. 128 para. 1. Although para 1 doesn't refer to art. 128 para 1 it must be assumed that art. 130 refers to the preconditions of art. 128 which must be seen as incorporated in art. 130.

If the right to appeal is excluded by special law no problem arises because only appeals under the regime of the CAP are comprised. If special law provides additional requirements to file an appeal these requirements must be met to activate the suspension effect unless otherwise stipulated by law.

## B. Effects of an administrative appeal against an administrative act in details

### I. The suspension principle (para. 1)

#### 1. Scope of Suspension

If an administrative act decides on a special position or on special rights of the addressee no execution of this determination can take place. As already stated above, the suspension effect must not be seen as restricted to formal execution measures regulated in art. 164 ff. of this code. Although para. 1 uses the term “execution” and art. 180 regulates the “suspension of execution” the regulation of this article comprises the suspension of many other effects an administrative act may have. An execution procedure as stated in art. 180 ff. can take place only if an administrative act imposes a duty on the addressee to do or not to do something or to let something happen. In other cases, administrative acts may have consequences or effects which affect an addressee without any execution automatically or by other measures. As a rule, no negative conclusions must be drawn if a suspension effect has taken place. Consequently, para. 3 doesn’t use the term “execution” but instead the term “application”.

If, for instance, an administrative act decides that the addressee shall lose his position as a civil servant or his membership to a special organization no execution is required to implement the decision. The same applies if an administrative act deprives or restricts a right of the addressee to do something. In all these cases the regulation must be seen as suspended when an appeal against the administrative act has been filed in accordance with para. 1.

#### 2. Appeal under the requirements of art. 130 - 132

The suspension effect begins at the very moment an administrative appeal has been filed “under the requirements of art. 130 – 132”. If the appellant does not comply with the preconditions referred to its appeal cannot suspend the execution or other effects. The decisive requirements are firstly the appropriate object of the appeal (art. 130), secondly the sufficient clarification of the appeal (art. 131) and thirdly the keeping of the deadline (art. 132).

In addition to the requirements listed in art. 130 – 132, an appeal can lead to the suspension effect only if the party claims that its legitimate rights or interests are affected. This requirement derives from art. 128 para. 1 and is to be observed although it is not explicitly mentioned in para 1. Since according to art. 128 para. 1 a party shall have the right to exercise administrative remedies only if it claims that its legitimate rights or interests are affected (see explanation on art. 128 under section B.I.) this precondition must be seen as a precondition for the suspension effect as well. This is an inevitable consequence of art. 135 lit. b), because the appeal is admissible only if the applicant has legitimacy under art. 128.

That means that – firstly – only an appeal of a “party” in the meaning of art. 128 para. 1 can lead to the suspension effect, and – secondly – an appeal claiming the affection of its own legitimate rights or interests. Appeals submitted by other persons cannot be successful in the very end and must not lead to a suspension effect during the meantime.

#### 3. The object of an appeal

Administrative acts (art. 3 para. 1) come into question as appropriate objects of appeals. Since the appellant must claim that his legitimate rights or interests might be affected by the administrative act the suspensive effect can only take place if the execution or implementation of the administrative act is not only in favour of the appellant. In other words: Only appeals against onerous legal effects of administrative acts can lead to a suspension.

Para. 1 makes clear that the same applies if an administrative act shall be deemed as issued in accordance with art. 97 when a public body failed to issue a requested administrative act within a stated deadline. But since a party will regularly request administrative acts in its own favour there is no need for a suspensive effect normally. An exception may take place if the administrative act requested lead to disadvantages of third parties.

As stated in art. 130 para 2 an administrative appeal against a procedural action as prescribed in art. 130 para. 3 can be submitted only when it is explicitly provided by law. When not provided by special law unlawful administrative procedural action can be controlled only in connection with the final decision in an administrative procedure.

#### 4. Clarity of an appeal

In art. 131 para. 1 are listed the formal preconditions of an appeal. The administrative appeal shall define the subject that exercises the appeal (the party), the public body having to review the appeal, the object of the appeal and the reasons (objects and clauses) of the appeal. The purpose of these preconditions is to clarify the parties or persons or bodies involved and the object of the appeal. The preconditions listed in art. 131 para 1 must not be met necessarily. As art. 131 para. 2 s. 2 makes clear that the crucial point is that the purpose to complain against an administrative act or

the omission of issuing such an act, must be “sufficient clear”. If the submission is clear in that was any request to the public body shall be assessed as an administrative appeal which means that the preconditions of para. 1 must be seen as fulfilled.

#### 5. Submission within the deadline

Of high importance is that an appeal is admissible only if it is submitted within the deadline stated in art. 132. If the party fails the appropriate deadline by submitting the appeal the suspensive effect cannot take place. This is the inevitable consequence of para. 2 and is justified because according to art. 135 lit. c) the appeal is admissible only if filed within the time prescribed by art. 132.

But there is the possibility to achieve a reinstatement of the deadline in accordance with art. 54. A reinstatement must be requested for (art. 54 para. 2) and shall be granted if the preconditions stated in art. 54 para. 2 – 4 will be met. In the time period between submitting the appeal after expiry of the deadline and the public body’s decision of reinstatement no suspensive effect can take place.

#### 6. Beginning and end of the suspensive effect

According to para. 1 the suspensive effect of the admissible appeal begins at the very moment the appeal has been filed. The regulations of art. 59 provided for submission of a request may be applicable. It is necessary that the appeal has reached the competent public body because only this body can suspend the execution. The suspensive effect shall last until the notification of the appeal decision to the appellant. In cases regulated in para 3 lit. c) the suspensive effect ends with the notification of the decision to the appellant (if at all the effect has started already).

#### II. The extension of the suspension effect (para. 2)

In para 2 the suspension effect stated in para 1 is extended to all parties involved in the same administrative procedure if they have the same interests. This regulation is to avoid that parties may be treated differently if they are affected by the regulation of an administrative act in the same way.

The consequence of the regulation in para. 2 is that only one party must file an appeal against the administrative act to activate the suspension effect for all parties. Unclear are the consequences if the other parties fail to appeal within the deadline. It follows that consequently the final decision on the appeal must apply even to all parties involved in the procedure.

#### III. The exemptions of the suspensive effect (para. 3)

##### 1. General remarks

Para. 3 provides 3 cases in which the application of an administrative act shall not be suspended. The norm comprised situations in which the public interest of an immediate implementation of an administrative act is seen as more important than the protection of rights and interests of the addressee. Para. 3 lit. a) covers administrative acts which aims to collect taxes, fees and other budgetary revenues, para. 3 lit. b) administrative acts relating to police measures. In both cases the suspensive effect is cancelled automatically without any decision of the public body. Para. 3. lit. c) authorized the public body to cancel the suspensive effect by a special decision, which can be controlled by the court in accordance with para. 4.

In para. 3 lit. a) and b) no suspensive effect is provided at all. Even in cases the application could lead to serious problems the law doesn’t provide the possibility to install the suspensive effect in these cases. Since the constitution requires effective protection of legal rights and interests it must be seen as inevitable to accept that there must be a legal instrument to suspend the application even in the cases of para. 3 lit. a) and b). See below No. 4.

##### a) Tax, fees and budgetary revenue related administrative acts (lit. a))

As a rule no suspensive effect shall take place if the appeal is filed against an administrative act which “aims to collect taxes, fees and other budgetary revenues”. The reason for this exemption of the suspension principle is that on one hand there must not be an incentive to file appeals only to postpone the duty to pay taxes, fees and other budgetary revenues. On the other hand this regulation is set to ensure that the state can comply with its tasks and duties.

Para. 3 lit. a) comprises not only administrative acts which impose the duty to pay a special amount of tax, fees etc... but also administrative acts which “aims to collect” tax, fees etc. That means that the suspensive effect should not apply even to administrative acts which are only related to the collection of taxes, fees etc. as a kind of precondition of the later administrative act which impose the tax, fee etc.

b) Administrative acts relating to police measures (lit. b))

Para. 3 lit. b) provides an exemption of the suspensive effect for administrative acts “relate(d) to police measures”. The reason for this exemption is obvious: The police authorities have the duty to keep public safety and order and as a rule administrative acts issued to protect against danger and disorder. In most cases these acts of police authorities must be applied or implemented without hesitation or delay. Therefore as a rule, the effectiveness of administrative acts of this kind don’t take suspension.

The scope of the exemption of para. 3 lit b) must be defined in relation to the indicated legal reasons of the norm: Administrative acts are related to police measures if they are issued in order to protect public or individual rights and interests against factual violation or the danger of violation. It is not necessary that the administrative act has been issued by a special police body. The essential question is whether or not the administrative act aims to protect against a specific factual danger or against an actual disorder or violation of public or individual rights and interests.

c) Specific decision of the public body to stop the suspensive effect (lit. c))

Of high importance is para. 3 lit c) which entitles the competent public body to abolish the suspensive effect stated in para. 1 in special cases due to the interest of public order, public health and other public interests. Unfortunately, the norm doesn’t formulate preconditions for issuing such a decision. For this reason, the specific preconditions must be developed by systematic interpretation.

## 2. Specific interests

Important is the systematic context of para. 3, which is an exemption of the suspensive principle formulated in para. 1. Therefore, a decision in accordance with para. 3 lit. c) must be taken only if the case has its own special characteristics, which can rectify the abolishment of the suspension principle. There must be specific public or individual interests for an immediate application or implementation or execution of the administrative act which have a higher value than the average.

### 3. Detailed consideration

The public body must take the conflicting interests of the appellant on the one hand and the public or individual interests on the other hand in consideration. By doing so it has to compare the consequences an immediate application of the administrative act will have for the appellant with the consequences a suspensive effect will have for the public or a third person concerned. A decision in accordance with para. 3 lit. c) must be taken only if the weight or importance of public or individual interests overrides the private interests of the appellant.

### 4. No discretion

The public body comparing and considering the conflicting interests doesn’t have any discretionary power. In according to para. 4, the appellant have the right to appeal against the decision claiming that either there are no specific interests to rectify the abolishment of the suspensive effect or these interests must not override the interests of the appellant to hold the suspensive effect.

There is the question whether or not the body must take into account the expected result of the appeal at the very end of the procedure. Normally, the result of the appeal is difficult to anticipate. In these cases the expected outcome or result of the appeal cannot be taken into account. In other cases, when for instance the appeal must be seen as not admissible, it is allowed to take into account that the appeal will be finally without any chance.

## IV. The right to appeal against a decision to stop the suspending effect (para. 4)

Para. 4 provides a separate appeal against a procedural action as stated in art. 130 para. 2. The decision of the public body to stop the suspensive effect has the character of a procedural action as stated in art. 130 para. 3. The appellant has the right to file a direct appeal against “the act which decides to stop the suspending effect of the appeal”. The appellant must claim that the preconditions of para. 3 lit. c) in the case are not met, either because there are no special interests or that the interests of the public or of individuals to applicate or execute the administrative act immediately are not overriding.

*Article 134 Body where the appeal is addressed*

1. Except when it is not otherwise provided for by law, an appeal against an administrative act may be addressed to the public body:
  - a) which has issued or is competent to issue the act;
  - b) the superior public body of the body described in Subparagraph "a" of Paragraph 1 of this Article, or;
  - c) another public body explicitly set forth by law.
2. If the appeal is directed to one of the bodies, which are provided for in the Subparagraphs "b" and "c" of Paragraph 1 of this Article, they shall transmit it without delay to the competent body.
3. An appeal against an administrative omission may be addressed directly to the bodies provided for in Subparagraphs "b" and "c" of Paragraph 1 of this Article. If the appeal was sent to the body foreseen in Subparagraph "a" of this Article, it shall transmit it, without delay, to one of the bodies provided for in Subparagraphs "b" and "c" of Paragraph 1 of this article along with the case file and a written report about the reasons for silence.

A. General Introduction

I. Content and purpose of art. 134

Art. 134 regulates, to which administrative body an appellant must address his appeal. As a rule an appeal can be addressed and submitted either to the body which has issued the contested administrative act or to the superior public body or - in cases stipulated by special law to another public body notwithstanding which public body has to deal with the appeal at the first hand. If the public body the appeal is directed is not competent to deal with the appeal at the first hand the appeal must be forwarded (transmitted) to the competent public body. In the effect the appellant has the choice to which one of the public bodies mentioned in para. 1 he addressed and submitted his appeal. This is to make submitting an appeal easier and to avoid errors of the appellants by addressing the appeal. In relation to art. 24 para. 1 it is quite clear that art. 134 must be seen as a special regulation for remedy procedures. Similar to art. 124 para. 2 deadlines are kept if the appeal is submitted to one of the bodies mentioned in para. 1.

Regarding the remedy procedure art. 134 follows the difference between appeals against administrative acts and appeals against the omission of administrative acts: An appeal against an administrative act must be reviewed on the first hand by the public body which has issued the act in accordance with art. 136. Only in cases of negative results of the reviewing procedure the appeal must be forwarded to the superior body in accordance with art. 137. Therefore, an appeal against an administrative act which is addressed to the superior body must be forwarded to the competent body of the first instance (para. 2).

Appeals against administrative omission have to be forwarded to the superior public body directly which has the exclusive jurisdiction. In these cases the competent public body of the first instance has no competence to decide on the omission. Therefore, an appeal against an administrative omission addressed to the competent body of the first instance must be forwarded to the superior public body immediately (para. 3 sentence 2).

II. Constitution and EU-Law

The regulations of art. 134 are in alignment with the requirements of the Albanian constitution and the EU-law as well.

III. Legal consequences of art. 134

As already mentioned above: to keep the deadlines stated in art. 132 it is sufficient to submit to one of the public bodies listed in para. 1 even if the addressee fails to forward the appeal to the competent authority in accordance with para. 2 and 3. art. 134 regulates only the possibilities to address the appeals, not the competence to decide on the appeals, which is regulated in art. 136 - 138.

IV. Scope of application

art. 134 is applicable to appeals in the sense of art. 130 only, even to appeals against procedural action in cases of art. 130 para. 2. To these actions art. 134 shall apply *mutatis mutandis*: An appeal against a procedural action in cases of art. 130 para. 2 must be treated like an administrative act, the omission of a procedural act must be treated like the omission of the omission of an administrative act.

It is clear that art. 134 is applicable only if not otherwise provided for by special law.

## B. Body where the appeal is addressed in details

### I. The addressees of an appeal (para. 1)

As mentioned above already, para. 1 contains a list of the addressees to which an appeal might be directed and submitted. The listed possibilities are equal, notwithstanding the public body the appeal is addressed to must forward the appeal to the public body which has to deal with it on the first hand in accordance with para. 2. Even if it is necessary to forward the appeal it must be seen as submitted in the right manner and as keeping the deadlines stated in art. 132.

Para. 1 lit. a) refers in its first alternative to appeals against administrative acts. In these cases the body which has issued the act shall be the addressee of the appeal because according to art. 136 it is the competent body to review the act issued by its own. The meaning of the second alternative "or is competent to issue the act" is unclear. It cannot refer to cases the competent administrative body has failed to issue the administrative act the appellant has requested because the omission cases are regulated in para. 3. Therefore, the second alternative can only comprise cases the competence of the public body first instance has changed.

Para. 1 lit. b) gives the possibility to address the appeal against an administrative act directly to the superior body, notwithstanding that the superior body must forward the appeal in the cases stipulated in para. 2 to the competent body of the first instance in order to conduct the procedure stipulated in art. 136.

Para. 1 lit. c) covers only cases in which a public body different from the bodies mentioned in lit. a) and b) is appointed as an addressee by special law.

### II. Forwarding the appeal to the competent body of the first instance (para. 2)

As a rule appeals against administrative acts must be reviewed and treated on the first hand by the public body which has issued the administrative act (see art. 136, 137). Therefore, appeals may be addressed to these bodies (para. 1 lit. a)). Nevertheless it is permitted to address appeals even to the superior body in order to keep the deadlines stated in art. 132. But if the appellant addressed and submitted the appeal to the superior body it must be forwarded without delay to the competent public body which has issued the administrative act in accordance with para. 2.

### III. Appeal against omission of an administrative act (para. 3)

#### 1. Competence of the superior body

If the appeal is submitted against the omission of an administrative act within the set deadline in accordance with art. 136 no review procedure shall take place. In these cases the appeal shall be decided on directly by the superior as stated in art. 138. As stated in para. 3 sentence 1 the appeal must be addressed to the superior body directly. If the appellant submits the appeal to the public body of the first instance, the appeal must not be rejected but shall be forwarded to the superior body.

#### 2. Forwarding with case file and written report (para. 3 sentence 2)

If the appeal has been addressed to the public body of the first instance, which has failed to decide within the deadline, the appeal must be forwarded to the superior body with the case file and a written report about the reasons for the silence. This is in order to inform the superior body and to provide the preconditions for a decision of the superior body. If the appeal has been submitted to the superior body directly the regulation of art. 138 para. 1 is applicable.

## Article 135 Conditions for admissibility of the appeal

### 1. The appeal shall be admissible if it meets the following conditions:

- a) it is not expressly excluded by law;
- b) the applicant has legitimacy under Article 128 of this Law;
- c) it is filed within the time prescribed by Article 132 of this law, and
- d) any other condition provided for in the law.

## A. General introduction

### I. Content and purpose of the norm

Art. 135 prescribes preconditions for the admissibility of the appeal but without stating the consequences of failing the admissibility. Therefore, the consequences must derive from the systematic view of the following and the preceding articles of this part of the CAP, especially from art. 128 and art. 136, 137. As a rule, one can say an appeal must meet the preconditions listed in art. 135 to achieve a substantial review of the administrative act, action or the omission of an act or action (see below sec II). Even as a rule, the public body has to prove the admissibility of appeals *ex officio*.

The preconditions stated in art. 135 lit. a) and d) have a clarifying character only. It is quite clear that an appeal is not admissible if expressly excluded by law, as stated in lit. a). The same applies to lit. d), because special law might comprise additional preconditions for the admissibility of appeals in special cases.

Of major importance are the precondition stated in lit. b) and c). In lit. b) it is made clear that an appeal must be seen as not admissible if the party doesn't claim an affection of its rights or legal interests in a substantial manner as prescribed in the commentary to art. 128 para. 1. In this case even filing a lawsuit to the competent court is not admissible because claiming an affection of subjective rights or legal interests are precondition to file lawsuits as well.

### II. Constitution and EU-law

There are no doubts that art. 135 is compatible with the requirements of the Albanian constitution and EU-law. The preconditions of art. 135 lit. b) and c) are proportional and reasonable regarding the right to appeal and to achieve judicial protection against the affection of subjective rights or legal interests. Even the exclusion of the substantial review in case of failing deadlines must be seen as in accordance with EU-law.

### III. Scope of the norm

Art. 135 states conditions for admissibility for all kinds of appeals regulated in art. 130. That means for appeals against administrative acts, procedural actions and the omission of administrative acts or procedural actions.

### IV. Legal consequences

If a party failed to meet the deadlines provided in art. 132 the appeal must also be seen as not admissible unless the party must be granted a reinstatement in the deadline in accordance with art. 53, 54. If no reinstatement can be granted the appeal is not admissible and will not reviewed in a substantial manner. In this case even a lawsuit to the competent court is blocked due to the precondition stated in art. 129. A party failing the deadline cannot exhaust the remedy-procedure because the public bodies are not entitled to decide on the appeal in a substantial manner.

## B. Conditions for admissibility of the appeal in details

### I. Admissibility expressly excluded by law (lit. a)

As mentioned above already art. 135 lit. a) must be seen as a clarification only because it is quite clear that special law may exclude the possibility of filing an appeal if it is in accordance with the constitution and EU-law. Despite the wording of art. 135 an explicit exclusion it is not necessary. It is sufficient if special law states the exclusion in a sufficient clear manner.

### II. Legitimacy to appeal (lit. b)

As a rule, legitimacy is an absolute precondition for the right to appeal. According to art. 128 para. 1, legitimacy is given if the party can claim that its subjective rights or legal interests are affected by the administrative act, procedural action or by the omission of such acts or actions. Claiming the affection in a substantial way must be seen as sufficient for admissibility and for the right to get reviewed the object of the appeal in a substantial way. The reviewing might have the result that subjective rights or legal interests are not affected by the act or action or omission the appeal has been filed against.

### III. Keeping the deadline (lit. c)

Failing the deadline provided in art. 132 an administrative appeal must be seen as not admissible unless the preconditions for reinstatement are not met. As a rule, the competent public body has to prove this precondition *ex*

officio. The public body is not entitled to accept even an appeal delayed and to review the object of the appeal in a substantial way.

As clarified in art. 54 para. 2 lit. c) a reinstatement can be requested even for remedy deadlines stated in art. 132. This is of high importance if the administrative act does not comprise a disposition part provided for in art. 99 para. 2 lit. c) indicating the right to appeal, including the public body where the appeal may be filed, the remedies, the deadline for lodging the appeal and the way of its calculation. If the administrative act fails to meet these preconditions a party must be seen as entitled to ask for reinstatement in accordance with art. 54.

#### IV. Other conditions provided by law (lit. d)

As mentioned above already even art. 135 lit. d) must be seen as a clarification only because it is quite clear that special law may install supplementary precondition to the admissibility of filing an appeal if it is in accordance with the constitution and EU-law.

## Section 2 The procedure of reviewing the administrative appeal against the act

### *Article 136 Procedure of reviewing the appeal by the competent public body*

1. An appeal against an administrative act shall be examined first by the competent public body itself, except for cases when it is provided for otherwise by law.
2. The competent public body shall initially examine whether the appeal is acceptable and only if this is the case, it shall examine the legality and suitability of the administrative act subject to appeal. If necessary, the competent public body may perform additional administrative investigations.
3. If the annulment, repeal or amendment of the appealed administrative act or the issuance of the refused administrative act would cause harm to another party, the competent body should give it the opportunity to be heard, under Article 87 of this Code, before making a decision on the appeal filed.
4. When the competent public body considers that the appeal is admissible and fully grounded, it shall annul or amend by means of a new administrative act the appealed act, or respectively issue the rejected act as required by the party.
5. When the competent public body considers that the appeal is not admissible or fully grounded, it shall, without delay and without being expressed on it, forward it for review and decision to the superior body along with all relevant documents of the file and a written report on its position.

#### A. General Introduction

##### I. Content and purpose of art. 136

##### 1. The structure of the appeal procedures

There are two different orders of appeal procedures depending on whether the appeal is filed against an administrative act or against the omission of an administrative act: The appeal filed against an administrative act (or against a procedural action in cases comprised by art. 130 para. 2) is regulated in art. 136, 137, the appeal filed against an administrative omission is regulated in art. 138. According to art. 136, 137 the appeal procedure has to be conducted – as a rule – in two phases. In the first phase an appeal shall be examined by the competent body itself which has issued the administrative act or procedural action (para. 1). If this body comes to the conclusion that the appeal is admissible and fully grounded it shall annul or amend by means of a new administrative act the appealed act or respectively issue the act as the appellant has required (para. 4). In all other cases the competent body has to forward the appeal procedure to the superior body which is designated to take a final administrative decision on the appeal in accordance with art. 137. If the appeal is filed against an administrative omission the law provides only one procedural phase: The public body failing to issue an administrative act within the deadline has no jurisdiction to decide upon the appeal but the superior body has to review directly. The reason for the difference is twofold: on the one hand the competent body cannot be expected to conclude the appeal procedure in a proper way when it could

not manage to decide on the request within the deadline stated, on the other the regulation allows the superior body effective control over the competent body in terms of timely performance of the administrative procedures.

## 2. First stage of the procedure (reviewing by the competent authority)

The first stage of the procedure starts with submitting the appeal to the competent body. In the first step, the competent body has to examine whether or not the appeal is acceptable in accordance with art. 135. If the public body finds the appeal not (fully) acceptable it has to forward the appeal along with all relevant documents of the file (para. 5) and a report on its position. The same applies if the competent body considers the appeal as not fully grounded. Even if the competent body would come to the conclusion that the appeal is only partly admissible or partly grounded it is not entitled to annul or amend the administrative act only partly and forward only the rest to the superior body. Due to efficiency reasons the law doesn't provide partial decisions of the competent body in the appeal procedures.

## 3. Procedural steps of the first phase of the appeal procedure

The competent body has – as a rule – the full jurisdiction to review the appeal if it is considered as acceptable (admissible) in accordance with art. 135 (see above explanation on art. 135 under A. I.). In the first step the body has to examine the acceptability. If the appeal is considered as inadmissible the competent body has to transfer it to the superior body without any further checking the legality and suitability of the administrative act. If the appeal is considered admissible the competent body has to continue the appeal procedure and to examine in the second step the legality and suitability of the administrative act.

The scope of reviewing in the second step is the same as the scope of examining during the previous procedure which has led to the contested administrative act. The competent body has to review not only the legality but also the suitability (para. 2 s. 1) and is entitled to perform additional administrative investigations (para. 2 s. 2). If necessary, the competent body must give the opportunity to be heard (art. 87) to a third party which may be affected by a substantive decision.

If the competent body comes to the conclusion that the appeal is admissible and fully grounded it has to take a decision in accordance with para. 4 and annul or amend the contested administrative act or to issue the rejected act as required by the appellant. If the appeal is not considered as admissible and fully grounded the competent body has to proceed in accordance with para. 5 and forward the appeal completely to the superior body. Even if the body has conducted further investigations it is not entitled to decide other than in favour of the appellant.

## 4. Partially decisions of the competent body?

If the competent body cannot consider the appeal as admissible and fully grounded it must transfer the appeal to the superior body immediately along with the relevant documents of the file and a report (para. 5). In accordance with the wording (fully grounded), the competent body is not entitled to decide partly in favour of the appellant and to transfer the rest of the appeal to the superior body.

## 5. Constitution and EU-Law

Neither the Albanian constitution nor EU-Law requires an administrative appeal procedure before a case can be filed to the competent court. On the other hand, neither the constitution nor EU-Law forbids provisions for an administrative appeal procedure before a citizen has the right to bring his case to a competent court.

## II. Legal consequences of art. 136

As a consequence, all appeals against administrative acts irrespective of whether they are addressed to the competent or the superior body or another body must be forwarded initially to the competent body which has issued the contested administrative act in order to be reviewed by this body in the frame stipulated by art. 136. The superior body has no jurisdiction unless the competent body has concluded its review procedure and forwarded the case along with the files and the report.

Another legal consequence is that the competent body is entitled to annul or amend the administrative act issued by itself without recourse to the provisions of art. 113 – 118. The remedy procedures must be seen as independent reviewing procedures. During the appeal procedure the competent body is entitled to decide in favour of the appellant outside the regular administrative procedures provided to annul or amend administrative acts.

### III. Scope of application

As mentioned already art. 136 can be applied only to appeals against administrative acts or – in cases stipulated in art. 130 para. 2 – against procedural actions. Moreover, art. 136 is applicable only if not otherwise provided by law. The regulations of art. 136 are not applicable if the competent body has failed to issue an administrative act within the deadline provided for. In these cases the law provides that the appeal has to be transferred directly to the superior body (art. 138). The reason is that it cannot be expected that the competent body which has failed to decide within the deadline would decide on the appeal properly.

#### B. Reviewing procedure in details

##### I. Examination by the competent body (para. 1)

###### 1. Appeal against an administrative act

Para. 1 applies only if the appeal is directed against an administrative act, regardless of the content of the regulation. Comprised are all kinds of administrative acts, even administrative acts which reject a request fully or partially and regardless whether they are issued by request or ex officio. Para. 1 applies as well if the appeal is directed against administrative actions prescribed in art. 130 para. 3. It applies to all appeals against these acts regardless of the admissibility of the appeal. It is up to the competent body to decide whether or not the appeal is admissible.

###### 2. Competent body

As a rule the competent body is the same body which has decided on the administrative act contested by the appeal or which has rejected to issue the administrative act the appellant has requested for. There are only two exceptions of this rule: Firstly if it is otherwise provided by law, secondly if the jurisdiction has changed in the time between the issuing of the contested administrative act and the submission of the appeal. In the latter case the competent body which has got the actual jurisdiction shall decide in accordance with art. 136. As a rule, the body which used to have jurisdiction is not entitled any more to decide on the appeal, unless the body is keeping the jurisdiction to decide on appeals against administrative acts issued itself.

The administrative body which has issued the administrative act is the competent body even if it did not have jurisdiction to decide on the administrative act during the administrative procedure. Competent body in the sense of this article is – as a rule – the administrative body which has issued the administrative act irrespective of whether it has had jurisdiction or not.

##### II. The scope of examination (para. 2)

###### 1. Admissibility

In a first step the competent body has to examine whether or not the appeal can be considered admissible. As stipulated in art. 135 the appeal shall be admissible if it is not expressly excluded by law, if the appellant has legitimacy in accordance with art. 128, if it is filed within the deadlines prescribed by art. 132 and if it met any other condition provided for by law.

How to prove the legitimacy of the appellant is prescribed in the commentary of art. 128 (under B.I.2). If the appellant has failed to file his appeal within the deadline stipulated in art. 132 it must be extended to the question whether or not a reinstatement has to be granted. In accordance with art. 54 para. 1 a party may ask for the reinstatement of the deadline if for reasonable reasons it has been prevented to comply with the deadline.

As clarified in art. 54 para. 2 lit. c) a reinstatement can be requested even for remedy deadlines stated in art. 132. This is of high importance if the administrative act doesn't comprise a disposition part provided for in art. 99 para. 2 lit. c) indicating the right to appeal, including the public body where the appeal may be filed, the remedies, the deadline for lodging the appeal and the way of its calculation. If the administrative act fails to meet these preconditions a party must be seen as entitled to ask for reinstatement in accordance with art. 54.

###### 2. Legality

By using the term "legality" para. 2 refers to art. 107 as a consequence of the legality principle (art. 4). According to art. 107 an administrative act is lawful if it was issued by the competent public body, in accordance with the legal principles and requirements of the legislation in force. Moreover, para. 2 refers to art. 128 para. 2. According to art. 128 para. 2 administrative appeal remedies may be exercised due to unlawfulness.

a) Objective infringement and violation of subjective rights and legal interests

As stated in the commentary of art. 128 (under B.I.1) the infringement of objective law must not be seen as sufficient to annul or amend an administrative act in the appeal procedure. On the contrary, the infringement must lead to a violation of subjective rights or legal interests of the appellant.

b) Legislation in force

Legislation in force comprises the formal law and the secondary legislation as well. The examination of the administrative act must take place on the basis of the law which is applicable in the very moment of the appeal procedure. If the applicable law has changed in the time between the issuing of the contested administrative act and the appeal examination the actual law must be relevant unless the scope of the new law doesn't comprise the contested act due to its transitional provisions.

c) The distinction between material and procedural law

As stated in art. 107 the examination in the appeal procedure comprises both material and formal requirements of the administrative act. But the treatment of material and formal legal requirements in the appeal procedure must be seen as different. While the violation of material law shall – as a rule – lead to an annulment or amendment of the administrative act the violation of some formal requirements may lead to a correction of the contested administrative act by the competent body, if possible (see below B.III. of art. 137 ).

### 3. Suitability

The appeal examination comprises the "suitability" of the administrative act. Since the law doesn't determine the term suitability examining the suitability means the proper use of discretion in accordance with art. 3 para. 3 in cases the law provides discretionary power for the competent administrative body. The competent body which has to examine the administrative act issued by itself is given not only the right to examine whether or not the discretion has been exercised in a lawful way (art. 11) but the entire right to examine and to amend or alter its decision if it considers the decision as not suitable any more.

### 4. Additional investigations

Para. 2 sent.2 makes clear that the competent body is entitled to perform additional investigations if it considers it necessary to examine legality and suitability. It is not restricted to the facts the contested administrative act has been based on. This is because the competent body shall have the same range of examination possibilities as it has before during the administrative procedure.

#### III. Hearing a third party (para. 3)

Para. 3 contains further requirements for the appeal procedure. It is a consequence of the principle to be heard in administrative procedures stated in art. 87. It makes clear that the same right must apply to the appeal procedure stated in art. 136 if the annulment or amendment of the appealed administrative act "would cause harm" to another party. This right to be heard must consequently comprise the right to inspect files stipulated in art. 45 as made clear in art. 87 para. 2 lit. c). The entire regulation of the right to be heard (art. 87 ff.) shall apply in the appeal procedure as well.

#### IV. Admissible decisions of the competent body (para. 4)

##### 1. General principle

Acc. to para. 4 the competent body reviewing the administrative act is entitled to decide on the appeal by using the entire scope of decisions possible in favour of the appellant. As a rule the competent body has the same jurisdiction as it has before the administrative procedure was completed by issuing the administrative act. But there are two important restrictions because the appeal must be considered as admissible and fully grounded. Firstly the competent body is not entitled to decide against the appellant, secondly it is not entitled to decide only partly in favour of the appellant unless the subject of the appeal can be divided into independent parts which can be decided on separately.

##### 2. Annulment or amendment of the administrative act

The competent body is entitled to annul or amend the appealed administrative act by issuing a new administrative act on the same issue in favour of the appellant. As stated above already issuing a new administrative act is allowed only if the competent body considers the appeal as admissible and fully grounded. A decision on a part of the subject is admissible only if the subject can be divided into independent parts.

If the appellant claims only formal mistakes of the appealed administrative act, if for instance the administrative act doesn't comply with the requirements of art. 99, the competent body must be seen as entitled to amend the administrative act and to issue a formally correct administrative act instead of the appealed one. In this case the competent body considers the appeal as fully grounded although the material content of the decision has remained the same. This possibility is to correct formally incorrect administrative acts if no material mistake is asserted.

### 3. Issuing the rejected administrative act

As made clear in the second part of para. 4, the competent body is entitled to issue an administrative act the appellant has requested for and annul the rejection of the request. Both regulations (annul the rejecting act and issuing a new act) can be bound together in only one administrative act.

## V. Transfer of the appeal to the superior body (para. 5)

### 1. Appeal not admissible and fully grounded

According to para. 5 the competent body has to forward the appeal to the superior body if it doesn't consider the appeal as admissible and fully grounded. As stated above already the competent body must be seen entitled to split the appeal and decide on the appeal partly in favour of the appellant if the subject of the appeal can be divided in this way. In this case the competent body must forward only the part of the appeal it has not decided on in favour of the party.

If for instance the subject of the contested administrative act comprises two legally independent regulations the competent body is entitled to decide on one of them in favour of the party and transfer only the other to the superior body in accordance with para. 5. On the other hand: If for instance the appeal is filed against an administrative act which contains the duty to pay a certain amount of money the competent body is not entitled to reduce the amount by amendment and forward the rest of the administrative act to the superior body. In this case the appeal must be forwarded entirely to the superior body.

### 2. Forwarding with all relevant documents

Forwarding the appeal means transferring the whole file of the administrative procedure and the appeal procedure to the superior body. Although the wording of para. 5 comprises only "relevant" documents it must be assumed that all documents of the file must be transferred because the question whether or not a document is relevant to decide on the appeal is up to the superior body. Forwarding the appeal to the superior body is a procedural action which can be subject of an appeal only if regulated by special law (art. 130 para. 2).

### 3. With a written report

The competent body must complete the forwarded files with a written report of the competent body comprising its legal position on the appeal. This is not only to rectify and clarify to the superior body the competent body's position but also to make easier the work of the superior body using the considerations in the process of its own examination and decision.

The report has an internal character and must not notified the appellant or other parties. Since the report shall be part of the file and by inspecting the files the parties may take notice of the report.

### 4. Without delay and being expressed

As stated in para. 5 the forwarding of the appeal to the superior body must take place immediately and ex officio. A special request is not required.

*Article 137 Procedure for the review of the appeal by the superior body*

1. In the case provided for by paragraph 5 of Article 136 of this Code, the superior body will review the appeal as forwarded by the competent authority and, if necessary, conduct additional investigations or, it shall order the competent authority to conduct additional investigations and notify on them. Paragraph 2 and 3 of this Article of this law shall apply also in this case.
2. The superior body shall, upon an administrative act, reject the appeal if it turns out to be not acceptable or ungrounded.
3. If the superior body considers that the ordering part of the appealed administrative act is legal, but the reasons given are other than those provided by the competent public body in the appealed act, or if it considers that its reasoning is incomplete, it shall reject the appeal and present new reasoning.
4. If the superior body considers that appeal is admissible and grounded, it should finally decide by a new act to annul or amend, in whole or in part, the appealed act, or to respectively issue the act required by the party.
5. Unless otherwise expressly provided for by law, the act of the superior body may only be in favour of the appellant.

A. General Introduction

I. Content and purpose of art. 137

The art. 137 regulates the second phase of the appeal procedure, when the competent body has come to the result that the appeal is either not admissible or not fully grounded (art. 136 para. 4) and has forwarded the appeal with the files and the report to the superior body (art. 136 para. 5). The superior body shall conduct the procedure, review the appealed administrative act and decide on the appeal.

Para. 3 opens the possibility to correct or to amend the reasoning of the appealed administrative act if the ordering part of the act has turned out as legal. This is of high importance because in the consequence formal requirements don't lead to illegality and to annulment of the administrative act if they are met by the decision of the superior body.

II. Constitution and EU-Law

The regulations of art. 137 are in line with the constitutional and European legal requirements.

III. Legal consequences of art. 137

As an important legal consequence para. 3 restricts the effects of formal unlawfulness of administrative acts in the appeal procedure by providing a correction if the ordering part of the act is lawful.

IV. Scope of application

Art. 137 applies to appeals against administrative acts within the scope of the code only. If the appeal is directed against administrative silence (art. 130 para. 1 second alternative) only art. 128 is applicable.

B. The appeal procedure in detail

I. Reviewing the appeal, conducting investigations (para. 1)

1. Scope of Reviewing

The superior body has to review initially the admissibility of the appeal in the same way the competent body had to do (see art. 136). The superior body is not entitled to examine the legality of the appealed administrative act if the appeal is not admissible.

Unlike the reviewing of competent body in accordance with art. 136 para. 2 the reviewing of the superior body is restricted to legality. The superior body is not entitled to review even the suitability of the administrative act.

2. Conducting additional investigations

If the superior body considers necessary further facts in order to decide on the appeal it is entitled to conduct additional investigations by itself. The regulations of art. 80 ff. shall apply to those investigations *mutatis mutandis*.

### 3. Additional investigations by the competent body

Instead of conducting the investigations by itself the superior body is entitled to mandate the competent body to carry out the investigations needed. This is to disburden the superior body because conducting investigations takes often a high amount of time and effort. Moreover, the competent body may have a better expertise to search for evidence. On the other hand the superior body shall conduct the investigation by itself if there are doubts whether the competent body will carry out the mandated investigation properly and open minded.

If the superior body will mandate the competent body it has to describe the questions which are to answer and to determine the ways and means of investigation precisely. The superior body is not entitled to transfer the case back to the competent body in order to achieve additional evidence in general.

If the competent body has carried out the mandate to conduct the investigation it has to notify the superior body of the result of its efforts. That means the competent authority must draw a report on the investigation describing the ways and means and the result. The superior body is entitled to claim additional explanations even to claim a verbal report of the persons conducting the investigation.

## II. Rejecting the appeal as not acceptable or ungrounded (para. 2)

### 1. Acceptability and legality

As mentioned above the superior body has to start the reviewing by examining the admissibility of the appeal in accordance with art. 135. If it doesn't consider the appeal as admissible it has to reject the appeal by an administrative act. The same takes place if the superior body considers the appealed administrative act as legal. By issuing an administrative act rejecting the appeal as inadmissible or ungrounded the appeal procedure is completed. In this case the administrative appeal remedies are exhausted in the sense of art. 129 and the appellants are entitled to file a lawsuit to the competent court.

### 2. The rejecting administrative act

The decision to reject the appeal has to be taken and issued by an administrative act. This regulation refers to art. 98 ff. which provisions and requirements are to meet by the administrative act of the superior body.

## III. Correction and amendments to meet formal requirements (para. 3)

### 1. False and incomplete reasoning

If the ordering part of the appealed administrative act is legal but the superior body considers the reasons given by the competent body in the appealed act false or incomplete it has to reject the appeal by presenting new reasoning. Ordering part of an administrative act is in accordance with art. 99 para. 2 lit. c) the part of the administrative act which indicates what has been decided. Despite the wording of art. 99 para. 2 lit c) ii) the ordering part comprises also the decision at what time the act shall enter into force. This is an integral part of the decision stipulated in art. 99 para. 2 lit.c) i) because it regulates the temporal extension of the material regulation of the administrative act.

If the decision is considered legal but the reasons given for this decision are – in the view of the superior body – either false or incomplete the superior body has to present new reasons or to amend the incomplete reasons and reject the appeal. According to the wording of para. 3 the regulation applies only if the competent body which has issued the appealed administrative act has given reasons at all. If the administrative act doesn't contain any reasoning para. 3 is not applicable.

In the consequence, errors or deficiencies of the reasoning part (see art. 99 para. 2 lit. b) shall not lead to absolute invalidity as stated in art. 108 lit. a) iii) but to a correction or to an amendment of the reasons in accordance with para. 3. If the appellants file a lawsuit against the administrative act the competent court has to examine the administrative act on the basis of the reasons given by the superior body.

### 2. Correction of other formal requirements?

Since art. 137 para. 3 provides a correction of the reasoning part of an administrative act only, the superior body is not entitled to correct other parts of the administrative act listed in art. 99 by its own decision.

#### IV. Decision in favour of the appellant (para. 4)

##### 1. Appeal admissible and grounded

The superior body shall decide in favour of the appellant if it considers the appeal admissible and grounded. Unlike the regulation in art. 136 para. 4 the appeal must not be “fully grounded”. That means the superior body is entitled to decide partly in favour of the appellant and reject the rest of the appeal. In this case the superior body altered the appealed administrative act partly. The appellant is entitled to file a lawsuit in regards the rest of the appeal so far the superior body has it rejected.

##### 2. Annulment or amendment

The superior body is entitled to annul the appealed administrative act fully or partly or modify the act in favour of the appellant (see para. 5). In the very effect in cases of para. 4 after conclusion of the appeal procedure there is only one administrative act issued by the superior body.

##### 3. Issuing the administrative act requested

The superior body is even entitled to issue an administrative act the appellant has requested. In this case the administrative of the competent body which has rejected the request must be annulled. If the superior body has issued an administrative act in favour of the appellant partly but rejected a part of the request the appellant may file a lawsuit to the competent court.

#### V. No reformation *in peius* (para. 5)

Despite the misleading wording of para. 5 contains only the prohibition of a reformation *in peius*. That means the superior body is not entitled to decide on the appeal in a way which deteriorate the position of the appellant. The superior body has the option either to decide in accordance with para. 4 in favour of the appellant or to reject the appeal as not admissible or ungrounded. It is not entitled to alter the ordering part of the administrative act (art. 99 para. 2 lit.c) in a way which is more inconvenient to the appellant.

#### Article 138 Appeal against administrative omission

1. An appeal against administrative omission shall be directly reviewed by the supervisor body. The superior body shall immediately ask the competent body to submit the case file and a written report on the reasons of administrative silence.
2. The supervisor body shall initially examine whether the appeal is admissible or not and if it is so, it shall make a decision on the request of a party, as it has been submitted to the competent body.
3. The superior body will make a decision on the request based on the file of the case or, if necessary, conduct additional administrative investigations, or order the competent body to conduct such additional investigation and notify the results of the investigation.
4. Except as otherwise provided for by the law, the superior body shall solve the case by means of issuing a final act.

#### A. General Introduction

##### I. Content and purpose of art. 138

Unlike appeals against administrative acts or actions the appeal against administrative omission shall be treated and reviewed by the superior body only. Appeals submitted to the competent authority have to be forwarded to the superior body. The competent body doesn't have any jurisdiction to decide upon appeals in these cases. The reason for skipping the competent body is that this body has failed to issue an administrative act within the stated deadline. For this reason it cannot be expected that the competent body which failed to decide within due time. The direct jurisdiction of the superior body shall avoid further delay. The reasons for failing the deadline are not relevant, even when the delay could be seen as justified the competent body has no jurisdiction any more when the deadline has been failed.

## II. Constitution and EU-Law

As mentioned already, the regulations of an appeal procedure is not an infringement to the fundamental rights of art. 42 para. 2 of the constitution.

## III. Legal consequences of art. 138

Art. 138 skips the first stage of the procedure as stipulated in art. 136 (see explanation on art. 136 under A. I. 1.) for an appeal against administrative omissions.

## IV. Scope of application

The special regulation of art. 138 applies only in the cases stipulated in art. 128 para. 3 lit. a) i) if a public body fails to decide on a request of a party within the stated deadline. According to art. 130 para. 1 this is called the appeal against administrative silence. If the competent body rejects a request to issuing an administrative act in favour of the party (permission, license etc.) within the deadline art. 138 is not applicable because it has completed the procedure properly.

Moreover it is clear that art. 138 applies only if not otherwise stipulated by special law.

## B. Appeal against administrative omission in details

### I. Direct jurisdiction of the superior body (para. 1)

#### 1. Appeal against administrative silence (sent.1)

Art. 138 is applicable if the competent body fails to issue an administrative act a party had requested for within a deadline stated by law. The norm refers to art. 91 according to which an administrative procedure initiated upon request should be concluded within a deadline set by special law. If special law does not provide a specific deadline art. 91 para. 2 applies which provides a deadline of 60 days, which can be extended once (art. 92).

Art. 138 is not applicable if art. 97 applies because according to the silent consent rule the request shall be deemed approved. In these cases is no need to appeal because the requested administrative act shall be deemed as issued in silence (art. 97 para. 2). Since the silent consent rule of art. 97 is applicable only if provided for by special law it is necessary to provide a remedy in all other cases of administrative omission.

#### 2. Asking for files and a written report (sent.2)

In cases regulated by art. 138 the superior body has the whole jurisdiction and responsibility to decide on the request because it is not restricted to the reviewing of the administrative act issued by the competent body. The superior body has to decide instead of the competent body and has to conduct the appeal procedure accordingly. For this reason, the superior body has to ask for the files and records created by the competent body already.

Moreover, the superior body has to ask the competent body to submit a written report on the reasons of the administrative silence. This is to provide a control on the behaviour of the competent body and to check the reasons for the administrative omission. art. 138 does not provide consequences for the competent body. Providing consequences is a matter of the civil service law.

### II. Examination and decision of the superior body (para. 2)

#### 1. Admissibility of the appeal

Para. 2 makes clear that the superior body has to examine initially whether or not the appeal is admissible. This corresponds to the regulation in art. 137 para. 2. As commented there the appeal is admissible if all preconditions are met stated in art. 135. If the appeal cannot be assessed acceptable the superior body shall reject the appeal without examination of the substance of the appeal. The form of the rejection is regulated in para. 4 (see below).

#### 2. Decision on the request as submitted

If the superior body assesses the appeal as admissible it shall take a decision on the request and issue the respective administrative act. As mentioned above already the superior body has the full jurisdiction to decide on the request instead of the competent body failing to issue an administrative act within the deadline.

It is of importance that the appellant must not amend his request during the appeal procedure. The superior body has to decide on the same request the appellant has submitted to the competent body before.

### III. Basis of the decision, investigations (para. 3)

Para. 3 makes clear the superior body has to take its decision on the request based on the file which has to be forwarded to the competent body by the competent body, but – if necessary – also on the basis of investigation of its own. There are no restrictions to the superior body concerning the investigation needed to decide on the request.

Moreover the superior body is entitled to order further investigations of the competent body. In this comments on similar regulation in art. 137 para. 1 shall apply.

### IV. Solving the case by issuing a final act (para. 4)

#### 1. Solving the case

Para. 5 makes clear that the superior body shall solve the case by issuing a final act if not otherwise stipulated by special law. This means that the superior body must conclude the procedure by its own and without forwarding the case to the competent body again. As mentioned above already the superior body has to act in the same way and manner the competent body had to do regularly.

#### 2. Issuing a final act

The administrative act the superior body has to issue is final. By the final decision of the superior body the appeal procedure is concluded and the administrative procedure is as well. The administrative act issued by the superior body must meet all requirements provided for acts issued by the competent authority as well.

### *Article 139 Content and effect of the act resolving the appeal*

1. Besides the requirements of Article 100 of this Code, the reasoning of the administrative act that resolves an appeal shall also contain an evaluation of the allegations put forward by the party in the appeal.

2. Except as otherwise provided for by the law, the act that resolves the appeal shall have legal effect on to the past. Paragraph 2 and 3 of Article 116 of this Code shall apply also in this case.

### A. General Introduction

#### I. Content and purpose of art. 139

Art. 139 para. 1 contains an amendment to the reasoning provisions in art. 100 by stating that the final administrative act concluding the appeal procedure must contain an evaluation of the allegations the party has submitted with its appeal. This is to make sure that the superior body has taken into account all these allegations of the appellant in order to take a legal and proper decision. By doing so the final decision is transparent to the appellant and has a better chance to being accepted.

Art. 139 para. 2 provides that the final administrative act issued to conclude the appeal procedure shall have legal effect on to the past. This is to grant the appellant the position he would have got if the legal and proper decision would have been taken, issued and notified in an earlier stage during the administrative procedure. Moreover, in these cases art. 116 para. 2, 3 shall apply *mutatis mutandis*.

#### II. Legal consequences of art. 134

If the superior body fails to amend the reasoning part of the administrative act in the way provided for in para. 1 the decision is formally unlawful.

#### III. Relation to previous CAP

No comparable regulation

#### IV. Scope of application

Para. 1 applies only to the final decision of the superior body because the competent body is restricted to decide in favour of the appellant only (art. 136 para. 4). In these cases according to art. 101 lit. b) a reasoning part is not required.

Para. 2 is applicable to the final decision of the competent body in accordance with art. 136 para. 4 as well.

## B. Content and effect of the act resolving the appeal in details

### I. Additional reasoning (para. 1)

The final decision must meet the requirements of art. 100 and contain in addition the allegations of the appellant during the appeal procedure. art. 101 does not apply to the appeal procedure.

### II. Retroactive effects (para. 2)

The final decision of the superior body and in cases stipulated in art. 136 para. 4 shall have retroactive effects. The appellant's position shall be the same as it would have been if the legal decision would have been issued and notified earlier.

## *Article 140 Deadline for notifying the act resolving the appeal*

1. Except as otherwise provided for by law, the administrative act that resolves the appeal shall be issued and notified to the party within 30 days of the filing of the appeal.

2. The period provided for in Paragraph 1 of this Article may be extended when it is required to conduct additional administrative investigations. Article 92 of this Law shall apply also to the extension of the deadline as provided for by Paragraph 1 of this Article.

3. Article 93 of this Code shall not apply in the case of administrative appeal.

## A. General Introduction

### I. Content and purpose of art. 140

Art. 140 provides a deadline for concluding the appeal procedures. Since the conclusion of an appeal procedure is a precondition for filing a lawsuit to the competent court (see art. 129) it must be finished within proper time. Therefore the whole appeal procedures shall not last longer than 30 days. Only one extension can take place only if further investigations are required.

### II. Legal consequences of art. 134

Art. 140 does not provide legal consequences if either the competent body or the superior body cannot issue the final administrative act within the deadline stated in para. 1 or extended in accordance to para. 2. If the competent or superior body causes financial damages by exceeding the deadline a liability may take place in accordance with the Albanian damage compensation law.

### III. Relation to previous CAP

There are no comparable provisions in the previous CAP

### IV. Scope of application

Art. 140 is applicable to the whole appeal procedure comprising the first phase (art. 136, 138) and the second phase (art. 137) as well. This means that both phases together must not last longer than the deadline stated in para. 1 unless the preconditions of an extension of the deadline (art. 92) are fulfilled.

## B. Deadline for notifying the act resolving the appeal in details

### I. The deadline of 30 days (para. 1)

Para. 1 stipulates a deadline of 30 days for conducting the whole appeal procedure. The time period shall begin with the filing of the appeal either to the competent or to the superior body. If the competent body does not conclude the appeal procedure by issuing an administrative act in favour of the party the superior body must issue and notify the final administrative before the deadline has been expired.

II. Extension of the deadline (para. 2)

Para. 2 restricted an extension of the deadline to cases further investigations are required. Other reasons for a delay cannot lead to an extension. Moreover, by referring to art. 92 the deadline can be extended only once under the conditions of art. 92.

III. No applicability of art. 93 (para. 3)

Para. 3 excludes the applicability of art. 93 in the appeal procedure. Therefore the death of a party or the termination of a legal entity cannot lead to a conclusion of the appeal procedure. The competent or the superior body must decide on the appeal even in these cases. The administrative act must be addressed and notified in these cases to the successor of the party.

Unfortunately, the law does not provide the possibility of a further extension of the deadline in these cases.

## **CHAPTER III**

### **ADMINISTRATIVE OBJECTION**

#### *Article 141 Scope of administrative objection*

1. In case of administrative complaint against another administrative action, under the regime of administrative law, the party may require from the public body:

a) the cessation of the performance of another administrative action;

b) performing of another administrative action, to which the party is entitled, if such action has been required by the party but the public body has failed to act;

c) the withdrawal or amendment of a public declaration;

ç) the declaration of another administrative action as unlawful and the rectification of its consequences.

2. The party may, in the case of administrative objection regarding the indirect delivery of public utility services, and other public services, require the exercise of regulatory functions or supervision by the regulatory, supervisory or licensing body in order to ensure the benefiting by the objecting party of a service, for which it is entitled under the law, and the respecting by the private or public entity of the duties provided for in Paragraph 1 of Article 128 of this Code.

#### A. General Introduction

##### I. Content and purpose of art. 141

As stated already in art. 128 para. 3 lit.b) the code provides not only the right to appeal against administrative acts or the omission of these acts but also the right to lodge an administrative objection against other administrative actions. Despite the misleading header art. 141 doesn't contain further regulations of the scope of the objection. It repeats only art. 128 para. 3 lit.b) so far: According to para. 1 objections can be lodged only against administrative actions, which fail to meet the criteria for being qualified as administrative acts or the omission of such an act (art. 3 para. 11). Since the legal effects of other administrative actions are significantly different to the legal effects of administrative acts or omissions of such acts, the CAP provides the objection as a special kind of remedy to fight against administrative actions.

##### 1. Aims and measures of the objection

The main purpose of art. 141 is to provide some specific aims a party may require when lodging an administrative objection. Due to the different legal effects of administrative actions there must be provided different measures to protect the subjective rights and legal interests of a party. Para. 1 comprises 4 different aims of an administrative objection: The cessation of the performance (lit.a), the performance of a required administrative action (lit.b), the withdrawal or amendment of a public declaration (lit.c) and the declaration of an administrative action as unlawful and its rectification (lit.d). In addition, para. 2 provides another aim of an objection regarding the delivery of public utility services. It must not be decided whether or not this listing is complete and final, because it covers all measures necessary to protect legal rights or interests of a party regarding administrative actions.

##### 2. The objection procedure

The regulations of art. 128, 129 applies to the administrative objection as well as to the administrative appeal. As stated in art. 142 para. 1 the formal requirements of art. 131 shall apply to the objection as well. But the other regulations concerning the administrative appeal must not apply to the administrative objection. Especially, the objection doesn't have the suspending effect stated in art. 133. Moreover, art. 143 makes clear that unlike the appeal procedures regulated in art. 136 the objection procedure has only one procedural phase.

#### II. Relation to previous CAP

There are no comparable provisions in the previous CAP

### III. Scope of application

Art. 141 is applicable only if the remedy is lodged against “other administrative actions” (para. 1) and against defective deliveries or public utility services (para. 2).

#### 1. Other administrative actions (para. 1)

The term “other administrative actions” is defined in art. 3 para. 11 and again in art. 126. The definition in art. 126 para. 1 is carried out in a partly negative way: Other administrative actions are all unilateral forms of activities of a public body when exercising its public functions under the regime of the administrative law, “that fail to meet the criteria to be an administrative act or administrative contract and that bring legal effects on subjective rights and legitimate interests”. The elements are:

- Activity of a public body
- When exercising its public functions
- Under the regime of the administrative law
- Which brings legal effects on subjective rights or legal interests
- Which fails to meet the criteria of an administrative act

This definition requires to differentiate between administrative acts and other actions due to the definition of the administrative act in art. 3 para. 1 especially by analysing the legal effects: Administrative acts shall be issued by a public body with the purpose to establish, modify or cease a specific legal relation.

#### 2. Procedural actions (art. 130 para. 3)

The definition in art. 126 para. 1 must be completed by a further criteria: The other administrative action must not be a procedural action defined in art. 130 para. 3 and regulated in art. 130 para. 2. Against procedural actions an objection cannot be lodged because remedies against these actions are specially regulated in art. 130 para. 2: To protect subjective rights or legal interests of a party against procedural actions an appeal can be lodged, but only when the appeal is expressly provided by special law. If there is no provision even an objection is excluded.

For this reason, it is necessary to differentiate between other actions and procedural actions. The latter are defined in art. 130 para. 3 as “any act, action or omission of a public body during the administrative procedure, which is not a final administrative act or administrative act of the completion of the administrative procedure provided for in art. 90.” The confirmation of a verbal administrative act in a written form must not be seen as a procedural action in the sense of art. 130 para. 3 because the final act has been taken already. In cases of omission of the written confirmation an objection can be lodged.

#### 3. Defective deliveries of public utility services (para. 2)

As made clear in para. 2 an objection can be lodged even “to ensure the benefitting ... of a service”. As stated already in art. 2 para. 2 lit. c) the provisions of the CAP shall also apply to public and private entities which provide public services. In case of deficiencies “regarding the indirect delivery of public utility services and other services” the party is entitled to lodge an objection in order to protect its rights to “ensure the benefitting” of the services comprised. The objection has to be addressed in these cases to the regulatory, supervisory or licensing public body (art. 143 para. 1) which has to take the appropriate measures against the entity providing the services.

### B. The regulations of art. 141 in detail

#### I. The aims of an objection (para. 1)

Para. 1 contains at least 4 possible aims of an objection in order to protect the subjective rights or legal interests of the party affected by or through “other administrative actions”. The provisions cover all regulation necessary for an effective protection of the affected parties. Therefore, it must not be decided whether or not the listing in para. 1 can be amended. The party is entitled to require the listed actions by lodging an objection if the action is necessary to protect its subjective rights or legal interests which are affected by “other administrative actions” in case of unlawfulness (see art. 126 para. 2)

### 1. Cessation of the performance of an action (lit. a)

If another administrative action is unlawful (art. 126 para. 2) and affects subjective rights or legal interests, the affected party can require the cessation of the performance of this action. Precondition is that the affecting administrative action has not been concluded already but is still enduring. If for instance, an administrative activity (art. 3 para. 12) produces unbearable (and therefore unlawful) noise impact the affected party may require the cessation of the activity or at least the reduction of the noise impact to a lawful level. If the noiseful works or activities are completed and the affection has come to an end even an objection is settled and a cessation cannot be required anymore. If the result of a finished administrative action causes enduring affections the party may require the rectification of the unlawful consequences of the action in accordance with lit. d).

### 2. Performing the action required (lit.b)

A party may require the performance of an administrative action by lodging an objection if firstly the party is entitled to require the action by law, secondly the party has required the action before in a proper manner and thirdly the public body has failed to undertake the action within due time. The objection can be successful only if the entitlement of the party is still valid and the public body is still obliged to fulfil the requirement in the very moment of the decision upon the objection. Otherwise, the objection has been settled and the party's cannot achieve the required performance any more. To the question whether or not the party may alter its objection and require the declaration of the omission as unlawful see commentary lit.d below.

### 3. Withdrawal or amendment of a public declaration (lit. c)

According to lit. c) a party may by lodging an objection require the withdrawal or amendment of a public declaration if the declaration has turned out as unlawful (art. 126 para. 2) and affects the subjective rights or legal interests of the party. It is up to special law whether or not a public declaration turned out as unlawful and infringe subjective rights of a party. Although the Albanian Constitution does not expressly protect the right to an unaffected personality this right must be seen as part of fundamental rights in art. 15 of the Albanian Constitution and therefore protected by the constitution. Nevertheless the unlawfulness of public declarations must be decided on by special law.

### 4. Declaration of unlawfulness and rectification (lit.d)

According to lit.d) a party may require by objection the declaration of unlawfulness of an unlawful administrative action and its rectification if the subjective rights or legal interests are affected. This possibility is granted especially if the cessation of the activity (lit. a) or the withdrawal of a declaration is either not possible any more due to the finishing of the affecting activity or not sufficient to remove the infringement of subjective rights or legal interests.

There is the question whether or not lit.d) is applicable also when the public body has failed to perform an action required by the party and the right to require this action has been ceased or settled due to the changing of facts or legislation. Since according to art. 3 para. 11, 12 an administrative action is defined as an "activity" it must be seen as problematic to apply lit.d) even to cases of the administrative omission of an required activity.

## II. The aims of an objection regarding the delivery of public utility services (para. 2)

Para. 2 extended the possibility of lodging an objection to cases of deficiencies of the delivery of public utility services. Generally, these cases are comprised by para. 1 lit.b) because the objection is directed to the proper performance of public services in the scope of the CAP (see art. 2 para. 2 lit. c). But the objection covered by para. 2 is not addressed and directed against the provider of the service itself but to the public body which has the competence to control, supervise and direct the provider in order to ensure the proper delivery of public services.

*Article 142 Content and deadline of administrative objection*

1. Article 131 of this Code shall apply also to the administrative objection, to the extent possible.
2. An administrative objection shall be presented within 15 days from the day the party has become aware of the fact, which it is objecting.

A. General Introduction

I. Content and purpose of art. 142

1. Formal and procedural requirements

Art. 142 contains formal and procedural requirements for lodging an objection. According to para. 1 the formal requirements stipulated in art. 131 shall apply also to the administrative objection to the extent possible which means *mutatis mutandis*. Para. 2 stated a deadline of 15 days to present (lodge) the objection to the public body in order to shorten and accelerate the reviewing and to finish the objection procedure as soon as possible.

2. Additional requirements for the admissibility

Although art. 135 is not applicable directly it is quite clear that even an administrative objection must meet the same requirements for admissibility *mutatis mutandis*: An objection is admissible only if it is not excluded by special law and if other conditions provide by special law are not met. A different regulation is made in para. 2 regarding the deadline for lodging an objection. Finally, the requirements stated in art. 142 shall be completed by the provisions stated in art. 128 which are applicable both to appeals and objections. Of special importance is that the party must claim that its legitimate rights or interests are affected (art. 128 para. 1) and that the party shall not have the right to exercise an objection in the same case for the second time.

3. Application of art. 128 para. 4

The latter provision might lead to problems in cases when the affection or infringement of the subjective rights or legal interests is increasing after finishing a first objection procedure. In these cases it is to prove whether or not the second objection must be seen as lodged "in the same case."

II. Scope of application

Art. 142 is applicable only if the remedy must be seen as an objection in the sense of art. 128 para. 3 lit.b) lodged against "other administrative actions" (art. 141 para. 1) and against defective deliveries or public utility services (art. 141 para. 2).

B. Content and deadline of administrative objection in detail

I. Application of art. 131 to the extent possible (para. 1)

The formal requirements for lodging an administrative appeal stated in art. 131 shall be applicable *mutatis mutandis* to the administrative objection as well. That means the objection shall define (see art. 131 para. 1)

- the subject that exercises the objection,
- the body which has to review the other action,
- the action which is being challenged or required, and finally
- the object and causes for which the appeal is made.

Of major importance is the application of art. 131 para. 2 to the lodging of an objection because it is typically more difficult to define the objection in the way stipulated in art. 131 para. 1 than in an appeal procedure. Defining other administrative actions is more difficult because an administrative act as such, its content and aim are apparent and visible easier than other actions. For this reason it is important that any request addressed to the public body shall be assessed as an administrative objection, even if it is not expressly named as such. It must be seen as sufficient for the admissibility of an objection that the purpose to complain against a specific administrative action or against the omission of such an action or against deficiencies of the delivery of a public service is sufficiently clear.

## II. Deadline for objections (para. 2)

Para. 2 stipulates a deadline of 15 days for lodging the objection. The time period starts from the day the party has become aware of the fact against which the objection is directed. After expiring of the deadline an objection against the action or omission of the action or the deficiency of a service is not admissible any more. Since according to art. 128 para. 4 the party shall not have the right to exercise an objection in the same case for the second time keeping the deadline is of high importance.

### 1. Start of the deadline

According to para. 2 the time period starts from the day the party has become aware of the facts which it is objecting. This regulation leads to some problems: Firstly, this day is hard to determine: The party itself must declare the day by lodging the objection. Otherwise the public body must investigate the day especially by asking the party. Secondly, the question is how to deal with when an affecting other administrative action has a long-term or a repeated effect. According to the wording the very first day of the affection must be decisive.

### 2. Keeping the deadline

For meeting the deadline stated in art. 142 the presentation of the objection to the competent body is essential.

### 3. Reinstatement (art. 54)

Furthermore, it must take into account that there is no duty to attach an explanation of the right to lodge an objection as required in art. 99 para. 2 lit.c) for administrative acts. When the party is not notified the right to lodge an objection it may fail to meet the deadline because of ignorance or unawareness. In this case art. 54 para. 2 lit.c) must be applied because there is no difference made between appeal and objection in this matter.

## Article 143 *Review of the administrative objection*

1. The administrative objection in case of indirect delivery of public services shall be addressed and performed by the public regulatory, supervisory, or licensing body. The complaining party shall be informed without delay on the adopted measures by this body.

2. In cases laid down in Subparagraphs "a", "c" and "ç" of Article 141 of this Code, the objection shall be addressed and reviewed by the competent body. The provisions on the acceptance or rejection of the administrative objection shall be applied to the extent possible.

3. In the case of Subparagraph "b" of Article 142 of this Code, the objection shall be addressed to and reviewed by the supervisory body. If the superior body rules in favour of the party, it shall set a deadline to the competent body for performing the other administrative action being requested.

4. The decision of the review of the objection shall be taken and notified within 30 days from the date of its submission. A direct lawsuit may be brought against this decision to the competent court for administrative matters.

## A. General Introduction

### I. Content and purpose of art. 142

Art. 143 contains some provisions for the objection procedure. Firstly it defines the administrative body an objection must be addressed to. Secondly it contains some regulations concerning the procedure to be conducted by the competent administrative body. Unlike the procedure concerning administrative appeals stated in art. 136 the objection procedure comprises one unique phase only. In cases the objection is rejected by the competent body the party might bring a direct lawsuit to the competent court. The same applies if the body competent to decide on the objection fails to take the final decision on the objection within the deadline stated in para. 4 s.1.

### II. Definition of the competent body

As a rule the objection has to be addressed to the competent body. Only in the cases stipulated in art. 141 para. 1 lit.b) must be addressed to the supervisory body because in case of the administrative omission it cannot be seen as reasonable to address an objection to the same body which has failed to act in the past. In cases stipulated in art. 141 para. 2 the objection must be addressed to the public body which has the jurisdiction to act as the regulatory, supervisory or licensing body.

### III. Scope of the norm

Art. 143 applies to the objection within the scope of art. 141 only. It is not applicable to administrative appeals notwithstanding the appeals are lodged against administrative acts or procedural action defined in art. 130 para. 3.

#### B. Review of the administrative objection in detail

##### I. Objection in cases of indirect delivery of public services (para. 1)

###### 1. Addressing the supervisory, regulatory or licensing body (s.1)

If the objection is directed against deficiencies of public services within the scope of art. 2 para. 2 lit.c) the party must address the objection directly to the public regulatory, supervisory or licensing body. The reason is that the aim of an objection in these cases is that this body initiates by using its supervisory or regulatory power that the entity which provides the public services act in alignment with its duties. In many cases it might be difficult for the party to find the regulatory resp. supervisory or the licensing body. If the public service entity refuses to inform about the competent body the party must require information before lodging an objection. In these cases a reinstatement in the deadline must be granted if the party cannot keep the deadline due to lack of information.

If there are different bodies entitled to act as supervisory resp. regulatory and licensing body the objection should be directed to the supervisory or regulatory body because this body must be seen as in the forehand to exert the influence in order to correct deficiencies of the public services delivery. If the party addressed the objection to the licensing body the objection must be forwarded to the supervisory body. The deadline stated in art. 142 para. 2 must be seen as kept if the objection is presented to the licensing body within due time.

###### 2. Information on the adopted measures (s.2)

If the supervisory resp. regulatory body finds the objection justified it takes appropriate measures in order to correct and to stop the deficiencies of the delivery of the public services and notifies the complaining party on the measures taken without delay. This information must be seen as the decision of the review of the objection in the sense of para. 4 and must be given without delay, at least within 30 days from the date of its submission.

##### II. Addressing the competent body (para. 2)

In the cases stipulated in art. 141 para. 1 lit. a), c) and d) the objection shall be addressed and reviewed by the competent body itself. This body is entitled to decide on the objection within the deadline stated in para. 4 s.1. Unlike the appeal procedures no supervisory body is provided to decide on the objection in a second phase.

##### III. Addressing the supervisory body (para. 3)

If the objection is directed on the performing of an administrative action (art. 3 para. 10, 11) to which the party is entitled if the action has been required but the competent body has failed to act the objection must be directed directly to the supervisory body which has to take the decision. As stated above already this is to avoid that the competent body which has failed to decide on the request of the party would omit to decide on the objection as well. It cannot be expected that the competent body would decide on the issue properly.

As stated in para. 3 s.2 the superior body shall set a deadline to the competent body to perform the administrative action requested, if it comes to the decision that the objection is rectified. This provision makes clear that the superior body is not entitled to perform the administrative action itself.

##### IV. Deadline for decision on the objection (para. 4)

Para. 4 s.1 provides a deadline for the public body to notify its decision on the objection which is applicable in all cases regulated in art. 143. The time period counts from the day of submission of the objection to the body which is entitled to decide.

Although the exhaustion of the objection procedure is – unlike the appeal procedure in accordance with art. 129 – no precondition for bringing a lawsuit to the competent administrative court the party must be seen as impeded to bring a lawsuit to the court before the expiry of the deadline provided for in para. 4 s.1. The party has the choice whether to bring a lawsuit directly to the court or to lodge an objection. But when an objection has been submitted to the competent body the party must wait until the deadline stated in para. 4 s.1 has been expired before it may bring a lawsuit to the court.

## **CHAPTER IV**

### **REVISION**

#### *Article 144 Revision*

1. Revision is the legal administrative remedy, by means of which it is requested the annulment or amendment of an issued administrative act, or, the issuance of a refused administrative act, the appeal against which is not acceptable any more due to the expiry of the deadline provided for by this Code.

2. A party may seek revision, if new written evidence or circumstances are discovered, which are relevant for the case, which were not known and could not be known by the party during the conduct of the administrative procedure, which led to the issuance of an administrative act.

#### A. General Introduction

##### I. Content and Purpose of the norm

Art. 144 entitles a party to require a revision of an administrative act when after issuing of the act “new written evidence or circumstances are discovered” which are relevant for the case and which could not have been taken into account within the administrative procedure and even in an appeal procedure due to the expiry of the deadline. In the system of the CAP the revision cannot be seen as a remedy but as an institute to reopen an administrative procedure which was concluded by issuing an administrative act.

##### II. Relation to the administrative appeal

As made clear in para. 1 a revision is admissible only if no appeal is admissible any more due to the expiry of the deadline stated in art. 132. Therefore, if the written evidence or other circumstances could have been submitted by the party either in the administrative procedure or in the appeal procedure but the party has failed to do so it is not admissible to require a revision in order to let the public body reopen the administrative procedure and to let it take a new decision on the case. Precondition of a revision is that the party has not been able to submit the written evidence or specific circumstances within the administrative or in an appeal procedure.

##### III. Relation to Annulment or Repeal (art. 113)

The provisions for annulment or repeal of administrative acts as stipulated in art. 113 – 118 remain unaffected. While the party is not entitled to require an annulment or repeal of an administrative act because it is up to the discretion of the public body whether or not an administrative act shall be annulled or repealed, under the preconditions of art. 144 a party is entitled to require the reopening of the concluded administrative procedure in order to review the decision taken by taking into account a new written evidence or new circumstances which could not have been submitted before.

##### IV. Scope of the norm

Art. 144 is applicable only to administrative acts (art. 3 para. 1, 2) against which an appeal cannot be filed any more due to the expiry of the deadline stated in art. 132. It is not applicable to other actions (art. 3 para. 10,11, 126) or procedural actions (art. 130 para. 3). The scope comprises administrative acts which are onerous to the party either due to its burdening effects or because the request of a beneficiary administrative act has been refused.

#### B. Revision in detail

##### I. Definition of revision (para. 1)

As defined in para. 1 revision shall be an administrative remedy (see also art. 128 para. 2 lit.c) by which a party may request the reopening of an administrative procedure concluded by issuing an administrative act in order to take written evidence or circumstances into account which the administrative act could not be based on because the party had not the knowledge of it. The party is entitled to request an annulment or an amendment of the administrative act if the preconditions of the revision are met and the actually submitted written evidence or the circumstances which has become known and discovered must lead to the required annulment or amendment. In any case, it is a precondition of the revision that an appeal cannot be lodged due to the expiry of the deadline.

## II. Preconditions of the revision (para. 2)

The preconditions of the annulment or amendment by revision of onerous administrative act which cannot be appealed due to expiry of the deadline are

- Submission of new written evidence or new circumstances
- Which were unknown to the party and could not be known before
- Which would have led to an administrative act different to the issued one

### 3. New written Evidence or Circumstances

“New written evidence” are documents in written form only which are appropriate to give evidence to allegations or claims of relevant facts stated by a party in the investigation procedure. Only written means of evidence can lead to a revision. These documents must not be “new” despite the wording of para. 2. They must be discovered or found newly, that means after the conclusion of the procedure by issuing the administrative act.

Even the circumstances must not be “new”, but newly discovered or figured out by the party. Precondition is that the circumstances have been existing already to the time the administrative procedure have been conducted but were not known to the party and therefore not submitted to the public body.

### 4. Not known to the party and could not be known

It is essential that both the documents and the circumstances are not known to the party and could not be known to the party during the time the administrative procedure were conducted. If the party had the positive knowledge of the fact or the document relevant for the conclusion the preconditions of the revision are not met. The same applies if the party has had the opportunity to get and submit the document or to become aware of the facts and did not by negligence.

### 5. Documents or facts that would have led to a different decision

The party lodging a revision must explain that the public body would have taken a different decision and issued a different administrative act if the document or the facts would have been presented earlier during the administrative procedure.

## III. Revision Procedure

It is quite clear that a revision must meet the general requirements for remedies stated in art. 128. Especially the party must claim that its subjective rights or legal interests are affected by the administrative act against the revision is lodged. Moreover, the party must require the total or partial annulment or amendment of the administrative act by lodging the revision.

If the public body refuses to annul or amend the administrative act the party is entitled to bring a lawsuit to the competent court in order to achieve a judicial decision which obliged the public body to annul or amend the administrative act by revision.

### *Article 145 Deadline and submission*

1. The request for revision should be submitted within 30 days of the date that the party becomes aware of the cause of revision, but in any event not later than 2 years of the date when the cause for revision has occurred.
2. The request shall be submitted to the body that issued or refused the administrative act subject of the request for revision.

## A. General Introduction

Art. 145 provides deadlines for the request for revision and made clear that the request must be addressed to the public body which has issued the administrative act or refused the request to issue a beneficiary administrative act. The deadlines are stated in order to improve the legal order and to avoid the reopening of procedures after years.

B. Deadline and submission in detail

I. Deadlines for revision (para. 1)

The request for revision “should” be submitted within 30 days after the date the party becomes aware of the cause of revision. Despite the wording para. 1 contains a strict deadline. After expiry of the deadline a revision must not be required any more. But it must be taken into account that in many cases it will be hard for the public body to find out the very day the party becomes aware of the cause of the revision. Moreover, there is the possibility to require the reinstatement of deadlines if the provisions of art. 54 are met.

A reinstatement cannot be required and not be granted after expiry of the second deadline of 2 years. If this time period is over a revision is not admitted anymore regardless the reasons the party may have not to submit the revision within the 2-years-deadline.

II. Addressing the revision request

Para. 2 makes clear that the request to reopen the administrative procedure by revision has to be submitted to the public body which has issued the administrative act or the decision not to issue the administrative act the party has requested for.

*Article 146 Decision on the revision*

1. The body, which has issued or refused administrative act, when it finds out that the administrative act or administrative refusal would be unlawful, if issued in the current prevailing circumstances, it shall respectively annul or amend the act, or issue the refused act. Otherwise, the revision shall be denied.

I. Content and Purpose of the norm

Art. 146 rules the decision which is to be taken on the administrative revision. Despite the wording of the norm the public body shall annul or amend the administrative act only if it finds out that the issued administrative act would have been unlawful if the document or the circumstances the party is presenting in the revision procedure would have led to a different decision if the party would have presented them in the previous administrative procedure and can explain why it was not able to present them in the previous procedure.

II. The decision on the revision

Art. 146 makes clear that the final decision in the revision procedure is either to annul or to amend the administrative act after the reopening of the administrative procedure or to refuse the request of revision. In both cases the decision must be seen as a new administrative act. If the revision is refused the party is entitled to bring a lawsuit to the competent court.

# **PART SEVEN**

## **Notification**

## PART SEVEN NOTIFICATION

### CHAPTER I GENERAL RULES OF NOTIFICATION

#### Article 147 *Appropriate notification*

1. The public body shall communicate to the party or another person involved in the administrative procedure the administrative action or the procedural action by means of a notification.
2. Unless otherwise provided for by law, the public body shall be free to decide on the appropriate way of notification of administrative actions or any other notification in the framework of the administrative procedure, review of administrative legal remedies, or the execution procedure of the administrative act.
3. At any case, the public body shall perform the notification taking into account its effectiveness, the legal protection of the party, transparency, and cost.

#### A. General Introduction

##### I. Content and purpose of Art. 147

Art. 147 opens Part VII of this Code by providing some principle elements on how the public body acting through its responsible official (art. 43) communicates its administrative actions including procedural actions in the frame of an administrative procedure. Para. 1 of this Article introduces for this communication the concept notification without providing an exhaustive definition of this concept. Instead, elements of it are to be found in subsequent paragraphs and articles. Para. 2 lays down the freedom of form of notification thus offering – in connection with art. 148 and art. 155 et seq.– to the public body the use of principally all current and future technical ways of communication. However, the margin of discretion in the selection of the way of notification is not unlimited but confined by the criteria effectiveness, legal protection of the party, transparency and efficiency (cost) as provided by para. 3 of this article.

Notification is not only an obligation of the public body. It is a central requirement of any administrative procedure, because an administrative action comes into existence no earlier than in the moment when at least one of the parties of the procedure has been notified. Until then the activities of the public body are no more than a merely internal matter.

Furthermore, notification ensures legal protection of the party (art. 1), transparency of public administration (art. 5), legal certainty, supervision and legal control of administrative actions (art. 4 and 20) and effectiveness and efficiency of administrative behaviour (art. 18).

The possible ways of notification are described in detail in art. 148 et seq. and regarding written and electronic documents, in art. 155. For relations to other provisions see lit. B I.3 below.

##### II. Constitution and EU-Law

Art. 41 of the EUCFR grants the right to good administration. This includes the right to be notified of every decision that affects the citizen's rights or interests, as is made clear by art. 20 of the ECGAB, which regulates that the public official "shall ensure that persons whose rights or interests are affected by a decision are informed of that decision in writing as soon as it is taken" and before it is communicated elsewhere.

Art. 297 para. 2 of the TEU regulates that "... decisions which specify to whom they are addressed, shall be notified to those to whom they are addressed...".

Also art. 18 of the *ECGAB* demands the personal notification of individual decisions, if possible.

### III. Legal consequences of art. 147

Without notification an administrative action does not come into legal effect (art. 104 para. 1), except in the case of art. 97, acc. to which the failure to notify a written administrative act within the deadline set by the law may lead to the request deemed approved by silent consent. The notification of the administrative act is the relevant date for the calculation of the deadline for the administrative appeal against the administrative act, art. 132 para. 1, and is necessary precondition for the administrative act to be executable, art. 164.

### IV. Relation to previous CAP

In the previous CAP the administrative act is the only form of administrative action. So art. 56 et seq. of previous CAP regulate notification only in relation to administrative acts, and that in a less detailed way. The scope of addressees of notification as regulated in art. 56 of previous CAP is in principle identical with art. 147 para. 1.

### V. Scope of application

The scope of art. 147 extends to administrative and procedural actions performed by a public body conducting an administrative procedure

## B. Notification in details

### I. Notification as obligatory means of public body's communication (para. 1)

Para. 1 of art. 147 determines the personal, temporal and material scope, within which notification is the legally prescribed means of public bodies' communication - and thus the scope of the whole regulatory system provided in Part Seven - by setting out the following three preconditions.

#### 1. Public body's communication to a party

Addressee of the rules in Part Seven of this Code is the public body conducting the administrative procedure. It is only the one-way communication from the body to the party that can be subject matter of notification.

The parties stand on the other side of the communication line, for their communication measures towards the body the provisions on notification do not apply.

"Party or another person involved in the administrative procedure" is to be understood as a reference to the concept of a party as stipulated in art. 33, using "another person involved in the administrative procedure" as reference to para. 2 and 3 of art. 33. Although the legislator uses in para. 2 and 3 of art. 33 a different wording than para. 1 of 147, two strong reasons speak against widening interpretation of "another person involved in the administrative procedure" with the effect of extending the scope of art. 147 to other persons than those covered by art. 33. Firstly, para. 1 of 147 mentions only administrative or procedural actions (see explanation below under section B. I. 3 of this article) as objects of notification, and addressees of these actions can only be parties in the meaning of art. 33. Moreover, in all other articles of Part Seven the legal text only uses the term "party".

#### 2. Administrative procedure

With the term administrative procedure para. 1 specifies the temporal the scope of notification. Acc. to the definition in art. 3 para. 9 administrative procedure covers the period of "preparing and adopting concrete administrative actions, their execution and review with administrative legal remedies". This period starts with the initiation of a procedure acc. to art. 41 and ends either with conclusion acc. to art. 90 – 97. Activities outside this period, e.g. a public body's preliminary investigations before an ex-officio procedure is initiated, as well as informal follow-up evaluation of administrative activities (*Example: The responsible official calls a party to asks whether a certain amount of money the public body had to pay has arrived to the party's bank account.*) do not fall within the scope of the rules on notification.

### 3. Administrative or procedural actions

Para. 1 distinguishes between two categories of cases, for which the public body's communication requires the means of notification, namely the administrative actions and procedural actions, for which notification is a precondition of the respective action to produce legal effects (cf. art. 104 para. 1).

It follows from this that not any kind of contact between the public organ and the party during an administrative procedure requires the application of the rules on notification but only those communications of the public body that could have an impact on the legal position of the party. (*Example: A telephone call of the responsible official (art. 43) to remind the party not to forget a certain deadline set by law or administrative decision or similar forms of a public body's assisting or advising initiatives do not fall under the body's duties connected to term "notification".*)

This Code comprises numerous regulations that explicitly stipulate the means of notification for a specific action.

#### a) Administrative actions

The concept administrative action covers administrative acts, administrative contracts and any other administrative action (art. 3 para. 10). Accordingly, for the following actions of a public body notification is mandatory:

- Administrative acts concluding an administrative procedure acc. to art. 90 – 97, such as:
  - Issuance of administrative act acc. to art. 104;
  - Issuance of administrative act by one stop shop, art. 75 para. 1 lit. a)
  - Decision on administrative appeal, art. 140 para. 1
  - Decision on review of an administrative objection, art. 143 para. 4
  - Decision on the revision, art. 146
  - Notification of other parties about terminating the procedure acc. to art. 64 para. 2
  - Withdrawal of an administrative contract, art. 123 para. 3
- Other administrative acts, such as:
  - Decision on the request to be included as a party in a procedure acc. to art. 33 para. 2 and 3 (??)
  - Interim decision, art. 67 para. 3 and abrogating such decision, art. 68 para. 2
  - Stopping the suspending effect, art. 133 para. 4
  - Announcement of forceful execution of an administrative act, art. 169 and 172 (formal notification in the sense of art. 157 et seq.)
- Other administrative actions, art. 126, 127

As stipulated in para. 2 of art. 126 for other administrative actions acc. to art 126, 127 the provisions on administrative acts related to notification apply *mutatis mutandis*.

#### b) Procedural actions

Procedural actions are defined in para. 3 of art. 130. Para. 2 of art. 130 stipulates that procedural actions may be separately challenged only, if expressly provided by law, i.e. the review of the lawfulness of procedural actions is – as a rule – to be challenged by appeal against the final administrative act concluding the procedure (art. 90 et. seq.), and not during the procedure, i.e. immediately after the procedural action was performed. Accordingly, procedural actions that need to be notified are the following:

- Information to submit a request in the Albanian language and writing, art. 20 para. 2
- Initiation of administrative procedure, art. 42 para. 1

- Taking up a request to initiate an administrative procedure, art. 44 para. 2
- Information on the right to check the files and the costs of copies, art. 45
- Information that a request does not fulfil form requirements, art. 62 para. 2
- Suspension of a procedure acc. to art. 66 para. 1 and
- Deciding a preliminary issue relevant for another public body, art. 70 para. 3
- Refusing a request to provide administrative assistance, art. 72 para. 1
- Any action of the one stop shop acc. art. 75 para. 1 lit. c)
- Requirement to submit further information, evidence or documents etc..., art. 84
- Suspending the procedures acc. to art. 85 para. 3
- Granting the party the right to be heard before making a final decision, art. 87, para. 1
- Extension of deadline, art. 92 para. 3

#### 4. Legal consequences of para. 1

Para. 1 stipulates the obligation of using the means of notification if the above-explained preconditions are fulfilled. The list under 3. is not exhaustive.

#### II. Choice of the appropriate way of notification (para. 2)

In contrast to other national laws on administrative procedures art. 147 para. 2 does not restrain notification to the written form. Instead, discretionary power is given to the public body to decide, which out of possible (suitable) means should be chosen. Thus Part Seven of this Code constitutes an example of a modern, effective and citizen-oriented regulation. It adapts to the variety of situations of everyday administration, the necessary notification can be done according to the circumstances of the situation in a less formal, less costly and sometimes faster way (cf. art. 148).

#### III. Criteria for choosing the way of notification (para. 3)

Para. 3 lists the criteria for the choice between the different ways of notification. This is necessary, as para. 2 opens the door for a diversity of forms of notification which are explained in detail in the following articles. These are effectiveness, legal protection of the party, transparency and cost.

The term effectiveness requires interpretation, for which the comparison to the term efficiency is useful. According to common understanding a means is effective if it can produce the intended or expected results. ("Do the right things to achieve the goal".) Efficient, however, is a means by which the intended or expected results can be achieved with the least waste of time, effort, costs. ("Do the things right.")

These criteria applied to the responsible official's choice of the appropriate form of notification mean that that form of notification is effective, which is necessary to be sure that the information reaches the party. (*Example: Don't send an email, if the party has not got a computer. But both sending a letter to the party as well as notifying it verbally would ensure the achievement of the intended or expected results.*). In order choose the efficient means, the responsible official has to take into consideration not only the costs – as explicitly mentioned in para. 3 - but also aspects of speed and simplicity of the process.

The concept of legal protection of the party shall secure that the party is enabled to enforce its rights in the best possible way. Transparency can be understood in the way that the party or the person concerned must be notified about all relevant aspects. Guided by these criteria, the responsible official shall take the discretionary decision on the means of notification to be applied in line with the following provisions of Part Seven of this Code.

*Article 148 Forms of notification*

1. When the party is present, the notification may be done orally or in any other appropriate form of communication.
2. A written document may be notified by mail, by electronic means, fax, or by formal notification, under the provisions of this Code.

A. General Introduction

I. Content and purpose of art. 148

Art. 148 corresponds to art. 98 that regulates the form of administrative acts and therefore both provisions need to be interpreted in full consistency, i.e. for the forms of notification the same principles and criteria apply as for the forms of administrative acts (for the interpretation of art. 148 see also the complete explanation below on art. 98).

Art. 148 distinguishes two basic rules related to the form of notification, depending on two objectively differing circumstances, in which the one-way communication from the public body to the party (see art. 147, explanation under B.I.1) can take place. On the one hand, for the situation when the party is present para. 1 allows any appropriate form of communication and explicitly includes the direct verbal statement as one of the possibly appropriate forms, whilst for the notification of non-present parties para. 2 refers to the technical ways and means of communication as specified in art. 155 to 163.

Both paragraphs confirm the intention of the legislator that pervades the whole Chapter Seven of this Act (see also explanations B.II on art. 147 and A.I. on art. 156), namely to provide a flexible and citizen-oriented regulatory set-up for the public body's communication vis-à-vis the party that not only ensures effective and reliable information but also avoids unnecessarily costly and time-consuming formalities and opens the door for the deployment of the most up-to-date technology (see for the openness of this Code for technological development the explanation on the principle of freedom of form for the issuance of administrative acts under A. I. of art. 98).

II. Constitution and EU-Law

Art. 148 is in line with European law (cf. explanation to art. 147). In as much as para. 1 allows a non-written notification, it is more generous than art. 20 ECGAB.

III. Relation to previous CAP

Art. 148 is dealing with a similar regulatory object as art. 60 para. 1 of the previous CAP did. However, the new regulation differs significantly from the previous act by allowing the oral statement and any other appropriate form of communication in para. 1 and responding to technological development in para. 2

IV. Scope of application

The scope of application of art. 148 is as described as for art. 147 (see above A.V. on art. 147).

B. Forms of notification in details

I. Notification to a present party (para. 1)

Para. 1 provides the widest possible range of options the public body may choose for notifying the party, setting for the body's discretionary decision the legal requirements "presence of the party" and "appropriateness of the form".

### 1. Presence of the party

The concept “party” is here in the same way used as it is done in all of the following provisions of Part Seven of this Act, i.e. the concept covers the three statuses of a party as stipulated in art. 33 (see detailed explanation above on art. 147 under B.I.1).

The party is “present” if he/she is in the same room as the responsible official, through whom the public body is performing the notification, and the size of the room allows immediate interaction between the two of them. This is usually the case in an office of the public body, but could also happen in any other room such as private living or business spaces or in a hospital ward. If party and responsible official are in the same larger hall or outdoor location, the requirement “presence of the party” is satisfied, if the overall acoustic and optical circumstances, in particular the physical distance between the party and the place from where the information is given, allows the party’s correct perception of the information.

Moreover, presence of the party, however, does not necessarily require a face-to-face situation between notifying official and the addressee. Decisive for this requirement is merely that speaking and receiving happens in the same moment. Therefore notification by telecommunication (see below and art. 98 B. I. 1. b.) is possible if it is clear for the addressee that the speaking person is the responsible official through which the public body acts (art. 43).

### 2. Appropriateness of the form

The legislator allows the verbal notification as a typically appropriate form of notification, in case the party is present, regardless whether the information is addressed to a single person or a group of persons and no matter if the words are spoken directly, amplified by loudspeaker system or megaphone or transmitted through telecommunication means (see above and more detailed explanation on art. 98 under B. II. 1. b.).

By stipulating “or any other appropriate form” the legislator allows also leaving a message on an answering machine or on voicemail systems using digital data storage on computer or smart phone (explanation on art. 98, B. I. 1. c.) or using any other optical or acoustic signal that a person can clearly and unmistakably comprehend as a notification of a public body’s will addressed to him/her. That could include the hand signal of the traffic police, the optical “STOP POLICE” and “PLEASE FOLLOW” signal shown from a police vehicle, the traffic lights or other traffic signs expressing commandments or prohibitions.

### 3. Legal consequence of para. 1

The choice between more than one appropriate forms of notification is at the discretion of the public body, for which the criteria of para. 3 of art. 147 applies (see above explanation on art. 147, B.III.). However, under certain circumstances the margin of discretion can be reduced to only one single decision. This is frequently the case in the area of regulating road traffic, when the use of a traffic sign or the hand signal of a police officer is the only possible appropriate form to handle the situation. Another area, where oral notification is the only possible appropriate form, is the dispersal of a demonstration that became violent by way of escalation.

## II. Notification of written documents (para. 2)

Para. 2 defines the “written document” by treating an electronic document or fax as equal to paper documents and by doing so refers to notification by surface mail (art. 155), by electronic means including fax (art. 156) and additionally to the form of formal notification. The latter is further specified in art. 158 and according to this provision includes the notification by personal delivery (art. 159), through a third person (art. 160) or through mail, i.e. through certified mail with acknowledgment of receipt (see below explanation on art. 158), as well as by electronic publication (art. 161), by public notification (art. 162) or by official publication (art. 164).

*Article 149 Notification receiver*

1. Except when explicitly otherwise provided by this Code, the notification shall be sent to the party personally. Exceptionally, when the public body has been informed on the appointment of a representative or persons responsible for the notifications, the notification shall be sent to the latter.
2. The notification, which is sent to the representative or the person responsible for the notifications, shall be deemed to have been sent to the party personally.

A. General Introduction

I. Content and purpose of art. 149

Art. 149 regulates vis-à-vis whom a notification shall be carried out. This includes as an exception the notification to other persons than the party in person, namely his/her appointed joint representative (art. 37, 38) or other persons assigned as responsible for the notification (art. 150), and the effect of the use of such an intermediary.

II. Constitution and EU-Law

Although European regulations as cited in remark A.2 to art. 147 regulate notification only regarding the addressee, this does not exclude the involvement of an intermediary according to art. 149.

III. Relation to previous CAP

The rules of previous CAP (art. 56 to 60) on notification do not provide a comparable regulation.

IV. Scope of application

Cf. explanation on art. 147 under A.V. Moreover, the wording “notification shall be sent” stipulates that the use of an intermediary is restricted to the notification of a written document as specified in para. 2 of art. 148 (cf. explanation on art. 148 under B. II.).

B. Notification receiver in details

According to the wording “the notification shall be sent” in para. 1 and “The notification, which is sent” in para. 2 clarifies that object of the regulation of art. 149 is a written document as specified in para. 2 of 148.

I. Persons, who can receive a written notification (para. 1)

1. Priority of notification to the addressee in person (para. 1 sentence 1)

The notification shall secure that the addressee is properly informed of the administrative action that affects him. So it is obvious that para. 1 emphasizes the first rank of a notification to the addressee.

2. Exceptional notification to another person than the party (para. 1 sentence 2)

According to the second sentence of para. 1 of art. 149, which is to be understood as a sub-case of art. 35 para. 2, the public body is obliged to address the notification to another person than the party, if the following legal requirements are satisfied:

- a) Another person is in place acting either as legal representative acc. to art. 34, as appointed representative acc. to art. 36, 37, 38 or as assigned person responsible for the notifications acc. to art. 150.
- b) The appointment resp. assignment has not become invalid, e.g. through withdrawal by the competent body (art. 36) or the party (art. 37, 38, 150).
- c) In cases of the involvement of a representative the public body needs to examine if the scope of the power of the representation covers the specific administrative action, which the public body intends to notify. This requirement is relevant, if the scope is limited to the performance of only some procedural actions either
  - according to the legislation in force in the case of art. 34 para. 2
  - or
  - according to art. 36 para. 5 resp. art. 38 para. 1 .
- d) The public body has been informed on the appointment; the wording does not specify the way, how the body “has been informed”; two cases needs to be distinguished:
  - in the cases of art. 37, 38 and 150 the public body receives this information already through the appointment procedure, in other words no additional action of information from the party is required; however, if the legal or factual situation related to the appointed representation has changed, the party has the obligation to inform the public body thereof, unless the public body has otherwise learned about the change of the situation;
  - in the cases of representation according to art. 34 and 36 the public body has the obligation to ex-officio examine the factual and legal situation related to representation at any stage of the procedure.
- e) When the above listed preconditions a. to d. are satisfied, the notification must be done to the representative resp. joint person responsible for the notification. However, the public body is not hindered to notify in addition one or more members directly, with the consequence that in the case legal consequences depend on the day of the notification the day of the direct notification is the legally relevant day, that is to say for the cases of direct notification para. 2 (see below) does not apply. *(Example: For one or some members of the group it is legally relevant that the written document needs to be notified on a certain day in order to meet a deadline and this can be made sure more likely by direct notification.)*

## II. Effects of a notification to other persons (para. 2)

When a notification is performed vis-à-vis a representative or a person responsible for the notification in accordance with art. 149, in the moment, once it has reached the sphere of control of the representative its legal effects occur as if the notification had been done vis-à-vis the party him-/herself. For cases when the public body notifies in addition one or more members of the group as well, the legal fiction of para. 2 is not applicable to this direct notification (cf. explanation in the previous section).

### Article 150 Person responsible for the notifications

1. When 20 or more parties with identical requests do not have a joint representative, they shall, be obliged to assign upon the request of the public body and within a deadline defined by the public body, a joint person responsible for the notifications.
2. In case the person responsible for the notifications is not assigned within the deadline, the public body may assign one of the parties as the responsible person for the notification, after having received its consent. At any case, the assignment of the responsible person for the notification shall be made under the procedure provided for in Paragraph 2 of Article 38 of this Code.
3. All parties to whom the notification is addressed shall be indicated in the act notified to the joint agent

## A. General Introduction

### I. Content and purpose of art. 150

Art. 150 supplements art. 149 in cases where the notification is to be addressed to a plurality of 20 or more persons but a joint representative as stipulated in art. 37, 38 does not exist. In this case a joint person responsible for the notifications shall be assigned.

The joint person responsible for the notifications should not be confused with the joint representative stipulated in art. 37, 38, though both legal institutions have some similarities in common that serve the same purpose, namely to contribute to simplification and efficiency of the administrative procedure. However, there are significant differences: Firstly, art. 150 is applicable for a group of 20 or more parties only, the joint representative can already be appointed, when more than one party are involved in the same administrative procedure. Secondly, in contrast to the voluntary appointment of a representative pursuant to art. 37, 38 the assignment of a joint person responsible for the notifications is obligatory if the legal requirements of para. 1 of art. 150 are satisfied. Finally, the scope of power of the person responsible for the notification is restricted to the passive role of receiving notification, whilst the joint representative can be vested with the proactive role of exercising all procedural actions of the procedure on behalf of the party.

### II. Constitution and EU law

The relevant EU-regulations do not contain corresponding regulations, as they are not as detailed and leave this topic to the national legislator.

### III. Relation to previous CAP

The regulations of the previous CAP were not so detailed regarding notification, nor did they rule on representatives.

### IV. Scope of application

Art. 150 is applicable to written documents (cf. above explanation on art 149 under A. IV. and B.) to be notified in the frame of administrative procedures that were initiated upon request acc. to art. 41 para. 1 and art. 44.

## B. Persons responsible for the notifications in details

### I. The group of parties' obligation to assign a joint person responsible for notification (para. 1)

To facilitate the communication of a public body with a multitude of parties with identical requests para. 1 allows the public body to address only one single person for the purpose of notifying the entire group under the following legal preconditions:

#### 1. Group of 20 or more parties with identical requests

Para. 1 requires identical requests (see explanation on art. 41 under B.I.2) of a group of more than 20 parties. *Example: Cases of application could be the identical requests of a group of farmers to obtain subsidies, the requests of a group of citizens for the permission to hold a demonstration or the requests of landowners for being heard in the frame of an urban planning procedure.*

#### 2. This group has not appointed a joint representative acc. to art. 37

If a joint representative was appointed by the group acc. to art. 37, 38 there is no space for assigning a person responsible for the notifications, unless the scope of power of representation is limited and does not cover the notification of all procedural actions. It follows from this that the public body needs to examine the range of power of the joint representative in order to decide whether the existence of the joint representative excludes the application of art. 150.

### 3. The public body requests the group to assign a joint person responsible for the notifications

The public body's request needs to be individually notified to each member of the group. Otherwise this legal requirement of a request of the body is not satisfied.

### 4. Deadline for the assignment

The public body shall set a reasonable deadline for the assignment of a person responsible for the notification. The deadline is reasonable if it allows sufficient time for the group to identify suitable candidates and find a consensus on the assignment of such person.

### 5. Legal consequences of para. 1: obligations of the group and of the person responsible for the notifications

#### a) The group's obligation to assign a responsible person

Art. 150 para. 1 stipulates the obligation of the group of parties to assign a person responsible for the notifications within the deadline set by the public body.

#### b) Eligibility of the responsible person

The wording of art. 150 para. 1 does not explicitly mention, whom the group may assign as responsible person. However, the eligibility follows from analogue application of the 2<sup>nd</sup> sentence of art. 37 para. 1. „Accordingly, eligible as person responsible for the notification are the members of the group of 20 or more parties as well as any other person having the capacity to act in an administrative procedure acc. to art. 34.

#### c) Unanimity

Though not expressly regulated in para. 1 of art. 150, it follows from intention and purpose of the provision that the assignment of a joint person responsible for notifications requires the group's unanimous agreement on an eligible candidate.

#### d) Form of the assignment

Acc. to art. 150 para. 2 second sentence the responsible person requires to be assigned in the form stipulated in art. 38 para. 2 for the appointment of an appointed representative, that is to say in writing, verbally declared before the public body or in any other appropriate form.

#### e) Obligation of the assigned person responsible for the notifications

The duties of the joint person responsible for the notifications follow from the function of this legal institute in connection with the purpose of facilitating a simplified and efficient administrative procedure. Accordingly, the assigned person is obliged to ensure that all members of the group that has assigned him/her get cognizance of the notified content. Nevertheless, para. 2 of art 149 applies (cf. above explanation on art. 149 under B.II.), even if the assigned person fails to comply with this obligation to properly inform all parties about the notified content, that means that also in the case of non-compliance the notification sent to the assigned person is deemed to have been sent to the party.

## II. Assignment through the public body (para. 2)

By way of execution by substitution the public body may have the right to assign itself a joint person responsible for the notifications

## 6. Legal requirements

- a) The public body has requested the group of parties to assign a responsible person acc. to para. 1 and set a reasonable deadline for the assignment.
- b) The set deadline has expired without the requested assignment.
- c) The public body has asked one member out of the group of more than 20 parties for his/her availability to act for the group as responsible person.
- d) The asked member of the group has declared his/her consent.

## 7. Legal consequence: public body's exercise of discretion

On the cumulative presence of the above mentioned preconditions the public body "may" assign itself a responsible person. The wording "may" denotes that the assignment is at the discretion of the public body, for which the principles of art. 11 apply. Limiting criteria for the discretionary decision follow mainly from intention and purpose of the legal institute of a responsible person but also from other legal norms.

The discretionary power is given to the public body on two levels. Firstly the public body has to decide whether or not to use for each notification the use of a responsible person. On a second level the body has got the discretionary power, to decide whom out of possible and suitable members of the group of parties should be chosen.

For the first decision it is not only necessary to consider if in light of all relevant circumstances the use of a person responsible for the notification is actually more practical (*Example: Do all members in the same area/country and therefore could easily be reached by the responsible person?*) and purposeful (*Does the use of a responsible person it really lead to a simplified and more efficient procedure?*). The body shall also examine whether legally protected interests of a member would not allow that the content of a notification is disclosed to the other parties. This would probably never be a problem, if not only the requests of the parties are identical but also the content of the notifications (*Example: invitation of the whole group to a joint hearing.*). However, if the contents of the notifications are different, one or more members might have a legally protected interest in safeguarding privacy (*Example: In the area of granting subsidies to a group of farmers the results of the final decisions differ and the reasoning of a decision refers to economic details, whose disclosure could harm the legitimate interest of a member.*) In this case the discretionary decision to use a responsible person for the notification would be unlawful.

For the second level of choosing the responsible person the candidate's suitability (capability but also legal capacity) and reliability as well as his/her acceptance by the other members of the group would belong to the key criteria of the discretionary decision.

### III. Content of the notification, para. 3

Para. 3 clarifies that in case of a multitude of addressees represented by a person responsible for notifications or by a joint appointed representative, all parties of the group must be indicated in the notified act, because the responsible person requires the complete list of addressed parties for his task to forward the notification to the whole group of addressees. (*Advice for administrative practice: The indication of post addresses, email addresses and phone numbers of all parties would be helpful for the responsible person.*)

A missing name on the list would have the consequence that the notification is not valid vis-à-vis the non-listed name carrier.

*Article 151 Places of notification*

1. The notification shall be sent to the following locations:

- a) the place where the recipient is staying or residing;
- b) any place where the recipient is located, including also the penitentiary institutions;
- c) if the recipient is a legal entity, the seat or place where it operates.
- ç) place of work;
- d) the place of activity or office of the recipient.
- dh) any other place as specified and designated in advance by the party.

2. Paragraph 1 shall apply to the extent possible also in the case of notification of the representatives of the party or the person responsible for notifications.

A. General Introduction

I. Content and purpose of art. 151

Art. 151 enumerates, at which places a notification may be carried out.

II. Constitution and EU law

Regulations of the Albanian Constitution are not affected. The relevant EU-regulations do not contain corresponding regulations, as they are not as detailed and leave this topic to the national legislator.

III. Relation to previous CAP

The previous CAP does not contain such a regulation.

B. Place of notification in details

I. Notification to the recipient himself (para. 1)

The list of places given in para. 1 is very detailed and exhaustive.

It should be kept in mind that the procedure of notification at the place quoted as second alternative in lit. b, "penitentiary institutions", is specified in art. 153 para. 2.

Lit. dh gives the possibility to the recipient to specify and designate any other place for notification in advance, that is not contained in the enumeration of lit. a to d.

II. Notification to a representative or a person responsible for notification (para. 2)

Para. 2 clarifies that the regulations of para. 1 apply also in case of notification to a representative or a person responsible for notification (cf. art. 150), as far as appropriate.

*Article 152 International notification*

1. Notification to foreign countries, international organizations and persons enjoying diplomatic immunity shall be carried out through the institution covering the foreign affairs, unless stipulated otherwise by law.

A. General Introduction

I. Content and purpose of art. 152

Art. 152 deals with the notification to foreign countries, international organizations and persons with diplomatic immunity.

## II. Constitution and EU law

Regulations of the Albanian Constitution are not affected. The relevant EU-regulations do not contain corresponding regulations, as they are not as detailed and leave this topic to the national legislator.

### III. Relation to previous CAP

The previous CAP does not contain such a regulation.

## B. International Notification in details

As the public bodies that are regularly responsible for notification have no legal competence outside of the territory of the Republic of Albania or towards international organizations and persons enjoying diplomatic immunity, in these cases a notification shall be done by the institution covering the foreign affairs, unless stipulated otherwise by special law.

### *Article 153 Notification in special cases*

1. Notification of persons who are serving in the Armed Forces or in the units of the Ministry covering the internal affairs shall be carried out through their administration.
2. Notification of persons, who have been deprived of their freedom in the detention centers or penitentiary institutions, shall be carried out through the administration of the respective institution where the person is. At any case, the administration of the institution should document the receipt of the notification.

## A. General Introduction

### I. Content and purpose of art. 153

Art. 153 regulates cases of notification to recipients, who are subject to a particular authority relationship with a state authority and, due to this particular relationship, a direct personal contact between the public body conducting the administrative procedure and the party or his/her representative resp. person responsible for the notification (art. 149) with the addressee is not possible, be it for factual or legal reasons. Protective purpose of the norm is to ensure that addressees shall not be disadvantaged in administrative procedures due to their particular authority relationship with a state authority. art. 153 finds a solution for those cases by obliging the state authority to perform the notification on behalf of the public body. To certain extent this regulation can be compared with the legal institution of administrative assistance as stipulated in art. 71, however with the important difference that in art. 153 the legal relationship between the public body and the state authority providing assistance is mandatory and legally determined by this norm.

### II. Constitution and EU law

Regulations of the Albanian Constitution are not affected. The relevant EU-regulations do not contain corresponding regulations, as they are not as detailed and leave this topic to the national legislator.

### III. Relation to previous CAP

A corresponding regulation is lacking in the previous CAP.

## B. Special cases in details

### I. Recipients in the Armed Forces or in units of the Ministry covering the internal affairs, para. 1

As these persons normally cannot be addressed in the locations as cited in art. 151 para 1, notification to them shall be carried out by their administration.

## II. Recipients who are deprived of their freedom, para. 2

Recipients in detention centers or penitentiary institutions shall be notified through the administration of these institutions. The administration of these institutions is obliged to document the receipt of the notification.

## III. Legal consequences

In the cases of para. 1 as well as para. 2 the notification is carried out “through the administration” of the respective state authority, i.e.. their actions related to notification are carried out “on behalf” of the public body conducting the procedure. It follows from this that

- The public body conducting the procedure decides about form (art. 148), person responsible for the notifications (art. 150) and “ways and means of notification” (art. 155, 156 and art. 157 et sequ.) in the light of the particularities of the practical circumstances, if and as far as necessary introduces the assisting administration to all legal and procedural requirements and prepares all documents and technical necessities the assisting administration requires to implement the notification as decided by the public body.
- The notification is completed and produces its legal consequences according to the general rules, i.e. related to the time of notification in the moment, when the notified information has reached the addressee’s sphere of control.
- At any case, the administration of the institution should document the fact that and the time when the addressee has received the notification. This obligation is stipulated in the 2<sup>nd</sup> sentence of para. 2 but must apply for para. 1 as well, because there is no reason to deal with the two cases differently.

### *Article 154 Notification mistakes*

1. If, as a result of a mistake made by the public body when carrying out the notification, the legal situation of the receiving party becomes worse, the notification shall be considered to have been made on the day, when the receiver proves to have become aware of the notification.

## A. General Introduction

### I. Content and purpose of art. 154

It is a basic rule of administrative procedural law (as also explained above for art. 147 under A.I.) that an administrative action does not become legally effective until its content is notified to the party the action is addressed to. The same applies, when a notification procedure has been carried but suffers from a legal defect, i.e. was not carried out in full compliance with the procedural principles and regulations of this Code, in particular with its Part Seven dealing with notification. Without valid notification any administrative activity remains a merely internal measure of the public body.

The requirement of a valid notification as precondition for an administrative action to become legally effective serves on the one hand the public interest in general and the interests of the public body conducting the procedure in particular (cf. explanation on art. 147 under A.I.).

On the other hand the major purpose of the notification procedure is to protect the individual interest of the party in being informed about all relevant aspects and steps of the administrative procedure through regular, clear and comprehensible communication from the public body to the party. Such information is a prerequisite for the party’s right to a transparent and predictable administrative decision-making process, ensures the party’s participation in the procedure, its equal treatment and its legal protection against unlawful administrative actions. And the legislator assumes that the party is in the state of being properly informed about the respective action of the public body, if the notification is conducted in full compliance with the procedural rules.

However, art. 154 allows an exception from the basic rule acc. to which the legal effect of an administrative action depends on the correct conduct of its notification. According to this exceptional provision the public body's erroneous non-compliance with procedural notification rules shall not lead to a legal disadvantage for the party, if the party - although a correct notification has not taken place –has nevertheless obtained the necessary information on the content of the administrative action. Art. 154 supplements the strict procedure-related view of the legislator by a more result-oriented perspective, in other words underlines that the notification procedures do not end in themselves. Accordingly, art. 154 states that – if needed for protecting the party's legitimate interest and under further narrowly formulated preconditions and - the party's factual state of knowledge about the content of the administrative action shall be in the end the overriding criteria for the administrative action's legal validity, and not the full compliance with procedural rules.

But it needs to be emphasised, that due to the exceptional character of art. 154 its legal preconditions must be interpreted restrictively and shall apply solely for the purpose of avoiding legal disadvantages of the party caused by an erroneous mistake of the public body. In all the other cases, that is to say when notification rules were disregarded or misapplied and the consequence of the absence of the administrative action's legal effect is either legally neutral or even advantageous for the party, the basic rule of administrative procedure law remains applicable: No legal effect of an administrative action without proper notification!

## II. Constitution and EU law

The relevant EU-legislation does not contain corresponding regulations, as they are not as detailed and leave this topic to the national legislator.

## III. Relation to previous CAP

Comparable regulations were lacking in the previous CAP.

## B. Errors in notification and their consequences in details

### I. The legal preconditions of art. 154

The exceptional character of art. 154 requires a restrictive interpretation of the legal text. This leads to the following understanding of the legal preconditions the provision:

#### 1. The public body when carrying out the notification

The first precondition is that the public body acting through its responsible official (art. 43) performs activities with the intention to notify the party of a certain content.

##### a) Activity connected to notification

The wording "carrying out the notification" in art. 154 means that the responsible official performs activities that are to be understood as at least one or more sub-steps of a notification process (*Example: the responsible official prepares a written document and the envelop with the post address of a party.*)

##### b) Intention to notify

According to the wording "carrying out the notification" it is necessary that the responsible official performs the activities with the intention to notify the administrative action, which means that the responsible official expressed his/her will to deliver the information related to the administrative action to the party. Accordingly, merely preparatory activities performed without the will or intention to get the information off the grounds and to the party do not yet satisfy the legal precondition "the public body when carrying out the notification". (*Example: The responsible official prepares a written document and the envelop with the post address of a party, but he/she does not yet have the intention to get this document off the ground because it is not yet approved by the superiors. In this situation the preparatory activities lack the intention to notify something and therefore do not satisfy the first legal precondition of art. 154.*)

## 2. No valid notification of the party

The legal precondition “no valid notification of the party” is not explicitly provided by the wording of art. 154 but is clear from the context, in particular from the legal consequence of the norm, and its logic. Therefore a reasonable supplementary understanding of art. 154 reads: “If, as a result of a mistake made by the public body when carrying out the notification, a valid notification did not take place and because of this the legal situation of the receiving party becomes worse, the notification etc.)

This additional legal precondition covers first of all cases when the message - be it sent in verbal, written or any other appropriate form (art. 148) - has physically not reached the addressee’s sphere of control.

*Some examples:*

*i.) The responsible official asks a friend to take the envelope with the written document to the post office, but the friend forgets to do so. Two weeks later the friend found the letter in his briefcase.*

*ii.) The responsible official asks a friend to take the envelope with the written document to the post office, but he gave an empty envelope to his friend.*

*iii.) A postman has lost the letter with the written document the public body has posted to notify the party.*

*iv.) The public body has sent a document destined for addressee A erroneously to addressee B.*

*v.) A verbal message directed to a group of present addressees acc. to art 148 cannot reach all members of the group due to a defect loudspeaker.*

*vi.) The administrative act is notified to a person responsible for the notifications – art. 150 - , but erroneously, one member out the group of 20 or more parties was not indicated in the act notified.*

This legal precondition, furthermore, covers the cases, when the notification was defective, i.e. the message reached the party but under violation of procedural rules stipulated in this Code, in particular in Part Seven of this Code.

## 3. Mistake made by the public body

The failure of notification was caused by a mistake made by the public body in the frame of the notification procedure. Mistake is to be defined here as any intentional or unintentional wrongdoing on the part of the public body. It furthermore shall also include the wrongdoing of other persons as well as the occurrence of adverse events that fall into the scope of risk of the public body connected to the body’s procedural obligations.

## 4. The legal situation of the receiving party becomes worse

This legal requirement is fulfilled if the reception of a valid notification would have entailed a legal advantage for the party but the legal advantage does not arise for the reason that - due to the lack of a valid notification caused by the public body’s mistake - the intended administrative actions did not become valid.

Typically, not resp. not correctly notified beneficial administrative acts would fall under this requirement.

*Examples:*

*The correct notification of an administrative act*

*i.) would have granted the licence to run a small enterprise as from the day of notification or*

*ii.) would have lifted the ban of a political assembly or*

*iii.) would have granted the right to apply for a subsidy by the presentation of the notified administrative act.*

Furthermore, also cases fall under this legal requirement, when the public body allows a period within which the party has the right to submit a request or present evidence but due to a mistake of the public body this was not correctly notified to the party.

## 5. The party has become aware of the notification

Two alternatives fall under this requirement: either the party has received the complete intended content from the public body but through an incorrect notification procedure or the party has lawfully got cognizance from the intended notification and its intended content either from a third side or through any other lawful occurrence.

6. The party proves the awareness

The burden of prove can only relate to the day, when the party became aware of the content. The content of the awareness as such becomes already evident through the party's respective statement reflecting the content.

II. Legal consequences of art. 154

Art. 154 stipulates a twofold legal fiction. On the one hand it stipulates that a valid notification shall be considered to have been made. It moreover clarifies that the day, on which the party has become aware of the content of the administrative action, shall be considered the day of notification.

## **CHAPTER II**

### **WAYS AND MEANS OF NOTIFICATION**

#### **Section 1**

#### **Notification by surface mail and electronic means**

##### *Article 155 Notification by surface mail*

1. The notification by surface mail shall be carried out through simple or certified mail.
2. For the purpose of this Code, a written document, which is sent via simple or certified mail, shall be deemed notified on the third day of the posting of the document for addresses within the Republic of Albania, and 5 days for addresses outside the territory of the country.
3. Paragraph 2 of this Article shall not apply if the addressee proves that the document was not received or was received at a later day.

#### A. General Introduction

##### I. Content and purpose of art. 155

The dispatch of a hard copy paper document by post is one of the ways that may be used to notify written documents. This is regulated in para. 2 of 148. (The other ways of sending a written document are using electronic means, fax or one of the various ways of formal notification dealt with in art. 157 to 163.) Art. 155 now specifies the dispatch of a paper document by post in twofold respects. In para. 1 it provides the public body with the discretion to choose between two ways of posting. Purpose of para. 2 and 3 is to determine the day of receiving a letter dispatched by post on the basis of a rebuttable legal presumption.

##### II. Constitution and EU-Law

The relevant EU-regulations do not contain corresponding regulations, as they are not as detailed.

##### III. Relation to previous CAP

Art. 60 para. 1 of previous CAP mentions the notification by mail without providing any further details.

#### B. Notification by surface mail in details

##### I. Notification by surface mail and the problems of certified mail (para. 1)

In administrative practice of today, notification by surface mail is still the standard way of notifying a written administrative action.

Surface mail may be carried out by simple mail or by certified mail (registered letter). The choice between the two options is left to the discretion of the public body.

In terms of determining the day of notification both options have got the same effect (see below explanation on para. 2 and 3). In this respect there are no indications for exercising discretion into this or that direction. However, there are criteria for the discretionary decision, namely the security of the delivery versus its costs. Simple mail is less costly, whilst the certified version improves security, i.e. increases the certainty that the addressee will receive the document, in other words the risk that the document gets lost on its postal way is reduced due to the particular diligence the postal service is obliged to exercise when handling with certified (registered) letters.

## II. The legal presumption of the notification and its date (para. 2)

When a public organ sends a written document by simple or certified mail, it does not get any automatic feedback from the postal office whether and especially when the addressee received it. This is even true when certified mail is used. But as the date of the notification often triggers procedural deadlines and, above all, the deadline for an administrative appeal (art. 132 para. 1), the knowledge of its date is important. To overcome this uncertainty, para. 2 provides a legal presumption.

As a rule, if the public body is in the position to prove that it has posted the document by the surface mail, the written document is deemed to be notified. As to the date of notification it is deemed to be received by the addressee either on the third day after the day of posting the document for addressees residing within the Republic of Albania or on the fifth day residing outside the territory of this country.

As it can normally be expected that mail within this time limit will reach the addressee, this rule shall avoid disputes about the date of notification.

Even if the mail arrives at an earlier date, the public organ has to base calculations of time limits on this rule. On the other hand, the addressee who receives the document earlier, may make use of it from the day of receipt, e.g. when he gets a permit valid from the day of receipt.

For the calculation of the 3- or 5-days deadline para. 2 of art. 56 applies.

## III. Rebuttal of the legal presumption of notification (para. 3)

Para. 3 allows the addressee to rebut the legal presumption related to the notification and the day when the addressee received it, the addressee proves that he/she did not receive the document at all or not within the time limit. In this particular case the party bears the onus of proof. The principle of ex-officio investigation (art. 77 para. 1) does not apply.

To avoid the uncertainty that is connected to the right of the party to rebut the legal presumption, the public organ should, especially in cases when the notification of the document triggers a time limit that is not at the disposition of the public body itself, e.g. for a legal remedy, not use simple or certified mail but one of the modes of formal notification as offered by art. 158. Only by formal notification it is guaranteed that the sending public organ gets reliable information about the exact date of notification.

### *Article 156 Notification via electronic means*

1. The notification via electronic means or by fax shall only be carried out when the addressee has preliminary agreed on this form of notification, and the law does not provide for another obligatory form of notification. If the notification is not readable, the addressee may require the public body to resend the notification in another more suitable form.
2. A document, which is sent via electronic communication means, shall be deemed received under the provisions of the law on electronic communication.
3. A document sent by fax shall be deemed as notified on the third day of its sending.
4. Paragraph 2 and 3 of this Article shall not apply if the addressee proves that the written document was not received or was received at a later date.

## A. General Introduction

### I. Content and purpose of art. 156

Art. 156 states in the first sentence of its first paragraph two very important principles regarding the use of electronic communication means by a public body vis-à-vis a party or other person: The public body may utilize these means of communication -- but only and insofar as the addressee consents. The second sentence provides

for communication problems stemming from the high variety of file formats available. The second to fourth paragraph contain the rules as to when an electronically sent document or a fax message has been received.

Art. 156 supplements art. 155 on the notification by surface mail by providing for the notification by electronic means and fax. Both articles form Section 1 of Chapter II of Part Seven “Notification” provide for simple, non-formal ways of notification. They have a very high practical relevance as simple notification is the most common form of communication of public bodies vis-à-vis a party or any other person. Section 2 on the other hand contains provision on the formal notification, with art. 161 dealing with a formal notification by electronic means. The public body is under the obligation of art. 18 to conduct the proceedings in a way that bears as little formal burden as possible and is as fast as possible. This includes the form of notification chosen by the public body, which should be as informal and fast as reasonable. For the norms requiring notification refer to the commentary on art. 147.

## II. Constitution and EU law

Neither the constitution nor relevant EU-legislations do contain corresponding regulations, as they are not as detailed. However, the Services Directive 2006/123/EC sees the use of electronic means of communication as vital for administrative simplification, which could bring benefit to service providers, recipients as well as the competent authorities (recital 52). Art. 8 para. 1 of the directive therefore requires the Member States to ensure that all procedures and formalities relating to access to a service activity and to the exercise thereof may be easily completed, at a distance and by electronic means. This includes the lodging of a request as well as the notification of the decision.

## III. Legal consequence of art. 156

A (simple) notification following the specifications of Art. 156 has the same legal consequences as a notification by surface mail (art. 155). A document sent in spite of the fact that this way of communication is not opened cannot trigger any legal consequences; the addressee is free to discard the document without hesitation and without the need to inform the sender. The same applies if the law requires another obligatory form of notification, especially a form of formal notification (art. 157 ff.).

## IV. Relation to previous CAP

The previous CAP did not provide for a notification by electronic means. Art. 60 saw the postal (para 1. lit. a) or personal (para 1. lit. b) notification as the norm and allowed for a notification “by telegram, phone, telex or facsimile” only “in urgent cases” and only under the condition that the notification is confirmed the next day in a regular manner, i.e. by post or personal delivery.

## V. Scope of application

The article applies to the notification of written documents, as is made clear by para. 4 (“the written document”). This term includes electronic documents and fax messages, see art. 58 para. 3, art. 59 para. 6 and art. 98 para. 1, 2 and 3 as well as art. 99 para. 2 and especially art. 148 para 2.

Art. 156 applies at any stage of the proceeding. Formally this does include the execution of the administrative act as provided for in Part Eight of the law. The notices required by art. 169 and art 172, however, need to be formally notified with the effect that a simple notification according to art. 156 is not sufficient.

## B. Notification via electronic means in details

### I. Preconditions for using electronic means for notification (para. 1)

Art. 156 para. 1 principally allows for the simple notification by electronic means and by fax message. Its first sentence names the conditions under which it is permissible to use these means, while the second sentence addresses the problem of technical incompatibilities.

### 1. Usage of electronic communication means

While the former CAP limited the use of electronic communication means to emergency cases and required the confirmation of such extraordinary notification, this form is no longer second-rate. The law principally acknowledges the possibility of a notification by electronic means or fax message as a full legal equivalent to the notification by surface mail that is provided for in art. 155. The law may, however, require, the document to be notified by surface mail, in which case the notification by electronic means or fax message is not allowed. The CAP itself does not contain such provision. Both of these forms of simple notification, on the other hand, are not sufficient where the law provides for another obligatory form of formal notification. This is for example the case with the notices required by art. 169 and art 172 in the course of the execution of an administrative act; these notices need to be formally notified.

### 2. Preliminary approval of the addressee

Although the use of electronic communication means principally is acknowledged, the law does limit their use due to the fact that these means cannot, however widely they are used, be supposed to be as common as traditional mailboxes and paper documents, especially in the communications with public bodies. The law therefore limits the notification by electronic means to the cases where the addressee has preliminarily agreed on this form of communication. This includes three things: the will to use electronic communication means vis-à-vis the public body at all, especially in this administrative matter, and in certain file formats. The same applies mutatis mutandis to fax messages.

While a person may be able and willing to conduct an administrative procedure of a lesser weight electronically, he might not find it appropriate to utilize this means in a more complicated and more important field. The law therefore stresses the importance of the fact that no person shall be forced to use electronic communication means. Every addressee thus has to permit electronic files to be submitted to him, and he has to do so beforehand. He also has to choose and name the file formats he or his system is able to process. Electronic signatures and encryption technologies are file formats in this respect, too. The permission can be given explicitly as well as implicitly. While having an email address alone does not show the person's will to receive administrative acts or other messages in this way, something else may be concluded when he submits his request electronically to the public body.

A document sent in spite of the fact that this way of communication is not opened cannot trigger any legal consequences. The addressee is free to discard the document without hesitation and without the need to inform the sender of this. This includes the cases where the receipt of electronic document was not allowed by the addressee in the first place as well as cases where only the respective file format was not approved beforehand. This even more so with virus-laden emails. These can be deleted without hesitation, because malicious messages are surely not supposed to be accepted.

### 3. Technical incompatibilities

The second sentence of para. 1 addresses a different point: Because of the comparably large diversity of computer file formats, the addressee may not be able to read the document sent to him. This may be the case because the public body has sent a file format the addressee has not preliminarily declared to be able to process. In this case, as discussed above, the notification has failed and needs to be repeated with a file format approved by the addressee. There may, however, be cases where the public body has chosen an approved file format but the addressee may still not process the respective document. In this case the notification was successful and triggers the corresponding legal consequences, although the goal of the notification was not reached -- to enable the addressee to know the content of the notice. This however lies entirely with his sphere of risk, as the public body has done everything it could in order to reach that goal, especially using a file format that the addressee preliminarily has declared to be capable of processing.

In order to enable the addressee nevertheless to read the document, he may request the public body to resend the document in a more suitable form. The condition "if the notification is not readable" only names the reason for this provision and does not state an actual requirement that needed proof. The addressee may simply state that he is not able to read the document and request it to be sent to him again in a more suitable form. If the file format

requested by the addressee is too obscure for the public body to create, it may send the document in paper form according to art. 155. The same applies if converting the document would require unreasonable efforts as for example obtaining specialized computer programs.

The notification must be deemed successful as soon as the addressee has received the document sent to him in the file format specified by him preliminarily. As soon as that is the case, sending the document in a more suitable form according to sentence 2 may not be seen as a notification that trigger legal consequences. Deadlines for example do not start to run again.

## II. Time of Notification via electronic means (para. 2)

Pursuant to para. 2, a document that is sent via electronic communication means shall be deemed received under the provisions of the law on electronic communication. This is to be understood as a general reference to legislation in force dealing with electronic means in the meaning of art. 156.

Such a piece of legislation is the Law No. 10 273 on the Electronic Document, dated 29.4.2010, as amended by Law No. 101/2015, dated 09.23.2015. This law in its art. 14 to 16 contains provisions on the sending and receiving of electronic documents. According to art. 15 para. 2 of the said law, the time at which the electronic document enters the receiver's computer system and/or the computer system of the person authorized by him shall be deemed as the electronic document receiving time. Where a confirmation of receiving an electronic document is required, the time when the receiver sends the confirmation shall be deemed as the time of receiving the electronic document, para. 3. For this the computer system shall record the time according to the standard of measuring the official time in the Republic of Albania, and shall present the time according to the Albanian standards of presenting the hour and the date, para. 5 and 6.

Art. 16 of the said law, on the other hand, takes into account also the time the document was personally received by the receiver or by a person authorized by him, and contains several provisions regarding the confirmation of receiving the electronic document. The receiver must confirm the reception of the document in accordance with the preliminary requirements of the sender and confirm the reception by means of an action as predefined by the sender, including an automatic confirmation of reception by the receiver's computer system. If the confirmation is not received by the defined deadline, the sender must inform the receiver that he has not received this confirmation about the electronic document that he has sent.

The Law on the Electronic Document hence largely depends on the confirmation of receipt and thereby on the willingness of the addressee to cooperate. If he does not send such a confirmation, the sender is dependent to determine "the time at which the electronic document enters the receiver's computer system". This information of course is rather difficult to obtain and even harder to prove, as the receiver's computer system is usually not under the sender's control. As art. 156 para. 2 does not contain a provision on when the notification is deemed to have happened at the latest moment, the public body may be forced to notify the document in another way if the addressee fails to resend the confirmation.

## III. Time of Notification via fax message (para. 3)

According to para. 3, a document sent by fax is deemed as notified on the third day of its sending.

Technically the fax message is received the moment the transaction has been terminated by the two fax machines and the fax message has been recorded by the addressee's machine for print-out. Alternatively the message may be converted into a readable file format as TIFF or PDF in order to be processed at the addressee's computer system. This does not, however, correspond to the moment the addressee factually may be supposed to take notice of the document. The message may be sent in the middle of the night or at the weekend, addressed to a fax machine that is known to the public body to be standing in the addressee's office premises. In this case the document may be expected to be taken notice of only at the beginning of the next working day. If the document is sent out Friday night, this may be the next Monday morning. In order to avoid a too detailed regulation, the law simply states the three-days-presumption.

As this provision does not set up a deadline, art. 56 does not apply. So a document sent by fax at a Thursday is deemed to be received the following Sunday and not the Monday thereafter.

#### IV. Rebuttal of the presumptions (para. 4)

The fourth paragraph of the article corresponds with art. 155 para 3. The addressee of an electronic document may rebut the presumption of art. 156 para 2 resp. 3 related to the time when the document is deemed to have been notified in the same way as the addressee of a paper document may rebut the respective presumption of art. 155 para. 2.

In order to not be bound by the presumption the addressee of an electronic notification shall prove that the written document was not received or was received at a later date. As the burden of proof lies with him, the presumptions are to be deemed as true as long as he is not able to prove otherwise. The problem here lies with the likely necessity to prove a negative: to prove that something has not happened (as here the reception of a document by the addressee). As this is impossible it must be sufficient for him to prove all circumstances that make it very unlikely that he in fact did receive the message in question.

## Section 2 Formal notification

### *Article 157 Formal notification*

**1. The notification of a written document may be carried out also through formal notification, if this is explicitly provided by law, or decided by the public body itself.**

#### A. General Introduction

##### I. Content and purpose of art. 157

Art. 157 specifies the legal requirements for using formal notification, which is acc. to art. 148 para. 2 one out of four options to notify a written document.

As detailed in the explanation on art. 155 and 156, the usual notification of a written document is subject to a certain level of uncertainties, which are mainly outside the sphere of influence of the public body. The uncertainty relates to both the fact whether or not the addressee has received the notification as well as to the exact date of the reception.

Both result from the fact that for the delivery of the document an intermediate process is involved, be it the postal service (art. 155) or the IT system, (art. 156) on whose error-free functioning the public body has no influence upon, once it has introduced the document into the process (posting the document resp. starting the electronic communication process). That is why the legislator needs to operate with the instrument of legal presumption (para. 2 of art. 155 resp. para. 3 of art. 156) that in turn the addressee can rebut under certain preconditions.

For good pragmatic reasons the legislator accepts this uncertainty connected to the usual way and means of notification, because this administrative practice as provided in art. 155, 156 is the most efficient one for the largest part of notifications, given also the fact that the intermediate processes involved have been of increasingly reliable functioning.

However, for cases when the exact date of reception of the notified document is legally relevant, legislation provides a system of various notifying instruments – called formal notification – whose purpose is that the fact of notification as such as well as its exact day and time can be recorded in a court-proof manner.

This system is operating without involving an intermediate process but carried out through resp. under the responsibility of the public body itself and without the need of being based on rebuttable legal presumptions but on objectively and directly facts.

## II. Constitution and EU law

The relevant EU-regulations do not contain corresponding regulations, as they are not as detailed.

## III. Relation to previous CAP

Art. 60 para. 1 of previous CAP enumerates the possible modes of notification without a distinction between informal and formal notification.

## B. The choice between informal and formal notification in details

### I. Formal notification is explicitly provided by law

If the law operates with “explicit legal provision” it always indicates that this provision is of exceptional character, in other words that the non-formal notification should be the rule for the administrative practice.

### 4. Legal precondition

“Law” can include provisions of this Code as well as material administrative law, whereby as to the latter according to the general use of the term “law” in the entire Code the term comprised the primary and the secondary legislation, but not the several forms of local bylaw.

In this Code art. 169 para. 2 and art. 172 para. 2 explicitly stipulate that formal notification is required before executing an administrative act.

### 5. Legal consequence

Legal consequence is the obligation of the public body to comply with the explicit legal order. The wording “may” in the beginning of the text of art. 157 relates logically to the second alternative legal requirement on (see explanation below in the following section).

## II. Formal notification is decided by the public body itself

The alternative to the explicit legal prescription is formal notification pursuant to a discretionary decision of the public body on whether or not formal notification shall be used.

According to the above explained special purpose and function of formal notification (cf. explanation above under A. !.) the public body shall examine in every individual case if the legal character of the administrative action as well as the addressee’s factual circumstances require the highest possible level of certainty related to both the mere fact of notification and its exact date. According to the exceptional character of formal notification, only in cases when such particular certainty is really needed, in other words only when the principle of effectiveness (c.f. explanation on art. 147 under B.III.) shall be the overriding criteria for the dutiful exercise of the discretion, the extraordinary personnel and financial expenses are justified to opt for formal notification.

The exceptional character of formal notification becomes clear when considering that this Codes sees the real need of using formal notification is always given on in cases regulated in art. 169 para. 2 and 172 para. 2. Nevertheless, there are some other cases regulated in this Code, for which the Code does not explicitly stipulate formal notification, although the fact of notification as such as well as its exact day and time is of high relevance since the date of notification triggers a time limit, e.g. for lodging a legal remedy. In those cases the public body should take formal notification into consideration despite its higher expenses. Accordingly, formal notification is advisable for final decisions in administrative procedures like the issuing of an administrative act (cf. art. 104 para 1, the act resolving the administrative appeal, art. 140 para. 1, the review of an administrative objection, too (art. 143 para. 4). Also decisions resolving a revision (art. 146) formal notification should be taken into account, as only in this way a control of time limits is secured.

Even for some decisions during the course of an administrative procedure a formal notification might be advisable to underline their importance for the addressee, e.g. when he is asked to give additional information within a time limit, e.g. in the case of art. 84.

*Article 158 Ways of formal notification*

1. Formal notification shall be carried out by delivering it personally, notification through a third person or through the mail, as well as through electronic publication, public notification or official publication, under the provisions of Articles 159 to 163 of this Code.

A. General Introduction

I. Content and purpose of art. 158

The purpose of art. 158 is twofold.

On the one hand it provides a gives a definitive list of the possible modes of formal notification comprising the following six options:

- personal delivery to the addressee; specified in art. 159
- personal delivery through a third person; specified in art. 160
- notification through mail; without specification in one of the following articles
- electronic publication; specified in art. 161
- public notification; specified in art 162
- official publication; specified in art. 163

As far as the formal notification through mail is concerned art. 158 – on the other hand - forms also the legal basis for the legal preconditions of this way of notification (for details cf. below under B.)

II. Constitution and EU law

The relevant EU-regulations do not contain corresponding regulations, as they leave details of notification to the national legislator.

III. Legal consequences of art. 158

1. Exhaustive list

The list of modes of formal notification is exhaustive. It follows from this that, whenever formal notification is required in pursuance of art. 157, any different form of notification would be unlawful and – except in the case of 154 – the incorrectly “notified” administrative action invalid.

2. Decision of the public body

The decision of the public body to notify either through personal delivery (including that one exercised through a third person), mail or the electronic publication is in principle left to the dutiful discretion of the body. Criteria for the exercise of the discretion will be explained below in connection with the respective article.

The use of public notification and official publication are mandatorily prescribed by art. 162 resp. 163.

IV. Relation to previous CAP

The catalogue of art. 60 of the previous CAP is less comprehensive than art. 158. Regarding formal notification, there is certain congruence only about public notification (art. 60 para. 1 lit. ç).

## B. Formal notification by mail in details

### I. Legal preconditions

Art. 148 differs between notification by mail and formal notification, the latter in turn includes acc. to art. 158 also the mail (postal service) as one of the six possible ways of formal notification.

The use of the postal service for non-formal notification is further detailed in art. 155 and according to its para. 1 “shall be carried out through simple or certified mail”. In para. 2 and 3 of art. 155 it operates for the fact and date of notification on the basis of a rebuttable legal presumption (for the reason of this c.f. below explanation on art. 155 under B.II. and on art. 157, A. I.).

The use of the postal service of formal notification acc. to art 158 is not specified in one of the following articles, by which the other modes of formal notifications are regulated. However, this gap within the section on formal notification needs to be filled by interpretation, for which the juxtaposition of non-formal mail and formal notification through mail in art. 148 is relevant. This juxtaposition indicates that the use of postal service for formal notification mentioned in art. 158 implies different - i.e. a higher and stricter level of – formalities in order to avoid the uncertainties connected to simple or certified mail and instead ensure that the fact of notification as such as well as its exact day and time can be recorded in a court-proof manner.

This higher level of certainty is ensured by the use of certified mail with acknowledgement of receipt (certified mail with notification of delivery) provided by the public postal service. By using this formalized postal service the purpose of the formal notification, namely its particular evidential value, is fulfilled.

### II. Legal consequences

#### 1. Discretion to choose

The choice of certified mail with acknowledgement of receipt is at the dutiful discretion of the public body. This way of formal notification is usually less expensive for the body than personal delivery and therefore should be chosen, if there are no particular reasons pro personal delivery (cf. explanation on art. 159 under A.I. for cases when personal delivery is advisable or even required) and also the legal requirements for the most efficient electronic publication are not given.

#### 2. Further consequences

In analogy to the personal delivery in the case of art. 159 para. 1 and the electronic publication according to art. 160 para. 1 the fact of notification and its date of receipt is exactly documented by the written acknowledgement of receipt. Here is no space for a legal presumption with respect to the date.

*Article 159 Personal delivery*

- 1.) An official of the public body shall personally deliver the written document to the addressee, in one of the places of notification provided for by this Code. The personal delivery shall be written down in a record. The record shall include data on the identification of the delivered written document, date of delivery, and it shall be signed by the official and the addressee.
2. If the addressee is not found at the place of notification, the official shall make a second attempt for the personal delivery not prior to 24 hours and no later than 72 hours from the first attempt.
3. If the addressee is not found again, or when he refuses to receive the notification, the official shall make the relevant note in a record, and when possible, prove such situation with the signatures of a present witness. In this case, the official of the public body shall display a notice in the premises of the place of notification, specifying the addressee and the respective office of the public body where the written document can be withdrawn. The note shall also specify the date and hour of the display and the date that will be deemed as the notification date as per Paragraph 4 of this Article.
4. The delivery, under Paragraph 3 of this Article, shall be deemed as carried out after 3 days of the date of writing down the note.
5. The delivery shall be carried out only during the working days and between 7:00 to 19:00 hours.

A. General Introduction

I. Content and purpose of art. 159

As explained above on art 158 (under A.III.2.and B.) the public body may at its dutiful discretion choose between the use of postal service to send a “certified mail with acknowledgement of receipt” on the one side and – on the other- the delivery through an official of the public body. The latter is called personal delivery and can be done either by handing out a written document directly to the addressee – this is the case dealt with in art 159 – or by giving the document to a third person on the conditions stipulated in art. 160 (see explanation on art. 160 below). However, there is of course no discretion when personal delivery is the only option because there is no postal service in place that could be used

But if the public body has the choice between postal and personal delivery, two aspects connected to the use of postal service could be relevant for its discretionary considerations. The first aspect is that at least one or - depending on the local situation - even two or more days can pass between the time of the written document’s postal dispatch and the time (day, hour) when it was handed out to the addressee. Secondly, during the time while the paper document is being handled by the postal service the paper could be misplaced, lost or damaged or delivered to the wrong addressee. Therefore in order to minimize the risk connected to the use of the postal service, personal delivery could be a more appropriate instrument in one of the following cases:

- Particular circumstances render it reasonable that the public body keeps the whole process of transferring the document from the public body’s office to the addressee in its own sphere of control in order to ensure a higher level of certainty that the addressee will receive the document.
- For future evidentiary purposes it could be an advantage that the public body’s official carrying out the delivery is obliged to write down all delivery-related facts in a record in a record (art. 159 para. 1 second sentence) because such official document enjoys increased evidential value.
- The second attempt of delivery provided in para. 2 of art. 159 as well as the possibility of involving a third person acc. to art 160 could be an advantage in comparison to the rules applied to the postal service.
- In urgent cases, for example when observance of deadlines is at stake, personal delivery could often be the quickest way of delivery.

Art. 159 provides in para. 1 and 5 formal details the official of the public body needs to observe for the personal delivery. Para. 2 obliges the official to undertake a second delivery attempt if the first attempt was unsuccessful,

because the addressee could not be found at the place of notification. Para. 3 provides a substitute delivery, if also the second attempt remains unsuccessful, with the legal presumption in para. 4 that the delivery is deemed to be carried out three days after carrying out the substitute delivery.

## II. Constitution and EU law

The relevant EU-regulations do not contain corresponding regulations, as they leave details of notification to the national legislator. The restriction of para. 5 to deliver only on working days between 7.00 to 19.00 hours is an expression of respect of fundamental rights in the sense of art. 15 para. 2 of the Albanian Constitution.

## III. Relation to previous CAP

Art. 159 adopts in principle art. 60 para. 1 lit. b of previous CAP, which had however a more restricted scope of application and was less detailed.

## IV. Relation between art. 159 and art. 160

See below explanation on art. 160 under section A.V.

## B. Personal delivery in details

### I. Delivery of a written document by an official of the public body (para. 1)

The first sentence provides the basic legal requirements of personal delivery, whilst the sentences two and three stipulate in detail the obligation of recording the delivery action.

#### 1. Official of the public body

The person carrying out the personal delivery can be, of course, the responsible official carrying out the administrative procedure, though in administrative practice this is unlikely if he/she is a higher-ranking civil servant. But it could also be any other member of the staff of the same public body having the status a civil servant. If a civil servant is not available, a public employee of the body could also perform the personal delivery, but only if he/she has undergone a special training for this task and was expressly authorized by the public body to do so.

The requirement of a relatively high level of qualification for a person carrying out the delivery results from the fact that both the application of art. 159 as well as the notification on the basis of art. 160 (cf. explanation below on art. 160 under A.) imply taking administrative decisions, in other words is to be seen as exercise of public authority vis-à-vis the addressee.

#### 2. Written document

“Written document” in the meaning of art. 159 is not identic with the definition provided in para. 2 of art. 148, because the latter definition includes also faxes and electronic means, whilst for formalized notification (art. 157 – 163) the Code provides with art. 161 a special provision for the use of electronic means. Accordingly, only paper documents fall under the scope of art. 159, but not electronic data carriers (such as CD or USB memory stick).

#### 3. Personal delivery in one of the places of notification

Personal delivery means here that the paper document is passed from the hand of the Public body’s official to the hand of the addressee.

Places of notification are those listed in para. 1 of art. 151 (see explanation above).

#### 4. Record on personal delivery

For the purpose of providing proof in any legal disputes the notifying official is obliged to keep a written record on the delivery that includes data on identification of the document - usually done by writing down the file number and the text in the subject line - and the date of delivery. In cases when the exact time of delivery could be legally relevant, in addition to the date also the hour and minute of handing out the document shall be written down.

Though not explicitly required by the legal text it is advisable to include also name of the official and his/her unit within the public body as well as the place of notification in the record.

#### 5. Signatures of official and addressee

The record must be signed by both the official and the addressee.

Not regulated is the situation that the addressee accepts the document but refuses to sign the proof of delivery. In this case the main purpose of the notification – the handing out of the document to its addressee – has been fulfilled. In such situation the proof of the fact of handing out, its place and its date can be furnished by analogy to the procedure regulated in para. 3 sentence 1 of this article. That means that the official may prove these facts with the signature of a present witness and if this is not possible through a relevant file note written down in the record.

#### II. Procedure if the addressee is not found at the place of notification (para. 2)

If a formal notification as described in para. 1 is not possible because the addressee is not found at the place of notification, the official shall make a second attempt within a time frame terminated by law: not earlier than 24 hours and not later than 72 hours. For the calculation of this time frame only working days are counted (cf. para. 5). The official's obligation of second attempt and its timeframe implies only the minimum of efforts the official shall make in order to deliver the document. This legal obligation does not prevent the official from doing more than the minimum, neither from carrying out the second attempt later than 72 hours after the first one, nor from undertaking a third or even fourth attempt, if particular circumstance of the case make it likely that such additional efforts could lead to successful notification.

#### III. Legal consequences

##### 1. Obligation to decide, whether or not the legal consequences stipulated under para. 3 are appropriate

If the procedure stipulated in para. 3 of 159 is not appropriate, in other words if the art. 160 approach (see explanation below) is a more promising approach to serve the general purpose intended by the instrument of personal delivery, the public body is obliged to switch to the procedure regulated in art. 160 from the moment when the second attempt as stipulated in para. 2 of art. 159 has unsuccessfully been completed.

##### 2. Obligation to carry out the procedure acc. to para. 3 with the further legal consequences of para. 4

When even at the second attempt (see para. 2) the addressee is not found or when he refuses to receive the document, the notification by personal delivery has nevertheless not failed completely. As one of the possible consequences the official is obliged to do the following:

###### a) Notice for the addressee

The official shall prepare a paper document containing the following information:

- Name of the addressee (obligatory, because explicitly mentioned para. 3 of art. 159);
- The unsuccessful attempts of formalized personal delivery of a written document including place and dates of the attempts (not explicitly mentioned in the provision but advisable);
- The place of the public body's office, where the document can be withdrawn (obligatory, para. 3 of art. 159);
- Data to identify the written document like title/header of the document, file number, etc. (not explicitly mentioned in para. 3 of art. 159 but obligatory since resulting from the context);
- The date on which the delivery is deemed to be carried out acc. to para. 4 (not obligatory but advisable);
- The official's name and signature (not obligatory but advisable).

b) Display at the addressee's premises

"Display" means not only sticking the envelop with the document at the door of the addressee's house or apartment so that it is visible at a distance. The document may also be dropped into the addressee's letterbox if the box's nature, appearance and position clearly indicates that it is regularly emptied.

c) Record on personal delivery

In order to document that this attempt of notification so far has not been successful, the official must make a note in a record comprising the following relevant elements:

- Place and dates of the two unsuccessful attempts of delivery;
- Date and hour of the display;
- Date that will be deemed as the notification date (legal assumption of para. 4)
- Name and signature of the official;
- If possible the additional signature of a present witness who confirms the unsuccessfulness of second (resp. last) attempt of personal delivery including its place and date.

d) Further legal consequence: legal assumption of personal delivery and its date (para. 4)

The legal consequence provided in para. 4 is a twofold legal assumption.

Firstly, the Code assumes that a notification as such took place, irrespective of whether or not the addressee has got cognizance of the notice displayed at his/her premises and collected the document from the public body's office.

Secondly, the legal assumption of para. 4 also implies the determination of the date when the fictitious notification shall be deemed to have occurred. Accordingly, the legal effects of notification occur *ex lege* after 3 days from the date of writing down and displaying the note at the premises of the addressee, provided the procedure of para. 1 to 3 has been carried out correctly and accurately. Another result of this fiction is that there is no need for the public body to switch over to another form of formal notification, even if the addressee does never touch the written document destined for him.

3. Obligation to carry out the procedure during the time stipulated in para. 5: between 7:00 and 19:00

To protect the addressee's right of privacy, the personal delivery is allowed only on working days and only between 7.00 and 19.00 hours. As this rule does not foresee any exemption, there might arise problems in practice in very urgent cases, especially as also the notification through a third person (art. 160) is subject to identical time limits (para. 7).

IV. Legal consequences of procedural defects

In case of the official's non-compliance with procedural rules stipulated in art. 160 the notification of the written document is considered to be invalid.

*Article 160 Notification through a third person*

1. In cases where the notification as per the above Article is not appropriate and the addressee is not found, the official of the public body shall make the delivery through a third party who agrees to deliver the notification to the addressee in the following order of preference:
  - a) A family member who has reached the age of 16, in the place of notification as provided for by Paragraph 1, Subparagraph "a" of Article 151 of this Code,
  - b) an adult neighbour, in the place of notification, as provided for by Paragraph 1, Subparagraph "a" of Article 151 of this Code;
  - c) an employee or doorman in the place of notification, as provided for by Paragraph 1, Subparagraphs "a" through "d" of Article 151 of this Code;
2. The delivery specified in Paragraph 1 of this Article shall not be carried out through a person who participates in the same procedure and who has conflicting interests with the addressee.
3. The third person who agrees to make the delivery should sign a record, whereby he undertakes the commitment to deliver it to the addressee. The public official shall include in the record data on the relationship of the third person with the addressee, data on the identification of the delivered written document, and the date when it was handed over to the third person.
4. In case the third person refuses the acceptance, the official shall make the relevant note in the record, and, where possible, prove such refusal with the signature of a present witness.
5. In the case provided for by Paragraph 4 of this article, the written document shall be left in the mailbox of the place where the addressee is staying or residing. The date and time of putting it in the mailbox, along with the date, which shall be considered as the notification date under Paragraphs 6 and 7 of this Article shall be written down by the official on the envelope of the written document, and reflected in the respected record.
6. The delivery shall be considered as made after 3 days of the day of receipt of the written document by the third persons, or the date of placing it in the mailbox.
7. The delivery under this article shall be made only during working days and between 7:00 to 19:00 hours.

A. General Introduction

I. Content and purpose of art. 160

Art. 160 is conceived as the sequel of art. 159 in those cases, where the second attempt of formal personal delivery acc. to para. 2 of art. 159 was not successfully completed in the sense that it has not resulted in handing over the document to the addressee.

As explained above, art. 159 ensures by its para. 3 and 4 that also the unsuccessful attempt of handing over the document leads in the end to a fictitious notification that triggers all legal consequences, as if the document had been handed over properly. Nevertheless, art. 160 obliges the public body to examine an alternative to art. 159 by switching at a certain moment from one procedure (completion of the procedure acc. to para. 2 of art. 159) to the procedure provided by art. 160. precondition for this switch is that the application of the latter is more appropriate to serve the purpose intended by the instrument of personal delivery than the acceptance of the legal assumption of para. 4 of art. 159. So art. 160 shows the intention of the legislator to rely on the fictitious notification of art. 159 para. 4 only as a last resort and instead give preference to the factual delivery even if this can be done only through involvement of a reliable third person.

This way of "indirect" handing over of the document is preferable, if this person and some other circumstances of the concrete situation - as detailed in art. 160 - promise a high level of certainty that the document will reach the addressee. The advantages of this alternative to para. 3 and 4 of art. 159 are obvious: i) In the case of art. 160 the addressee receives the document most probably quicker than by going and picking it up at the public body's office (art. 159, para. 3). ii) The actual reception of the document by way of the art. 160 procedure is usually more in the

addressee's interest rather than the legal assumption of art. 159, which only in exceptional cases is a satisfactory solution for the addressee<sup>23</sup>. iii) The art. 160 procedure is more efficient for both the public body and the addressee; the body saves extra work connected with providing and delivering the document at the body's premises, whilst the visit to the public body's office is at least time-consuming and quite often costly for the addressee.

## II. Constitution and EU law

The relevant EU-regulations do not contain corresponding regulations, as they leave details of notification to the national legislator. The restriction of para. 7 to deliver only on working days between 7.00 to 19.00 hours is an expression of respect of fundamental rights in the sense of art. 15 para. 2 of the Albanian Constitution.

## III. Legal consequences of art. 160

### 1. Legal assumption of notification and its date acc. to para. 6

For the two alternative cases that the document was either accepted by a third person (para. 3) or dropped in the addressee's mailbox (para. 5), the art. 160 provides in its para. 6 the same two legal consequences as we find in art. 159 para. 4, namely the following twofold legal assumption:

Firstly, the law assumes that a notification as such took place, irrespective of whether or not the addressee has received the document from the third person.

Secondly, para. 6 also determines that the legal effects of notification occur *ex lege* after 3 days from the date, when the third person has received the document resp. when the document was dropped in the mail box.

### 2. Return to the procedure acc. to para. 3 of art. 159

If the public body switches from para. 2 of art. 159 to the more promising procedure of art. 160 (see above explanation on art. 159, section B. III. 2.) but can neither find an eligible third person in the meaning of para. 1, lit. a – c nor adequate conditions for dropping the document in a mailbox (*e.g. such mailbox does not exist*), the official has to return to the approach of art 159, para. 3 and 4 (see explanation above in section B. III. 1.).

## IV. Relation to previous CAP

The previous CAP did not provide a notification through third persons.

## V. The relation between art. 159 and 160

Art. 159 and 160 are closely interconnected in a sequence of priorities:

Priority one (art. 159, para. 1 and 2)

Action	Direct delivery from the hand of an official of the public body to the hand of the addressee;
Consequences	i) highest level of certainty that the addressee can take cognizance of the content of the written document ii) court-proof evidence that the addressee received the document including the exact actual time when this occurred

Priority	two (art. 160, para. 1 – 3) possible alternative if priority one could not successfully be completed
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Action	Switch to indirect delivery (from the hand of an official through the hand of a third person to the hand of the addressee)
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Consequences	i) Lower level of certainty that the addressee can take cognizance of the content of the written document
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<sup>23</sup> Example for an exceptional case: The legal assumption of art. 159 fully meets the addressee's interest, because the notified beneficial administrative act provides the legal advantage irrespective of the addressee's actual knowledge thereof.

	ii) (Due to the lower level of certainty) need for legal assumption (para. 6 of art. 160) related to both the fact that the addressee received the document and the time when this occurred
Priority	three (art. 159, para. 3,4) if neither attempt of direct (art. 159) nor indirect (art. 160) delivery could successfully be completed
Action	Attempt to inform the addressee about the possibility to pick up the written document at the body's office
Consequences	i) No certainty that the addressee can take cognizance of the content of the written document ii) Need for legal assumption related to both the fact that the addressee received the document and the time when this occurred

## B. Notification through a third person in details

### I. Involvement of a third person as intermediary for delivery of written documents (para. 1)

#### 1. The addressee is not found in cases of notification acc. to art. 159

This legal requirement connects art. 160 to the procedure dealt with in the previous article 159. It is fulfilled, when the official of the public body has unsuccessfully carried out the second attempt of personal delivery because the addressee was not present at the place of notification.

At the same time this requirement clarifies that the second alternative of unsuccessful attempt of personal delivery, namely the situation when the addressee refuses to receive the notification, does not open the way to the application of art. 160.

#### 2. The notification acc. to art. 159 is not appropriate

Appropriateness is an indeterminate legal concept that requires systematic interpretation to make it applicable for the official of the public body.

For this it is necessary to clarify firstly the moment when the official has to decide on whether or not "the notification acc. to art. 159 is not appropriate". This moment is determined by the end of an unsuccessful second attempt of personal delivery acc. to para. 2 of 159. In this moment the Code obliges the official to opt between two procedural routes, either

- to continue the procedure according to para. 3 and 4 of art. 159 (option 1)

or

- to make another (third) attempt of notification on the basis of art. 160 (option 2).

For the interpretation of "inappropriateness" of option 1 the official is obliged to assess the prospects of the success of the procedure provided in art. 160, bearing in mind that the legislator gives a clear preference to the factual delivery due to its higher level of legal and actual certainty (see explanation above under A. I. and V.). Consequently, the continuation of the procedure acc. to art. 159 is inappropriate, if a successful attempt of proceeding acc. to art. 160 is not unlikely. Such likeliness always exists if the following legal requirement is fulfilled, in other words if one of the possible "third persons" - as explained in the next section - is present.

#### 3. A "third person" is present

The legislator determines that eligible persons – in the following order of preferences - are

- firstly, "family members"; the Code does not define the term family member, but the legal purpose of the norm indicates that eligibility should be limited to the narrower circle of relatives: spouses/companions; parents; siblings or children aged 16 or over, when they live at the same place - house, apartment - as the addressee (para. 1 lit. a of art. 160);

- secondly, (i.e. if no family members in the meaning of lit. a are present), “adult neighbours”; the circle of eligible neighbours should not go beyond those who live in the same or adjacent building, so that a regular contact between the neighbour and the addressee can be expected (para. 1 lit. b of art. 160);
- thirdly, (i.e. if neither family members nor neighbours are present), an employee or doorman working in one of the possible places of notification as provided in art. 151, para. 1, lit. a – d (para. 1 lit. c. of art. 160).

#### 4. The third person “agrees” in the involvement

This requirement ensures that the third person - conscious of the importance of the task voluntarily - accepts the responsibility. This requires that the official has informed the potential person about the relevant circumstances, in particular on the legal consequences for the addressee. For cases, when there is no eligible person that agrees in the involvement, see the explanation below under II. of this article.

#### 5. Third person is not excluded acc. to para. 2

If the third person, to whom the notification is entrusted,

- participates in the same administrative procedure and
- has conflicting interests with the addressee,

Para. 2 prohibits requesting such a person. This regulation prevents that the third person could misuse its role to the detriment of the addressee, e.g. withhold the document to the addressee’s legal disadvantage.

#### 6. Legal consequences

The official has got the following obligations:

- a) Obligation to carry out the procedure during the time stipulated in para. 5: between 7:00 and 19:00

See explanation above on art. 159, under B. III. 3.

- b) Handing over the document to the third person

#### II. Preparing a record on the notification procedure (para. 3)

Because of its legal importance, also the notification through third persons must be recorded thoroughly, especially as the official of the public body cannot control it to its completion. For the purpose of proving the delivery the record should contain at least the following elements, which are partly explicitly mentioned in para. 3 of art. 160 are they a logical consequence of the close relationship to art. 159:

Name of the addressee (obligatory; not explicitly mentioned in para. 3 of art. 160 but resulting from the context explicitly mentioned in the legal text);

The unsuccessful attempts of formalized personal delivery of a written document carried out acc. to art. 159 including place and dates of the attempts (not explicitly mentioned in para. 3 but obligatory in order to justify the approach provided by art. 160);

- Name and address of the third person selected for the procedure (not explicitly mentioned in para. 3 but obligatory since resulting from the context);
- Third person’ relationship to the addressee according to the criteria of para. 1 sentence 2 lit. a to c (obligatory acc. to para. 3);
- Data to identify the written document like title/header of the document, file number, etc... (not explicitly mentioned in para. 3 but obligatory since resulting from the context);
- The date when the document is handed over to the third person (obligatory, para. 3 of art. 160);
- The third person’s statement that he/she commits to forward the document to the addressee confirmed by the third person’s signature (obligatory, para. 3 of art. 160)

- The official's name and signature (not explicitly mentioned in para. 3 but obligatory as a matter of course of good administrative practice – see also art. 99, para. 3);

Further consequences: legal assumption of personal delivery and its date (para. 6)

### III. Procedure in case of refusal of the third person (para. 4 and 5)

The third person that is addressed by the official of the public body to perform a formal notification pursuant to art. 160 is not obliged to do so. Therefore, para. 4 and 5 provide an alternative procedure, namely dropping the document in the addressee's letter box, if the following legal requirements are satisfied:

#### 1. An eligible third person acc. to para. 1 could be identified and requested to engage in the delivery procedure

The first requirement for the alternative procedure is that the official has identified one or more persons that satisfy the legal preconditions of one of the alternatives provided by para. 1, lit. a – c.

The legal consequence, if no eligible person exists or cannot be found: The official must cancel the procedure of art. 160 and return to the continuation of the procedure acc. to art. 159. This legal consequence results from systematic interpretation of art. 159, 160. If in cases, where no eligible third person is present, the procedure of art. 160 would apply, there was almost no scope of application for art. 159, in other words art. 159 was to the largest extent meaningless.

#### 2. Refusal of the selected persons, para. 4

None of the requested eligible third person accepts the commitment to forward the document to the addressee.

#### 3. Mailbox at the place, where the addressee is staying or residing, para. 5

The official shall find out whether at the place where the addressee is stay or residing a mailbox exists, which belongs to the addressee. The wording of para. 5 is clear: only mailboxes at places defined in art. 151, para. 1 lit.a) and c) can be used for this exercise. In other words, the alternative procedure as stipulated in para. 5 is not applicable for places specified under lit. b), ç) and dh).

#### 4. The official cannot have any reasonable doubt that the addressee will take the document from his letter box

This unwritten legal precondition results from a systematic interpretation of art. 160, para. 5. The solution of dropping the document in the mail box is clearly of exceptional character. It is applicable to the case when a selected eligible third person is in the end not willing to take over the requested commitment. But even in this situation the use of the exceptional solution is justified only, if the official – after thorough and dutiful examination of the situation - can conclude from the circumstances of the individual case that the addressee will definitely be in the position to take the document from his/her letter box. Such conclusion can be reached if the official receives credible and plausible information from persons who are familiar with the circumstances, under which the addressee lives. (*Example: The addressee's mother refuses to receive the document, because she doesn't want to interfere with her adult son's affairs but nevertheless provides firm and detailed assurances that her son returns every evening about 20hrs from his job and checks every evening his mail box.*)

If this unwritten precondition would not be required, there is no reason, why not almost every procedure commenced ion the framework of art. 159 could finally be completed by dropping the document in the addressee's mail box. But this would obviously not be in line with the normative purposes and the legislator's intention related to art. 159 and 160.

#### 5. The official's report on the unsuccessful attempt to deliver the document through a third person

The official shall write down a note on the unsuccessful attempt to deliver the document through a third person containing the at least the following elements:

- Name of the addressee (obligatory; not explicitly mentioned in para. 5 of art. 160 but resulting from the context explicitly mentioned in the legal text);

- The unsuccessful attempts of formalized personal delivery of a written document carried out acc. to art. 159 including place and dates of the attempts (not explicitly mentioned in para. 5 but obligatory in order to justify the approach provided by art. 160);
- Data to identify the written document to be notified such as title/header of the document, file number, etc... (not explicitly mentioned in para. 4 and 5 but obligatory since resulting from the context);
- Name and address of the persons requested to act as “third person” in the meaning of para. 1 of art. 160 and their refusal (obligatory; para. 4);
- If possible: prove of refusal through signature of a present witness (obligatory; para. 4)
- Explanation of the reasons, why the circumstances of the individual case justifies the conclusion that the addressee will definitely be in the position to take the document from his/her letter box (obligatory; results from the unwritten precondition explained above under section 3.).

#### 6. Preparation of the envelope containing the written document

The official shall attach to the envelope with the document a written note containing:

- Name of the addressee (obligatory; not explicitly mentioned in para. 5 of art. 160 but resulting from the context explicitly mentioned in the legal text);
- The unsuccessful attempts of formalized personal delivery of a written document carried out acc. to art. 159 including place and dates of the attempts (not explicitly mentioned in para. 5 but obligatory in order to justify the approach provided by art. 160);
- Date and time of putting the envelope in the mail box (obligatory; para. 5)
- The date, on which the delivery is deemed to be carried out acc. to para. 6 (obligatory; para. 5) but advisable);

#### 7. Legal consequences

If the above under section II. explained legal preconditions are satisfied the official has got the following obligations:

- a) Carrying out the procedure during the time stipulated in para. 5: between 7:00 and 19:00
- b) Dropping the envelop with the written document into the addressee’s mailbox
- c) Further consequences: legal assumption of personal delivery and its date (para. 6)

#### IV. Legal consequences of procedural defects

In case of the official’s non-compliance with procedural rules stipulated in art. 160 the notification of the written document is considered to be invalid.

*Article 161 Notification via electronic publication*

1. The notification may be carried out through the publishing into an Electronic Register, which is open to the public, in cases as provided for by the special law, and only if the addressee was informed in advance, on the exact date when the publication will be made.
2. The notification under Paragraph 1 of this Article shall be deemed as carried out in the date set for the publication, only if the document was factually published on that date.
3. The notification of an electronic document may also be carried out through the download from a certain server, closed to the public, only if the party is provided, in advance, with access through authentic electronic means of identification, and if it was made aware through a preliminary notification on the exact date or period when the document may be downloaded.
4. The notification under Paragraph 3 of this Article shall be deemed as carried out on the day it was downloaded from the server. If the document was not downloaded on the specified date, the public body shall send the party a second notification. If the document is not downloaded on the specified date of the second notification, it shall be notified by another suitable way.

A. General Introduction

I. Content and purpose of art. 161

Content: Art. 161 allows for a formal notification by electronic means. It provides two ways of doing so: On the one hand para. 1 and 2 open up the possibility to publish the notification in an electronic register. Para. 3 and 4 on the other hand describe the method of notification by retrieval of the notification. Both methods are formal notification in the sense that they determine the exact date the addressee has received the notification.

Purpose and relation to other CAP provisions: Art. 158 lists the ways a formal notification may be carried out, of which the formal notification by electronic means are described in art. 161. They utilize the possibilities of electronic communication means to assure the transport of the information that is to be notified to the addressee in a way that this fact as well as at the exact date and time of the notification is recorded in a court-proof manner. Art. 161 thereby supplements art. 159 on the personal delivery, art. 160 on the notification through a third party, art. 162 on public notification and especially – in para. 1 and 2 – art. 163 on official publication in the “Official Journal”. The use of electronic means of communication for the purpose of notification requires the addressee to have preliminarily agreed on this form of communication, art 156 para. 1.

II. Constitution and EU law

Neither the constitution nor the relevant EU-regulations do contain corresponding regulations, as they are not as detailed. However, the Services Directive 2006/123/EC sees the use of electronic means of communication as vital for administrative simplification which could bring benefit to service providers, recipients as well as the competent authorities (recital 52). Art. 8 para. 1 of the directive therefore requires the Member States to ensure that all procedures and formalities relating to access to a service activity and to the exercise thereof may be easily completed, at a distance and by electronic means. This includes the lodging of a request as well as the (formal) notification of the decision.

III. Legal consequence of art. 161

A formal notification following the specifications of Art. 161 has the same legal consequences as any other way of formal notification as described in art. 158. A formal notification prescribed by law not following all conditions set up in the provisions of para. 1 and 2 or 3 and 4 is not sufficient to render these effects. A document sent in spite of the fact that this way of communication is not opened by the addressee cannot trigger any legal consequences;

the addressee is free to discard the document without hesitation and without the need to inform the sender. Insofar the basic principle of art. 156 applies here as well.

#### IV. Relation to previous CAP

The previous CAP did not provide for a notification by electronic means. Art. 60 saw the postal (para 1. lit. a) or personal (para 1. lit. b) notification as the norm and allowed for a notification "by telegram, phone, telex or facsimile" only "in urgent cases" and only under the condition that the notification is confirmed the next day in a regular manner, i.e. by post or personal delivery.

#### V. Scope of application

Art. 161 applies at any stage of the proceeding including the execution of the administrative act as provided for in Part Eight of the law; art. 169 and art 172 require the notice of execution to be formally notified.

### B. Notification via electronic publication in details

#### I. Publishing into an Electronic Register (para. 1 and 2)

If a special law provides so, a document may notified by publishing it into an electronic register which is open to the public.

##### 1. Electronic Register (para. 1)

The register provided for here must be an "electronic" one in the sense that it is published electronically, i.e. retrievable by electronic means of communication. This factually requires the register to be published on the Internet. Additionally, the register must be "open to the public". It must be readable without special barriers as for example the need to be registered as a user or even a paywall. The addressee must be able to retrieve the document that is to be notified to him without a burden that goes beyond the usual efforts needed to retrieve documents on the Internet. This is one of the main differences to the notification by retrieval (para. 3 and 4) which requires a certain server that is closed to the public (para. 3).

The wordings of para. 1 ("the exact date when the publication will be made") and para. 2 ("the date set for the publication") imply that the electronic register provided for is a periodical (electronic) publication with fixed publication dates. The register may, however, be also a database that is continually updated. In this case "the exact date when the publication will be made" is the moment the document is added to the database and made openly readable. This date could also be referred to as "the date set for the publication", for example in the E-Mail or other message that informs the addressee about the publication of the document.

##### 2. Information of the addressee (para. 1)

As it is not very common to study the Official Journals and comparable publications, the law requires that the addressee must be informed in advance on the exact date when the publication will be made. This could be made by E-Mail or a text message, but also vocally. As is implied by the word "date", the information must be given at least one day "in advance".

##### 3. Special law (para. 1)

The notification through the publishing into an electronic register may only be carried out in cases provided for by special law, para. 1. There is currently no special law that would provide for this form of notification.

#### II. Date of Publication (para. 2)

The information is notified on the date set for the publication, if the document actually was published on that date, para. 2. This applies to the publication in a periodic journal and the like but also to the publication by adding the document to a database. Although in this case the document can be retrieved not only on that date but later on as well, the exact date of the publication is still of great importance in order to identify the moment of notification, para. 2, which is important for the calculation of deadlines etc...

### III. Notification by Retrieval (para. 3 and 4)

Pursuant to point 3 and 4, the notification of an electronic document can also be done through retrieval from a server closed to the public. This is permissible if the addressee has guaranteed access through authenticated electronic means and is preliminary informed about the date or period the document is saved at that server, para 3. The notification shall be deemed as done in the moment of retrieval. If the document is neither retrieved in the specified time limit in the first nor in that of the then necessary second notification, the administration shall resend the document through other appropriate means, para 4.

The procedure described in these paragraphs allows the public body to precisely determine the moment an electronic document was not only sent out to the addressee, but the moment he actually received it. As discussed in the commentary on art. 156, it is complicated up to impossible for the public body to keep track of an electronic document sent out via E-Mail or comparable means and determine when exactly it enters the receiver's computer system. Therefore it is better to let the addressee download the document after he was authorized, and record the date of that download. This can clearly be set as the moment the document was received by the addressee.

#### 1. Retrieval from a server (para. 3)

An electronic document is notified formally in the following way: The document is stored at a server that is accessible to the addressee. A notification is sent to the addressee, mainly by e-mail or other means as for example text messages. The addressee accesses the server, authorizes himself and receives the document. The moment of access is laid down in the log files of the server and sent to the public body.

It is not necessary for the public body to run the server by itself. It is sufficient if the server is determined by the public body, as long as it has control over the server and its content. It is possible – and preferable – for example to use a central server that is used by all public bodies and maybe courts as well. This would simplify the delivery process for any citizen who -- regardless of the public bodies he deals with -- only has one place to look for electronically served messages and only needs one method of authorization. And it would simplify the method for the public bodies as well that only have to set up and maintain one server, or instruct a private company to set up and maintain the server. The server has to fulfil several crucial tasks: It has to be highly reliable and failsafe. It has to be secured against intruders. It has to check the identity of the addressee. And finally it has to log the access and its date and time. The server also should automatically send out a message to the addressee as soon as a new document is saved in the mailbox of the party, and a message to the authority as soon as the document is accessed, hence served. The server and its log files should be proof against manual interference.

The identification is necessary to make clear and non-disputable that it was the very addressee who received the electronic document, or his representative. It can be done using electronic signatures. Other methods are possible as well, as long as they serve the same purpose and provide a comparable security level. As long as this is the case, even PIN and TAN are possible technical solutions.

The addressee has to be informed that a new document is provided for him at the server. This can be done in any appropriate way, be it E-Mail, text message or even automated letter, although E-Mail will likely be the means of choice since it is the fastest and cheapest way. The addressee has now some time to access the document.

#### 2. Time of notification, second notification (para. 4)

Pursuant to the first sentence of para. 4, the document is deemed served the moment it has been gathered by the addressee. However, if the document has a file format that the addressee has not declared to accept beforehand, the administrative act contained in the document cannot be deemed as being served, art 156. If the addressee only experiences problems opening the document, although his previously declared requirements are met, he is under the obligation to follow the procedure set out in art 156 para. 2, second sentence. In these cases the administrative act is served regardless. Unforeseen and unforeseeable hindrances on the side of the addressee are a case of the reinstatement of a deadline, art 54.

For this form of notification it is crucial, however, that the addressee cooperates. The public body has no means to force him to access the document. Therefore, provisions have to be taken for the case that the addressee does not retrieve the administrative act or any other document that is stacked at the server for him. Since the electronic

formal notification shall be a fast and effortless way of notifying administrative acts, it would not be sufficient to simply rely on the addressee to someday access the message. It would be wrong as well to give up this easy way too fast, and “switch back” to the common ways of formally notifying the document. Therefore the procedure is two-tiered. At first the preliminary notification of the fact that the document may be retrieved shall be repeated, as it may be the case that the first notification simply has not come through. And only after another set period the public body shall utilize other means of formally notifying the document. The length of the period is not set. It is up to the discretion of the public body to specify a reasonable period. With regard to art. 156 para. 3 and art. 160 para. 6, the deadline could normally be set to three days. This would take into account the speed of E-Mails and the fact that persons who are willing to communicate electronically with a public body usually will check their E-Mail account at least twice a week. On the other hand a longer deadline could be necessary, for example in the holiday season.

The wording of the third sentence stating that the public body is held to use “another suitable way” implies that in this case the formal notification by retrieval is not possible to choose. This way, however, can be barred for this time only, and may be chosen again for the notification of a different document.

#### *Article 162 Public notification*

1. A public notification shall be carried out in following cases:

- a) When the participating parties are unknown;
- b) When the place of notification is not known and the notification is not possible, as per Article 151 of this Code;
- c) When other forms of notification are unsuitable or impossible,
- ç) In any other case explicitly provided for by law.

2. The public notification shall be done by displaying the written document on a special notice corner in the head office of the body or its local branch offices, in the prefecture or in another place, and where is considered that him/her to whom it is addressed may be informed.

3. The public notification shall be considered as carried out after 10 days of the date of the publication, as per Paragraph 1 and 2 of this Article. This deadline may be extended by the public body for justified grounds. Date of displaying and removal of the notification shall be specified in the written document displayed in the premises referred to in Paragraph 2 of this Article.

4. In addition to the public display of the written document in the premises referred to in Paragraph 2 of this Article, the public body shall publish the act on its web site and may also publish it on the printed media, in the two newspapers with highest edition.

5. In case of notification of an administrative act, the published text shall contain all the elements as provided for by Article 99 of this Code, with the exception of the reasoning part. It shall be accompanied with information on the office, place and way of getting acquainted with the reasoning part.

#### A. General Introduction

##### I. Content and purpose of art. 162

The formal notification procedures stipulated in art. 159 and 160 (see detailed explanations above) aim at putting the addressee in possession of a written document, by which an administrative action is to be communicated (see art. 148, para. 1). In cases when the realization of the public body’s intention fails, by exception both norms provide – upon fulfilment of certain procedural prerequisites - the legal assumption that the document is deemed to be received by the addressee, irrespective of whether or not he/she has actually come into possession of the document.

As a means of last resort art. 162 provides a means of formal notification that waives *a priori* the addressee's receipt of a written document and instead operates by public communication directed to whom the administrative action concerns. The provision covers two categories of exceptional cases. The first category regulates situations when it is clear that handing over a written document is impossible, in particular because the addressee him-/herself or at least his/her abode is unknown. The second group of cases comprises cases where other forms of formal notification – although technically possible – would be unsuitable to achieve the objective of notification.

So, art. 162 provides a mode of notification if all other means - e.g. an attempt of notifying acc. to art. 159, 160 - have turned out to fail or if the public body on the basis of *ex ante* consideration concludes that any other mean would fail.

## II. Constitution and EU law

The relevant EU-regulations do not contain corresponding regulations, as they leave details of notification to the national legislator. However, the implementation of art. 162 shall be done in the light of art. 20 of the European Code of Good Administrative Behaviour, which rules that no other persons shall be informed of that decision until the addressee has been informed. Consequently, art. 162 shall be applied as *ultima ratio* only. Moreover, to certain extent para. 4 of art. 162 takes this EU-rule into account, as it ensures that only the addressee has access to the grounds of the notified administrative act.

## III. Legal consequence of art. 162

The legal consequence of the public notification is a twofold legal assumption:

Firstly, the law assumes that a notification as such took place, irrespective of whether or not the addressee has got cognizance of the publicly notified content.

Secondly, para. 3 also determines that the legal effects of notification occur *ex lege* after a period of 10 or – if extended by the public body – more days from the date when the public notification was displayed.

## IV. Relation to previous CAP

Art. 60 par. 1 lit. ç) of previous CAP contains a comparable regulation.

### B. Public Notification in details

#### I. The legal preconditions for using public notification (para. 1)

1. Formal notification acc. to art. 157, 158 is required
2. One of the four cases listed in para. 1 is applicable
  - a) The participating parties are unknown (lit. a of para. 1)

Lit. a covers primarily cases where the administrative action is related to the condition of a movable or immovable object, whose owner cannot be identified despite intensive efforts. (*Example: A dilapidated building on a freely accessible piece of land endangers life and health of children when playing on the neighbouring playground. The owner of the property cannot be identified. The competent public body issues an administrative act imposing the obligation on the owner to fence in the whole plot perimeter.*)

- b) The place of notification is unknown (lit. b of para. 1)

Lit. b deals with cases when the identity of an addressee is known but his/her current abode is unknown. (*Example – modification of the previous one - : A dilapidated building on a freely accessible piece of land endangers life and health of children when playing on the neighbouring playground. The owner of the property is known. But he is taking a trip around the world, and nobody knows anything about his current whereabouts. The competent public body issues an administrative act imposing the obligation on the owner to fence in the whole plot perimeter.*)

c) Other forms of notification are unsuitable or impossible (lit. c of para. 1)

Typical cases of lit. c include the issuance of an collective administrative act - as defined in para. 1 lit. b) of art. 3 - addressed to a larger group of persons. (*Examples: The competent public body forbids all commercial merchants of a city to sell fish of a certain delivery that is suspected to be poisoned. The competent public body issues the order to all house owners of a city, who have installed a certain type of gas heating to take it out of operation, as this type has have been shown to be highly dangerous, proved by several explosions that have already occurred.*)

Unsuitability or impossibility would usually result from the size of the addressed group. The larger the number of group members (e.g more than thousand potential addressees) the higher is the degree of unsuitability, whilst public notification to a smaller number of members could be justified in cases of particular urgency that do not allow long identification of individual addressees. However, decisive shall always be the circumstances of the individual case.

d) Special law explicitly prescribes a public notification (lit. ç of para. 1)

Special regulation prescribing public notification might be provided by material administrative law.

II. The means of a public notification (para. 2 and 4)

As a rule, public notification shall be performed in a rather traditional, not to say old-fashioned way, by displaying the written document on a special notice corner in a building of the issuing public body. It might be done in the head office of this body or in its local branch office, in the prefecture or in another public place. The decisive criterion for the choice of the site must be to opt for an alternative that provides the best chance of reaching the addressee. But practice shows that there is only a slight probability that an addressee who could not have been contacted before by other means of notification will be informed in this way.

Therefore para. 4 obliges the public body - as additional measure - to publish the document on its web site, which however requires that the public body maintains such website. If a website does not (yet) exist, the rule renders ineffectual.

Furthermore it is at its discretion to publish the document in the two newspapers with highest edition, but should be obligatory, if a website does not exist.

III. The legal assumption of a public notification (para. 3)

Although the two means of public notification foreseen in para. 4 may be more promising, according to para. 2 only the publication on the notice board triggers a fictitious notification after 10 days of the publication. The public body is authorized to extend this deadline if it thinks this might improve the chance that the addressee learns of the publication.

According to para. 2 the public body shall specify in the displayed document the date of display and removal. The law does not regulate how long the public notification on the notice board shall last. But there is no legal necessity to display it longer than the deadline for the fictitious notification, as with this the legal consequences of the notification occur.

IV. Special rules for the public notification of an administrative act (para. 5)

If an administrative act is published in form of public notification, the published text shall contain all the elements as provided by art. 99 except the reasoning part. This rule is expression of data protection, as everybody has the possibility to read the document at the notice board or in the web site or eventually in the newspaper. But the addressee must have the opportunity to inform himself without delay also about the reasoning part. So the published text must contain the information where and how the addressee can get to know the reasoning part.

*Article-163 Official publication*

1. The notification through publication in the “Official Journal” or in the official publication bulletin shall be mandatory in cases where:
  - a) The notification is addressed to a group of persons, the members of which are or may be identified individually, on the basis of general characteristic, and any other form of notification is considered impossible or inappropriate; or
  - b) It is explicitly provided for by law.
2. Paragraph 5 of Article 162 this Code shall apply to the extent possible.
3. Except when otherwise provided for by the law, the notification under this Article shall be considered as carried out within 10 days of the date of publication.

A. General Introduction

I. Content and purpose of art. 163

Art. 163 regulates another specification of formal notification with some similarity to art. 162 (see explanation above). But here the public notification shall not be carried out by means of a notice board, website or newspapers but by publication in the “Official Journal” because the means of art. 162 would be impossible or inappropriate. There are only a few cases imaginable where an official publication in the “Official Journal” seems more effective than a public notification as provided in art. 162, as the official journal is not as widely read as the alternative means of art. 162, the web site of the public body and two newspapers with the highest edition. The legal value of art. 163 is that after having exhausted all legal possibilities of notification, to provide the absolutely last resort to achieve the legal assumption of para. 3.

II. Constitution and EU law

The relevant EU-regulations do not contain corresponding regulations, as they leave details of notification to the national legislator.

III. Relation to previous CAP

Art. 60 para. 1 lit. ç) of previous CAP mentions the official publication without regulating details.

B. Official publication in details

I. The application of art. 163 (para. 1)

The field of application of art. 163 is rather restricted, as para. 1 limits a formal notification by official publication to two specific cases:

1. The cases of lit. a) of para. 1

Lit. a) of para. 1 stipulates the publication in the “Official Journal” provided the following two legal preconditions are met:

- a) Group of persons, the members of which are or may be identified individually, on the basis of general characteristic

Public notification applies only when the written document is to be notified to a multitude of persons who are or can be identified by common general characteristics, their names and identities, however, are unknown to the public body in the moment of notification. This precondition is typically satisfied if the administrative action that is to be communicated constitutes a collective administrative act as defined in art. 3, para. 1 lit. b). But also administrative actions without the legal character of an administrative act such as warnings addressed to a group of persons (e.g. “to all parents of children under six years of age”) would fall under this preconditions. However,

whenever the official of the public body intends to apply lit. a, he/she has to examine carefully firstly, whether the addressees' names and addresses can be found out easily. If so, the use of an official publication would be unlawful, i.e. the notification invalid, as an individual notification would be possible.

b) Another form of notification is considered impossible or inappropriate

This legal precondition clarifies the exceptional character of art. 163. Other forms of formal notification could particularly be the public notification to a group of addressees acc. to 162 (see above the explanation on art. 162 under B.I.2.c.). Consequently, the legislator gives preference to art. 162 whenever possible or appropriate, which – as a rule - can be assumed if the target group lives in a geographically limited area so that the (local or regional) public body can – with a certain probability – reach the members of this group by means of a notice board, website or regional newspapers. For a multitude of addressees spread over a larger area, however, who do not have some spatial link to the public body and its location, the official publication might be justified as the very last resort.

c) Connection to para. 1 of art. 106

Art. 163 is in close connection to art. 106. The regulation in para. 1 lit. a must be regarded as one of the cases of "stipulated by law" referred to by art. 106 para. 1, that deals with the publishing of administrative acts in the "Official Journal".

## 2. The cases of lit. b) of para. 1

Official notification is required if stipulated so by law. Such stipulation can be found in

### II. Special rules for administrative acts (para. 2)

Para. 2 makes the special rule of art. 162 para. 5 applicable for the official publication (see explanation above). This means that the published text of an administrative act for reasons of privacy must not contain the statement of grounds.

### III. The legal assumption of an official notification (para. 3)

Like in art. 159 – 162, a legal assumption takes effect, even when the addressee does not retrieve the document. Acc. to para. 3, the deadline is 10 days after the publication in the "Official Journal" if not otherwise provided for by special law. (c.f. for the legal consequences in detail the explanations to art. 159 – 162).

# **PART EIGHT**

## **Execution of the Administrative Act**

## PART EIGHT EXECUTION OF THE ADMINISTRATIVE ACT

### **CHAPTER I GENERAL PROVISIONS**

#### *Article 164 Executable Act*

1. The administrative act may be executed only after it enters into force.
2. The execution of the administrative act shall begin:
  - a) upon expiry of the deadline for administrative appeal, if no appeal has been lodged;
  - b) upon the notification of the administrative act, if the administrative appeal is not allowed;
  - c) upon the notification of the administrative act, if under the law the administrative appeal has no suspension effect;
  - ç) upon the notification of the decision to abolish the suspension effect of the appeal under Article 133 of this Code;
  - d) upon notification of the decision resolving the appeal, if the latter has rejected or has failed to accept the appeal.
3. The decision of the public body, which amends the appealed act, shall become executable upon its notification to the party.

#### A. General Introduction

##### I. Content and purpose of Art. 164

##### 1. Executable and non-executable administrative acts

Many administrative acts have a declaring character or grant benefits to the party (e.g. permitting to erect a building or granting a subsidy). These acts are not touched by Part 8 of this Code. The addressee of a permission cannot be forced to make use of it, and the beneficiary of a subsidy is not obliged to accept it. On the other hand, onerous administrative acts (for kinds of administrative acts see above explanation on art. 3 para. 1 a) under A. I. 2) that prohibit specified actions (eg. to enter a house in danger of collapsing) or demand specified actions (e.g. to cut down a rotten tree on the party's property that threatens to fall onto the road or to take the snappy dog for a walk only with a leash) must be complied with by their addressees and are in principal subject to execution.

##### 2. Survey on levels of execution

For executable acts, Part Eight provides 2 modes: the voluntary execution (art. 169 and 170) and the forceful execution (art. 165, 167 and 171 et seq.).

The regulations of this Code about administrative acts, especially art. 42 (communication with parties), 45 (right of the parties to check the files), 47 (right to submit opinions and explanations), 87 (right to be heard), 100 (reasoning) are conceived to convince the addressee of the necessity of complying with its orders or prohibitions. But the legislator does not trust in the addressee's willingness to obey the order and demands the exercise of a certain psychological pressure (c.f. art. 170) even on the first level, the voluntary execution. Logically, the addressee is from art. 169 onwards called "subject of execution". And furthermore, often the proceeding of voluntary execution remains without effect and a forceful execution becomes inevitable. The reasons are diverse. Often the non-compliance of the addressee is based on negligence, incomprehension or unwillingness. Then at

first an escalated psychological pressure is applied by the different stages of the forceful execution to urge him to comply with the administrative act, especially by the notification about the forceful execution (art. 172). If this is not successful, the means of forceful execution as described in art. 174 to 177 can be applied to attain the objective of the administrative act, if necessary against the will of the addressee. But it should always be kept in mind that the purpose of execution is not primarily the application of the means of execution provided by art. 174 to 178 but to reach the target of the onerous administrative act by inciting the addressee (“subject of execution”) to comply with the act more or less voluntarily.

Another method of forceful execution is regulated in art. 179, which applies when an important and imminent danger must be repelled and there is not time for the complicated proceeding of issuing an administrative act, attending its enforceability, notify a notice about the forceful execution etc. or if there is no addressee at hand for such an act.

The execution of an administrative act – be it forceful or not – represents an important encroachment into the legal sphere of the addressee. That is why the legislator has bound the execution to strict preconditions.

Art. 164 describes the preconditions which the administrative act that shall be executed must fulfil.

## II. Constitution and EU-Law

The execution of an administrative act may affect the legally protected sphere of the addressee. The corresponding constitutional framework is formed by the addressee’s constitutional rights, especially by art. 37 (inviolability of residence) and art. 41 (right of private property) as well as by the principle of proportionality, which is underlined by art. 165 (see below).

Art. 20 of the Code of good administration of the Council of Europe inflicts the property of the addressee, this Code observes the limits of Art. 17 EUCHFR.

## III. Legal consequence of Art. 164

The execution of administrative acts that do not fulfil the preconditions of art. 164 is illegal.

## IV. Relation to previous CAP

Art. 164 para. 1 is identical with art. 130 para. 1 of previous CAP. The further specifications and explanations in para. 2 and 3 are lacking in the previous CAP.

## V. Scope of application

The scope of art. 164 extends to the execution of onerous administrative acts.

## B. Executable act in details

### I. The general rule of Art. 164 para. 1

Para. 1 states the principle that the execution of an administrative act is only admissible after this has entered into force (to the preconditions of entering into force cf. art. 104 and its explanation). The basic idea of this regulation is that the act shall not be executed before its addressee has had the opportunity to use all available legal remedies against it. Otherwise the execution would create a *fait accompli* that might prove as illegal if the legal remedy against the administrative act is successful (e.g. a house has been torn down by forceful execution, and in the appeal procedure is revealed that the administrative act demanding the demolition was illegal).

Although the wording of art. 164 and its systematic position might suggest otherwise, it is obvious that the time limits for execution only apply for a forceful execution, but not in case of a voluntary execution. The addressee is not hindered to comply with an interdiction or order before it has entered into force. Logically he is not obliged to wait until the end of the time limit for appeal, if he does not intend to lodge an appeal.

The specific cases of entering into force in relation to execution are listed in para. 2 and 3.

## II. The alternative preconditions of execution of para. 2

### 1. Expiry of the deadline for administrative appeal, if no appeal has been lodged (lit. a)

An onerous administrative act may be executed forcefully only after the time limit for an administrative appeal is expired, as the addressee may exploit the deadline for an appeal up to its last day.

### 2. Administrative acts against which an administrative appeal is not allowed (lit. b)

In the few cases where no administrative appeal against the administrative act is allowed (cf. art. 130 para. 1) and thus no deadline for a remedy is triggered, an onerous administrative act may be executed forcefully from the moment when the administrative act is notified.

### 3. Administrative appeal without suspension effect (lit. c)

Art. 133 para. 1 states that in general an administrative appeal suspends the execution until the notification of the appeal decision. As an exception, according to art. 133 para. 3 lit. b an administrative appeal against administrative acts related to police measures has no suspension effect by law. Thus such an administrative act is executable already upon its notification.

### 4. Abolishment of the suspension effect (lit. ç)

The second exception in art. 133 para. 3 applicable to enforceable administrative acts is lit. c which rules that the public body which has issued the administrative act as well as the superior public body may abolish the suspension effect of the appeal if it considers that the immediate application is in the interest of the public order, public health or other public interests (to the high requirements of such a decision cf. explanation on art. 133 under B. III). When the decision on the abolishment of the suspension effect is notified to the addressee, the onerous administrative act containing a prohibition or an order becomes executable.

### 5. Termination of the appeal procedure to the disadvantage of the appellant (lit. d)

If an administrative appeal against an onerous administrative act that shall be executed fails for formal or material reasons, the administrative act becomes executable with the notification of the decision on the appeal. If the appeal is partly successful (e.g. the competent public body considers the construction of a house as completely illegal and orders its complete demolition, but the appeal decision holds that the house is only oversized and reduces the order to the demolition of the upper floor), only the part of the administrative act where the appeal remained unsuccessful may be executed.

It should be kept in mind that if the appellant lodges a claim to the administrative court against the decision rejecting his appeal, this might have a retroactive suspension effect under the conditions of art. 28 et seq. of Law No 49/2012 on the Organisation and Functioning of Administrative Courts and the Adjudication of Administrative Disputes. So it is advisable that in the cases described in lit. d the public body attends at least the end of the deadline for the claim to the administrative court, before it starts execution. Otherwise the execution could be illegal and trigger claims for compensation.

### 6. Amendment of an administrative act during the appeal proceeding (para. 3)

If an appealed onerous administrative act that shall be executed is amended in the course of the appeal proceeding, this amendment is legally regarded as a part of the decision resolving the appeal and thus has the same legal consequences (cf. remark C.V. above to para. 2 lit d). Thus the amending administrative act becomes executable with its notification to the party.

*Article 165 Principles of forceful execution*

1. Public organs shall not execute any action or measure that in one way or another limits legitimate rights of private persons, without issuing in advance an administrative act that has become executable, except as provided by article 179 of this Code.
2. The execution of administrative acts shall be carried out by the way and means of execution, which ensure execution by causing the minimum possible damage to the rights and legal interest of the subject, against which the execution is carried out.

A. General introduction

I. Content and purpose of Art. 165

Art. 165 postulates 2 principles of forceful execution, in para. 1 the rule that only administrative acts, that have become executable acc. to art 164 may be executed, and in para. 2 a specification of the fundamental rule of proportionality in relation to enforcement.

II. Constitution and EU-Law

See above A.II. on art. 164. The principle of proportionality that is emphasized in para. 2 is mentioned in art. 6 ECGAB as well as in Art. 5 of the Code of good administration of the Council of Europe, especially in para. 2.

III. Legal consequence of Art. 165

A forceful execution that does not comply with the rules of art. 165 is illegal and may trigger claims for compensation.

IV. Relation to previous CAP

A comparable regulation to para. 1 is art. 130, especially para. 2, of the previous CAP. Para. 2 adopts the principle of former art. 132 para. 2.

V. Scope of application

The scope of application of art. 165 is as described for art. 164 (see above A.V. on art. 164).

B. Principles of forceful execution in details

I. Prohibition to execute forcefully an administrative act not yet executable (para. 1)

Para. 1 postulates that every onerous action of a public body intruding into the legally protected sphere of a citizen, eg. by a prohibition or an order, must be preceded by an administrative act that has become executable. It thus accentuates the general rule already expressed in art. 164 where the cases of executable administrative acts are listed.

An exemption from this general rule with very strict legal preconditions is necessary in situations when an executive action is imperatively necessary and urgent to ensure public order and security or avoid immediate threats or risks to people's health, life or property and it is impossible even to notify such an administrative act or when such an act has been notified, but not yet reached the state of enforceability. This is regulated in art. 179 (Immediate execution).

II. The principle of proportionality in execution (para. 2)

Any administrative action requires the compliance with the proportionality principle. Thus it must not interfere with rights and freedoms beyond what is necessary to achieve the purpose of the respective administrative action. This principle is to be applied not only when conceiving the onerous administrative act containing a prohibition or an order. It applies as well to the forceful execution of this act. In this stage the danger of an exuberant infringement into the sphere of the addressee cannot be denied and must be prevented. It must always be kept in

mind that a forceful execution, that in general happens only when the addressee has before denied complying with the administrative act, is not a form of punishment, but has the simple function to attain a situation that is in accordance with the law. This is what para. 2 emphasizes. Thus also the act of forceful execution must fulfil the 3 criteria of proportionality.

### 1. Suitability

Firstly, the act of execution must be suitable to attain the purpose prescribed by law.

*Example: A, owner of a house in a bad state, has been ordered by the competent public body to support the tumbledown concrete balcony. As he does not react within the set deadline, the public body initiates a forceful execution acc. to the regulations of this Code and orders the artisan B to support the balcony (cf. art. 176). But it turns out that B is a glazier who has nor the knowledge nor the means to support a concrete balcony. So this act of execution is not suitable to attain the purpose and thus not proportional.*

### 2. Necessity

Secondly, the act of execution must be strictly necessary to obtain the purpose, what means that it must not exceed the necessary action. Especially this condition must be diligently observed by the competent civil servant.

*Example: Like the example above. As A does not react, the public body orders the demolition contractor to remove the whole balcony (although it would have been sufficient to ban the danger by supporting it). This measure is unnecessary and thus disproportionate. As it burdens the legal situation more than necessary, it is unlawful and may trigger claims of compensation.*

### 3. Adequacy

Thirdly, the act of execution must be adequate, i.e. the administrative intervention must not imply a disadvantage that is out of proportion with the designed end.

## Article 166 Grounds for non-execution

1. Except for cases where the law has provided for otherwise, the administrative act, which is executable under Article 164 of this Code, shall not be executed when:

- a) Its effects have been suspended;
- b) An appeal with suspension effect has been filed against it;
- c) 5 years have lapsed from the date when the act became executable.

## A. General introduction

### I. Content and purpose of Art. 166

Art. 166 complements art. 164 by adding negative conditions that hinder an execution.

### II. Constitution and EU-Law

See above A.II. on art. 164.

### III. Legal consequence of Art. 166

If one of the 3 obstacles cited in art. 166 applies, the execution of an administrative act, although it fulfils the conditions for execution as regulated in art. 164, is illegal.

### IV. Relation to previous CAP

Lit. a and b correspond to art. 131 para. 1 lit. a and b. There was no equivalent to lit. c in the previous CAP.

## V. Scope of application

The scope of application of art. 166 is as described for art. 164 (see above A.V. on art. 164).

## B. Grounds for non-execution in details

### I. No execution, when the effects of the administrative act have been suspended (lit. a)

Even when an administrative act is executable acc. to art. 164, its forceful execution may be suspended for a couple of reasons, which are listed in art. 180. A suspended administrative act must not be executed.

### II. No execution, when an appeal with suspicion effect has been filed against it (lit. b)

According to art. 133, an administrative appeal suspends the execution of the appealed administrative act until the notification of the appeal decision, if no exception of art. 133 par. 3 applies. Furthermore, in case that the suspension effect has been stopped by an act of the public body (art. 133 para. 3 lit. c), art. 133 para. 4 gives the opportunity to the party to file a direct appeal against this act to the competent court for administrative matters. In these two cases lit. b underlines that the execution of the onerous administrative act is illegal.

### III. No execution 5 years after the administrative act has become executable (lit. c)

When an onerous administrative act has not been executed within 5 years after it has become executable, one can esteem that the public body is no longer interested in its execution. To create legal certainty, especially for its addressee, lit. c forbids its further execution.

## *Article 167 Competent body for forceful execution*

1. Except for cases where the law has specifically specified for another body, the forceful execution shall be under the jurisdiction of the public body, which has issued the initial act, even if it has been changed or substituted by the superior body, due to the administrative appeal or by the court.

## A. General introduction

### I. Content and purpose of Art. 167

Art. 167 regulates that the public body that has issued the initial administrative act is competent for its execution, if not regulated otherwise by special law.

### II. Constitution and EU-Law

See above A.II. on art. 164.

### III. Legal consequence of Art. 167

If a public body performs a forceful execution without being competent acc. to art. 167, the execution is illegal.

### IV. Relation to previous CAP

The previous CAP did not contain an equivalent rule.

## V. Scope of application

The scope of application of art. 167 is as described for art. 164 (see above A.V. on art. 164).

## B. Competent public body for the execution in details

As there are no special public bodies appointed for forceful execution, art. 167 rules that an onerous administrative act shall be executed by or under the jurisdiction of the public body that has issued it, except if otherwise regulated by law. This rule applies, too, when the act has been substituted or amended by the appeal decision of the higher public body or by the competent court for administrative matters.

When a forceful execution must be applied acc. to art. 179 (Immediate execution), often there is no time to issue an administrative act before. In this case art. 167 must apply accordingly. This means that the execution is under the jurisdiction of the public body that should have issued the onerous act, if there had been time to do so (cf. art. 179 para. 2).

### *Article 168 Addressee of forceful execution*

The execution shall be conducted against the party who has to fulfil an obligation imposed by an administrative act or against its legal heirs, if the obligation does not have a strictly personal character.

## A. General introduction

### I. Content and purpose of Art. 168

Art. 168 clarifies, against whom a forceful execution shall be directed, especially if the original addressee is no longer available.

### II. Constitution and EU-Law

See above A.II. on art. 164.

### III. Legal consequence of Art. 168

If the forceful execution is directed against the wrong addressee, it is illegal and may trigger claims for compensation.

### IV. Relation to previous CAP

The previous CAP did not contain a corresponding clarification.

### V. Scope of application

The scope of application of art. 168 is as described for art. 164 (see above A.V. on art. 164).

## B. The addressee of forceful execution in details

The addressee of execution is defined already by the underlying onerous administrative act to a specified person or a group of specified persons (cf. art. 3 para. 1 lit. b). Art. 168 concentrates on the problem, whether the execution proceeding can be continued against the heir.

### *Examples:*

*A, owner of an estate, from which a rotten tree threatens to fall on public ground and endangers passing persons and vehicles, dies during the execution procedure which aims at felling the tree.*

*B builds a house illegally in an outer area. The public body demands its demolition; during the execution procedure B dies.*

*C is owner of a car from which oil is leaking permanently. C dies after receiving the administrative act that demands him to repair the car.*

D is ordered to reveal his financial situation to prove that he cannot support his son's university education.

Art. 168 focuses on the question, whether the obligation is strictly personal or not. Regarding the examples, the obligation of D to reveal his financial situation is strictly personal, so that the proceeding must be terminated with D's death. Regarding A, B and C, the dangers for the public order and security (the tree, the illegally built house and the leaking car) are independent of the addressees of the administrative act, but connected to their belongings. Thus in these cases the execution proceedings can be continued against their heirs, who have to fulfil the obligations of A, B or C respectively. To the heirs the base for the execution, the onerous administrative acts against the testators, should be notified for their information, but without the possibility of appealing them if they have become executable acc. to art. 164 and 166.

Similar problems arise, when the original addressee does not die, but is no longer available for other reasons, e.g. by selling the properties from which the dangers for the public order and security come. Here the same principles as shown above regarding heirs must be applied.

## **CHAPTER II**

### **VOLUNTARY EXECUTION OF THE ADMINISTRATIVE ACT**

#### *Article 169 Notification of voluntary execution*

1. Except in cases of immediate execution under Article 179 of this Code, the competent public body shall send a notice to the subject of execution to execute the obligation under the administrative act and gives it a reasonable deadline.
2. The notification of the voluntary execution shall be made in writing and formally notified to the subject of execution.

#### A. General introduction

##### I. Content and purpose of Art. 169

Art. 169 regulates together with art. 170 the details of warning of a possible forceful execution.

##### II. Constitution and EU-Law

See above A.II. on art. 164.

##### III. Relation to previous CAP

The previous warning of a possible forceful execution was not specially regulated in the previous CAP.

##### IV. Scope of application

The scope of application of art. 168 is as described for art. 164 (see above A.V. on art. 164).

#### B. Notification of voluntary execution in details

##### I. The necessity of the voluntary notice (para. 1)

Although, as explained above on art. 164 A.I.2., in theory an onerous administrative act should be so convincing that its addressee will comply with it voluntarily, the legislator is not so confident to rely on the addressee's willingness to fulfil his obligation. So para. 1 demands that except in case of immediate execution as regulated in art. 179 the competent public body shall send a special "voluntary notice" to the addressee (subject of execution). The purpose of this is both information as well as warning, announcing that a forceful execution might be carried out if the obligation would not be fulfilled within a set deadline. With this voluntary notice the first level of psychological pressure on the subject of execution is reached. Thus in general it should be combined with the underlying administrative act.

However, the voluntary notice seems dispensable if the competent public body has gained the conviction, e.g. on occasion of the hearing, that the subject of execution will fulfil his obligation.

The content of this voluntary notice is detailed in art. 170.

##### II. Formal conditions of the voluntary notice (para. 2)

To underline the importance of the voluntary notice and to secure that the subject of execution gains cognizance of it, para. 2 demands its written form and formal notification. This is one of the few occasions where this Code expressly demands a formal notification. As the notice should be integrated into the administrative act which shall be executed, this means that the administrative act itself plus the voluntary notice integrated into it must be formally notified.

*Article 170 Content of the voluntary notice*

**1. The notice about the voluntary execution shall contain:**

- a) An abbreviation of the administrative act that will be executed;**
- b) Information on the manner of execution and other data necessary for the execution;**
- c) Warning made to the subject of execution that, in case of failure to perform the voluntary execution, within a deadline as specified in the notice, a forceful execution shall commence.**

**A. General introduction**

**I. Content and purpose of Art. 170**

Art. 170 displays the content of the voluntary notice.

**II. Constitution and EU-Law**

See above A.II. on art. 164.

**III. Relation to previous CAP**

The previous CAP regulated in art. 133 only the notice on forceful execution.

**IV. Scope of application**

The scope of application of art. 168 is as described for art. 164 (see above A.V. on art. 164).

**B. Content of the voluntary notice in details**

The voluntary notice as regulated in art. 169 and 170 has a double function. It is information about the intentions of the public body as well as warning what might happen to his detriment if he does not fulfil his obligations demanded in the onerous administrative act. Thus the voluntary notice serves as an incentive to the subject of execution to avoid disadvantages by complying with the administrative act voluntarily.

**I. Designation of the onerous administrative act (lit. a)**

To the subject of execution must be clear to which administrative act the voluntary notice refers. Thus the notice must designate the underlying onerous administrative act which shall be executed. For this designation the essentials of its introductory part (cf. art. 99 para. 2 lit. a) and the file number are sufficient. Such an abbreviation is of course not necessary when the voluntary notice, as recommended, is part of the underlying administrative act itself.

**II. Information on a possible execution (lit. b)**

Although the execution is still on the level of voluntariness and the sense of the voluntary notice is simply to incite the subject of execution to comply with the underlying administrative act and show what could happen in case of disobedience, lit. b demands to inform him about the possible manner of execution and other data for the execution. This means that already in this notice should be mentioned, whether the final forceful execution will be an execution of pecuniary obligations (cf. art. 174) or of non-financial obligations done through third persons (cf. art. 176) or by the public body itself, possibly with the help of the State Police (art. 177) and which costs might arise for the subject of the execution (c.f. art. 176 para. 3).

However these specifications are not absolutely binding for the public body. If at last a forceful execution should become necessary, the circumstances might have changed and the public body might regard another manner of execution more appropriate than the one announced in the voluntary notice. In the voluntary notice these specifications are only destined to show to the subject of execution what might happen if he does not fulfil his obligations and as at this level of execution it is by no means sure that there will be a forceful execution at all.

### III. Warning of a forceful execution (lit. c)

The voluntary notice must also contain the explicit warning that the manner of execution mentioned in lit. b will be applied forcefully, if the subject of execution will not fulfil his obligations voluntarily within a set deadline and the execution proceeding will pass over to forceful execution.

Although the legal text places the setting of this deadline into the voluntary notice, it might also be specified already in the underlying administrative act instead. The deadline is necessary to give the possibility to the subject of execution to fulfil his obligation voluntarily. Its length depends on the content of the order.

Examples:

If the subject of execution shall break down the house he has erected illegally, he must have the time to choose between the offers of different contractors. Additionally, it must be taken into account that the chosen contractor probably cannot start his work on the next day.

On the other hand, if the owner of a snappy dog shall take it for a walk only with a muzzle and at a leash of 1,5 m, the deadline may be only 3 days to buy the necessary equipment.

If the administrative act that shall be executed represents a prohibition, a deadline for complying with it is only necessary, if the prohibition shall not yet be valid from the date of its notification.

Contrary to the forceful execution, the underlying onerous administrative act must not yet be executable in the sense of art. 164 (for this see below explanation B II. to art. 173), when the deadline set in it or in the voluntary notice expires. This first deadline serves only for inciting the subject of execution to a voluntary action. But if he does not respect this deadline, he shows his unwillingness to comply with his obligation and so may lead the competent public body to start a proceeding of forceful execution. But as further deepened below in explanation B to art. 173, the continuation by a forceful execution is not obligatory but in the discretion of the public body.

### **CHAPTER III**

## **FORCEFUL EXECUTION OF THE ADMINISTRATIVE ACT**

#### *Article 171 Time of forceful execution*

1. The forceful execution on public or official holidays, as well as the execution between 19:00 – 7:00 hours, may be carried out only in urgency cases, if as a result of non-execution the public interest would be affected, based on a written and reasoned order of the body, which is competent for the execution.

#### A. General introduction

##### I. Content and purpose of Art. 171

Art. 171 continues the series of articles on forceful execution interrupted by Chapter 2 (art. 169, 170) and postulates strict conditions for the forceful execution on holidays and at night-time.

##### II. Constitution and EU-Law

See above A.II. on art. 164.

##### III. Legal consequence of Art. 171

Forceful executions within the forbidden periods are unlawful.

##### IV. Relation to previous CAP

A corresponding regulation was lacking in the previous CAP.

##### V. Scope of application

The scope of application of art. 171 is as described as for art. 164 (see above A.V. on art. 164).

#### B. Time limits for execution in details

In accordance with the principle of proportionality (cf. art. 165 para. 2), the impact of the forceful execution into the sphere of the subject of execution shall be as low as possible. This implies that an intervention on public or official holidays as well as in night-time from 19.00 to 7.00 hours shall be avoided, if possible. Art. 171 allows exemptions from this rule if otherwise the public interest would be affected. This sounds like a rather meaningless condition, as in principle every disobedience to onerous administrative acts could be regarded as being against public interest. But the exceptional role of this exemption is underlined by the fact that in these cases a special written and reasoned order of the competent body (cf. art. 167) is prescribed.

#### *Article 172 Notification of the forceful execution*

1. Except for cases of immediate execution under Article 179 of this Code, if the obligation is not implemented voluntarily, the competent public body shall inform the subject of execution about the forceful the execution.

2. The notification of the forceful execution shall be made in writing and it shall be formally notified to the subject of execution and shall constitute an administrative act.

3. In case the submission of an appeal has no suspension effect under the special law, or if it is obvious already during the procedures that the party will not voluntarily fulfil the obligation, the notice shall be itself be part of the administrative act, which is executed.

A. General introduction

I. Content and purpose of Art. 172

Art. 172 contains together with art. 173 the formal conditions of the forceful execution.

II. Constitution and EU-Law

See above A.II. on art. 164.

III. Legal consequence of Art. 172

The forceful execution is illegal if the conditions of art. 172 are not regarded.

IV. Relation to previous CAP

Art. 172 contains elements of art. 133 of previous CAP.

V. Scope of application

The scope of application of art. 172 is as described as for art. 164 (see above A.V. on art. 164).

B. Notification of the forceful execution in details

I. The necessity of a notice on forceful execution (para. 1)

If the voluntary execution has failed, as the subject of execution has not fulfilled his obligation within the set deadline, the competent body may initiate a forceful execution.

But it should be kept in mind that even in this situation the public body is not obliged to start a forceful execution. Furthermore the decision to execute an administrative act by force is at the discretion of the competent body. There are situations when it is advisable not to execute an administrative act, e.g. when the result of the execution proves to be in a massive imbalance to the envisaged objective or if the circumstances since the issuing of the administrative act have changed meanwhile so that its execution would make no sense any longer.

If the competent body decides after in-depth reflection to start a forceful execution, this does not mean that one of the possible instruments of execution as shown in art. 174 to 177 will be applied at once. This would be only the last-ditch measure in the execution procedure which is based on a gradual psychological escalation that aims at impelling the subject of execution to fulfil his duties expressed in the underlying administrative act by himself. In case of an execution of non-financial obligations through third persons, this effect is emphasized by the regulation in art. 176 para. 3 about the pre-payment of the costs of execution, which in practice should be part of the notice. Thus art. 172 provides as mainstay of the execution procedure the notice to the subject of execution to inform him about the now impending forceful execution. This is a last attempt to convince the subject of execution that it would be favorable for him to comply with the administrative act instead of becoming the victim of forceful executive measures.

Art. 172 does not apply in the cases of art. 179 (immediate execution), when there is not time to issue an administrative act before the application of the execution measure, or if an underlying administrative act was issued, but the danger to public order and security grows so quickly and unexpected that a notice about the forceful execution cannot be issued in time.

II. Formal conditions of the notification about the forceful execution (para. 2)

Because of the outstanding importance of the notice in the course of the execution proceeding (cf. above explanation B), para. 2 demands its written form and formal notification. This is one of the few occasions where this Code expressively demands a formal notification.

When the notice refers to an impending execution of non-financial obligations through third persons, it shall contain the calculated expenses and order the subject of execution to deposit an advance amount necessary to cover them (art. 176 para. 3).

### III. Combination of the notice with the underlying administrative act (para. 3)

In general, the notice about the forceful execution will be issued as a separate administrative act, because the proceeding on the forceful execution can start only when it becomes apparent after the proceeding of voluntary execution that the subject of the execution is not willing to fulfil his duties. A combination with the underlying onerous administrative act is foreseen when the competent public body has acquired the firm impression during the preceding procedure that the subject of execution is not willing to fulfill his obligations voluntarily. Besides, para. 3 rules another case. If an appeal against the underlying administrative act which is to be executed would have no suspension effect under special law, the notice shall be integrated into the administrative act.

To the effects of such a combination on the appeal proceeding see below art. 183.

#### *Article 173 Content of the notification of the forceful execution*

##### 1. The notification of the forceful execution should contain:

- a) an abbreviation of the administrative act that will be executed;
- b) the date and time planned for the performance of the execution.
- c) Information on the manner of execution and other data necessary for the execution.

2. In cases where the forceful execution is made under Article 176 of this Code, the warning shall contain, if possible, also the amount of the execution costs.

#### A. General introduction

##### I. Content and purpose of Art. 173

Art. 173 displays the content of the notification on forceful execution.

##### II. Constitution and EU-Law

See above A.II. on art. 164.

##### III. Relation to previous CAP

Art. 173 contains elements of art. 133 of previous CAP.

##### IV. Scope of application

The scope of application of art. 173 is as described as for art. 164 (see above A.V. on art. 164).

#### B. Notification of the forceful execution in details

##### I. The content of the notification (para. 1)

The notification on forceful execution as regulated in art. 172 and 173 is the last and highest level of psychological pressure onto the subject of execution. It shows to him which execution measure is imminent and by announcing the date of the planned execution it offers him the last chance to avoid it by fulfilling his obligation before. The notice is an administrative act whose existence depends on the existence of the underlying onerous administrative act.

##### 1. Designation of the onerous administrative act (lit. a)

To the subject of execution must be clear to which administrative act the v notice of forceful execution refers to. Thus the notice must designate the underlying onerous administrative act which shall be executed. For this designation the essentials of the introductory part (cf. art. 99 para. 2 lit. a) and the file number are sufficient.

## 2. Date and time planned for the performance of the execution (lit. b)

In contrast to the deadline set in the onerous administrative act or in the voluntary notice, this date set in the notice of forceful execution is the definite date for the performance of the execution, although, as mentioned above, the subject of execution still has the possibility to avoid it. If possible, also the time of day should be indicated.

For the calculation of this ultimate deadline 2 factors must be observed, a factual and a legal one.

The factual aspect is that the deadline must be realistic to give the last chance to the subject of execution to fulfil his obligation, as explained above under B III. to art. 170. Although the subject of execution normally already has had time to fulfil his obligation within the deadline set in the onerous administrative act or in the voluntary notice, the competent public body should grant him a prolongation of this new deadline, if he credibly shows that he is not able to keep even this new deadline because of problems outside his responsibility (e.g. the appointed enterprise to tear down his illegally erected house cannot keep the date for the work).

But it might be risky for the subject of execution if he makes full use of the deadline and complies with his obligation only in the last moment: If the competent public body has already contracted with a company to do the work instead of him (cf. art. 176) when the deadline has expired, and the company demands compensation for non-compliance as it cannot fulfil the contract and has lost other orders, these costs must be paid by the subject of execution.

The legal aspect to be observed within the calculation is prescribed by art. 164, acc. to which the deadline must never end before the administrative act is executable. There is no problem when one of the cases listed in art. 164 para. 2 or para. 3 apply. But attention is recommended when the deadline for a possible appeal has not yet expired. This is especially possible if the competent public body has waived the proceeding of voluntary execution (cf. above explanation D to art. 169). Then the deadline for the execution must not end before the end of the deadline for the appeal. Should the subject of execution lodge an appeal with suspension effect, the deadline for the execution becomes obsolete. The same applies if another remedy with suspension effect is lodged, e.g. a claim to the administrative court after the administrative appeal has been rejected (cf. art. 164 para. 2 lit d). According to art. 28 et seq. of Law No 49/2012 on the Organisation and Functioning of Administrative Courts and the Adjudication of Administrative Disputes the court may grant a suspension effect.

## 3. Information on the manner of execution and other data necessary for the execution (lit. c)

The notification on forceful execution must define the intended manner of execution, whether it will be an execution of pecuniary obligations (cf. art. 174) or of non-financial obligations done through third persons (cf. art. 176) or by the public body itself, possibly with the help of the State Police (art. 177). The competent public body should not only use the legal term, but describe detailed and understandable what shall happen (e.g. not only write: "An execution of non-financial obligations through third persons will be executed", but also "The balcony on the street side of your house Baker Street 15 will be removed by an ordered contractor in the morning of 10th July"). If further information to the subject of execution is necessary, it should be added here (e.g. "Please leave the garden door open so that the contractor has access to your property").

### II. Nomination of the costs of execution (para. 2)

If the competent public body chooses to execute a non-financial obligation under the conditions of art. 176 through a third person, it enters into a contract with this legal or natural person, e.g. a craftsman or a company, who shall fulfil the obligation instead of the subject of execution. The appointed person will send a bill for its work to the public body. According to art. 176 para. 2, the subject of execution must refund these expenses and will be informed about these costs and ordered to pay the calculated amount in advance to the public body (cf. art. 176 para. 3). In the notice on forceful execution, the subject of execution should already quantify the necessary amount, if possible. Otherwise the public body should at least inform the subject of execution about his obligation to refund the costs of the third person. This is an additional way to exert psychological pressure on the subject of execution and could show him that it might be cheaper to execute the demanded action by himself than to pay the costs of somebody else.

### III. Survey on the variations of proceedings of execution

The ordinary execution proceeding as conceived by the legislator is as follows: The administrative act to be executed is normally accompanied by the voluntary note. The competent public body may waive the voluntary note when it is convinced that the subject of execution will comply with his obligation voluntarily and without any pressure, cf. above note B.I. on art. 169. But if he does not, the proceeding will in general be continued as forceful execution as well. If the subject of execution does not comply with his obligations, the competent public body will shift to the forceful execution and send the note about the forceful execution to the subject of execution, setting a new deadline. If this deadline is not met by the subject of execution, the means of execution can be applied.

The much faster immediate forceful execution has very strict pre-conditions which will be dealt with below to art. 179.

#### *Article 174 Forceful execution of pecuniary obligations*

1. The execution of pecuniary obligations shall be carried out by the competent public body in accordance with the provisions of the law governing the tax procedures, which shall apply to the extent possible.

#### A. General introduction

##### I. Content and purpose of Art. 174

Art. 174 makes the regulations on tax procedures applicable for the execution of pecuniary obligations.

##### II. Constitution and EU-Law

See above A.II. on art. 164.

##### III. Relation to previous CAP

The Previous CAP did not contain a corresponding regulation.

##### IV. Scope of application

The scope of application of art. 174 is as described as for art. 164 (see above A.V. on art. 164), limited to pecuniary obligations.

#### B. Execution of pecuniary obligations in detail

##### I. Pecuniary obligations

This legal precondition includes any kind of financial obligations on the part of the parties that can result from an administrative procedure. Those obligations include in particular:

- Administrative fees (see explanation above on art. 19)
- Administrative fines e.g. for traffic offences
- Payment obligations entered into through administrative contract
- Costs of execution acc. to art. 176 para. 2

##### II. Carried out by the competent body

This precondition makes clear that the execution of financial obligations falls in the competence of public body that conducted the administrative procedure and issued the concerned administrative act (art. 167).

### III. Legal consequences of art. 174

Pecuniary obligations shall be retracted in accordance with the rules provided by the regulations on tax procedures, which apply *mutatis mutandis*. This requires the sound familiarity of the competent administrative authorities with all relevant provisions of the tax law.

### C. Recommendation de *lege ferenda*

Usually, other European national administrative laws provide as one of execution law instruments the possibility of coercive fines to execute administrative acts containing a prohibition or an order that can only be fulfilled by the subject of execution himself and not by a third person. As it can be seen from the list of possible financial obligations falling in the scope of this article, such coercive instrument is not provided by this Code. It must be assumed that this legislative loophole is obviously the result of a legislative error, however with serious unintended consequences. The lack of coercive fines creates a simply powerless public body in cases, if the addressee of an administrative act imposing a strictly personal obligation is unwilling to comply. As in this context the resolution of this problem by analogue application of another legal provision cannot be seen, it shall be the task of the legislator to fill without delay this legislative loophole by an adequate regulation.

#### *Article 175 Execution of non-pecuniary obligations*

1. Non-financial obligations are those obligations that are related to the carrying out of an action, permission for the carrying out of an action, or prohibition of carrying out of an action by the subject of the execution, except for the payment in cash.

2. The forceful execution of non-financial obligations shall be carried out through one of the instruments of execution specified in the articles 176 to 177 of this Code.

### A. General introduction

#### I. Content and purpose of Art. 175

Art. 175 defines the term “non-pecuniary obligations” to distinguish it from pecuniary obligations (art. 175) and gives an overview about the applicable regulations

#### II. Constitution and EU-Law

See above A.II. on art. 164.

#### III. Relation to previous CAP

The previous CAP contained no corresponding rule.

#### IV. Scope of application

The scope of application of art. 175 is as described as for art. 164 (see above A.V. on art. 164).

### B. Execution of non-pecuniary obligations in details

#### I. Definition of non-pecuniary obligations (para. 1)

Non-pecuniary obligations are those which do not demand money from the subject of execution but consist in performing, bearing or ceasing an ongoing action by him.

#### II. Applicable articles for the forceful execution of non-pecuniary obligations (para. 2)

Para. 2 refers to the instruments of execution explained in art. 176 and 177.

Art. 176 relates to the forceful execution through third persons. This instrument can be applied when the subject of execution does not perform an action which can be done by somebody else (e.g. tear down a dangerous rotten tree on the subject's ground). But it is not suitable to replace an action that is highly personal and could only be performed by the subject of execution himself (e.g. give an information about his financial situation). Nor is this instrument suitable to execute a prohibition, as the non-action of the subject of execution cannot be replaced by the non-action of a third person.

Art. 177 is the "ultima ratio" of executive instruments, using mere force against the subject of execution who has failed to fulfil a non-financial obligation. This direct coercion (e.g. entering into a house against the will of the owner to rescue a person, even by breaking the door, if necessary with the assistance of the State Police) must be applied with strict obedience to the principle of proportionality and only if the execution of the non-financial obligation cannot be achieved at all or on time by application of art. 176. It can only replace a not performed action of the subject of execution, but is not suitable to execute a prohibition or a highly personal action.

### III. Gaps of the instruments of execution

Although para. 1 mentions as an example for non-pecuniary obligations the "prohibition of carrying out of an action by the subject of execution", the Code does not provide a suitable tool to achieve this objective. An instrument to execute a highly personal obligation is lacking as well. In these cases a third person (cf. art. 176) cannot be applied, and the instrument of art. 177 is mostly neither appropriate nor proportionate. A coercive fine would have filled this legislative gap.

If special law applies, there might be a regulation for these cases.

#### *Article 176 Execution of non-financial obligations through third persons*

1. The public body, which is competent for the execution, may assign a third person to fulfil the non-financial obligations if:

- a) the non-financial obligation is an action of such a nature that can be fulfilled by a third person;
- b) the subject of execution has failed to fulfil or has only partially fulfilled the non-financial obligation.

2. The fulfilment of the obligation by the third person shall be made with the expenses of the subject of execution.

3. The public body, which is competent for the execution, shall calculate the expenses and order the subject of execution to deposit an advance amount necessary to cover them.

4. The obligation under Paragraph 3 of this Article may be executed in accordance with the rules on the execution of financial obligations, if the subject of execution fails to deposit the amount of the execution expenses.

### A. General introduction

#### I. Content and purpose of Art. 176

Art. 176 regulates the most important instrument of forceful execution which applies when the subject of execution does not fulfil his non-pecuniary obligation.

#### II. Constitution and EU-Law

See above A.II. on art. 164.

#### III. Relation to previous CAP

This instrument of execution was not specially regulated in the previous CAP.

#### IV. Scope of application

The scope of application of art. 175 is as described as for art. 164 (see above A.V. on art. 164).

## B. Execution through third persons in detail

### I. Conditions for the commissioning of a third person (para. 1)

When the subject of execution does not comply with the administrative act that demands him to do something non-financially, this may be completely or only partly (lit. b). In any case, an execution through third persons is only possible if the demanded action is not highly personal (e.g. to give an information about his financial situation) but apt to be executed by somebody else (e.g. to fell a rotten tree on his ground that endangers passing people).

### II. Commissioning of a third person and its costs (para. 2)

The competent public body will enter into a contract under private law with the third person that shall execute the non-financial obligation in the place of the subject of execution. This will regularly be a craftsman or a company that will send a bill about the costs of the measure to the competent body. So there are no contractual relations between the subject of execution and the engaged third person. The subject of execution is obliged to tolerate the action of the third person. If necessary, this can be enforced acc. to art. 177.

The choice of the third person is at the discretion of the public body. Only when the public body decides to engage a company or a craftsman for identical works over a longer period (e.g. a towing company that shall tow away all parking offenders during the next 3 years), it should call for tenders of different providers before signing a contract.

For the competent body the costs are a pass-through item, as these will be collected from the subject of execution by an administrative act, if necessary in the way of forceful execution acc. to art. 174.

Whether the public body may in addition demand a refunding of administration costs or administrative fees is a question of special law.

### III. Prepayment of the costs (para. 3)

The possibility to order the payment of the estimated costs of the execution in advance has a double function. Firstly, it avoids that the competent public body must pre-finance the costs of execution, especially when high costs will arise (e.g. to break down an illegally erected house). Secondly, this order strengthens the psychological pressure on the subject of execution, as he gets aware that it might be less costly for him to perform the demanded action with his own forces.

To attain these aims, the body competent for execution should calculate the expenses and order the subject of execution by an administrative act to pay the calculated sum in advance. It is recommended to include this order already into the notice about the forceful execution (art. 172). It seems justifiable to waive this calculation and the order of payment in advance if the relevant costs are unimportant or cannot be calculated in advance. Thus a rather complicated administrative proceeding can be avoided.

This calculation of costs is not binding for the competent body. If it turns out after the execution that the real costs have been higher, the difference to the advance must be required. On the other hand, if the execution was cheaper than calculated, the competent body must refund the difference.

### IV. Forceful execution of the costs of execution (para. 4)

If the subject of execution fails to pay the advance voluntarily, acc. to para. 4 art. 174 about the forceful execution of pecuniary obligations is applicable.

*Article 177 Duty to cooperate*

1. If the fulfilment of a non-financial obligation can't be achieved as stipulated under Article 176, and the subject of execution has failed to entirely or partially fulfil such obligation, the competent public body shall forcefully execute the non-financial obligation, under the provisions of this Code and the legislation in force.

2. The State Police shall assist the public body for the execution of non-financial obligations under Paragraph 1 of this Article.

A. General introduction

I. Content and purpose of Art. 177

Art. 177 regulates the second instrument to execute non-financial obligations. Its title is a bit misleading as it refers only to para. 2.

II. Constitution and EU-Law

See above A.II. on art. 164.

III. Relation to previous CAP

This instrument of execution was not specially regulated in the previous CAP.

IV. Scope of application

The scope of application of art. 177 is as described as for art. 164 (see above A.V. on art. 164).

B. Duty to cooperate in details

I. The role of art. 177 within the execution instruments and its conditions (para. 1)

1. Subsidiarity of art. 177

Although its title is a bit misleading, art. 177 describes another manner to execute non-pecuniary obligations. The wording of para. 1 makes clear that the application of art. 177 is strictly subsidiary to the application of art. 176. Only when the subject of execution has not fulfilled his non-financial obligation partly or completely and an execution through third persons (art. 176) is not suitable, e.g. when there is no third person who is able to do this instead of the subject of execution, because of the kind of obligation or because of lack of competence, force or instruments, art. 177 may be applied. Thus art. 177 is the "ultima ratio" of executive instruments. It can only replace a not performed action of the subject of execution, but is not suitable to execute a prohibition or a highly personal action.

2. Manners of applying art. 177

The application of art. 177 consists of using force, be it by physical violence, by instruments to support physical violence or even by weapons, against things of the subject of execution or against the subject of execution himself. So the decision to apply art. 177 requires a thorough preceding verification of proportionality whether the chosen form of force is compliant with the regulations of art. 165 para. 2. So before using physical violence against persons it must always be considered whether the application of force against things would be sufficient.

In contrast to art 176, no refunding of the costs that might arise for the public body is foreseen, but administrative fees may be fixed by special law.

Some examples shall illustrate the range of art. 177:

- The competent public body has ordered the closure of a restaurant, where permanent infringements of hygiene rules had occurred and endangered the health of the clients. As the operator does not comply with

the order, it is executed by sealing the door (this is no application of art. 176 as only a public body and no third person is entitled to use an official seal).

- The competent public body is informed by neighbours of an old and sickly lady, who lives alone in a flat, that they heard noises of a crash and afterwards diminishing groaning. As nobody has a key of the flat and one fears that the lady is seriously injured and needs urgent help, the civil servant breaks the door of the flat with a crowbar or throws himself against the door to break it (If there had been time to order a key service to open the door, this would have been an application of art. 176).
- The police seizes an illegal radar warning device in a car as the driver is not willing to hand it out voluntarily.
- The competent public body is informed by citizens about a smell of gaz. Investigations show that the source of the leakage seems to be in a certain house, whose inhabitant is ordered to let technicians enter to stop the leakage. As he is not willing to let them enter, the commanding civil servant pushes him aside to enable the entry.

## II. Assistance of the State Police (para. 2)

The use of physical violence, of instruments to support physical violence or of weapons will in many cases overstrain the capability of the competent public body and its civil servants. Thus para. 2 obliges the State Police to assist on demand.

Example: A person threatens to attack his neighbours and their children with a big sword. It is taken away with assistance of the State Police.

## Article 178 Execution of interim decisions

1. The execution of interim decisions, as provided for by article 67 of this Code, which sets out non-financial obligations, shall be done under the provisions of articles 176 and 177 of this Code, even before the act becomes executable.
2. The execution notice in the case provided for in Paragraph 1 of this Article shall be part of the act, which orders taking of the respective measure.
3. The obligations under the interim decision shall be executed within 3 days of the issuance of the act.

## A. General introduction

### I. Content and purpose of Art. 178

Art. 178 regulates the execution of interim decisions.

### II. Constitution and EU-Law

See above A.II. on art. 164.

### III. Relation to previous CAP

The previous CAP contains no comparable regulation.

### IV. Scope of application

The scope of application of art. 177 is as described as for art. 164 (see above A.V. on art. 164).

## B. Execution of interim decisions in details

### I. Interim decisions and the exception from enforceability (para 1)

Primarily para. 1 has a clarifying function. It makes art. 176 and 177 applicable for interim decisions on non-financial obligations. But the specific role of interim decisions demands an exemption from a fundamental rule of execution. Interim decisions are destined acc. to art. 67 for situations when “it is deemed that the failure to take certain measure would cause serious and irreparable damage to public interests or to the rights or legal interests of the parties”. Thus a (forceful) execution must be possible without delay.

But the preconditions for execution regulated in art. 164 do not match the situation of such a situation, unless the police is acting, as then art. 164 para. 2 lit. ç in combination with art. 133 para. 3 lit. b apply with the consequence that an interim decision of the police is executable.

For interim decisions that are not issued by the police, para. 1 gives a different solution as it allows the forceful execution “even before the act becomes executable”.

However, the application of this exemption from the general rule of art. 164 entails risks and should be used only with greatest care. If the execution is judged illegal in the further proceeding, especially in an appeal procedure, claims for damages against the public body may arise.

### II. Obligatory combination of interim decision and notice on forceful execution (para. 2)

As the interim decision can be executed very soon after its notification, it is obligatory to inform the subject of execution about that. Thus the notice on forceful execution (cf. art. 172) shall be integrated into the act.

### III. Deadline for execution of interim decisions (para. 3)

In accordance with the tight preconditions of the interim decision (cf. art. 67) that require an imminent danger, the deadline for the execution is reduced to 3 days within the issuance of the administrative act. It might be even shorter, dependent on the circumstances of the case.

## Article 179 Immediate execution

1. The public body may exceptionally apply one of the forceful execution methods as provided by article 176 and 177 of this Code, even without issuing an administrative act beforehand, if the three following conditions are met:

- a) It is necessary to adopt an urgent measure to insure the public order and security or avoid immediate threats or risks to people’s health, life, or property;
- b) Due to extreme urgency to adopt the measure, an administrative act ordering the fulfilment of a non-financial obligation cannot be issued in due time;
- c) The party, or the representative, to whom the act ordering the fulfilment of a non- financial obligation is to be addressed, can’t be found.

2. Upon request by the party affected by the execution of the urgent measure and within 8 days from the day of submission of the request, the public body shall issue a written act, which confirms the performed action. At any case, the request of the party may not be submitted later than 60 days from the date of the execution.

## A. General introduction

### I. Content and purpose of art. 179

Art. 179 regulates the application of art. 176 and 177 in urgent cases, especially when the previous issuance of an underlying administrative act is not possible.

## II. Constitution and EU-Law

See above A.II. on art. 164.

## III. Relation to previous CAP

A corresponding regulation did not exist in the previous CAP.

## IV. Scope of application

The scope of application of art. 177 is as described as for art. 164 (see above A.V. on art. 164).

## B. Immediate execution in details

### I. Preconditions of the immediate execution (para. 1)

Art. 179 enables executions acc. to art. 176 and 177 in urgent cases even without a previous underlying administrative act, but only under three very tight preconditions listed in para. 1 lit. a -c, which must apply cumulatively.

#### 1. Urgency to protect high ranking goods (lit. a)

The execution measure must be necessary to ensure the public order and security or avoid immediate threats or risks to people's health, life or property. These are high ranking legally protected goods. The context of this list shows that marginal risks for health or property shall not justify this special form of execution.

#### 2. Impossibility to issue an administrative act before (lit. b)

Furthermore the urgency of the measure must prevent the issuance of an underlying administrative act on a non-financial obligation in due time.

But the term "even" in the first sentence of para. 1 allows the use of art. 179 also in atypical situations where an underlying administrative act has been issued, and opens the scope of application for different scenarios:

- a) A written underlying administrative act and even a notification about the forceful execution acc. to art. 172 have been issued, but the date for the intended forceful execution is not yet reached. Art. 179 allows a premature execution when the deadline becomes obsolete because of changing factual circumstances.

Example: A disused rotten chimney of an old factory threatens fall down on the street and endanger passers-by and cars, the competent public body has ordered the unwilling owner to tear it down and has set a deadline of 3 weeks in the notification about the forceful execution (art. 173 para. 1 lit. b). 2 weeks before the deadline expires, the weather forecast announces a heavy whirlwind that would blow over the chimney with high probability. The competent body orders a contractor to pull the chimney down before the storm (art. 176).

- b) A written or verbal underlying administrative act has been issued, but there is no chance for a formal notification of forceful execution.

Example: At the occasion of a control in the city center a man is taken up with a considerable quantity of drugs. He is ordered verbally to hand them out to the civil servant of the competent public body. As he refuses to do so, the drugs are taken away with assistance of the State Policy (art. 177).

#### 3. Subject of execution not reachable (lit. c)

Finally, the application of an immediate execution requires that neither the subject of execution nor his representative can be reached, so that not even an oral administrative act can be notified to them, especially not the note on forceful execution.

Example: A driver parks his car so that busses and trucks cannot pass and a traffic jam arises. As the park offender has left the place and cannot be ordered to drive his car away, the competent public body tasks the towing service to move the car away. Here no underlying administrative act could be issued for lack of an addressee.

4. Differentiation of the immediate execution to the execution of non-financial obligations in the formalized way (art. 169 - 173)

The competent public body has no discretion whether to apply the execution means of art. 176 and 178 in the “ordinary” multi-stage proceeding described in art. 169 – 173 or in the accelerated proceeding as immediate execution, as the latter is only applicable if the tight preconditions of art. 179 para. 1 which exclude any possibility of a complete multi-staged proceeding including a formal notification of the forceful execution. If these preconditions are not fulfilled, the multi-staged proceeding must be applied.

II. Written confirmation of the immediate execution (para. 2)

Contrary to the multi-staged proceeding described in art. 169 – 173, where the subject of execution is informed in advance of the impending execution, in an immediate execution often the execution itself is the first administrative action against the subject of execution, who learns about it often only after its completion. Comprehensive information about the measures taken against himself or his belongings is irrefutably necessary for him, not only to decide on possible remedies and claims on compensation. Para. 2 entitles the subject of immediate execution to request a written act which confirms the action and must be issued within 8 days after the request. This administrative act takes the place of the underlying administrative act that would have been issued if there had been time for an “ordinary” execution acc. to art. 169 – 173. The request must be submitted within a deadline of 60 days from the date of execution.

## **CHAPTER IV**

### **SUSPENSION, DISMISSAL AND APPEAL OF EXECUTION**

#### *Article 180 Suspension of execution*

1. The forceful execution shall be suspended either *ex officio* or upon request of the subjects of execution in cases where:
  - a) it is proved that there is a risk of causing a serious and irreplaceable damage to the subject of execution while suspension in such case does not affect the public interest.
  - b) the competent court for administrative matters has decided to suspend the implementation of the act, under the provisions of the legislation on administrative dispute resolution.
  - c) the execution has been already or is being carried out against a subject that was not subject to an obligation;
  - ç) under the law, the execution is not allowed;
  - d) in other cases provided by law.
2. All actions carried out up to the moment of suspension of forceful execution shall be cancelled.
3. In all cases, the public body shall reason its decision to suspend the forceful execution.

#### A. General Introduction

##### I. Content and purpose of art. 180

Art. 180 regulates, under which conditions a forceful execution shall be suspended to avoid damages or breaches of law (para. 1), as well as the consequences of a suspension (para. 2 and 3).

##### II. Constitution and EU-Law

See above A.II. on art. 164.

##### III. Legal consequences of art. 180

In case of suspension, the act must not be executed (c.f. art 166 lit. a).

##### IV. Relation to previous CAP

A suspension of executive actions ordered by higher public organs or the court is enabled in art. 132 para. 3 and 4 of previous CAP.

##### V. Scope of application

The scope of application of art. 165 is as described for art. 164 (see above A.V. on art. 164).

#### B. Suspension of execution in details

##### I. Conditions of a suspension (para. 1)

Because of the grave consequences of a forceful execution it is indispensable that the continuation of its proceeding can be suspended if there is the suspicion of legal obstacles. Suspension means a temporary interruption of the proceeding, but must be changed to a termination of execution (c.f. art. 181) if the suspicion proves true and its reasons continue for the future. A suspension is possible *ex officio* or upon request of the subject of execution. The list of conditions in lit. a – d should not be regarded as exclusive; at the discretion of the competent public body a suspension might be possible in other cases, dependent on the circumstances.

### 1. Massive imbalance of proportionality (lit. a)

As a direct application of the principle of proportionality (cf. art. 12 and 165 para. 2) lit. a allows a suspension if the forceful execution would cause a serious and irreplaceable damage to the subject of execution and the suspension would not touch the public interest. The result of this consideration must be sure.

This condition might apply rarely, because as a rule the decision to start a forceful execution should always base on a careful reflection whether this action is necessary to safeguard the public interest. If there are doubts in this respect, and on the other side the execution would cause severe damages to the subject of execution, an execution must not start at all, as it would be obviously disproportionate.

### 2. Suspension by the court for administrative matters (lit. b)

When the court for administrative matters decides within its competence that the underlying administrative act must not be implemented, it is expression of the rule of law that the competent public body must suspend the forceful execution of this act.

### 3. Wrong subject of execution (lit. c)

When there is a suspicion that a forceful execution is carried out against the wrong addressee, it is self-understanding that it must be suspended as soon as possible.

### 4. Legal interdiction of execution (lit. ç)

When against a law that bans a forceful execution an execution has started, it must be suspended in the moment when this mistake is detected. This case must consequently lead to a final termination of the execution proceeding.

### 5. Special law (lit. d)

If special law demands the suspension of a forceful execution, this must be obeyed acc. to the rule of law. Here, too, a termination is the logical consequence.

## II. Consequences of suspension (para. 2)

In the moment when the suspension is decided, all executive actions must not be continued and have to be stopped. If after further investigations the suspicions prove true, the execution must be terminated.

## III. Reasoning (para. 3)

The decision to suspend execution is an administrative act in the sense of art. 3 para. 1, so that art. 100 about reasoning applies. This is underlined by para. 3 of art. 180.

## *Article 181 Termination of execution*

### 1. The forceful execution shall terminate in cases where:

- a) the subject of execution has fulfilled the obligation,
- b) the administrative act that serves as ground for the execution has been annulled or repealed.
- c) other cases as provided for by the law.

## A. General Introduction

### I. Content and purpose of art. 181

While art. 180 provides a temporary suspension of a forceful execution (that might lead over to a termination), art. 181 describes cases when the execution proceeding must end definitively. There is only a marginal difference

between the scopes of application of these two articles, as in most cases the suspension will turn into a termination of forceful execution, when the reasons for the suspension persist.

## II. Constitution and EU-Law

See above A.II. on art. 164.

## III. legal consequences of art. 181

When the conditions of art. 181 are fulfilled, the forceful execution must terminate.

## IV. Relation to previous CAP

The previous CAP saw no necessity to rule these cases, as they are rather obvious.

## V. Scope of application

The scope of application of art. 165 is as described for art. 164 (see above A.V. on art. 164).

## B. Termination of execution in details

### I. The obligation has been fulfilled by the subject of execution.

When the subject of execution has fulfilled his obligation, the aim of the execution proceeding is reached. All further measures must be stopped at once, even if e.g. a company has already been contracted to carry out a forceful execution acc. to art. 176. Should the subject of execution have fulfilled his obligation only after the deadline has expired, he is liable for possible costs of the competent public body that were caused by his delay, e.g. when the company has rejected another order because of the contract with the competent body and claims for damages.

### II. The underlying administrative act has been abrogated or revoked annulled or repealed

With the annulment or repeal of the underlying administrative act the execution loses its legal ground and must be terminated at once.

### III. Other cases as provided by law

If special law rules other cases of termination, these apply.

### IV. Proceeding of termination

Although not mentioned expressly in the Code, art. 180 para. 2 applies *mutatis mutandis* for the termination, as it is an administrative act, too.

## *Article 182 Postponement of the execution*

### 1. The forceful execution shall be postponed in cases where:

- a) the public body has decided for its postponement for a specific deadline;
- b) another act substitutes the act which is being executed.

## A. General Introduction

### I. Content and purpose of Art. 182

Art. 182 rules the cases when a forceful execution shall be postponed.

## II. Constitution and EU-Law

See above A.II. on art. 164.

## III. Legal consequences of art. 182

When the conditions of art. 182 are fulfilled, the forceful execution shall be terminated

## IV. Relation to previous CAP

There is no corresponding regulation in the previous CAP.

## V. Scope of application

The scope of application of art. 165 is as described for art. 164 (see above A.V. on art. 164).

## B. Postponement of the execution in details

### I. Decision on a grace period (lit. a)

There are situations possible where the competent public body may interrupt a proceeding of forceful execution.

Examples:

The subject of execution who was in the beginning not willing to fulfil his obligation and has let expire the set deadline, changes mind and declares that he is now willing to act, but needs more time.

Because of changed circumstances the competent body considers appropriate to stay the proceeding and wait for the end of the development, e.g. when a house shall be broken down. Suddenly the municipality has to lodge a great number of refugees and needs this accommodation for a limited time.

Then the competent body may postpone the already fixed forceful execution and possibly set a new deadline. This must be done by an administrative act to give planning security to the subject of execution.

### II. The underlying administrative act has been substituted (lit. b)

This situation is a possible continuation of art. 181 lit. b, because the substitution of the initial administrative act by a new one requires the annulment or repeal of the first. The difference is that art. 182 lit. b assumes that the public body wants to continue the execution. So the postponement only grants a pause for reflection about the details of the substituting act. In fact this postponement must lead to a termination of the initially intended forceful execution, as this must not be continued on the base of a changed administrative act. To avoid confusion, with the issuing of the substituting administrative act the execution proceeding must restart from the beginning.

## *Article 183 Consequences of the execution of a repealed or annulled act*

1. When the voluntary or forceful execution is conducted, and the underlying administrative act has later been repealed or annulled, the subject of execution shall have the right to request reinstatement to the previous situation or the relevant situation, under the new act.

2. The request shall be reviewed by the public body, which is competent for the execution, upon request of the person subjected to execution.

## A. General Introduction

### I. Content and purpose of Art. 183

Although located in the chapter III on forceful execution, art. 183 regards the consequences of forceful as well as voluntary execution in the situation that the underlying administrative act is repealed or annulled after the execution has been completed.

### II. Constitution and EU-Law

See above A.II. on art. 164.

### III. Legal consequences of art 183

When the conditions are fulfilled, the subject of the execution is entitled to request reinstatement.

### IV. Relation to previous CAP

The previous CAP contained no corresponding regulation.

### V. Scope of application

The scope of application of art. 165 is as described for art. 164 (see above A.V. on art. 164).

## B. Consequences of the execution of a repealed or annulled act in detail

### I. Reinstatement (para. 1)

#### 1. Conditions for the reinstatement

The administrative act that was basis of the execution must have been abolished afterwards. Here it makes no difference whether the act has been repealed (art. 113, 114, 116) or annulled (art. 113, 114, 115), although an annulment has retroactive effect whereas a repeal produces effects for the future only (cf. art. 113 para. 2), nor whether the subject of execution has fulfilled his obligation voluntarily or a forceful execution has been carried out. This comprises annulment, repeal or amendment in a proceeding of administrative appeal (cf. art 130 et seq.).

An analogous application of art. 183 is necessary in 2 further cases:

- The administrative act is cancelled by the court for administrative affairs.
- An immediate execution is declared unlawful, be it by repeal or annulment of the conforming written act (art. 179 para. 2) or in another way, especially by the court.

#### 2. Content of reinstatement

When the condition cited above are fulfilled, the subject of the execution that has lost its legal basis primarily has the right to request reinstatement to the previous situation. Reinstatement means the restoration of the state before the execution. This is easy to understand in case of financial obligations – which must be refunded – or in many cases of art. 176, 177 and 179 (The unlawfully confiscated radar warning device or the dangerous sword must be given back, the seal at the door of the unlawfully closed restaurant must be removed, etc...). But if the public body has ordered to tear down a rotten house completely and later the underlying administrative act is partly repealed that only the left half needed to be torn down, it would make no sense to rebuild (restitute) the right half in a rotten state. In this and resembling cases the reference in art. 183 to repeal and annulment allows to apply here *mutatis mutandis* the rules about compensation (art. 116 para. 3) by money.

A more complex situation arises, when the underlying administrative act is not only repealed or annulled, but replaced by a new administrative act that lessens the burden on the subject of execution without abolishing it completely. Acc. to the second alternative of para 1 in this case the subject of execution cannot demand the restoration of the original state before the execution, but only the establishment of the state that is conform with the new act by the public body.

Example: The – already executed – administrative act that orders the subject of execution to hand over his 3 pistols to the competent public body is repealed and replaced by a new administrative act which orders the confiscation of 2 pistols only. Then the subject of execution cannot request the state before the issuing of the first administrative act and reclaim his 3 pistols, but only one.

## II. Competent public body (para. 2)

Reinstatement is granted only on request of the subject of execution. The public body competent for the execution decides on it by administrative act.

### *Article 184 Appeal against execution actions*

1. An appeal may be brought against the notice of execution, under the provisions of this Code. The appeal shall be directly reviewed by the superior body of the competent body for the execution, within 5 days from the submission. The appeal may only concern the chosen method of execution, and shall not have any suspension effect.

2. The party may appeal to the superior body of the competent body for execution, when the actions performed for the forceful execution exceeded the ordering part of the act that is executed, or when these actions run against the provisions of this Code. The submission of the appeal shall not have any suspension effect and it shall be examined within 5 days of the date of its submission.

3. Exceptionally, if the continuation of the execution could represent a threat to the health, life or property, the party may directly address the competent court for administrative matters.

## A. General Introduction

### I. Content and purpose of Art. 184

Art 184 contains the basic rules concerning remedies in execution procedures. It differentiates between the appeal against the notice about the execution stated in art. 172 (para. 1) and singular executorial actions (para. 2). In both cases the appeal shall be reviewed by the superior body directly.

In the cases prescribed in para. 3 the party may file a lawsuit directly to the competent court. This must be seen as a legal exception in accordance with art. 129 para. 1 lit.b). In all other cases the exhaustion of the administrative appeal is a precondition for bringing a lawsuit to the competent court even in executorial cases stipulated in art. 171 ff.

### II. Relation to previous CAP

The previous CAP contained no corresponding regulation.

### III. Scope of application

Art. 184 opens the appeal procedure against executorial notice (para. 1) and executorial actions (para. 2). Since para. 1 doesn't make any difference between notice on the voluntary execution (art. 169) and the notice on the forceful execution (art. 172) it must be assumed that the appeal can be lodged against both forms of notices.

## B. Appeal against execution actions in details

### I. Appeal against the notice of execution (para. 1)

Para. 1 provides as a remedy the appeal (art. 130) against the notice of execution which is required by art. 172 at the beginning of the execution procedure. Since art. 172 para. 2 defined the notice of execution as an administrative act para. 1 is to make clear that an appeal may be lodged against it despite the fact that the

executorial procedure cannot be seen as a regular administrative procedure. By referring to the appeal procedure regulated in art. 130 it is clear that all requirements of the appeal procedure must be met.

The sentences 2 and 3 of para. 1 contain restrictions for lodging an appeal against the notice of execution. Firstly, sentence 2 shortens the deadline for the resolution of an appeal to 5 days from the submission of the notice. This is to avoid any delays of the execution and to avoid time periods of uncertainties. Since the appeal lodged against the notice of execution has no suspension effect it is reasonable to minimize the risk that execution later turns out as unlawful.

Of high importance is that according to sentence 3 the appeal may only concern the chosen “method of execution”. This means that the appellant is restricted only to claim that the preconditions of the voluntary or the forceful execution are not met. The restriction makes quite clear that the appellant is not entitled to claim that the executable act itself (art. 164) is unlawful. The executable act can be the basis of the execution if the preconditions stated in art. 164 ff. are fulfilled, especially if the requirements of art. 164 are met entirely. Within the executorial appeal procedure, no further examination of the lawfulness of the executable act takes place.

The sentence 2 of para. 1 excludes the suspension effect of appeals against the notice. That means that the execution procedure can be continued; it is not necessary to wait until the decision on the appeal is kept or notified. But art. 133 para. 3 lit.d) can be applied *mutatis mutandis*. That means that the superior body competent to decide on the appeal must be seen as authorized to decide to stop the execution before it takes its final decision. In addition, in exceptional cases, the party may address the court directly (para. 3).

## II. Appeal against executorial actions (para. 2)

Para. 2 opens the possibility to lodge an appeal against concrete executorial actions taken during the forceful execution. This appeal may be lodged regardless of the appeal stated in para. 1. It must be reviewed within 5 days of the date of its submission.

An appeal in accordance with para. 2 can only be lodged to claim that the forceful execution exceeds the ordering part of the executable act or the respective action run against this code which means that the action as such is unlawful.

## III. Direct appeal to the court (para. 3)

In very rare cases para. 3 allows to address an appeal to the competent court directly. This is only if the continuation of the execution may lead to serious danger for the health, life or property of the party. This must be seen as an exceptional appeal with the purpose to avoid serious damages which are not rectified by the legal execution.

# **PART NINE**

## **TRANSITIONAL AND**

## **FINAL PROVISIONS**

## PART NINE TRANSITIONAL AND FINAL PROVISIONS

### *Article 185 Transitional provision*

With regard to the administrative procedures, which have started before the entry into force of this Code, the provisions of Law no. 8485, dated 12 May 1999, “The Code of Administrative Procedures of the Republic of Albania” as amended, shall apply.

#### A. General introduction

##### I. Content and Purpose of art. 185

Art. 185 deals with the applicability “in time” of the new Code and previous CAP. It explicitly provides for the ultra-activity of the previous CAP to all the concrete administrative procedures initiated before the entry into force of the new Code, whilst the new Code shall become applicable with immediate effect only to administrative procedures initiated subsequently to its entry into force (the entry into force as established by art. 189).

In general, for entrance into force of new procedural laws, the principle of immediate applicability applies. In accordance with such a principle, if procedural laws apply immediately they must apply to all “situations” which arises after their coming into force, this implies the ultra-activity of the previous law to all the “situations”, arising in the life-span of the previous law. A legal confirmation of the principle of immediate applicability as done by art. 189, without any additional provision on the application of the previous law, would have been rather sufficient but would have eventually led to different interpretations on the moment when the procedural situation initiated under the previous law shall be deemed as “extinguished” and raise question marks on which law’s provision shall apply, on for instance, the administrative legal remedies, repeal, annulment or enforcement of an administrative act which related first instance administrative procedure was initiated and also concluded under the previous law. In order to avoid any possible doctrinal and judicial interpretation in relation to the principle of immediate application, as the one recently discussed in Albanian doctrine and case law related to the applicability of the law on administrative disputes and courts (see Decision no. 3, 2013 of the Supreme Courts), the legislator has explicitly consecrated the ultra-activity of the previous CAP as a try to a more clear solution and as better serving to the principle of protecting the legitimate expectations and legal certainty.

##### II. Scope of application of the norm

Art. 185 applies to any kind of administrative procedure notwithstanding whether it is initiated ex officio or upon request and whether aiming to the issuing of an administrative act or the conclusion of an administrative contract.

#### B. Transitory provisions in details

Art. 185 stipulates that the previous CAP shall continue to apply to all concrete administrative procedures already instituted under the old law. This legal consequence i.e. the ultra-activity of the previous CAP is triggered upon fulfilment of two preconditions: i) An administrative procedure instituted before the entry into force of the new Code and ii) the procedural legal relationship should have not been extinguished before the entry into force of the new Code. The first precondition is explicitly provided in the text of the article while the second is implied by the wording and a systematic interpretation of the Code.

##### I. Administrative procedure instituted before the entry into force of the new Code

###### 1. Administrative procedures

This legal precondition clarifies the scope of the provision, it applies to all administrative procedures defined in acc. to para. 9 of art. 3 as “the activity of one public body, with the purpose of preparing and adopting concrete

administrative actions, their execution and review with administrative legal remedies”, notwithstanding whether a procedure is initiated ex officio or upon request of the party and whether it aims the issuance of an administrative act or the conclusion of an administrative contract.

## 2. Started before the entry into force of this Code,

This legal precondition provides for triggering the legal consequence of the ultra-activity of the previous CAP. In accordance to art. 43 the administrative procedure is, *ex lege*, initiated upon the submission of the request (in case an administrative procedure initiated upon request) or upon performance of the first procedural action (in case an ex officio administrative procedure). The precondition is fulfilled if the moment of institution of the procedure (i.e. the moment of submission of the initial request by the party or respectively the moment of performance of the first procedural action by the public organ) falls before the entrance into force of the new Code.

Entry into force of the new Code is regulated, in acc. to art. 188, on the 29th of May 2016 (for more details see the commentary on art. 188 below).

## II. Procedural legal relationship should have not been extinguished before the entry into force of the new Code

As already preannounced the principle of ultra-activity implies the continuation of application of the previous law to all the “situations” arising during its life span and before the entry into force of the new law. In the administrative law the term “situation” must be understood to mean procedural situations i.e. procedural relations and not relations under substantive law. Applying this principle, if a procedural relation is not yet extinguished, it must continue to be governed by the law in force at the moment of the initiation of the procedure. This general rule raises the question on when the procedural relation, established with the institution of the procedure, is legally deemed to be “extinguished”.

There might be two possible interpretation on when the procedural relation is extinguished. Based on a rather narrow interpretation the procedural relation “ends” with the conclusion of the first instance administrative procedure in accordance with art. 90 and ff. A broader interpretation, however, is required by a literal and systematic interpretation of this Code. In accordance to with para. 9 of art. 3 an administrative procedure “the activity of one public body, with the purpose of preparing and adopting concrete administrative actions, their execution and review with administrative legal remedies”, which means that the procedural relation “survives” the conclusion of the first instance administrative procedure to the legal remedies and to the enforcement procedure (if the out- put of that procedure is an administrative act). So in other terms even if a first instance procedure was concluded in accordance with art. 90 of the Code and before the entrance into force of the new Code, the procedural relation shall be deemed as not extinguished for the purpose of art. 185, per consequence the provisions of the previous CAP on the legal remedies and enforcement shall continue to apply.

The only exception relates to the procedure/provisions of ex officio withdrawal or annulment of an administrative act in accordance with art. 113, 118 and ff. of the Code. Both of them are intentionally excluded by the definition of para. 9 of art. 3 and further more are considered as separate/distinct procedures (see the commentary on art. 113), per consequence in case of an ex officio withdrawal or annulment of an administrative act which was issued under a procedure initiated within the life span of the previous CAP, the provisions of the new Code shall apply.

## III. Legal consequences of art. 185

The previous CAP shall continue to apply to all the administrative procedures already instituted before the new Code entered into force, meaning that if a procedure was initiated before the entry force of the new Code, whatever its current phase might be, the continuing of the procedure and its output shall continue to be regulated by the provisions of the previous CAP which shall apply not only to the first instance administrative procedure, but also shall continue to apply to the administrative legal remedies as well as to the enforcement (if the output of that procedure is an administrative act). Whilst, per a contrario, the new Code shall became applicable, with immediate effect to any administrative procedure initiated subsequently to its entry into force.

*Article 186 Secondary legislation and internal rules*

Within 3 months from the entry into force of this law:

- a) The Council of Ministers shall adopt the acts provided for in Paragraph 7 of article 59, and Paragraph 3 of article 76 of this Code.
- b) The public bodies shall adopt internal rules of work for the implementation of the provisions of this Code.

A. General introduction

Art. 186 provides for the procedural delegation for the issuance of secondary legislation and internal rules for the applicability of the Code. It also provides for a three months period for the approval of secondary legislation and of internal rules for the applicability of the Code in practice.

B. Secondary legislation and internal rules in details

I. Issuance of secondary legislation (lit. "a")

The provision of lit. "a" is a procedural "authorisation" for issuance of secondary legislation in the sense of art. 118 of the Constitution, it: i) authorizes the issuance of subordinate legal acts; ii) designates the competent organ (which in this case the Council of Ministers), and ii) designates the issues that are to be regulated, by reference to para. 7 of art. 59 and para. 3 of art. 76. Whilst the principles on the basis of which these subordinate legal acts are to be issued are defined in the two respective articles.

1. Secondary legislation for the electronic submission (referred to by para. 7 of art. 59)

As already explained in the commentary on art. 59 the relevant public bodies and the respective administrative procedures have to be legally opened for the submission of electronic documents, both as at the incoming side as at the outgoing one. The Code leaves the decision as to which procedures, at which public bodies are to be opened and by when, as well as under what technical criteria, to the decision of the Council of Ministers. Such decision can be more detailed and is easier to change whenever the technical progress requires so. It can also more flexible determine the "ripeness" of each administrative body and procedure to handle electronic files, and the file formats.

2. Secondary legislation for the points of single contact (referred to by para. 3 of art. 76)

As already explained in the commentary on art. 76, the economic activities, the related administrative procedures to be dealt with through the point of single contacts as well as the assigned points of single contact and the related standard operating procedures shall be decided by the CoM. Such decision can also more flexible determine the "ripeness" of each administrative body and procedure to handle through the points of single contact.

II. Approval of internal regulations (lit. "b")

The implementation of the Code needs internal work regulations, in accordance with various provisions. For instance the assignment of the "responsible unit", if not directly established by the legislation, should be done by internal regulation of each institutions. Other measures might also be necessary. Lit. "b" opens the door and also oblige the public bodies to provide for internal work regulations that would ensure the full application of the Code. It should be noted that the law is directly applicable even in the case of lack of such internal regulations.

III. Deadline of three months

The initiating sentence of art. 186 provides for a deadline of three months, within which the secondary legislation and the internal regulations should be approved.

In fact, in relation to the secondary legislation provided by lit. "a", such a deadline, is hardly applicable. In accordance with the teleological interpretation of para. 7 of art. 59 and of para. 3 of art. 76 the delegation to the Council of Ministers is meant to provide for flexible solutions depending on the "ripeness" and "readiness" of each

administrative body and procedure to be handled electronically or through a point of single contact. Given this situation the deadline provided by art. 186 should be interpreted as applicable only to the already existing points of single contacts or electronic procedures.

On the contrary the three months deadline fully applies to the issuance/approval of the internal regulations in accordance with lit. "b". Within the 3 months deadline the public organs should take the necessary measures for the proper implementation of this Code.

*Article 187 References to the legislation in force*

Upon the entry into force of this law, any reference, which the laws and bylaws make to Law No. 8485, dated 12 May 1999 "The Code of Administrative Procedures of the Republic of Albanian", as amended, or to specific provisions of it, shall be considered as made to this Code to the extent possible.

It is not rare for the actual legislation to contain explicit references to the previous CAP or to its specific provisions (i.e. articles, paragraphs, letters, etc.). The rule under art. 187, ensures the legal "continuity" of such referring provisions by establishing that such references shall be deemed *ex lege* as made to the new Code or to its respective applicable provision to the extent possible.

*Article 188 Repeals*

1. Law No. 8485, dated 12 May 1999 "The Code of Administrative Procedures of the Republic of Albanian", as amended, shall be repealed.

2. Any law or bylaw, which runs against the provisions of this Code, shall be repealed.

The new Code substitutes the previous CAP which per consequence is repealed with the entry into force of the new Code. Though, as already explained under art. 185, the previous CAP "survives" even after this date due to the ultra-activity application to the already initiated administrative procedure.

*Article 189 Entry into force*

This law shall enter into force 1 year after its publication on the "Official Journal".

The Code was published in the "Official Journal" no. 87, date 28 May 2015. In accordance with general accepted rules on the calculation of the deadlines, it has entered into force on 00:01 of 29th of May 2016. From this date on the new Code shall become applicable, with immediate effect to any administrative procedure initiated subsequently.