The administration and you

Principles of administrative law concerning the relations between administrative authorities and private persons

A handbook

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Why this handbook?

This handbook is intended to set out, in a logical and, it is hoped, easily comprehensible form, those principles of substantive administrative law and administrative procedure which are considered to be of primary importance for the protection of private persons in their relations with the administrative authorities.

It has been drawn up in the context of the fundamental changes in central and eastern Europe which have resulted in many states of that region taking active steps to redesign their constitutional, legal and administrative systems by reference to the principles and standards of the Council of Europe. Some of these states have already become members of the Council of Europe, others have not. Consequently, it is important to note the two following points:

(i) The handbook is not intended as an instrument for the use of member states of the Council of Europe only, and accordingly it does not take the traditional form of a Council of Europe recommendation or resolution addressed only to governments of those member states. On the contrary, it is intended to be of use to legislators, judges, ombudsmen, administrators, lawyers and interested members of the public in all European states (and, indeed, in other interested non-European states as well) as a model or guide to those principles of administrative law and procedure which are considered to be of primary importance for the protection of the individual and which ought to be applied by states which wish to secure such protection, and to the means for ensuring compliance with them.

(ii) Although, for the member states of the Council of Europe, the handbook is not, accordingly, to be regarded as having in itself the political force of a recommendation or a resolution adopted by the Committee of Ministers under the Statute of the Council of Europe, the principles contained in the handbook are to a great extent a reflection of:

- the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms and some of its protocols, and other Council of Europe instruments in the field of human rights;
- the case-law of the European Commission and the European Court of Human Rights;
- Council of Europe conventions, recommendations and resolutions pertaining to administrative law.

Introduction – administration and administrative law

1. In order to meet its increased obligations, the modern state assigns to public administration various duties and powers. The scope of the administrative functions is basically determined by :

(i) the objectives, priorities and values of modern democracies and their legal framework ;

(ii) the technical, human and economic resources which administrative authorities have at their disposal ; and

(iii) the trust which is placed in the efficiency of the administrative apparatus.

2. The range of administrative activities goes from the classic minimum functions of defence, levy of taxes, police, the operation of public utilities, education, etc., to newer ones like social security, health care, urban planning, the defence of fair competition, protection of the environment, noise abatement, the fostering of cultural activities, etc. It must be noted, however, that in some countries there is now a growing tendency to hand over certain public functions to be carried out by private entities instead of public bodies.

3. The variety of tasks assumed by public administration for the benefit of the community as a whole often affects traditionally protected competing private rights. A fair balance must be struck between them and the public interest. This is the role of administrative law which, thus, appears not only as the instrument which organises the public administration but also the law that regulates the exercise of the administrative powers and provides for the control of its use.

4. Clear rules and principles of that latter branch of administrative law strengthen the certainty of law in this area and reduce the possibility of arbitrariness, without curtailing the necessary legal margin of discretion which must be left to administrative authorities for the sake of fair and efficient management of public affairs.

5. The fundamental decisions as to the content and the limits of the functions of public administration are of a political nature and lie with

the legislator. Once those decisions have been made by the parliament, the administrative authorities are responsible for their application in practice. The courts and, where applicable, the ombudsmen have the task of examining, in individual cases, whether the administrative authorities have done so properly.

6. However, by having subscribed to the European Convention on Human Rights, Council of Europe member states have agreed to respect certain principles which therefore govern the relationship of their authorities with private persons, including in the branch of administrative law. Those principles have been further refined in several conventions and various recommendations and resolutions which were adopted unanimously by the Council of Europe Committee of Ministers and which, thus, reflect the standards applicable in member states in pursuance of their devotion to the rule of law as expressed in the Statute of the Organisation.[1]

1. As regards the significance and practical impact of Council of Europe recommendations and resolutions, it is important to observe the following: contrary to conventions which states may have ratified, recommendations and resolutions have no legally binding effect on states and governments. They do have, however, a moral and political effect on them. This effect stems from two facts: first of all, it is difficult, albeit possible, for a government to totally ignore for a long period of time certain standards to which all or most of the other democratic states of the region pledge commitment; moreover, there can be an obvious problem with a government's good faith in cases where a government itself is among those who have not only participated in the negotiations of a text, but also voted for its adoption in the form of a "Recommendation from the Committee of Ministers to governments of member states", if such a government later on refuses to conform to its own appeal. Politicians, citizens, and all kinds of political pressure groups can use that argument at home and abroad, and lawyers might draw additional arguments from them for an interpretation of domestic legal rules in conformity with the content of such texts. This is, however, only valid if a government has not made use of its right to express reservations to all or part of a recommendation, as it can do under Article 10.2, lit. c) of the Rules of Procedure for the meetings of the Ministers' Deputies.

Chapter 1 – Scope of the principles, rule of law background and definitions of the terms used

I – Scope of the principles

7. In this handbook the term "principle" was preferred to the term "rules" because the aim of the Council of Europe's work is not to achieve, by adopting uniform rules, harmonisation of the different national laws but rather to promote general recognition, in the law and practice, of certain principles. Thus, the wording used leaves states as much freedom as possible in choosing the means for ensuring that administrative procedures will conform in substance with the principles set out; there is no definition of detailed obligations for the administrative authorities but rather a description of the ways conducive to the achievement of fairness in the relations between the administrative authorities and the private person.

7.1. *Comment*: The principles set out in this manual apply only to those administrative procedures which concern the taking of administrative acts (see the definition of administrative acts below in paragraph 11). Consequently, procedures which do not produce any results outside the administration (for example, a procedure which organises the transport and distribution of documents inside a given administration) are not covered.

8. It should be understood that while the principles which follow are for the most part addressed to the taking of administrative acts of an individual nature, in many cases they may be equally applicable to certain acts of general application taken by administrative authorities, such as decrees and regulations directly impinging on rights, liberties or interests of private persons and which do not require individual administrative acts or measures to enforce them.

8.1. *Comment*: In town planning for example, acts which directly concern a number of persons often taken the form of regulatory measures rather than the form of a set of individual acts.

9. Limitations to the principles would only be permissible if they are prescribed by law and to the extent to which they are acceptable in a

democratic society on grounds of overriding public interest, or if the weighing of competing private rights commands them. National judges and, where applicable, ombudsmen control the cases where their national administrative authorities invoke such exceptions.

9.1. *Comment*: The handbook does not contemplate those highly exceptional situations, such as a state of war or armed insurrection, in which, by reason of an emergency threatening the life of the nation, the relevant constitutional rules may permit the temporary suspension of certain principles. In such cases, lawfulness can derive directly from constitutional norms and not from laws (the application of which, by virtue of constitutional norms, may have been suspended). Such situations do not arise in the course of the normal relationship between the administrative authorities and private persons.

9.2. *Comment*: "Overriding public interests" can be, for instance, national security, public safety, public order, the economic well-being of the country or the prevention of crime.

9.3. *Comment*: The control exercised by the national judges and, where applicable, the ombudsmen, relates to their national law. The principles set out in this handbook are not necessarily expressed in the same form in national laws of member states but they are enshrined in such law in one or the other form.

9.4. *Comment*: Ultimately, the Strasbourg based control bodies of the European Convention on Human Rights can, under certain conditions, be requested by private persons to review the decisions handed down by their national judges.

II – Rule of law background

10. The principles are based on the assumption that the state accepts and adheres in practice to the fundamental constitutional principle of the rule of law, which consists of the following essential elements:

(i) Everybody – whether a natural or legal person – is subject to the law.

(ii) It must be possible for everybody to obtain knowledge of his or her rights and duties under the law.

(iii) Observance of the law by everybody can be controlled by judges who are independent in the exercise of their functions and whose judgments can be enforced.

III – Definitions of the terms used

11. The term "administrative act" means any individual measure or decision:

(i) which is taken in the exercise of public authority;

(ii) which is of such a nature as directly to affect – be it in a favourable or in an unfavourable way – the rights, liberties or interests of private persons; and

(iii) which is not an act performed in the exercise of a judicial function.

11.1. *Comment*: The reference to "individual measure[s] or decision[s]" includes those measures which apply to a number of specific persons.

11.2. *Comment*: Physical acts by agents of an administrative authority or by private persons vested with "public authority" (see 12.1 below) are, for the purpose of this handbook, regarded as the execution of administrative acts (decisions); they are part of those administrative acts (which acts or decisions may, at times, have to be construed as being implicit) and not independent administrative acts themselves. The towing away of a vehicle by a private enterprise upon request of a traffic police officer would be an example of such a physical act.

11.3. *Comment re (ii)*: The "rights, liberties or interests of private persons" in question are only those protected by law. Political interests as perceived by a private person will, for example, not qualify under this definition. Nor will the financial interest which one might take in an illicit operation. Of course, the definition of what "directly" affects a person's rights, liberties and interests may be difficult in practice.

11.4. *Comment re (iii)*: When an administrative authority contributes to the investigation of criminal offences, the principles applicable to the investigative (judicial) procedure apply and not the principles applicable to administrative acts.

12. The term "administrative authority" means any entity or person in so far as these are entitled to take decisions or measures which constitute an administrative act.

12.1. *Comment*: Public tasks can be conferred by law, decree or, in certain cases, by administrative acts, to private persons or entities who, while performing the task, may be entitled to "exercise public authority". This is why the definition given here uses a functional criterion, that is the exercise of powers or prerogatives exceeding the rights or powers of ordinary persons. The public or private quality of the entity or person is not decisive. What matters is the nature of the powers it exercises. Such powers are defined by national law with respect of different activities (tasks). The exercise of public authority for performing a given task may be authorised in some states, but not in others.

12.2. *Comment*: Judges who perform an administrative act, as can be done in certain Council of Europe member states, are not considered as administrative authorities in the sense of this handbook.

13. The term "discretionary power" means a power which leaves an administrative authority some degree of latitude as regards the acts to be taken, enabling it to choose from among several legally admissible solutions the one which it finds to be the most appropriate after weighing between the private and public interests involved.

14. The term "person(s) concerned" means:

(i) persons to whom the administrative act is, or is to be, addressed;

(ii) persons whose individual rights, liberties or interests are liable to be directly affected by the administrative act even though it is not addressed to them;

(iii) persons who, according to national law, have the right to claim a specific collective interest that is liable to be affected by the administrative act.

14.1. *Comment*: As most of the principles apply both to natural and legal persons, the term "person concerned" was chosen rather than the term "individual" which might be thought to be more applicable to natural persons.

Chapter 2 – Substantive principles

15. The reader's attention is drawn to the fact that a clear-cut distinction between substantive principles on the one hand (Chapter 2) and procedural principles on the other (Chapter 3) is impossible to make. For instance, the private person's right of access to public services means, on the substantive side, that administrative authorities must take the act to which the private person is entitled (which can, by the way, be a refusal). The significance of the same principle on the procedural side is that the administrative authorities have a duty to facilitate the private person's efforts to obtain the act in question. Likewise, the requirement that administrative authorities state the reasons which have led them to take their act, bears both a substantive and a procedural aspect. On the procedural side, an administrative act which is not motivated is deficient. However, even if an administrative act is accompanied by formal reasons, it may still not fulfil the substantive requirement of a "motivated" act in as much as substantive principles require proper and adequate motivation. The administrative authorities should have good reasons for taking an administrative act and not just give any reasons so as to satisfy formal requirements.

I – Lawfulness

A – Concept

16. The principle of lawfulness requires not only that the administrative authorities shall not break the law, but also that all their decisions have a basis in law and that their content complies with the law. Furthermore, it requires that compliance by the administrative authorities with these requirements may be effectively enforced. Implicitly, the principle of lawfulness also means that the law as to the functions and powers of the administrative authorities should be validly enacted and sufficiently clear and specific.

17. The principle of lawfulness also requires that unlawful administrative acts must, in principle, be withdrawn. However, other principles which

protect individuals' rights *vis-à-vis* the administrative authorities may take precedence over that rule (see below Chapter 4, II on the "revocation of administrative acts").

B – Scope

18. The principle of lawfulness requires compliance with:

(i) the constitution;

(ii) general principles of law;

(iii) statute law and secondary legislation;

(iv) customary or conventional rules of international law which have force of domestic law;

(v) court decisions in so far as, according to national law, they have legally binding effect; and

(vi) relevant administrative guidelines in so far as they can be invoked before the courts.

18.1. *Comment re (ii)*: Among the general principles of law there are the rules that nobody may be at the same time judge and party in a dispute, that one cannot claim benefits by arguing with one's own unlawful behaviour or that *force majeure* is a valid reason for not performing one's contractual obligations.

18.2. *Comment re (iv)*: One example of a customary rule of international law which has force of national law is the rule that the authorities of the host country may not enter the premises of a foreign diplomatic representation, except if invited to do so. Another such rule is that foreign governments may not be sued before national courts (immunity of jurisdiction) and that their assets may not be seized (immunity of execution).

18.3. *Comment re (v)*: Court decisions have the force of laws in the common law systems. But even in systems with codified law the decisions of the constitutional courts can have such force.

II – Equality before the law

A – Concept

19. Where cases are objectively the same, their treatment must be the same.

20. Where cases are objectively different, there will normally be corresponding differences in treatment. The principle of equality before the law does not mean that the administrative authorities should not

carefully and fairly consider each individual case by reference to the applicable laws and rules. The laws and rules should not be drawn up so as to prevent the administrative authorities from treating every case in a manner appropriate to its circumstances.

20.1. *Comment*: This also means that the reaction of the administrative authorities to an individual case must be to a certain extent foreseeable in the light of their previous administrative acts : there should be no departure from the previous practice unless rational reasons plead for it. Where appropriate, the way in which and the extent to which the administrative authorities adapt their new administrative acts to the changed circumstances of a new case should not be done in an irrational or arbitrary manner. To summarise : treatment of cases should only be different if plausible reasons plead for that, and the difference in treatment should be appropriate with respect to the difference in the situations.

20.2. *Comment*: The principle allows, however, for some margin of appreciation as to whether cases are the same or different.

20.3. *Comment*: Certain differences pertaining to the private persons concerned may not give rise to different treatment (discrimination) as regards the enjoyment of a certain number of fundamental rights and freedoms. This principle is protected under international human rights instruments. Under the European Convention of Human Rights, for example, it is forbidden that differences in sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status be used as a basis for different treatment (discrimination) as regards the enjoyment of the human rights enshrined in that instrument.

B – Limitations

21. The principle of equality before the law cannot be invoked to justify applying an illegal practice more widely.

21.1. *Comment*: Thus, one cannot avoid punishment by showing that in a similar case an offender was not punished.

22. Differences in treatment resulting from changes of general application in policy or practice with regard to the exercise of discretionary powers do not of themselves infringe this principle.

22.1. *Comment*: Administrative practices as regards the use of discretionary powers can change, within the limits set by the principle of the protection of legitimate trust and vested rights (see Chapter 2, VI), for example, as a result of a policy decided by a new government coming to power after elections. They can also change as a result of a new factual situation ; for instance, problems with water supply can lead an administrative authority suddenly to forbid the construction of private swimming pools in a given area whereas it did not pose any conditions previously. Another

example is the administrative authorities stopping to deliver permits for constructions which use asbestos, once asbestos had been recognised as dangerous.

III – Conformity to statutory aim

23. All administrative powers must be exercised solely for the purposes for which they have been granted by the relevant laws.

23.1. *Comment*: Linked to the principle of lawfulness, this principle means that no improper purpose may be entertained by the administrative authorities by the issuing of an administrative act. The proper purpose or purposes of a statute, the "statutory aim", may be indicated in a preamble of the act or, more often, in the government's explanatory report to the underlying bill or may just be understood from the provisions of the act itself.

23.2. *Comment*: Under common law, for example, administrative acts which are not in conformity with the statutory aim will be declared "*ultra vires*", whereas they would constitute under French law a case of "*détournement de pouvoir*". That latter notion is applied when the administrative act is not motivated by any public interest (example : licences of bars refused so that the bar owned by the mayor of the village suffers no competition) or when it is motivated by public interest, but not by the one for which the powers used were conferred to the public agent or administration (example : prohibition to undress or dress on the beach except in the cabins which one can rent for that purpose ; measure taken under the powers given to the local authorities to safeguard public morality but motivated by the need to economically help those who rent out such cabins).

IV – Proportionality

24. The principle of proportionality implies :

(i) the use of means commensurate to the aims to be pursued ;

(ii) that the measures taken should strike a fair balance between the public interests and the private interests involved, so as to avoid unnecessary interference with the rights and interests of private persons.

24.1. *Comment*: Yet one more amplification of the principle of lawfulness, this principle applies to another hypothesis of administrative authorities not adhering to the limits which the laws assign to their acts.

24.2. *Comment*: The observance of the principle of proportionality constitutes an all-embracing requirement in a state governed by the rule of law. According to that principle, public authorities may curtail the rights of citizens

vis-à-vis the state only to the extent which is indispensable for the protection of public interest. There must be a reasonable relation between the means chosen and the purpose pursued. This means that any restriction of the rights of citizens must not only be suitable for the purpose indicated by the legislator, it must also be necessary in that the purpose could not be achieved by another means which would impose fewer restrictions on private rights and interests. Moreover, the burden imposed on the private person must stand in a reasonable relationship to the benefit which that private person and the general public will draw from the act. A breach of the principle of proportionality will only be acknowledged where the burden imposed on an individual has no acceptable relationship with the importance of the matter in question. The prohibition against using excessive means obliges the public authorities to use milder means where more stringent means are not more promising as regards the achievement of the purpose pursued.

V – Objectivity and impartiality

25. All the factors relevant to a particular administrative act should be taken into account, while giving each its proper weight. Factors which are not relevant must be excluded from consideration.

26. An administrative act must not be influenced by the private or personal interests or prejudices of the person taking it.

27. Therefore, no civil servant or employee of an administrative authority should be involved in the taking of an administrative act in a matter concerning his or her own financial or other interests, or those of his or her family, friends or opponents or in any appeal against an administrative act which he himself or she herself has taken, or where other circumstances undermine his or her impartiality.

27.1. *Comment*: "Friends or opponents" in the sense of this principle are persons towards whom the official involved in the taking of the administrative act has a positive or negative predisposition. The notion implies a close relation between the official and the private person concerned, be it an ongoing or a former relation (example : divorced spouse).

28. Even the appearance of bias should be avoided.

VI – Protection of legitimate trust and vested rights

29. The administrative authorities must be consistent in their administrative acts so as to respect the legitimate trust which private persons ought to be able to place in them. Private persons thus acquire "vested

rights" which basically means that administrative acts may not have retroactive effect unless expressly authorised by law or unless such acts are to the private person's advantage.

29.1. *Comment*: The test for finding out whether legitimate trust was not respected can be formulated in three questions: (a) Was there something in which trust could be placed (clear message by the administrative authorities)? (b) Did the "person concerned" actually trust? (c) Is the trust of the "person concerned" worth protecting?

VII – Openness

A – Concept

30. Without having to show any specific interest, everyone is entitled upon request:

(i) to be given information which is in the possession of an administrative authority

(ii) within a reasonable time

(iii) in the same way as anyone else

(iv) by effective and appropriate means.

30.1. *Comment*: It is generally recognised that a democratic system can function more effectively when the public is fully informed about the issues of public life, because to be informed is a prerequisite of acceptance, participation and adherence. It is, thus, necessary that the public have, subject to unavoidable exceptions and limitations, access to the large quantities of records and information of general interest and importance which administrative authorities hold at all levels.

30.2. *Comment*: Moreover, in order to protect the rights of the private person, it is most important that the person concerned be aware of the information held by the administrative authorities concerning himself or his interests. Such openness is also likely to strengthen the confidence of the public in the administration. The administrative authorities on their part will often benefit from the feedback received from the private persons.

30.3. *Comment*: "Without having to show any specific interest" means mainly that one does not have to be a party in any administrative procedure as a prerequisite for the right to request information from administrative authorities.

30.4. *Comment re (ii)*: The administrative authorities should supply information as soon as possible. Obviously, very numerous requests for information coming from the public can entail a considerable workload for administrative authorities and, at some point, be considered as incompatible with

good and efficient administration and be handled with delay. The principle factors for assessing what is "reasonable time" are the nature and complexity of the information and the time needed for the administrative authorities to supply it.

30.5. *Comment re (iv)*: These means may consist in oral or written information, in allowing inspection of documents and files, etc. The fact that the administrative authorities charge a fee on the occasion of such a request or recover the costs for providing the information requested (copying, printing, mailing or other) is compatible with this principle.

B – Limitations

31. Access to information may be subject only to such limitations as are necessary in a democratic society for the protection of:

(i) legitimate public interests;

(ii) privacy and other legitimate private interests.

31.1. *Comment*: To ensure the protection of legitimate public and private interests, access to information has to be subject to certain limitations. Refusal of access may be justified as regards certain kinds of internal documents, such as documents exchanged within an administrative authority on a personal basis, or prepared as internal working papers. For there is, within any working environment including public administrations, a "private sphere" in which work is being done in a rather informal way and which has to be protected.

31.2. *Comment re (i)*: "Legitimate public interests in a democratic society" are, for instance, national security, public safety, public order, the economic wellbeing of the country (protection of the currency and the credit, etc.), the prevention of crime, preventing the disclosure of information received in confidence, etc.

31.3. *Comment re (ii)*: The protection of confidential personal data as well as the protection of the reputation and the rights of private persons other than those who request access to the information, can justify refusal of access to information. For the conditions under which personal data held by public authorities in electronic files may or may not be communicated to third parties, see below: "Protection of personal data", Chapter 4, III.

31.4. *Comment*: It is normally not for the administrative authorities to assess the applicant's own personal interest for access to information which the authorities possess on him or her. Such information should be furnished, subject only to specific limitations as in the case of, for example, certain medical or police records (see below: "Protection of personal data", Chapter 4, III).

32. Where access to information is refused:

(i) the administrative authorities must give a statement of reasons; and

(ii) the refusal must be subject to judicial or other independent review.

32.1. *Comment*: In some countries it may be necessary for the private person to request such a statement of reasons which may be given orally or in writing. It may also be that a refusal to deliver information is not accompanied by an indication of remedies. These are derogations from the rules which apply to other administrative acts which adversely affect a private person's rights, liberties or interests (compare below "Notification, statement of reasons, [...]", Chapter 3, V).

Chapter 3 – Procedural principles

I – Access to public services

33. Everyone has the right to make representations to an administrative authority which has a corresponding obligation to accept and deal with them properly. The proper way of dealing with a representation depends on its nature and is defined by domestic law.

33.1. *Comment*: Many constitutions expressly grant a "right to petition" which includes the right to make representations to the administrative authorities.

33.1. *Comment*: The term "representation" is meant to comprise all kinds of more or less formal requests, applications, petitions, complaints, etc., which are brought before the administrative authorities, be it in writing or orally.

34. Where a formal representation (request or complaint) is made with a view to obtaining or safeguarding a benefit to which the private person is legally entitled, domestic law may request:

(i) that the private person make it within specified time-limits, which must be reasonable;

(ii) that the administrative authorities take a formal act in response; time-limits can be fixed as to when that response has to be given by the administrative authorities (see below "Time-limits", Chapter 3, IV).

35. Even an informal representation:

(i) must not be refused without being examined; and

(ii) should give rise to a response by the administrative authorities unless it is manifestly frivolous or absurd.

36. The administrative authority shall, as necessary, provide guidance on how to initiate proceedings and how to proceed in a matter falling within its competence.

(i) Where a representation is made to an administrative authority which is not the competent one, that authority shall, where

this can reasonably be expected, transmit it to the competent administrative authority and notify the interested person thereof.

(ii) The proper forms for the different types of representations are defined by domestic law. If a representation is not made in the proper form, the administrative authority has the duty to accept it and, if necessary, either assist the private person in putting it into the proper form or give the necessary advice.

(iii) The administrative authority should be ready to provide information which allows the private person:

– to find the most efficient way to achieve his or her aim;

– to assess his or her chances for obtaining that aim.

36.1. *Comment*: The need of the private person to obtain guidance for communicating with the authority forms the basis for providing guidance. Therefore the person in need of guidance has to take the initiative by asking for advice from the authority. However, the person's factual need to receive advice determines the scope of the administrative authority's duty to provide guidance. Guidance should be provided to such an extent that the person is capable of meeting the requirements set by the procedure. In some cases the very fact of a private person contacting the administrative authority should be interpreted by it as a request for advice. Namely, there should be a liberal attitude by the administrative authority as regards the provision of information which it should give only "upon request" (see the wording of the substantive principle of "Openness", Chapter 2, VII). The overall principle is that administrative authorities must be friendly with private persons and, as a general attitude, "be at their service".

36.2. *Comment re (i)*: Rejection instead of transmission might be reasonable, for example, if the competent administrative authority cannot clearly be identified or belongs to a totally different branch of the administration.

36.3. *Comment re (ii)*: Guidance includes only giving various kinds of advice, whereas drawing up documents on behalf of a private person, for instance, does not fall within the tasks of an administrative authority, unless otherwise specified in domestic law (as it can be, for instance, in the domain of social affairs).

36.4. *Comment re (ii)*: One aspect of the proper form is the language used for the representation. Representations made in a foreign or a minority language should be accepted and properly dealt with to the extent possible where the private person is not able to use the official language of the competent administrative authority. To what extent the deliberate use of minority languages in the relations with the administrative authorities is accepted is subject to rules of domestic law.

36.5. *Comment re (iii)*: The kind of information envisaged here is information on the relevant administrative guidelines, on established interpretations

of the relevant legal provisions, on the practice of the office in question, etc. The civil servant providing guidance has to act without risking his impartiality. Guidance should not take the form of advocacy, which would, in fact, disqualify the authority from handling the case. Guidance must carefully respect the principle of equality between the parties.

37. Administrative procedures shall, as far as practicable, be in a form which minimises the costs of participation therein for the person concerned.

II – Right to be heard

A – Concept

38. Persons concerned have the right to submit facts, arguments or evidence.

38.1. *Comment*: The private person's right to be heard has a two-fold rationale : (a) it is part of the private person's right to fair trial in cases where an administrative authority takes the initiative of an administrative procedure which may affect the private person's rights, interests or liberties (sanctions, expropriations, public construction projects, noise and other pollution, etc.), and (b) it should allow the administrative authority to take the best act possible, that is, the act which is based on an accurate and equilibrated assessment of facts and arguments.

38.2. *Comment*: Although persons concerned have the right to submit all kinds of facts, arguments or evidence, the administrative authorities will, of course, often consider some of the material as irrelevant and not base their administrative acts thereon (see also the substantive principle of "Objectivity", Chapter 2, V).

B – Modalities

39. Where applicable, the administrative authority must inform the person concerned :

(i) in proper time and

(ii) by appropriate means

that it has begun an administrative procedure and that the person concerned has a right to submit facts, evidence and arguments.

39.1. *Comment*: These modalities are only applicable (a) when an administrative authority initiates an administrative procedure which may affect the private person's rights, interests and liberties, such as sanctions or administrative procedures which include participation procedures (public construction

projects, etc.) or (b) when a private person initiates an administrative procedure which may affect another private person's rights, interests or liberties. In the case of the person concerned taking him/herself the initiative of an administrative procedure, there is, of course, no need to "inform that a procedure has begun" and in most cases the person will by him/herself submit facts, evidence and arguments.

39.2. *Comment re (ii)*: For administrative procedures concerning a large number of persons the notification which is due under this principle may take the form of a public notification.

40. Where an administrative procedure provides for participation of persons concerned, they are entitled, upon request and with possible exceptions to be defined by law, to be informed :

(i) before the administrative act is taken and

(ii) by appropriate means

of all the facts, arguments and evidence on which the administrative authority intends to base its administrative act as well as of the legal basis on which the administrative authority proposes to take it.

40.1. *Comment*: With due regard to justified requirements of secrecy, access to information should in general include the right to inspect the files.

40.2. *Comment*: The "legal basis on which the administrative authority proposes to take its administrative act" may be drawn from laws, case-law, general administrative guidelines, etc. (see above the principle of "Lawfulness" : Chapter 2, I).

40.3. *Comment*: If a computerised procedure is involved, the information on the points mentioned above must be presented to the private person in intelligible form.

40.4. *Comment re (ii)*: Particular modalities apply for administrative procedures concerning a large number of persons where the participation of the persons concerned may be organised in the form of written observations, public hearings or representation by persons concerned or their representatives in an advisory body to the administrative authority.

41. To be effective, the right of a person concerned to make submissions must be exercised before the act of the competent administrative authority and he or she must be given enough time to prepare any submissions.

41.1. *Comment*: When urgent administrative action is required, it may not be possible to grant the persons concerned the exercise of the right to be heard prior to the taking of the administrative act (see, for instance, the case of "Provisional protection", Chapter 5,I,B).

42. The circumstances, including the procedure followed by the administrative authority, may be such that the persons concerned should be entitled to make submissions more than once.

42.1. *Comment*: Where the intended administrative act has been communicated to persons concerned for their submissions therein (namely in the course of an administrative procedure which provides for the participation of the persons concerned, see paragraph 40), and that administrative authority subsequently envisages taking an administrative act which is materially different from the intended one, the persons concerned must be given a further opportunity to make submissions.

43. If the procedure includes taking an opinion which has binding force, the making of submissions must be allowed before the taking of the opinion.

44. Submissions may be written or oral, according to national law.

44.1. *Comment*: They may also be partly written and partly oral.

45. When the administrative act is likely to affect rights, liberties or interests in the territory of a neighbouring state, the administrative participation procedure should be made accessible to the persons concerned in that state on a non-discriminatory basis.

45.1. *Comment*: In an increasing number of fields (major installations, industrial plants, spatial planning, etc.), administrative authorities are called upon to take administrative acts which affect in various ways a large number of persons. Some of these acts can also affect persons residing in neighbouring states. It is therefore desirable that administrative authorities also take into consideration observations from such persons concerned relating to potential effects of proposed acts in the territory of neighbouring states. In order to ensure compatibility between the requirements of good and efficient administration on the one hand and, on the other hand, the fair and effective protection of a large number of persons including, where appropriate, persons concerned by international effects of administrative acts, a Council of Europe recommendation adapted and complemented the principles which govern administrative acts addressed to one or a small number of individually identified private persons (see Appendix 3).

III – Representation and assistance

46. A person concerned has the right, but, as a general rule, not an obligation, to be represented or assisted throughout an administrative procedure in which he or she is involved.

46.1. *Comment*: In the case of administrative procedures concerning a large number of persons, the administrative authorities may, contrary to the general rule, impose representation by one or more common representatives or by associations or other organisations.

IV – Time-limits

47. If a procedure requires the taking of a formal administrative act at the end of it, the administrative authority (or authorities) involved must complete the different stages of the procedure and take the act within a reasonable time. This principle applies no matter whether the procedure was initiated by the administrative authority itself or by a private person.

47.1. *Comment*: Prompt expedition of any procedure for the determination of private persons' rights and obligations is an intrinsic element of justice. The promptitude requirement in respect of procedures, which is also to be found in Article 6, paragraph 1 of the European Convention on Human Rights, is imposed further by the objective of certainty of the law. In fact, before an act terminating an administrative procedure is taken – and up to the expiry of any time-limits after which failure to act can be considered as equivalent to action – the procedure remains pending and hence the legal situation undefined. Only the administrative act terminating the procedure opens the possibility of taking action against the procedure or the final administrative act (whereas any action taken before that moment can only aim at obliging the administrative authorities to take an administrative act).

48. A failure to act (silence or inaction) must, under national law :

(i) either be considered, after a specified period of time, as equivalent to an act (positive or negative decision) ;

(ii) or be subject to possible control by an administrative or judicial authority competent for that purpose (control for omission).

V – Notification, statement of reasons and indication of remedies

49. The administrative act must be notified to all persons concerned.

49.1. *Comment*: Notification normally means the personal information of the person or persons concerned. In the case of administrative procedures concerning a large number of persons, the notification of the administrative act taken and of the possible remedies against it (see next paragraph) may be made, for certain categories of persons concerned, not by personal information but by public notification.

49.2. *Comment*: In most legal systems, an administrative act which has not been regularly notified is not invalid but, as long as the person concerned has not been regularly notified of it, it can not produce its legal effects for that person.

49.3. *Comment*: This and the following principles under this section apply mainly to formal decisions taken by the administrative authorities (see the definition of administrative acts in paragraph 11 above) whereas they will often not be applicable to administrative measures of a more factual kind (also covered by the definition of administrative acts).

50. Reasons must be stated in writing for all acts which may adversely affect the rights or interests of private persons. The act itself should either state the reason upon which it is based or clearly indicate where those reasons can be found.

51. The statement of reasons must be adequate, clear and sufficient. It will normally indicate the main facts, arguments and evidence as well as the legal basis on which the administrative authority based the administrative act.

51.1. *Comment*: The written statement of reasons for any administrative act is a fundamental requirement in a state governed by the rule of law, as it is the point where judicial or other control is placed. The administrative authority has to develop its reasoning and to prove that it is acting within the legal powers conferred to it, that it took the act for good reasons and not arbitrarily, etc. (see the substantive requirements above in Chapter 2).

52. The act must contain an indication of the remedies available for challenging it. The indication must specify :

(i) the nature of the remedies ;

(ii) the bodies before which the remedies can be exercised ;

(iii) the time-limits for exercising such remedies.

52.1. *Comment re (i)*: Only "normal" remedies have to be indicated ; exceptional remedies which might be available under certain circumstances, like appeal to a constitutional court or to bodies like the ombudsman, need not be indicated.

VI – Execution of administrative acts

53. Administrative acts which grant a right or safeguard an interest of a private person (whether a party to the procedure or an interested third person) must be implemented within a reasonable time. The failure of the administrative authorities to do so must be subject to judicial and/or non-judicial review and may give rise to compensation.

53.1. *Comment*: The execution of an administrative act may require one or several subsequent administrative acts (which can be physical acts).

Chapter 4 – Special issues with impact both on the substantive and the procedural principles applicable

I – Additional guarantees for private persons as regards administrative sanctions

54. Administrative sanctions are administrative acts which impose a penalty on private persons on account of conduct contrary to applicable rules. The sanction can be a fine or any other punitive measure, whether pecuniary or not.

54.1. *Comment*: This definition does not include measures which administrative authorities are obliged to take as a result of criminal proceedings; in that case it is a court which decides on all aspects of the sanction, whereas the administrative authorities only execute (certain aspects of) the sanction. It likewise excludes disciplinary sanctions.

54.2. *Comment*: Not all administrative acts placing a burden on or affecting the rights or the interests of private persons are to be considered "sanctions". Such acts can pursue a plurality of goals including the pursuit of public interest and public policy, the protection of the community against an imminent danger (to public health, the quality of the environment, security of employment, etc.) by way of preventive measures as well as a punitive goal. Often there might be uncertainty as to which is the prevailing aim of the administrative act. The principles set out here apply only to those administrative acts which mainly aim at sanctioning a transgression of rules, thus discouraging new transgressions from occuring. By way of example, refusal to grant or renew a licence on the grounds that the applicant does not or no longer fulfill the requirements for such licence, is not considered as an administrative sanction. Likewise, prohibitions or the withdrawal of licences need not have punitive character, as they may well be motivated by new norms, for instance in the field of environment protection or public health, etc.

54.3. *Comment*: Administrative authorities enjoy considerable power of sanction as the administrative state has grown. In many different sectors of social life they lay down the rules, supervise their enforcement and wield a broad panoply of instruments for compelling private persons to comply and for sanctioning failure to do so. This applies particularly to such areas as social security, taxation, protection of the environment, town planning, public health, trade, etc.

54.4. *Comment*: Another reason for the enhanced sanctioning power of administrative authorities lies in the tendency towards decriminalisation, which means that the punishment of a number of offences is transferred from the criminal to the administrative sphere.

54.5. *Comment*: Administrative sanctions may take many forms. Without aspiring to give an exhaustive list, one might mention fines or higher charges, confiscation of goods, closure of an undertaking, a ban on practising an activity, suspension or withdrawal of licences, permits or authorisations necessary to the conduct of a business or industry (see, however, paragraph 54.2 above), etc. Such sanctions can have very severe consequences for private persons.

55. As applied to administrative sanctions, the principle of lawfulness requires that not only the circumstances in which sanctions may be imposed, but also the types of sanctions applicable, be expressly prescribed by law.

55.1. *Comment*: In a democratic society, it is not proper for the administrative authorities at the same time to lay down rules of conduct, determine the sanctions applicable in case of non-observance and put these sanctions into effect. Legislation is required at least to lay down the scale of pecuniary sanctions applicable, to empower the administrative authorities to apply such sanctions so as to ensure observance of particular legislative measures and to define those cases in which sanctions restricting the exercise of fundamental rights can be applied. A lesser degree of precision may suffice in the definition of the specific circumstances in which the sanctions may be imposed.

55.2. *Comment*: It is important for the effective guaranteeing of the private persons' rights that they be able to easily take knowledge of the rules governing competence, the types of sanctions applicable to the various misconducts and their maximum rates, the guiding principles for their enforcement procedure as well as the possibilities of appeal.

56. In the context of administrative sanctions:

(i) the burden of proof should as much as possible be on the administrative authorities; cases of doubt should be resolved in the private person's favour;

(ii) the principle of penal law is applied according to which such law must not be applied retroactively; this means that no administrative sanction may be imposed on account of an act which, at the time when it was committed, was not contrary to applicable rules;

(iii) the private person should benefit from the rule which is more favourable to him or her, where older laws have been superseded by more recent ones; this means that:

- where a less severe sanction was in force at the time when the offence was committed, a more severe sanction subsequently introduced may not be imposed,
- where less repressive provisions entered into force after the offence was committed, they should be to the advantage of the person on whom the administrative authorities are considering imposing a sanction;

(iv) a person may not be administratively penalised twice for the same act on the basis of the same rule of law or of rules protecting the same social interest;

(v) when the same act gives rise to action by two or more administrative authorities, on the basis of rules of law protecting distinct social interests, each of those administrative authorities shall take into account any sanction previously imposed for the same act.

56.1. *Comment re (iii)*: The principle of immediate application of less harsh legislation is one of penal law, thus duly taking into account the penal aspect of this part of administrative law. It also applies where the private person's act in question is no longer contrary to any rule at the moment when the administrative act containing the sanction is to be taken. The idea is that a changed attitude of the legislator should be to the benefit of those persons who did not respect the former law.

56.2. *Comment re (iv)*: This principle does not preclude the possibility that one act may constitute two or more offences in terms of administrative law, each giving rise to a specific sanction, whereby these sanctions may fall under the competence of different administrative authorities. In this case, sub-paragraph (v) applies. It is not clear, however, to what extent this principle applies in cases where one act is sanctionable both under administrative and criminal law rules with identical or very similar content. Article 4 of Protocol No. 7 to the European Convention on Human Rights strictly bans double punishment of one act, albeit on the basis of rules of law protecting distinct social interests. The said article refers to criminal proceedings; it is construed as also applying to a large extent to proceedings of penal character before administrative authorities.

56.3. *Comment*: In determining what is the "reasonable time" limit within which the administrative authorities have to take the sanction (see Chapter 3, IV) one will consider the social interest pursued by the norm which was breached. The time-limit for taking an administrative sanction will normally be shorter than the periods provided for in criminal procedure.

56.4. *Comment*: The administrative procedure regarding the taking of an administrative sanction will terminate either by the taking of such sanction or by a finding that there is insufficient evidence or that the facts do not warrant a sanction and, in that case, of a notification that the proceedings have been discontinued.

56.5. *Comment*: The procedural principles which govern the taking of all administrative acts are, of course, applicable to the taking of administrative sanctions. But as the taking of administrative sanctions resembles somewhat a trial, the rules of criminal law on fair trial apply to a certain extent. However, subject to the consent of the person concerned and in accordance with the law, such procedural principles may be dispensed with in cases of minor importance which are liable to limited pecuniary penalties, unless the person concerned objects to the procedure adopted or to the proposed sanction. In certain cases, notably parking tickets, the requirement of good and efficient administration may call for simplified procedures, even if the person concerned does not consent.

II – Revocation of administrative acts

57. Revocation of an administrative act is itself an administrative act, to which the substantive and procedural principles are fully applicable. The particular problem posed by revocation is the frequent conflict between the principle of lawfulness and reasons of public interest which plead for revocation on the one hand, and the protection of a private person's legitimate trust in the maintaining of the administrative act on the other hand.

57.1. *Comment*: Revocation can take different forms under national law. In most states administrative authorities can, under certain conditions, revoke their acts in whole or in part, either at the request of a person concerned (cf. below "Internal review by the administrative authorities", Chapter 5, II) or at their own initiative.

58. From the application of the principles set out in this handbook it follows that the revocation of an administrative act, with negative effect for a person concerned, is only permitted:

(i) if the initial administrative act is unlawful and

- where there is no legitimate trust to be protected, or
- where the public interest in revocation outweighs the rights and interests of the person concerned in the maintaining of the act;

(ii) if the initial administrative act is lawful but

- where no legitimate trust was placed in the maintaining of that act by the person concerned, or

– where the relevant facts and circumstances have changed and the public interest in revocation outweighs the rights and interests of the person concerned in the maintaining of the act.

58.1. *Comment re (i)*: There is no legitimate trust to be protected if, for example, the person concerned knew or should have reasonably known that the initial act was unlawful or if the person concerned has provided incorrect or incomplete information for the administrative authority in order to obtain the initial act.

58.2. *Comment*: If the relevant facts and circumstances at the time of the initial act were not known to the authorities but would, if they had been known, have led to another act or if the person concerned did not fulfil the conditions specified in the administrative act or in the law in the application of which the act was taken, the precise circumstances and national law will decide whether the initial act was lawful or unlawful.

58.3. *Comment*: The time elapsed since the taking of the initial administrative act is likely to influence the weighing between the public interest in revoking and the legitimate trust of the person concerned in the maintaining of the act ; the longer that time is, the stronger the argument of legitimate trust will be.

59. Depending on the extent to which the person concerned realised or should have realised the unlawfulness and depending on the weight of the public interests at stake, the act can be revoked with effect as of the date of revocation or even with retroactive effect as of the date of the taking of the initial act.

III – Protection of personal data

60. Administrative authorities have a certain number of obligations as regards the collection, the processing and the storage of personal data concerning private persons. These obligations are designed to strike a fair balance between everybody's basic "freedom to receive and impart information and ideas without interference by public authority and regardless of frontiers" (freedom of expression as enshrined in Article 10 of the European Convention on Human Rights) on the one hand, and the "right to respect for his [or her] private and family life, [...] home and [...] correspondence" (right to privacy, Article 8 of the Convention) on the other hand. Seventeen Council of Europe member states, by ratifying the 1981 Council of Europe Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data (ETS No.108), have undertaken to enact legislation which renders

obligatory, for both the administrative authorities and private operators, the respect of the principles set out in the paragraphs hereafter; most of the other Council of Europe member states also respect all or most of these principles.

60.1. *Comment*: "Personal data" means any information relating to an identified or identifiable individual. In many countries the private person's voice and image are considered personal data and enjoy protection of the law. "Automatic processing" includes the following operations if carried out in whole or in part by automated means: storage of data, carrying out of logical and/or arithmetic operations on those data, as well as their alteration, erasure, retrieval or dissemination.

60.2. *Comment*: The administrative authorities seen as a whole (which may include police, statistics, social security and public health services, tax and customs authorities, schools, land registers, administrations providing public utilities such as water, gas or electricity or public transport, telecommunications, etc.) have an important "knowledge" about individuals. They have access to many kinds of data, most of which are obtained upon request by the administrative authorities, but some of which may have been given spontaneously to them (on the occasion of a complaint made to the police, for example). Given the privileged position of the administrative authorities, it is of the utmost importance that they be bound to handle their powers in compliance with the principles set out below. It is normal practice for such compliance to be monitored by an independent authority (see below section E – "Sanctions and remedies").

60.3. *Comment*: Since the conclusion of the above-mentioned Convention No. 108, the issue of data protection has grown in importance. Public and other services (bank, credit, social security, social assistance, medical care, insurance, etc.) operate more and more with automated data files. It was felt that for many of these sectors the general principles contained in Convention No. 108 had to be refined. This is being done by means of Council of Europe Recommendations. The following recommendations have been adopted as of yet by the Committee of Ministers: No. R (81) 1 on regulations for automated medical data banks (23 January 1981); No. R (83) 10 on the protection of personal data used for scientific research and statistics (23 September 1983); No. R (85) 20 on the protection of personal data used for the purposes of direct marketing (25 October 1985); No. (86) 1 on the protection of personal data used for social security purposes (23 January 1986), No. R (87) 15 regulating the use of personal data in the police sector (17 September 1987); No. R (89) 2 on the protection of personal data used for employment purposes (18 January 1989); No. R (90) 19 on the protection of personal data used for payment and other related operations (13 September 1990); No. R (91) 10 on the communication to third parties of personal data held by public bodies (9 September 1991); and No. R (95) 4 on the protection of personal data in the area of telecommunication services, with particular reference to telephone services (7 February 1995). Other recommendations are under preparation in the fields of statistical data, medical data including genetic data and insurances. Moreover, a Council of Europe expert group was established to consider the problems of data protection raised by new technologies, such as the Internet.

A – Collection, use and quality of data

61. Personal data undergoing automatic processing have to be:

(i) obtained and processed fairly and lawfully;

(ii) stored for specified and legitimate purposes and not used in a way incompatible with those purposes;

(iii) adequate, relevant and not excessive in relation to the purposes for which they are stored;

(iv) accurate and, where necessary, kept up to date;

(v) preserved in a form which permits identification of the data subjects (private persons) for no longer than is required for the purpose for which those data are stored.

61.1. *Comment re (i)*: "Fair" and "lawful" collection and processing of personal data aims at ensuring that the data subject is in a position to exercise the rights recognised to him/her by Article 8 of Convention ETS No. 108 (see D below). The practical interpretation of this principle, which can be found in national legislation on data protection and which is reflected in several recommendations of the Council of Europe in the field of data protection, can be summarised as below.

The term "lawful" means that the purpose of collection must be permitted by domestic law (the collection of data for the purpose of slavery, for example, is unlawful).

According to Article 5.a of Convention ETS No. 108, personal data shall be obtained and processed fairly. The explanatory report on the convention says nothing about the principle of fairness. In particular, the requirement that processing of data shall be transparent and foreseeable for the data subject in order to permit him/her to adapt his response ensues from this principle. This implies that, as a general rule, data shall be collected from the data subject or at least with his/her knowledge. The data subject's right to information, which is given concrete expression in the draft recommendations on medical data and on statistics, ensues from this requirement of transparency linked to the principle of fairness. This transparency is a necessary precondition for facilitating exercise of the right to access and rights which ensue from it. Moreover, the principle of fairness implies that data may not be processed against the will of the data subject (except, of course, where the data subject is party to legal or contractual obligations). It also implies that data may not be collected and processed by deceit, for example by presentation under a false identity or by giving false information about the aim of the processing. Clandestine collection without the data subject's knowledge (telephone tapping, photography, etc.), collection under threat, or with the use of violence (a method of collection which is in general against the law) are also contrary to the principle of fairness.

61.2. *Comment re (ii)*: The (lawful) purpose of the collection and processing must be well determined and will determine itself the sort of data to be collected and the modalities of the processing and storage, etc. The lawfulness of the whole file and its processing is thus linked to the initial purpose, which may not be changed in the middle of the process unless the new purpose is compatible with the purpose for which the data were collected.

B – Special categories of personal data ("sensitive data")

62. Personal data revealing racial origin, political opinions or religious or other beliefs, as well as personal data concerning health or sexual life or criminal convictions may not be processed automatically unless domestic law provides appropriate safeguards.

C – Data security

63. Appropriate security measures have to be taken for the protection of personal data stored in automated data files against accidental or unauthorised destruction or accidental loss as well as against unauthorised access, alteration or dissemination.

63.1. *Comment*: Both technical measures (relying on the application of the latest level of computer sciences) and organisational measures (organisation of the work, authorisations, access to sites, checks, etc.) are necessary.

D – Right of access and rectification

64. Any person has to be enabled :

(i) to establish the existence of an automated personal data file, its main purposes, as well as the identity and habitual residence or principal place of business of the controller of the file ;

(ii) to obtain at reasonable intervals and without excessive delay or expense, confirmation of whether personal data relating to her or him are stored in the automated data file as well as communication to her or him of such data in an intelligible form ;

(iii) to obtain rectification or erasure of personal data if these have been processed contrary to the provisions of domestic law giving effect to the basic principles set out above under A and B ;

(iv) to have a remedy if a request for confirmation or communication, rectification or erasure as referred to in (ii) and (iii) above is not complied with.

64.1. *Comment re (i)*: The "controller of the file" is the natural or legal person, public authority, agency or other body who is competent according to the national law to decide what should be the purpose of the data file, which categories of personal data should be stored and which operations should be applied to them.

64.2. *Comment re (ii - iv)*: Restrictions on these rights may be provided by law with respect to files used for statistics or for scientific research purposes when there is obviously no risk of an infringement of the privacy of the persons concerned (see more details in Article 9 of Convention No. 108).

E – Sanctions and remedies

65. Appropriate sanctions and remedies are required for violations of provisions of domestic law giving effect to the basic principles for data protection set out above.

65.1. *Comment*: It corresponds to the spirit of Council of Europe Convention No. 108 that there be an independent supervisory body (often called "commissioner for data protection" or similar). Its independence is both with regard to the nomination of its head (often elected by the parliament) and with regard to the rules under which it functions. For the member states of the European Union, the establishment of such an independent supervisory body has become compulsory with the adoption, on 24 October 1995, of the Directive on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data.

Chapter 5 – Control of the effective application of the substantive and procedural principles

66. There are three types of control which may produce an effective remedy against administrative acts taken in violation of the substantive and procedural principles set out above in Chapters 2, 3 and 4. The first type, judicial review, is an essential element of a state governed by the rule of law and the respect of human rights.

67. The second type of control, internal review by the administrative authorities, plays an important part in practice. It offers the possibility of settling problems between the private person and the administrative authorities speedily, with little or no cost and out of court.

68. Review of the ombudsman type also plays an important part, as it may offer the possibility of stating an opinion on both the lawfulness and the suitability of the conduct of the authorities, thus helping to avoid future problems between private persons and administrative authorities. The statement of opinion may, in fact, serve as a guideline for the administrative authorities in carrying out their duties.

68.1. *Comment*: The private person may also make use of other methods of challenging an administrative act, such as asking his or her elected representative or the media to take up the case. However, these methods do not result directly in a remedy in the same way as judicial review or a review by the administrative authority or an ombudsman do.

I – Judicial review

A – Basic requirements as to the review itself

69. Administrative acts, and failures to take such an act, are subject to judicial review at least as regards their legality :

(i) before an independent and impartial tribunal established by law ;

(ii) involving a fair procedure the length of which is reasonable ;

(iii) including a fair and public hearing;

(iv) affording an effective remedy.

69.1. *Comment*: As regards the administrative authorities' "failure to take [...] an act", the situation contemplated is one where – as a consequence of an individual right, liberty or interest – a private person is entitled to request that a specific administrative act be taken in his of her favour.

69.2. *Comment*: The right of access to justice and to a fair hearing as guaranteed under Article 6 of the European Convention on Human Rights is an essential feature of any democratic society. There are, however, certain areas of administration (the so-called "non-justiciable acts" or "acts of government") which do not fall in the ambit of judicial review. The exempted areas are to be found mainly in foreign affairs, defense and in the relationships between parliament and the executive. But country practices vary a lot in this regard.

69.3. *Comment*: The requirement that there be judicial review "at least as to the legality" of the administrative act means that there may, depending upon national law and the nature of the particular case, either be full appeal or only control of legality. Whereas full appeal implies review of both matters of fact and law, the control of the legality of the administrative act is confined to checking whether the administrative authorities had the power to take an act of the kind in question (or the right not to act, as the case may be) in the situation which it has assessed. A reviewing court whose jurisdiction is confined to control of legality does not, in principle, substitute its own evaluation of questions of fact or of policy for that of the administrative authorities. Nonetheless, even in the case of control of legality only, the tribunal retains jurisdiction to decide whether, on the facts or evidence as established by the administrative authorities, there was sufficient legal justification for the administrative act (or omission) which is under review.

69.4. *Comment*: Judicial control of administrative acts involving the exercise of discretionary powers by the administrative authorities is inevitably less stringent than in the case of those acts which involve measures which are obligatory for the administrative authorities. Thus, it is a generally recognised principle that an administrative authority cannot be judicially compelled to exercise a power which is purely discretionary. Nonetheless, judicial control over the exercise of discretionary power ensures that, when an administrative authority exercises a discretionary power, it does so within the limits and purposes for which, under the law, it enjoys discretion.

69.5. *Comment*: As regards the question of who can challenge an administrative act before the courts, it should be noted that not only the individual addressees of an administrative act, but also all persons whose individual rights, liberties or interests are liable to be affected by an administrative act, irrespective of whether that act is an individual measure or decision or is a measure affecting the interests of a large number of persons, should be able to seek judicial review of the legality of that act.

69.6. *Comment re (i)*: The constitutional traditions and legal systems of different states offer various solutions as to the nature of the tribunals which

can review administrative acts. Under the civil law tradition, these are essentially administrative courts, the jurisdiction of which is confined to matters of administrative law and which have no jurisdiction concerning private litigation. In common law countries, the control of administrative acts is carried out in the ordinary courts by judges whose jurisdiction covers matters both of public and of private law. However, both traditions admit specialised tribunals established by law which are not part of the general system of administrative courts or of the system of ordinary courts, and which have a jurisdiction specifically limited to particular subjects such as, for example, social welfare matters, the granting or refusal of certain types of statutory licences, the granting (or refusal) of patents, or the determination of statutory compensation for administrative acts (for example in cases of expropriation). If the composition or functioning of such tribunals does not fulfil the requirements set out in this handbook, their decisions must be subject to appeal before courts which do offer such guarantees.

69.7. *Comment re (iv)*: A full system of judicial remedies involves judicial power to annul administrative acts, to compel the taking of such acts, and to prohibit or restrain administrative action. It also comprises consequential relief including powers to compel the administrative authorities to grant compensation or otherwise make reparation, as well as jurisdiction to grant provisional protection.

70. The decision of the tribunal should :

(i) state the reasons on which it is based ;

(ii) be notified to the persons concerned, together with an indication of the normal remedies available for challenging it, where a challenge is possible.

70.1. *Comment re (i)*: The tribunal can fulfil this requirement by simply stating that it confirms the legality of the reasons given by the administrative authorities which took the act.

71. Judicial review :

(i) should be accessible to persons concerned, without discrimination on grounds of nationality or residence ;

(ii) should be accessible even to a person concerned who lacks financial means ;

(iii) should include the hearing of persons concerned where those have a sufficient interest in the procedure.

71.1. *Comment*: Access to justice and to a fair hearing should not only exist in theory but also be secured in practice to everyone, including those in an economically weak position. This is why legal aid, that is, financial and/or direct legal assistance to persons who engage in court proceedings, should not be regarded as a charity to indigent persons but as an obligation of the community as a whole.

71.2. *Comment re (ii)*: Legal aid in court proceedings should always include the assistance of a lawyer whom the assisted person should, as far as practical, be free to choose. The fundamental principle is that the beneficiary of legal aid should be entitled to the assistance of a person having the same qualification as someone who would have been chosen by a party not in need of legal aid. This idea of equality of arms between parties also requires that the lawyer who grants legal aid be adequately remunerated.

71.3. *Comment re (ii)*: When considering whether a person is entitled to legal aid, account should be taken of the applicant's financial resources and obligations and the anticipated cost of the proceedings. Legal aid may cover only part of such costs and render a financial contribution of the assisted person necessary. Such contribution should not place the applicant in undue hardship but it may well require him or her to borrow (part of) his share of the costs. However, to give some examples, the financial conditions should not be so rigorous as to require an applicant to sell his home or mortgage his income for years ahead. The limits of legal aid are to a large extent dictated by economic conditions and budgetary resources of the country, because legal aid, as opposed to legal advice (see above), is to be paid for by the state.

71.4. *Comment re (ii)*: Even where the conditions as to the applicant's situation are fulfilled, legal aid can be refused when (a) the substance of the case is manifestly unfounded or, in general, when it is not reasonable for proceedings to be taken or defended (mere uncertainty about the outcome of the case is, of course, not sufficient) and (b) when the nature of the proceedings, because of the small costs involved or because of their simplicity or the help available from the court, would not justify granting, for example, the assistance of a lawyer.

71.5. *Comment re (ii)*: Legal aid should also be granted for proceedings which aim at the recognition or enforcement of a court decision rendered abroad, and this independently of any question of reciprocity.

71.6. *Comment re (ii)*: It is not sufficient to establish a system of legal aid. It is also absolutely necessary that persons who are eligible for such aid are informed of their rights in this regard. It is therefore important to disseminate information in such a way that it reaches as many potential beneficiaries as possible.

71.7. *Comment re (i) and (ii)*: With a view to permitting foreign persons in an economically weak position to exercise their rights more easily, Council of Europe member states are asked to grant to nationals of other member states, as well as to all persons having their habitual residence in their territory, the same treatment in respect of legal aid as that accorded to their own nationals. Legal (judicial) persons are not covered by this rule ; stateless persons, however, are. According to the definition of "habitual residence" persons having their habitual residence in a state but not having been granted official authorisation to reside in that state should also be granted the same legal aid as nationals.

71.8. *Comment re (ii)*: There should be the possibility for review of the decision which refuses legal aid. This does not mean that there has to be an appeal to another body ; the decision may be reconsidered by the same body.

72. When judicial review involves a large number of private persons, the tribunal may, if so provided by law and having due regard to the rights and interests of the persons concerned, take various steps to rationalise the procedure (which, thus, becomes a "collective procedure"), such as requiring private persons with common interests to choose one or more common representatives, hearing and deciding test cases and making notification of orders or decisions by public announcement.

B – Provisional protection

73. When an administrative act is challenged, the complainant has the right to request a court to grant him or her provisional protection. The court may grant such protection where the interests of the private person in obtaining such protection outweigh the public interest and the interests of other persons concerned. This may happen where the administrative act challenged will cause (or is likely to cause) the private person severe damage which is irreparable or difficult to repair in case of a successful challenge.

73.1. *Comment*: Provisional protection is one of the most important means by which, in favour of the private person, the effectiveness of remedies against administrative action can be assured. In some jurisdictions, a degree of provisional protection is automatically assured upon the bringing of an appeal to an administrative court because of the existence of a rule that such an appeal has suspensory effect in relation to the administrative act under challenge. In other cases, such suspensory effect has to be sought by means of a separate order from the appellate tribunal. Even under the most efficient of judicial systems, the complexity of many cases is liable to result in some delay before a hearing can take place and a judgment on the merits can be delivered. Therefore no system of effective remedies would be complete without the possibility for the applicant to seek provisional protection by way of suspension of the administrative act or an injunction restraining its enforcement pending the substantive hearing and determination of his claim. Provisional protection is not merely a desirable adjunct of the system of remedies against administrative acts; it is an essential element of such a system.

73.2. *Comment*: Provisional protection can also be granted against regulatory measures in legal systems where such acts can directly be challenged before a court. However, in states where regulatory measures cannot directly be set aside or altered, the validity of such administrative acts can only be contested incidentally by means of proceedings brought against an individual measure enforcing them. In such cases, a request for provisional protection against the regulatory measure would be pointless.

74. National law may require the principal claim to be admissible and *prima facie* well-founded.

74.1. *Comment*: National law may also impose other, less stringent, tests on applicants.

75. The court's order granting provisional protection may :

(i) suspend the execution of the administrative act ; or

(ii) re-establish the legal and factual situation which would exist in the absence of the administrative act ; or

(iii) place appropriate obligations on the administrative authorities.

75.1. *Comment re (i) and (ii)*: Suspension of the execution and re-establishment of the situation can be ordered in full or partially.

75.2. *Comment*: Measures of provisional protection are granted for such a period as the court thinks fit. They can be subject to certain conditions. They may be revised.

75.3. *Comment*: Measures of provisional protection in no way prejudge the decision to be taken by the court seized of the challenge to the administrative act.

76. The procedure for obtaining provisional protection shall be speedy and allow access by persons concerned. In cases of urgency the tribunal may grant provisional protection without hearing other persons concerned, who in this case are entitled to a new examination with a hearing within a short time.

76.1. *Comment*: The question of provisional protection arises in those cases where an administrative act is immediately enforceable. Any request to have its enforcement postponed, limited or modified *vis-à-vis* a private person, must therefore be examined rapidly. This implies that standard procedural deadlines may have to be shortened considerably and that hearings can also be dispensed with. The proceedings must, however, remain adversarial, the aim being to arbitrate, albeit provisionally, between different interests. They should involve the applicant and a representative of the administrative authorities as well as the addressee of the act where the latter is not the applicant himself. Other persons concerned have the possibility of presenting their views but they need not necessarily be summoned. When urgency makes it impossible to organise such an adversarial court hearing, a new examination with an adversarial procedure shall take place within a short time at the request of one of the interested persons which has to be heard in an adversarial procedure.

76.2. *Comment*: Depending on national law, the application for provisional measures may have to be lodged with the court which is seized of the challenge of the administrative act in question or with another court.

76.3. *Comment*: An application for provisional protection may even be lodged prior to challenging the administrative act before a court, when an internal administrative review with no suspensive effect is pending and when there is urgency.

76.4. *Comment*: The court decision which does or does not grant provisional protection must give clear reasons. But the reasoning may be brief given the urgency and also the provisional nature of such a decision.

II – Internal review by the administrative authorities

77. In addition to judicial review, national legislation may also permit or require an appeal against an administrative act to be made to the administrative authorities. The administrative authority competent for such a review may be the one which had taken the administrative act in question, or a superior authority, or a special appellate authority.

77.1. *Comment*: The more the powers of courts in reviewing administrative acts are limited, the more important is internal review by administrative authorities. Where courts are not empowered, for instance, to review the merits of a case or to replace the discretion exercised by the administrative authority by its own discretion, it lies with the administration itself to correct shortcomings in this respect. The legislator may prefer reserving such internal review of discretion to senior administrative authorities in view of, in particular, the democratic control to which administrative authorities are subject. Moreover, an appeal to an administrative authority may have advantages of speed, cost and informality over judicial review.

77.2. *Comment*: In some countries it is a precondition for the challenging of an administrative act before a court that the act shall have been the subject of a prior administrative complaint. Only after such a complaint has been brought and the time laid down by law for a response to it has elapsed, can proceedings to review the legality of the act be brought before an administrative court. In other countries, it is, to the contrary, the internal administrative review which must be halted until the judicial review is completed. But, in any event, the existence of the possibility of an administrative review must not preclude the right to a judicial review.

77.3. *Comment*: The standards set out in Chapters 2 and 3 of this handbook apply also to the internal review by the administrative authorities. Indeed, an application for an internal review may be regarded as a type of representation, as referred to in paragraph 33. Where the procedural principles contained in Chapter 3 have been complied with in respect of the taking of the administrative act against which the appeal is brought, the procedures in respect of the appeal may be curtailed, provided that the complainant is not thereby placed at an unfair disadvantage.

77.4. *Comment*: In the case of an appeal against an administrative sanction, the administrative decision (act) taken regarding an appeal should not be less favourable ("*reformatio in pejus*") to the person concerned than the initial administrative act against which the appeal was lodged.

III – External review of the ombudsman type

78. In addition to judicial review there should be provision for an external institution of the ombudsman type consisting of one or several persons who:

(i) are independent;

(ii) are preferably elected by parliament;

(iii) act for the purpose of protecting the rights and freedoms of private persons and reviewing the lawfulness and fairness of the administrative acts;

(iv) have the right of access to the files of the administrative authorities;

(v) may act under informal procedures;

(vi) are vested with powers to initiate investigations and express opinions and make administrative or legislative recommendations.

78.1. *Comment*: The institution of the parliamentary ombudsman is essentially based on the ideas of the protection of rights of the individual and the need for legal supervision of those who are entrusted with the exercise of public power. It has spread to numerous countries in all parts of the world. The experience of the institution of the ombudsman has shown that the opinions of ombudsmen do not only influence individual cases, in which a citizen contests an administrative act or complains about the conduct of a civil servant, but may also constitute a major factor in the evolution of general principles and rules governing the functioning of the administration and the conduct of public employees.

78.2. *Comment re (i) and (ii)*: An ombudsman must be independent of political authorities and of those who exercise executive power and as far as possible act independently of the organ which has granted him or her powers. It is important that the ombudsmen are appointed only because of their personal qualities and without reference to their political views. The confidence of the public in the ombudsman is dependent on his or her being free and independent not only in theory but also in reality. An ombudsman elected by parliament can contribute towards the strengthening of parliamentary control.

78.3. *Comment re (iii)*: The function of an ombudsman involves, *inter alia*, authorisation to receive and examine individual complaints concerning contended errors or other shortcomings on the part of the administrative authorities, with a view to enhancing the protection of the person concerned in his dealings with those authorities. Within the ombudsmen´s general competence to review the lawfulness and fairness of the administrative acts, they should be empowered to give particular consideration to human rights and fundamental freedoms in the functioning of the administration.

78.4. *Comment re (iv) and (v)*: As a supplement to regular legal institutions and with a function to deal with individual complaints the ombudsmen should act under informal procedures by, for instance, making inquiries and obtaining whatever information they consider necessary. It is important that the ombudsmen have access to the minutes and other documents of

any administrative authority and that authorities which come under supervision should be obliged to provide the ombudsman with information and statements on request. The ombudsmen can also be empowered to be present at the deliberations of an administrative authority. The review must be of exceptional quality and performed in such a way that the institution gains the respect and trust of both society at large and the government, as well as parliament. This is important if the voice of the ombudsman is to be heard. It is also important that the ombudsman's investigations and pronouncements to promote uniform and proper application of laws and other statutes is easily accessible to civil servants and other interested persons and organs through published reports.

78.5. *Comment re (vi)*: The ombudsman should be vested with the right to initiate investigations and express opinions, especially when questions of human rights are involved, on the way public authorities have handled a case and point out how, in his or her opinion, the matter should have been handled. Many ombudsmen are empowered to conduct investigations on their own initiative. An ombudsman should also be vested with powers to make recommendations aimed at promoting uniform and proper application of legislation and recommend amendments of relevant statutes or any other measure to rectify the matter in one way or another. A general characteristic of the institution is that decisions of the ombudsmen are not directly enforceable and the ombudsmen have no right to issue orders to an authority to act in a certain way. In order for the ombudsmen to carry out their responsibilities efficiently, they should be vested with statutory powers which enable them to establish the actual facts in the case under investigation.

Chapter 6 – Public liability and reparation

I – Public liability

79. Reparation for injury caused by an administrative act, or by failure to take such an act, must be ensured :

(i) where the administrative authorities fail to conduct themselves in a way which can be reasonably expected from them in law by the injured person (which failure is presumed in the case of transgression of an established legal rule) ; or

(ii) where an administrative act causes exceptional harm to an individual private person or to a group of private persons and it is manifestly unfair that such individual private person or group of private persons alone suffers the adverse effects of the act.

79.1. *Comment*: The term "reparation" used here is the broadest legal term possible to design the fact of making good damage done. Reparation can take various forms among which compensation (payment of a sum of money or granting of another advantage in order to compensate an injury suffered which cannot be directly repaired) and restitution (handing back the original good or restoring someone in his rights). See below II : "Reparation".

79.2. *Comment*: "Injury" for which reparation must be ensured, can be physical damage or financial loss, whereas reparation for moral suffering is not granted in most countries.

79.3. *Comment*: The affirmation that the damage must be "caused" by an administrative act establishes the need for causal relation between the act of the administrative authorities and the damage.

79.4. *Comment*: In some countries, administrative authorities will be exonerated from liability in the case of *force majeure*. *Force majeure*, an example of which arises out of atmospheric phenomena, is characterised by the fact that, since the cause of the damage cannot be attributed to the administrative authorities, the actual occurrence of the act causing damage is normally unpredictable and its consequences are unavoidable. It is not possible, in such cases, to speak of acts of causation of the administrative authorities which would justify attributing liability to the administrative authorities for the damage caused.

79.5. *Comment*: In certain cases the causal link may, in the legal sense, be broken by the intervention of a third person. If, for example, such an intervention prevents the administrative body from taking the necessary act, this frees the administrative authorities from liability.

79.6. *Comment*: A special problem linked to the concept of "administrative acts" may arise where damage is caused by an official ostensibly acting in the public service, but in fact acting in his or her own interest; one must determine the criteria for defining what is referred to in some systems as separate personal fault (*faute personnelle détachable*) and administrative error (*faute de service*). Where the appearance of normal activity of an administrative authority is sufficient to mislead reasonable and careful people, public liability may arise even if such an appearance subsequently proves to be untrue. This consequence is based on the fact that appearance is constituted by factors that are objectively linked to public administration or a public service. Thus, under certain circumstances, liability may arise if, in the particular case, the capacity of an administrative official and the circumstances of his action are of such a nature as to mislead the injured person, at least if there has been a lack of control on behalf of the administration.

79.7. *Comment*: Special systems of liability can exist for the internal functioning of the armed forces as well as in the fields of postal and telecommunication services, transportation and other activities which, in some legal systems, fall under a special status of "public utility" (*service public*). This does not mean, however, that there may be simply no public liability at all in those fields.

79.8. *Comment*: The words "must be ensured" indicate that the most important aim of public liability is not to assess any theoretical responsibility, but to make sure that reparation is effectively received by the victim. Thus, one public body may well have to pay for the damage done by another one. Moreover, the Council of Europe calls upon states to "examine the advisability of setting up in their internal order, where necessary, appropriate machinery for preventing obligations of public authorities in the field of public liability from being unsatisfied through lack of funds".

79.9. *Comment re (i)*: The standards of conduct which administrative authorities might reasonably be expected in law to observe depend on their tasks and the means at their disposal. The administrative authorities are instruments to which the nation entrusts functions for which they are assigned the means. Administrative authorities must consequently be in a position to perform a series of tasks and provide a number of services to the community, the definition, scope and nature of these activities being established by legal rules. When an administrative authority fails to comply with a duty required by the legal rules and damage to citizens ensues, it should be possible for the latter to obtain reparation from the administrative authority in question, regardless of any personal liability of the agents or officials who caused the damage.

79.10. *Comment re (i)*: The presumption raised in this principle is rebuttable, and the administrative authority in question will not be liable if it can show

that violation of the rule does not amount to non-compliance with the standard of conduct which it was bound to observe. At the same time, this presumption helps to protect the victim, who is not obliged to investigate the conduct of the administrative department responsible for the act causing the damage but has merely to prove that the administrative authorities as a whole could not produce the state of things prescribed by a legal rule. One application of this principle is the presumption, in many states, of liability in the case of technical failure of equipment used by the administrative authorities, for example, the case in which there is a technical failure of the traffic lights. A claimant should be able to get reparation even if it is not possible to establish any fault on the part of any particular official.

79.11. *Comment re (i)*: But public liability does not arise in every instance of transgression of a legal principle or legal rule, since (a) such principle or rule must be one that affects a right, freedom or interest of the injured person and (b) there must be damage. This means that neither the transgression of a rule which is concerned with an administration's internal organisation and does not directly or indirectly affect an private person's right or interest, nor the transgression of rule which does affect the private person's rights but which did actually not cause any damage, do give rise to public liability in the sense used here. This should not prevent the possibility of liability of a different kind like, for instance, criminal or disciplinary liability.

79.12. *Comment re (ii)*: A person's rights and legitimate interests may be infringed, and damage caused, not only when an administrative authority fails to conduct itself in the way required of it but also, in certain instances, when it acts in a proper manner and cannot be accused of breach of duty. Such damage is the consequence of a risk inherent in all social activity, and criteria must be established for determining those instances in which the damage should be borne by the injured person and those in which, on the other hand, it should be the responsibility of the community. A generally accepted principle of social solidarity requires persons to accept a whole range of inconveniences and damage as a normal consequence of life in society, when they are not excessively important or serious and they affect the population as a whole. Conversely, it seems unjust to require the injured person to bear damage to which the aforementioned qualifications do not apply and which constitutes an excessive burden for a specific person in relation to the principle of equality in sharing the consequences of public obligations. For these reasons, even if the conditions stated in paragraph 79 (i) are not met, in other words even if there has not been any failure by administrative authority to conduct itself in a way which could reasonably be expected of it, the Council of Europe expects states to provide in their internal law for rules granting reparation to the victim whenever it would be manifestly unjust for the injured person to bear the damage alone. In order to help to qualify the unjust character of the damage, this principle enumerates cumulative conditions.

79.13. *Comment*: Finally, it should be noted that the existence of a chapter on public liability in this handbook on principles of administrative law does

not at all mean that there must be a distinct system of public liability as compared to contractual and tort liability under private law. In some states administrative (and other public) authorities are answerable under the same rules as private persons, whereas in other states they fall under a separate system of liability because it is thought that specific principles are necessary in this field in order to take into account the particular nature of the administrative activities accomplished in the general interest. This item is often, but not necessarily always, linked to the decision of whether or not one has special courts for litigations which involve administrative authorities (see above Chapter 5).

80. The principle of liability for damages caused by lawful administrative acts (see above paragraph 79 (ii)) may be limited to certain categories of acts.

80.1. *Comment*: When the pertinent Council of Europe recommendation was drawn up in 1984, it was considered that, "since rules concerning reparation for damage caused by lawful acts may necessitate important changes in certain states' legislation and practice, [there had to be] the possibility of limited application of [the principle of liability for lawful acts] in national systems with the possibility of a gradual extension".

II – Reparation

81. Reparation on grounds of public liability :

(i) must not depend on an administrative claim having been made or on a prior attempt to sue the agent responsible ;

(ii) must be paid in full where the administrative act was unlawful and may be paid in part if it was lawful ;

(iii) may not be payable or only partly payable where the victim was partly responsible for the injury ;

(iv) is payable regardless of the person's nationality ;

(v) must be decided and paid straightforwardly and without undue delay.

81.1. *Comment re (i)*: Administrative conciliation systems prior to judicial proceedings may have the main advantage of facilitating friendly settlements in certain cases, although they might also have the disadvantage of making procedures unwieldy or of discouraging ill-informed persons from exercising their legitimate rights. Therefore it is requested that where conciliation procedures are provided for in law, they should be conceived and implemented in a manner which does not jeopardise the taking of legal action, since that is the principal means whereby a victim may obtain compensation.

81.2. *Comment re (i)*: In cases where the official or person who has caused the injury can be identified, some legal systems allow the victim to claim either against the administrative authority for which the official was working at the time or against the official himself, or against both simultaneously. Under other systems, claims must always be brought against the administrative authority, which can then take action against the official or civil servant who has caused the damage. The Council of Europe advocates a compromise solution, establishing that states should not hinder the victim in the exercise of his right to proceed directly against the administrative authority liable or bound to make good the damage, thus leaving it to the victim to choose in countries where direct action can be taken against the official in question. If the damage is the result of a lawful act, there is no basis for recourse action of the administrative authority against the agent having caused the damage.

81.3. *Comment re (ii)*: This provision establishes the principle that reparation must be made in full, meaning that the victim must be compensated for all the damage resulting from the wrongful act which can be assessed in terms of money, and be appropriately compensated for other damage. However, it leaves it to domestic law to determine the heads of damage, the nature and the form of the reparation. In most legal systems, however, reparation covers both immediate material damage (*damnum emergens*) and the loss incurred (*lucrum cessans*).

81.4. *Comment (ii)*: In the circumstances referred to in paragraph 79 (ii), in view of the characteristics of acts by administrative authorities which cause damage and having regard to the basis of the duty to make reparation, it may be appropriate for the injured person to bear a part of the damage. Indeed, since this provision specifically mentions cases in which it would be manifestly unjust for the injured person to bear the damage "alone", it follows that it may be just to make fair rather than full reparation. The amount of such reparation is to be fixed in the light of all the factors used in such cases to establish the degree of liability of administrative authorities and the consequent entitlement of the injured person.

81.5. *Comment re (iii)*: The victim is partly to blame for the injury if he/she has contributed to the damage by his/her own fault or by failing to use legal remedies. The same applies if a person, for whom the victim is responsible under national law (like, for example, an agent or a minor), has contributed to the damage. It will be for the court to determine in a specific case the contribution to the damage by the victim with a view to assessing the reparation or, if appropriate, disallow it.

81.6. *Comment re (v)*: The final decision (administrative act) recognising the right of the victim to receive reparation does not always result in effective reparation being received without delay. Procedurally speaking, the enforcement of decisions in this field is made according to one of the following systems: (a) The decision can be immediately enforced and constitutes sufficient title to obtain reparation; or (b) the decision cannot be immediately enforced and a special procedure is provided for in order to obtain effective reparation. In principle, the first system permits fast reparation.

Nevertheless, it was thought useful to lay down the general principle according to which enforcement of decisions in this field should be made as quickly as possible. If the second system is followed, the enforcement procedure should be easily accessible and fast.

81.7. *Comment re (v)*: However, practical or legal obstacles to obtaining an effective reparation may exist. One is represented by strict budgetary rules of the state or other public entities which might prevent the disposal of the funds necessary to enforce the decision (execute that administrative act). Another possible obstacle is the inertia of the officials of the administration. A third obstacle lies in the prohibition, in some states, of enforcement in respect of the administrative authorities. The Council of Europe does not describe specific measures to overcome such obstacle and recommends that states adopt budgetary or other appropriate measures. In some states, for example, budgetary rules provide for orders to pay and, if necessary, the automatic entry in the following year's budget of the sums which are due to the victim. To remedy the inertia or malicious conduct of officials of the administration, some systems provide for the possibility of the personal liability of the agents concerned.

Appendix 1 : Case-law of the European Court of Human Rights

Foreword

This appendix contains a selection of judgments of the European Court of Human Rights which were chosen for the purpose of illustrating the principles set out in the handbook.

The summaries of the cases selected cover those parts of the judgments which are relevant to the handbook. Paragraph numbers in brackets refer to the paragraphs of the judgments in which the summarised statement is made.

No part of this appendix is in any respect binding for the Court.

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Land planning

Town planning and construction

Sporrong and Lönnroth v. Sweden ; Allan Jacobsson v. Sweden ; Pine Valley Development Ltd. and others v. Ireland ; Katte Klitsche de la Grange v. Italy

Consolidation proceedings

Ettl & others, Erkner & Hofauer and Poiss v. Austria ; Wiesinger v. Austria

Refusal to approve transfer of land

Ringeisen v. Austria ; Håkansson and Sturesson v. Sweden

Housing

Gillow v. United Kingdom

Regulation of professional activities

König v. Germany ; van Marle and others v. Netherlands ; Pudas v. Sweden ; Tre Traktörer Aktiebolag v. Sweden ; Van de Hurk v. Netherlands

Economic regulation

Fayed v. United Kingdom ; Beaumartin v. France ; Stran Greek Refineries and Stratis Andreadis v. Greece

Customs

AGOSI v. United Kingdom ; Funke, Crémieux and Miailhe v. France ; Air Canada v. United Kingdom

Taxation

Bendenoun v. France ; Hentrich v. France ; Gasus Dosier- und Fördertechnik GmbH v. Netherlands

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Groppera Radio AG and others v. Switzerland ; Autronic v. Switzerland ; Editions Périscope v. France

Protection of the environment

Powell and Rayner v. United Kingdom ; Fredin No. 1 v. Sweden ; de Geouffre de la Pradelle v. France ; Lopez Ostra v. Spain

Index IV – Chronological

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Summaries of the selected cases

(in chronological order)
(§ numbers in brackets indicate the paragraph of the court decision to which reference is made)

Case of Ringeisen v. Austria, Judgment of 16 July 1971, Series A No. 13

In 1962, the applicant made a contract with some private persons for purchase of land. The District Real Property Transactions Commission and then the Regional Real Property Transactions Commission refused to approve the contract on the grounds that it would be contrary to the agricultural purpose of the land and that the deal was merely speculative. In 1964, after an appeal by the applicant, the Constitutional Court set aside the decision of the Regional Commission on the grounds of a violation of the right to have proceedings held before a judge established by law as, in the applicant's case, the commission had not been composed as prescribed. The Regional Commission then had to make a new decision. At the opening of the new proceedings, the applicant challenged several of the eight members of the Regional Commission on the grounds of bias, pointing out that the president had represented the Regional Commission in 1964 before the Constitutional Court; two members had been heard as witnesses in those proceedings and one of them was alleged to have stated that a different contract for sale of the same property had already been approved; a third member was said to have already pronounced himself against the approval of the contract; and two members had taken part in the decision which the Constitutional Court had set aside. The Regional Commission found the allegations of bias unfounded and the applicant's appeal was again rejected. The applicant appealed against this decision and among other grounds he reiterated the charges of bias. In 1965 the Constitutional Court rejected the appeal. Furthermore, the Constitutional Court rejected the ground of appeal based on the charges of bias by stating that even if the allegations were correct, the refusal of his challenges did not affect the applicant in his right to be judged by the judge established by law, as a board does not cease to be competent because a biased member takes part in the proceedings. (Later the applicant was found guilty of aggravated fraud and prosecuted for fraudulent bankruptcy.)

Article 6 §1 ECHR: Did the refusal of the Constitutional Court to examine the allegations of bias on the part of some members of the Regional Commission constitute a violation of the right to be heard by an impartial tribunal?

Applicability: It is not necessary that both parties to the proceedings should be private persons. The character of the legislation which governs how the matter is to be determined (civil, commercial, administrative

law, etc.) and that of the authority which is vested with jurisdiction in the matter (ordinary court, administrative body, etc.) are of little consequence. Article 6 §1 covers all proceedings, the result of which is decisive for private rights and obligations. This was the case here, since the Regional Commission's decision, although the commission was applying administrative law, was to be decisive for the relations in civil law between the applicant and the sellers of land. Article 6 §1 is thus applicable. (§94)

Compliance : There was no proof that the applicant was not given a fair hearing of his case. The Regional Commission is a tribunal within the meaning of Article 6 §1. (§95) Even if the applicant's assertions were in fact true, they would not support the conclusion that there was bias on the part of the Regional Commission. Nor could the fact that some members had participated in the first decision of the Regional Commission lead to the conclusion that as a general rule, in order to be considered impartial, an authority whose decision has been set aside by a superior court cannot try the case again when it is sent back from the superior court. (§97)

No violation of Article 6 §1 ECHR.

(The Court also tried alleged violations of Article 5 §3 and Article 6 §1 in connection with criminal proceedings against the applicant.)

Case of König v. Germany, Judgment of 28 June 1978, Series A No. 27

The applicant was the owner of a clinic at which he worked as the only medical practitioner. In April 1967 the *Regierungspräsident* withdrew the applicant's authorisation to run his clinic on the grounds that he could not be relied on to conduct the institution properly and lacked the diligence and knowledge required for its technical and administrative management. In July 1967 the applicant filed an objection, which was rejected by the *Regierungspräsident*. In 1971 the *Regierungspräsident* withdrew with immediate effect the applicant's authorisation to practice medicine on the grounds of his behaviour, which disclosed his professional unfitness, and his failure to meet ethical standards. In 1967 and 1971 respectively, the applicant appealed against these decisions ; the appeal concerning the authorisation to run a clinic had the effect of suspending enforcement of the decision complained of. The applicant's appeals were rejected by the Administrative Court in 1976 and 1977, respectively.

Article 6 §1 ECHR: Were the rights to run a clinic and to be authorised to exercise the medical profession "civil" and, if so, was the length of the proceedings before the Administrative Court unreasonable?

Applicability: Although the concept of "civil rights and obligations" is autonomous, the legislation of the state concerned is not without importance. However, it is the substantive content and effects of the right, and not its legal classification under domestic law, that determines whether or not a "civil right" is at stake. (§89) If the case concerns a dispute between an individual and a public authority, whether the latter had acted as a private person or in its sovereign capacity, is not conclusive. (§90) Only the character of the right at issue is relevant. The running of a private clinic is in certain respects a commercial activity carried on with a view to profit. An activity presenting the character of a private activity cannot automatically be converted into a public-law activity by reason of the fact that it is subject to administrative authorisations and supervision. (§92) The medical profession counts in Germany among the traditional liberal professions. Even under the national health scheme, the medical profession is not a public service: once authorised, the doctor is free to practise or not, and he/she provides treatment for his/her patients on the basis of a contract made with them. His/her general health-care responsibility towards the community as a whole does not alter the private character of the medical practitioner's activity. (§93) It is of little consequence that the cases concern administrative measures taken by the competent bodies in the exercise of public authority or if it is for administrative courts to give the decision. (§9) In the present case, the rights invoked by the applicant are of a private nature. Article 6 §1 is therefore applicable to the case. (§§90-95)

Compliance: The reasonable time stipulated by Article 6 §1 started to run on the day the applicant lodged an objection against the withdrawals of his authorisations in 1967 and not on the (later) date of the filing of the appeal with the Administrative Court, since he could not seize the competent court before having the lawfulness and the expediency of the impugned administrative acts examined in preliminary proceeding before the administrative authority. (§98) The principal reason for the length of the proceedings was to be found in the Administrative Court's conduct of the case. (§§105 and 110) The reasonable time was therefore exceeded. (§111)

Violation of Article 6 §1 ECHR.

Case of Winterwerp v. the Netherlands, Judgment of 24 October 1979, Series A No. 33

In May 1968, in accordance with an emergency procedure, the applicant was committed to a psychiatric hospital for three weeks on the direction of the burgomaster; the term of this emergency detention was extended by the public prosecutor. In June, on the application of his wife, the District Court issued a provisional order authorising his compulsory confinement for six months. On his wife's further application and subsequently at the request of the public prosecutor detention orders were made annually by the Regional Court on the basis of medical reports from the doctor treating the applicant. Before the various orders were made, the applicant had not been notified that the proceedings relating thereto were in progress. Neither did he have the occasion to argue his case before the courts or to challenge the medical findings on which the courts had based their decisions, or receive any legal assistance. The applicant requested his discharge four times, but was refused. As a person confined in a psychiatric hospital the applicant automatically lost the capacity to administer his property and his property was in the hands of a guardian appointed by the Regional Court.

Article 5 §1(e) ECHR: Did the deprivation of liberty constitute "lawful detention of persons of unsound mind" and was it carried out "in accordance with a procedure prescribed by law"?

The lawfulness of the detention presupposes conformity with domestic law and with the purpose of the restrictions permitted by Article 5 §1(e). The term "lawful" covers procedural as well as substantive rules. No detention that is arbitrary can ever be regarded as "lawful". Three minimum conditions are required in order to confine a person as "a person of unsound mind": except in emergency cases, a true mental disorder has to be established before the competent authority on the grounds of an objective medical expertise; the mental disorder must be of a kind or degree warranting compulsory confinement and the validity of continued confinement depends upon the persistence of such a disorder. (§39) In the instant case, the Court had no reason to doubt the objectivity and reliability of the medical evidence and concluded that the applicant's confinement constituted "lawful detention" within the meaning of Article 5 §1(e). (§§40-43)

The words "in accordance with a procedure prescribed by law" essentially refer back to domestic law, which has to be in conformity with the ECHR including the general principles expressed or implied therein.

The notion underlying the term in question is one of fair and proper procedure, namely that any measure depriving a person of his/her liberty should issue from and be executed by an appropriate authority and should not be arbitrary. (§45) Where the ECHR refers directly back to domestic law, the Court can and should review the observance of domestic law by the national authorities. (§46) In the instant case the confinement was made in conformity with these requirements. Article 5 §1(e) does not entail the right to appropriate treatment in order to prevent unnecessarily long confinement. (§§47-49)

No violation of Article 5 §1 ECHR.

Article 5 §4 ECHR: As the applicant had no occasion to argue his case before the courts or to challenge the medical findings on which the courts had based their decisions, was there a breach of his right to test the legality of the detention before a court?

Neither the burgomaster who made the initial direction to detain nor the public prosecutor who prolonged its validity can be regarded as possessing the characteristics of a court. In contrast, the District Court and the Regional Court are courts from an organisational point of view. (§56) Nevertheless the intervention of such bodies will satisfy Article 5 §4 only on the condition that the procedure followed has a judicial character and gives to the individual concerned guarantees appropriate to the kind of deprivation in question. (§57) In particular it is essential that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation, failing which he/she will not have been afforded "the fundamental guarantees of procedure applied in matters of deprivation of liberty". Mental illness may entail restricting or modifying the manner of exercise of such a right but it cannot justify impairing the very essence of it. Indeed, special procedural safeguards may prove called for in order to protect the interests of persons who, on account of their mental disabilities, are not fully capable of acting for themselves. (§60) As to the particular facts, under the Dutch Mental Health Act neither the District Court nor the Regional Court was obliged to hear the individual whose detention was being sought and the applicant was never associated, either personally or through a representative, in the proceedings leading to the various detention orders made against him: he was never notified of the proceedings or their outcome; neither was he heard by the courts nor was he given the opportunity to argue his case. (§61)

Violation of Article 5 §4 ECHR.

Article 6 §1 ECHR: Was the applicant's loss of his capacity to administer his property a determination of his "civil rights and obligations" in breach of the guarantees laid down in Article 6 §1?

Applicability: Divesting the applicant of the capacity to administer his property amounted to a determination of his "civil rights and obligations". Article 6 §1 is therefore applicable. (§73)

Compliance: The proceedings concerning the applicant's deprivation of liberty did not deal with the question of his civil capacity. Mental illness may render certain limitations upon the exercise of the right to a court, but it cannot warrant the total absence of that right as embodied in Article 6 §1. Accordingly, the proceedings cannot be taken as having incorporated a "fair hearing" within the meaning of Article 6 §1 on the question of his civil capacity. (§74)

Violation of Article 6 §1 ECHR.

Case of X. v. United Kingdom, Judgment of 5 November 1981, Series A No. 46

Following criminal proceedings in 1968 at the Sheffield Court of Assizes the applicant was convicted of wounding with intent to cause grievous bodily harm. By the same court's order the applicant was then admitted to and detained in a special secure mental hospital for the criminally insane. On recommendation by the responsible medical officer, the Home Secretary ordered the applicant's conditional discharge in 1971. After complaints by the applicant's wife of the applicant's behaviour the responsible medical officer at the mental hospital, without further investigation, referred the matter to the Home Secretary who, acting on his advice and without hearing the applicant or having any doctor examine him first, ordered, in 1974, the applicant's immediate recall to the hospital in pursuance of the Mental Health Act 1959. The applicant's solicitors applied for a writ of *habeas corpus* from the Divisional Court, but the application was rejected. Following the applicant's readmission to the hospital, his responsible medical officer was of the opinion that he should be further detained for treatment and medical reports indicated that he remained in a psychotic state. The applicant was conditionally discharged in 1976 and died in 1979.

Article 5 §1(e) ECHR: Did the applicant's recall to the hospital without the establishment by medical expertise that he was of unsound mind constitute "unlawful detention" in breach of Article 5 §1(e)?

Three minimum conditions are required in order to confine a person as "a person of unsound mind": except in emergency cases, a true mental

disorder has to be established before the competent authority on the grounds of objective medical expertise; the mental disorder must be of a kind or degree warranting compulsory confinement and the validity of continued confinement depends upon the persistence of such a disorder. (§40) Emergency cases constitute an exception to the principle that a person should not be deprived of his/her liberty unless he/she has been reliably shown to be of "unsound mind" (see the Winterwerp judgment). Where a provision authorises emergency confinement of persons capable of presenting a danger to others, it would be impracticable to require thorough medical examination prior to any arrest or detention. (§41) In the instant case, the recall to the hospital must be seen against the applicant's background, namely, *inter alia,* as a man with a history of psychiatric troubles who had been first committed to the mental hospital after a conviction for an offence involving a violent attack on another person. (§44) Regard must also be had to the overall system governing the discharge and the recall of restricted patients, for instance that the system of releasing patients on licence, with careful supervision and an immediate reaction in the event of a sign of new danger, very often is the only way patients of this kind can be allowed back into the community. In such circumstances the interests of the protection of the public prevail over the individual's right to liberty to the extent of justifying an emergency confinement in the absence of the usual guarantees implied in Article 5 §1(e). On the facts of the present case there was sufficient reason for the Home Secretary to have considered that the applicant's continued liberty constituted a danger to the public. (§45) His further detention was based on medical reports of which there was no reason to doubt the objectivity and reliability. (§46)

No violation of Article 5 §1 ECHR.

Article 5 §4 ECHR: Did the absence of further proceedings after the Court of Assizes' order and the fact that the habeas corpus *proceedings did not fully investigate the merits of the decision to recall the applicant, constitute a breach of his right to a court?*

A person of unsound mind compulsorily confined in a psychiatric institution for an indefinite or lengthy period is entitled, at any rate where there is no automatic periodic review of a judicial character, to take proceedings at reasonable intervals before a court to put in issue the lawfulness of his/her detention. (§52) A judicial review as limited as that available in the *habeas corpus* procedure in the present case was not sufficient for a continuing confinement. This procedure was concerned only with the compatibility of the administrative decision with the relevant domestic

law and did not allow examination of whether the patient's disorder still persisted or whether the Home Secretary was entitled to think that a continuation of the compulsory confinement was necessary in the interests of public safety. (§58)

Violation of Article 5 §4 ECHR.

Case of Sporrong and Lönnroth v. Sweden, Judgment of 23 September 1982, Series A No. 52

The joint heirs of Mr Sporrong were owners of land in Stockholm on which stood a building. As part of a large-scale redevelopment scheme for the city centre, the government, in 1956, granted to the City Council a zonal expropriation permit affecting Mr Sporrong's estate. In pursuance of the Expropriation Act 1917, the government set at five years the time-limit within which the City Council had to summon the owners to appear before the Real Estate Court for the determination of compensation. The time-limit was extended several times and the permit was maintained in force for a total of 23 years. In 1979 the permit was cancelled at the request of the City Council. From 1954 to 1979, the property in question was also subject to prohibition on construction. In 1970 the Sporrong Estate obtained an exemption from the prohibition on construction in order to widen the front door of the building. It never applied for any other exemptions.

Mrs Lönnroth's property, which was likewise situated in the centre of Stockholm, was subject to an expropriation permit from 1971 to 1979 and to a prohibition on construction from 1968 to 1980. The government refused her request to withdraw the expropriation permit. In 1970 she was granted an exemption from the prohibition on construction in order to make alterations to part of the premises; she never sought any other exemptions. Her property was on the market on seven different occasions but the prospective buyers withdrew after consulting the Council authorities.

Article 1 of Protocol No. 1 ECHR: Did the length of the period during which the expropriation permits, together with the prohibitions on construction, were in force constitute an unjustified infringement of the applicants' right to "peaceful enjoyment" of their possessions?

The expropriation permits were not intended to limit or control the use of property. They were an initial step towards deprivation of possessions

and must be examined under the right to "peaceful enjoyment of possessions". Although the expropriation permits left intact in law the owner's right to use and dispose of their possessions, they nevertheless in practice, significantly reduced the possibility of its exercise. They also affected the very substance of ownership in that they recognised, before the event, that any expropriation would be lawful and authorised the city to expropriate whenever it found it expedient to do so. The applicants' right of property thus became precarious and defeasible. The prohibitions on construction, for their part, undoubtedly restricted the applicants' right to use their possessions. There was therefore an interference with the applicants' right of property, the consequences of which were undoubtedly rendered more serious by the combined use, over a long period of time, of the expropriation permits and the prohibitions on construction. (§§60-74)

In an area as complex and difficult as that of the development of large cities, the Contracting States should enjoy a wide margin of appreciation in order to implement their town-planning policy. (§69) However in the present case the law in force at the relevant time was characterised by inflexibility ; the applicants were left for a long time in complete uncertainty as to the fate of their properties and they were not entitled to have any difficulties which they might have encountered taken into account by the Swedish Government ; there was no possibility of reassessing at reasonable intervals the interests of the city and the interests of the landowners ; the law did not provide for compensation to be granted and the adverse effects on property owners were accentuated by the existence of prohibitions on construction. Such a situation upsets the fair balance which should be struck between the protection of the right of property and the requirements of general interest. (§§70-73)

Violation of Article 1 of Protocol No. 1 ECHR.

Article 6 §1 ECHR : Was it an infringement of the right to a tribunal that the complaints concerning the expropriation permits were not and could not have been heard by the Swedish courts ?

Applicability : It is of little consequence that the dispute concerned an administrative measure taken by the competent body in the exercise of public authority : the expropriation permits affecting the applicants' properties related to a "civil right" and their period of validity gave rise to a "dispute" within the meaning of Article 6 §1. Accordingly Article 6 §1 is applicable. (§§80-83)

Compliance : As regards the City Council's decisions to request the government to issue or extend the permits, they could have been

referred to the county Administrative Board and then to the Supreme Administrative Court but the requests were only preparatory steps which did not at that stage interfere with a civil right. (§85) As regards the government's decisions, they could have been referred to the Supreme Administrative Court as an extraordinary remedy. However when considering the admissibility of such an application, the Supreme Administrative Court does not examine the merits of the case. (§86) Hence the applicants' case could not be heard by a tribunal competent to determine all the aspects of the matter. (§87)

Violation of Article 6 §1 ECHR.

Case of Malone v. United Kingdom, Judgment of 2 August 1984, Series A No. 82

The applicant, an antique dealer, was charged in 1977 with offences relating to the dishonest handling of stolen goods and was acquitted in 1978 after a trial where it emerged that one of his telephone conversations had been intercepted. He failed in instituting civil proceedings against the Metropolitan Police Commissioner, seeking a declaration that any tapping of conversations on his telephone without his consent was unlawful even though it was done pursuant to a warrant of the Secretary of State. The applicant believed that, at the behest of the police, his correspondence had been intercepted, his telephone lines tapped and his telephone metered by a device recording all the numbers dialled. At the time there was no overall statutory code governing these matters in the United Kingdom but under one of the relevant statutory provisions the Post Office could be required to inform the Crown about matters transmitted through the postal or telecommunication services. There also existed a practice whereby the telephone service made and supplied records of metering at the request of the police in connection with police inquiries into the commission of a serious offence, if no other means could be used.

Article 8 ECHR : Did the interception and metering by or on behalf of the police within a criminal investigation under national law and practice unduly violate the applicant's right to respect for his private life and correspondence ?

The existence in England and Wales of laws and practices which permit and establish a system for secret surveillance of communications amounted in itself to an "interference ... with the exercise" of rights under Article 8, apart from any measures actually taken against a person.

The actual interception of conversations and metering of the telephone involved interferences by a public authority with the applicant's right to respect for his private life and correspondence. (§§64 and 84)

In order to determine whether the interferences were in accordance "with the law" within the meaning of Article 8, the following applies. The interference must have some basis in domestic law, but the latter must itself be compatible with the rule of law ; hence the law, which covers both written and unwritten law, must be adequately accessible and foreseeable in order to prevent the risk of arbitrariness. These requirements cannot be exactly the same in the special context of interception of communications for the purposes of police investigations as where the object of the law is to place restrictions on conduct of individuals. Nevertheless the law itself must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to this secret and potentially dangerous interference with the right to respect for private life and correspondence. (§§66-67) In the present case, the law of England and Wales did not indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities as regards the interception of communications for police purposes. To that extent, the minimum degree of legal protection to which citizens are entitled under the rule of law in a democratic society was lacking. (§79) Moreover there were no legal rules concerning the scope and manner of the exercise of the authorities' discretion as regards the metering. (§87) Consequently, the interferences were not in accordance "with the law". (§§80-87) The interferences were not "necessary in a democratic society" : although the existence of some law granting powers of interception of communications to aid the police in their functions may be necessary in a democratic society for the prevention of disorder or crime, the system of secret surveillance adopted must contain adequate guarantees against abuse, which was not the case in light of the conclusion that the interferences and the metering were not in accordance "with the law". (§§81-82, 87-88)

Violation of Article 8 ECHR.

Case of Ashingdane v. United Kingdom, Judgment of 28 May 1985, Series A No. 93

In consequence of a penal judgment the applicant was detained in a special security hospital. In 1978, against the view expressed by the

psychiatrist in charge of the applicant's case, the Department of Health and Social Security and the Area Health Authority refused to carry out the applicant's transfer to an ordinary psychiatric hospital where the nature and conditions were fundamentally different. The reason for refusal was that the nursing staff at that hospital had put a ban on the admission of the restricted patients on the grounds that adequate resources for dealing with such patients were lacking. In 1979 the applicant instituted court proceedings to challenge the legality of his continued detention at the special security hospital. The Court of Appeal held that the nursing staff had acted unlawfully. On the other hand, the Court of Appeal held that the applicant was barred by section 141 of the Mental Health Act 1959 from pursuing the merits of his claims against the authorities. The effect of section 141 of the Mental Health Act 1959 was to provide immunity from suit in respect of certain acts unless the act was done in bad faith or without reasonable care (the Mental Health Act 1983 removed this protection). In 1980 the applicant was transferred to an ordinary psychiatric hospital and then discharged.

Article 5 §1(e) ECHR: Did the prolonged detention in a special hospital – once the applicant had been declared fit for transfer to an ordinary psychiatric hospital – constitute unlawful detention of a person of unsound mind?

Three minimum conditions are required in order to confine a person as "a person of unsound mind": except in emergency cases, a true mental disorder has to be established before the competent authority on the grounds of objective medical expertise; the mental disorder must be of a kind or degree warranting compulsory confinement and the validity of continued confinement depends upon the persistence of such a disorder. (§37) In the instant case, there was no reason to doubt the objectivity and reliability of the medical judgment that detention had been justified. (§38) There were important differences between the regimes at the two different hospitals. As regards the ordinary psychiatric hospital, the transfer there had a proximate connection with a possible recovery of liberty in that it constituted an unavoidable staging post before any eventual discharge. Nevertheless, the applicant remained a detained patient also during his stay at the ordinary psychiatric hospital in the sense that his liberty, and not just his freedom of movement, was circumscribed both in fact and in law. It could not therefore be said that the prolonged detention at the special hospital meant that he was being maintained in "detention" when he had been medically and administratively judged fit for return to liberty. (§42)

The lawfulness of any detention is required in respect of both the ordering and the execution of the measure depriving the individual of his liberty. The lawfulness of any detention presupposes conformity with domestic law and also with the purposes of the restrictions permitted by Article 5 §1, namely to protect the individual from arbitrariness. There must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention. In principle the detention of a mental health patient will only be lawful for the purposes of Article 5 §1(e) if effected in a hospital clinic or other appropriate institution authorised for that purpose. (§44) There is no cause for finding that the applicant's deprivation of liberty was unlawful under domestic law. (§45) As regards "lawfulness" in the autonomous sense of the Convention: despite the differences in regimes at the two hospitals, the applicant's right to liberty was not limited to a greater extent than that provided for under Article 5 §1(e). Neither was the applicant's continued detention at the special hospital arbitrary or effected for an ulterior purpose. (§§46-48)

No violation of Article 5 §1(e) ECHR.

Article 5 §4 ECHR: Did the bar on the applicant's possibility to challenge before the courts the lawfulness of the relevant authorities' refusal to transfer him violate his right to take proceedings before a court?

Article 5 §4 does not guarantee a right to judicial control of the legality of all aspects or details of the detention. The domestic remedy available under §4 should enable review of the conditions which, according to §1(e), are essential for the lawful detention of a person on the ground of unsoundness of mind. The claim that the applicant was prevented by section 141 of the Mental Health Act 1959 from suing the administration for breach of its statutory duty to provide accommodation and treatment in the more appropriate conditions of a different category of psychiatric hospital do not fall within the scope of the judicial determination of lawfulness guaranteed by Article 5 §4. (§52)

No violation of Article 5 §4 ECHR.

Article 6 §1 ECHR: Did the bar on the applicant's possibility to challenge before the courts the lawfulness of the relevant authorities' refusal to transfer him, violate his right to a tribunal?

(The Court did not rule on the applicability of Article 6 §1.) The right of access to a tribunal, laid down in Article 6 §1, may be subject to

implied limitations. Nonetheless the limitations must not restrict the very essence of the right. Furthermore a limitation will not be compatible with Article 6 §1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. (§57) In the present case, those requirements were respected : (i) The claim the applicant wished to assert in the domestic proceedings was founded on a legal obligation couched in rather general terms, leaving a wide discretion to the responsible authority and would, by its very nature and quite apart from section 141 of the 1959 Act, not be amenable to full judicial control by the national courts, (ii) Section 141 would have allowed any action against the responsible authorities alleging bad faith or negligence to proceed. (§§58-59)

No violation of Article 6 §1 ECHR.

Case of Feldbrugge v. the Netherlands, Judgment of 29 May 1986, Series A No. 99

In 1978 the Governing Board of the Occupational Association of the Banking and Insurance, Wholesale Trade and Self-Employment Sector in Amsterdam decided that the applicant had ceased to be entitled to a sickness benefit which she had been receiving up until then, since the association's doctor had declared her fit to work. The entitlement to sickness benefit flowed directly from the 1913 Health Insurance Act and applied mainly to persons bound by a contract of employment with a public or private employer. The applicant appealed to the Appeals Board. Its president sought the opinion of a permanent medical expert who examined the patient and offered her the opportunity of making comments. On the basis of medical reports, the president of the Appeals Board ruled against the applicant. The applicant unsuccessfully challenged this decision, firstly before the Appeals Board itself and then before the Central Appeals Board.

Article 6 §1 ECHR : Was the applicant's right to a fair hearing by a tribunal breached in the procedure for determining her right to sickness benefits ?

It was the first time that the Court had to deal with the field of social security. (§27)

Applicability : There was a genuine and serious dispute concerning the actual existence of the right asserted by the applicant to continue receiving

sickness benefit. The outcome of the proceedings could – and did in the event – lead to confirmation of the unfavourable decision being challenged, hence it was directly decisive for the right at issue. (§25) The right at issue was "civil" because of the predominance of the features of private law (the right in question was a personal, economic and individual right; it had a close connection with the contract of employment; health insurance in the Netherlands was similar in several respects to insurance under the ordinary law) of the entitlement to health insurance benefits over those of public law (the insurance was of a compulsory nature; the assumption by the state of responsibility for social protection). Article 6 §1 is therefore applicable. (§§31-40)

Compliance: The procedure followed before the president of the Appeals Board was clearly not such as to allow proper participation of the contending parties: the applicant was not heard and the president did not afford her the opportunity to file pleadings nor to consult the evidence in the medical case-file. (§44) The extremely restrictive conditions of access to the Appeals Board and the Central Appeals Board prevented the applicant from challenging the merits of the decision by the president of the Appeals Board. Accordingly, the shortcoming found to exist in respect of the procedure before this judicial officer was not capable of being remedied at a later stage. (§§45-46)

Violation of Article 6 §1 ECHR.

Case of van Marle and others v. the Netherlands, Judgment of 26 June 1986, Series A No. 101

The four applicants submitted requests to be registered as certified accountants within the meaning of the Netherlands Act of 1972 regulating this profession. Their requests were rejected by the Board of Admission, whose decisions were upheld by the Board of Appeal.

Article 6 §1 ECHR: Did the decisions in question constitute "disputes" in the meaning of Article 6 §1?

The word "dispute" within the meaning of Article 6 §1 should be given a substantive rather than formal import. It may relate to the existence of a right and to its scope or the manner in which it may be exercised and may concern questions of both facts and of law. It must be genuine and of a serious nature. (§32) Having regard to the function of the Board of Appeal to review the proper conduct of the Board of

Admission, this task may involve such matters as ruling whether a decision was arbitrary or *ultra vires* or whether there were procedural irregularities. Matters of this kind inherently lend themselves to judicial decision and any disagreement about them may be regarded as a contestation. However, the applicants did not allege that there had been any such irregularity. (§35) Having regard to the function of the Board of Appeal to reconsider whether the applicants, as regards ability, experience, length of time in the profession, etc., met the requirements for registration : this task is akin to a school or university examination and is far removed from the exercise of the normal judicial function so that the safeguards in Article 6 cannot be taken as covering resultant disagreements. There was thus no contestation. (§§36-37)

Inapplicability of Article 6 §1 ECHR.

Article 1 of Protocol No.1 ECHR : Did the refusal to register the applicants, result in an unjustified interference with their right to the "peaceful enjoyment" of their possessions ?

The refusal to register the applicants as certified accountants radically affected the conditions and scope of their professional activities. Their business fell. Consequently, there was an interference with their right to peaceful enjoyment of their possessions. (§42) The 1972 Act was designed to promote the general interest : its purpose was to structure a profession that is important to the entire economic sector by providing the public guarantees of the competence of those who carry on that profession. A fair balance between the means used and the intended aim was ensured by transitional provisions enabling the former unqualified accountants to gain entry to the new profession on described conditions. Thus, the interference was justified. (§43)

No violation of Article 1 of Protocol No. 1 ECHR.

Case of AGOSI v. United Kingdom, Judgment of 24 October 1986, Series A No. 108

In 1975, the applicant, a West German Company, sold gold coins to two individuals for £120 000. The cheque offered in payment was dishonoured. According to both the contract of sale and the relevant German law, the non-payment had as a result that the applicant remained owner of the coins. The "buyers" attempted to smuggle the coins into the United Kingdom in contravention of a prohibition on importation

of gold coins, but were discovered and the coins seized by the customs. The applicant claimed that the coins were not liable to forfeiture under the customs laws as they belonged to an innocent victim of fraud and that accordingly it was entitled to the return of the coins. The Commissioners of Customs and Excise were then obliged to institute condemnation proceedings before the English Courts in order to have the coins forfeited. The High Court ordered the coins to be forfeited. This ruling was upheld by the Court of Appeal. In 1980 the applicant brought administrative proceedings before the Commissioners of Customs and Excise under section 288 of the Customs and Excise Act 1952, who replied in the negative without giving any reasons. English courts are empowered to make judicial review of certain administrative decisions, one of the grounds being that the decision is one which a public authority properly directing itself on the relevant law and acting reasonably could not have reached (the "Wednesbury" principle), for example because the administrative authority exercising discretion had failed to take into account relevant considerations.

Article 1 of Protocol No. 1 ECHR: Were the forfeiture of the coins and the subsequent refusal to restore them decisions in breach of Article 1?

The forfeiture of the smuggled coins amounted to an interference with the applicant's right to peaceful enjoyment of its possessions. The prohibition on the importation of gold coins into the United Kingdom clearly constituted a control of the use of property. The forfeiture was a measure taken for the enforcement of that prohibition. The forfeiture did involve a deprivation of property, but in the circumstances the deprivation formed a constituent element of the procedure for the control of the use in the United Kingdom of gold coins. It is therefore the second paragraph of Article 1 which is applicable. (§51)

In order to determine whether a fair balance between the demands of the general interest and the interest of the individual was struck, many factors have to be taken into consideration, including the behaviour of the owner and in particular the degree of fault or care which he has displayed. (§§52 and 54) In the present case, the question of the applicant's behaviour was irrelevant in the proceedings concerning the condemnation of the coins as forfeit but was raised under the Customs and Excise Act in the proceedings before the Commissioners, who were bound to be guided by relevant considerations including the alleged innocence and diligence of the applicant. (§56) Moreover a judicial review of the exercise of the Commissioners' discretion was available to challenge the decision of customs authorities for, *inter alia*, failure

to take account of relevant considerations under the Wednesbury principle. (§§58-60) The procedure available to the applicant against the Commissioner's refusal to restore the gold coins was not inadequate for the purposes of Article 1 §2. In particular it was not established that the British system failed to ensure that reasonable account was taken of the applicant's behaviour or to afford it a reasonable opportunity to put its case. (§62)

No violation of Article 1 of Protocol No. 1 ECHR.

Article 6 ECHR: Did the decisions relating to the forfeiture amount to a determination of a criminal charge?

The forfeiture of the gold coins and the refusal to restore them were measures consequential upon the smuggling act for which third parties were prosecuted and the measures adversely affected the applicant's property rights. Those facts cannot themselves lead to the conclusion that any criminal charge was brought against the applicant. (§65)

Inapplicability of Article 6 ECHR.

Case of Gillow v. United Kingdom, Judgment of 24 November 1986, Series A No. 109

In 1956 Mr and Mrs Gillow moved to Guernsey, where Mr Gillow was going to work. In 1957 they bought some land on which they built a house to live in. In 1960, the applicants left Guernsey and lived overseas until Mr Gillow's retirement in 1978. In the meantime, they retained ownership of their house in Guernsey and let it to persons approved by the Housing Authority. In 1979 the applicants returned to live on Guernsey. However, they were informed by the Housing Authority that they had lost their residence qualifications by virtue of the Housing Control Law Act 1969 and that they needed a licence from the authority to occupy their house. All their licence applications and court appeals were rejected and they were prosecuted for unlawful occupation of their property; Mr Gillow was fined. Court appeals against the Housing Authority's could only be lodged by an advocate of the Royal Court. The Housing Laws discriminated in favour of people born or with roots on Guernsey, in comparison with other British citizens, as to the acquisition of residence qualifications. The laws also allowed for the establishment of a category of "open market houses". Such houses had a minimum rentable value. Houses of lesser value – to which category the applicants' house belonged – could only be occupied by people with licences of residence.

Article 8 ECHR: Did the Guernsey Housing Laws and the refusals of licences to occupy their house constitute unlawful interferences with the applicants' right to respect for their home?

The applicants had retained sufficient continuing links with the house for it to be considered their "home". (§46) The fact that, on pain of prosecution, they were obliged to obtain a licence to live in their own house, the refusal of the licences applied for, the institution of criminal proceedings against them and, in Mr Gillow's case, the imposition of a fine, constituted interferences with the exercise of the applicants' right to respect for their home. (§47) The interferences were in accordance with the law: the degree of discretion left to the Housing Authority was not inconsistent with the requirement of foreseeability. There is no such inconsistency if the scope of the discretion and the manner of its exercise are indicated with sufficient clarity. (§§51-52) The interference pursued a legitimate aim, namely the economic well-being of the island. (§54) The statutory obligation imposed on the applicants to seek a licence to live in their home could not be regarded as disproportionate to the legitimate aim pursued. Accordingly, there was no breach of Article 8 as far as the terms of the contested legislation were concerned. (§56) However, the manner in which the Housing Authority exercised its discretion in the applicants' case (refusal of licences, conviction and fining) was not proportionate to the legitimate aim pursued, since the authority gave insufficient weight to the applicants' particular circumstances. Accordingly there had been a breach of Article 8 as far as the application of the legislation in the applicants' case was concerned. (§§57-58)

Violation of Article 8 ECHR.

Article 14 ECHR taken together with Article 8 ECHR: Was there a case of inadmissible discrimination in favour of certain categories of people?

The difference of treatment had an objective and reasonable justification: It was legitimate to give preferential treatment to persons with strong attachments to the island and to provide protection for tenants of more limited means. (§§64-67)

No violation of Article 14 ECHR taken together with Article 8 ECHR.

Article 6 §1 ECHR: Was there a breach of the applicants' right of access to a tribunal (civil head)?

The applicants' right to occupy their home is a "civil right". (§68) The requirement of a lawyer to lodge an appeal before a higher court is a

feature common to several member states of the Council of Europe. Finally, the applicants had failed to show how their effective right of access to court had been interfered with by the refusal to allow them to occupy their house without facing prosecution. (§69)

No violation of Article 6 §1 ECHR.

Case of Bozano v. France, Judgment of 18 December 1986, Series A No. 111

The applicant, an Italian national, was sentenced *in absentia* by an Italian court in 1975 to life imprisonment for the kidnapping and murder in 1971 of a young Swiss girl. During a routine check in 1979 the applicant, who had taken refuge in France, was arrested by the French gendarmerie and taken into custody pending extradition proceedings. His extradition was requested by Italy. The Indictment Division of the Court of Appeal ruled against this request, holding that the Italian procedure for trial *in absentia* was incompatible with French public policy (*ordre public*). After the applicant was released, the police apprehended him, notified him of a deportation order that had been issued several weeks earlier by the Minister of the Interior, deeming that the presence by the applicant on French territory was likely to jeopardise public order. The police forcibly took him by car to the Franco-Swiss frontier. The Swiss authorities immediately placed him in custody pending extradition proceedings and extradited him to Italy in 1980. The applicant failed in summoning the Minister of the Interior to appear in urgent proceedings. The deportation order was quashed in 1981 by the Administrative Court on the grounds of a manifest error of judgment and abuse of powers.

Article 5 §1(f) ECHR: Did the applicant's abduction constitute unlawful arrest and detention?

The term "lawfulness" refers to national law but it also requires that any measure depriving an individual of his liberty must be compatible with the purpose of Article 5, namely to protect the individual from arbitrariness. (§54) It was doubted whether the contested deprivation of liberty satisfied the legal requirements in France. (§58) Having regard to the circumstances in which the applicant was forcibly conveyed to the Swiss border (the long time taken by the authorities to serve the deportation order, which was unnecessary and which prevented the applicant from making effective use of remedies theoretically available; the care apparently taken to ensure that the applicant did not

find out about the action being prepared against him ; the suddenness with which he was apprehended ; deportation not to the nearest state, which was Spain, but to Switzerland, a state which had an extradition treaty with Italy, etc.) (§59), the deprivation of liberty was neither lawful nor compatible with the right to security of person. It was a disguised form of extradition designed to circumvent the negative ruling of the Court of Appeal and not a detention necessary in the ordinary course of action taken with a view to deportation. (§60)

Violation of Article 5 §1(f) ECHR.

Case of Leander v. Sweden, Judgment of 26 March 1987, Series A No. 116

On 20 August 1980, the applicant, a carpenter and formerly active in the Swedish left wing movement and in trade unions, started work as a temporary replacement in a post of museum technician at the Naval Museum of Karlskrona. The museum was adjacent to the Karlskrona Naval Base, which was a restricted military security zone. On 25 September 1980 the applicant was informed by the director of the museum that the outcome of a personnel control carried out under the Personnel Control Ordinance 1969 had been unfavourable and that he therefore could not be employed at the museum. This ordinance contained, *inter alia*, provisions as to which posts were to be security classified, the procedure for handing out information and the use of the information released. The National Police Board kept a register that had its legal basis in the ordinance : in the register the Board could enter information "necessary for the special police service", but no entry was allowed merely for the reason that a person, by belonging to an organisation or by other means, had expressed a political opinion. There were further provisions concerning the application of this rule laid down by the government, some of which were secret. The National Police Board was authorised to handle questions of release of information from the register. The ordinance prescribed that before information was released in cases relating to appointment to posts classified in Security Class 1, the person concerned should be given an opportunity of presenting his observations, unless there were special reasons to the contrary. In cases of appointment to posts classified in Security Class 2 this procedure was to be applied only if required on account of special circumstances. The applicant requested to be informed of the reasons why he could not be employed, but these requests were ultimately rejected by the government. The government

concluded that there were no such special circumstances as were mentioned in the ordinance to give the applicant a right to be acquainted with the information in the secret police register. Supervision over the control system was carried out through the control of the Parliamentary Ombudsman and the Justice Chancellor, and by the Parliamentary Committee of Justice. Furthermore, there were parliamentarians on the National Police Board.

Article 8 ECHR: Did the personnel control procedure as carried out in the applicant's case amount to an unjustified violation of his right to respect for his private life?

Both the storing and the release of information about the applicant that was contained in the secret police register, which were coupled with a refusal to allow him to refute it, amounted to an interference with his right to respect for his family life. (§48) The aim of the Swedish personnel control system was clearly legitimate, namely the protection of national security. (§49) "In accordance with the law": the interference had a valid basis in domestic law, namely the Personnel Control Ordinance. (§52) The publishing of the ordinance itself met the requirement of accessibility. The National Police Board enjoyed a wide discretion as to what information might be entered into the register. However, the scope of this discretion was limited by law in important respects by the prohibition on entry of information merely for the reason that a person has expressed a political opinion. The National Police Board's discretion in this connection was further circumscribed by instructions issued by the government, one of which was accessible to the public. The entering of information was also subject to the requirement that the information be necessary for the special police services and aimed at preventing or detecting offences against national security, etc. Furthermore, the ordinance contained explicit and detailed provisions as to what, to whom and in which circumstances information might be handed out and the procedure to be followed when deciding whether to release information. Having had regard to the foregoing, the Court found that Swedish law gave citizens an adequate indication as to the scope and the manner of exercise of the discretion conferred on the responsible authorities to collect, record and release information under the personnel control system. The interference was therefore "in accordance with the law"; within the meaning of Article 8. (§§50-57) "Necessary in a democratic society in the interests of national security": necessity as required by Article 8 implies that the interference corresponds to a pressing social need and that it is proportionate to the legitimate aim pursued (see the

Gillow judgment). However, the national authorities enjoy a margin of appreciation and in the instant case the interest of the state to protect its national security must be balanced against the seriousness of the interference with the applicant's right to respect for his private life. The interference affected the applicant's legitimate interests because of his not gaining access to certain sensitive posts within the public service. On the other hand, the right of access to public service is not as such enshrined in the ECHR and, apart from those consequences, the interference did not constitute an obstacle to his leading a private life of his own choosing. In these circumstances it is acceptable that the states enjoy a wide margin of appreciation in assessing the pressing social need and choosing the means for achieving protection of national security. Nevertheless, in view of the risk that a system of secret surveillance for the protection of national security poses for undermining or destroying democracy on the ground of defending it, there must also exist adequate and effective guarantees against abuse. The Personnel Control Ordinance contained a number of provisions designed to reduce the effect of personnel control procedures to an unavoidable minimum. Furthermore, the use of the information outside such control was limited. The supervision of the proper implementation of the system was entrusted both to parliament and independent institutions. In conclusion, the safeguards contained in the personnel control systems met the requirements of Article 8 §2. In the present case the state was entitled to consider that national security prevailed over the applicant's individual interests. The interference of which the applicant was suspected could therefore not be said to have been disproportionate to the legitimate aim pursued. (§§58-68)

No violation of Article 8 ECHR.

Article 10 ECHR: Did the personnel control procedure give rise to a breach of the applicant's freedom of expression?

Freedom to express opinions: The purpose of the Personnel Control Ordinance was to ensure that persons holding posts of importance for national security had the necessary personal qualifications. In declaring that the applicant could not be accepted for reasons of national security for appointment to the post in question, the authorities took into account the relevant information merely in order to satisfy themselves as to whether or not he possessed one of the necessary personal qualifications for the post. Accordingly, there was no interference with the applicant's freedom to express opinions. (§§71-73)

Freedom to receive information: This freedom basically prohibits a government from restricting a person from receiving information that others wish to impart to him, but Article 10 does not confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the government to impart such information to the individual. Thus, there was no interference with the applicant's freedom to receive information. (§§74-75)

No violation of Article 10 ECHR.

Article 13 ECHR: Did the fact that the applicant had no right to receive and to comment upon the complete material on which the appointing authority based its decision and the fact that he had no right to appeal to an independent authority with power to render a binding decision in regard of the correctness and release of information kept on him, amount to a violation of his right to an effective remedy?

The lack of communication of the information on the applicant released by the National Police Board did not, of itself and in the particular circumstances, entail a breach of Article 13. (§78) As the applicant's complaints raised arguable claims under ECHR, at least as regards Article 8, he was entitled to an effective remedy in order to enforce his rights under that article as they were protected by Swedish law. As the Swedish personnel control system as such was considered compatible with Article 8, the requirements of Article 13 would be satisfied if there existed domestic machinery whereby, subject to the inherent limitations of the context, the individual could secure compliance with the relevant law. (§79) There existed the remedies of control by the Parliamentary Ombudsman and the Chancellor of Justice. Although they lacked the power to render legally binding decisions, they commanded great respect and were in practice, usually followed. There was also substantial parliamentary supervision of the personnel control system. Furthermore, the applicant had recourse to a review by the government, who's decision was binding on the National Police Board. Even if taken on its own, the complaint to the government was not considered sufficient to ensure compliance with Article 13; the aggregate of the remedies set out above does.

No violation of Article 13 ECHR.

Cases of Ettl & others, Erkner & Hofauer and Poiss v. Austria, Judgments of 23 April 1987, Series A No. 117

The cases concern consolidation proceedings during the period 1963-1986 in respect of Austrian farmers' agricultural land-holdings.

Case of Ettl & others : The applicants contested the lawfulness of the compensation obtained following the enforcement of consolidation proceedings, in respect of their land made public, by the District Agricultural Authorities. The applicants lodged appeals before the Provincial and Supreme Land Reform Boards and the Constitutional and Administrative Courts concerning that point as well as procedural irregularities. The Land and Reform Boards consisted of three judges and five civil servants respectively.

Case of Erkner & Hofauer and Poiss : The applicants complained that the compensation resulting from the temporary transfer of land decided in 1970 and 1975 respectively, by the District Agricultural Authorities was legally insufficient. Appeals were lodged before the Provincial and Supreme Land Reform Boards and/or the Administrative Court concerning the compensation and the procedural irregularities and damages.

Case of Ettl & others. Article 6 §1 ECHR : Was there a violation of the applicants' right to a (public) hearing by an independent and impartial tribunal as regards the proceedings concerning the lawfulness of the compensation ?

All the bodies concerned were clearly tribunals established by law. (§34) The Administrative Courts and the Constitutional Court undoubtedly complied with the requirements of independence and impartiality. (§35) As regards the Provincial and Supreme Boards : the fact that civil servants sat, and even constituted a majority, on the bodies concerned does not in itself contravene Article 6 §1 ECHR. According to the constitution and the law, the boards were independent and public authorities were prohibited from giving them instructions on their judicial duties. They were also independent of the parties of the case ; the hierarchical links which existed between the civil servants on the boards and the role of civil servant experts did not put independence and impartiality of the authorities concerned in doubt. (§§38-41) (The lack of public hearing was covered by an Austrian reservation. [§42])

No violation of Article 6 §1 ECHR.

Cases of Erkner & Hofauer and Poiss. Article 6 §1 ECHR : Was the length of the proceedings concerning the lawfulness of the compensation unreasonable ?

The period taken into consideration amounted to nearly 17 and more than 19 years respectively (EH. §68, P. §54). The reasonableness of the length of the proceedings is to be assessed according to the particular

circumstances and having regard to the criteria stated in the case-law of the Court, especially the degree of complexity of the case, the applicants' behaviour and the conduct of the relevant authorities. Any land consolidation is by its nature a complex process. Notwithstanding the complexity of the cases, the respective lengths were unreasonable in the circumstances, notably in regard of a special duty to act expeditiously entailed by the provisional transfer of land. As a result of the various delays attributable to the authorities, viewed together and cumulatively, the applicants' case was not heard within a reasonable time. (EH. §§66-70, P. §§55-60)

Violation of Article 6 §1 ECHR.

Cases of Erkner & Hofauer and Poiss. Article 1 of Protocol No. 1 ECHR: Did the consolidation proceedings amount to an unjustified interference with the applicants' right to "peaceful enjoyment" of their possessions?

The transfer of land must be considered under the first sentence of Article 1 §1, as the measures did not amount to formal or *de facto* expropriation, nor were they designed to restrict or control the use of land. (EH. §74, P. §64) As regards the elements to be taken into consideration, namely on the one hand, the aim of the legislature to ensure continued and economic farming in the interests of landowners generally and of the community and the fact that land was allocated to the applicants in lieu of their own, and, on the other hand, the length of proceedings, the impossibility of reconsidering a provisional transfer of land notwithstanding successful appeals against the consolidation plans, the impossibility of financially compensating the loss sustained, (EH. §§76-78, P. §§66-68) the necessary balance between protection of the right of property and the requirements of the public interests was lacking. (EH. §79, P. §69)

Violation of Article 1 of Protocol No. 1 ECHR.

Cases of O., H., W., B. and R. v. United Kingdom, Judgments of 8 July 1987, Series A No. 120-A and -B and 121-A to -C

Pursuant to English legislation on protection of children, a child may be placed under the compulsory (by court order) or voluntary (by request of a parent) care of a local authority. As a result, the authority has nearly

all the rights, powers and duties of a parent. In particular whether the parents should continue to have access to their children is a matter within its discretion, subject to its statutory duty to give first consideration to the children's welfare.

Cases of O. and B.: Compulsory assistance. A court order obtained by the local authority committed to its care the applicants' children. The children were then placed by the authority with foster parents. The termination of the parents' right to visit and other access to their children was decided by the local authority. The court proceedings in an attempt to withdraw the orders and to obtain the restoration of access were unsuccessful. The adoption of the children by foster parents was decided without the applicants' consent. The background of the H. case is close to these two cases. H. instituted proceedings before the Hight Court in November 1978 to re-establish access. In June 1981, H. was refused leave to appeal to the House of Lords against a decision whereby the Court of Appeal had upheld the High Court's adoption order, including its refusal to grant access.

Cases of W. and R.: Requested assistance. The local authority passed a resolution assuming parental rights in respect of the applicants' children. The children were placed with foster parents in view of adoption. The termination of the parents' access was decided by the local authority.

Case of W.: The resolution was withdrawn by a juvenile court but the situation was maintained. The child's adoption by the foster parents was decided without the applicant's consent.

Case of R.: The local authority rescinded its resolution. The High Court refused to dispense with the applicant's consent to the adoption of the children and ordered that arrangements be made for her to have a measure of access to her children.

Cases of O., W., B. and R. Article 6 §1 ECHR: Was the parents' right to a tribunal violated as regarded the question of access to their children?

Applicability: Extinction of all parental right in regard to access to their children would scarcely be compatible with the fundamental notions of family life and the family ties which Article 8 ECHR is designed to protect. Therefore the applicants could claim a "right" in regard to access to their children. This right was the object of a "dispute" and it was "civil". Article 6 §1 is thus applicable. (O. §§53-59, W. §§72-79, B. §§72-79, R. §§77-84).

Compliance: Although the applicants had a possibility of challenging before a court an order committing a child to a local authority's care,

such proceedings would be directed to the order as such and not to the isolated issue of access, to which different considerations may apply. (O. §62, W. §81, B. §81, R. §86) The applicants could apply for judicial review or institute wardship proceedings and thereby have certain aspects of authorities' access decisions examined by English courts, but the courts' powers were not sufficient, as they did not extend to the merits of the matter. (O. §63, W. §82, B. §82, R. §87)

Violation of Article 6 §1 ECHR.

Case of H. – Article 6 §1 ECHR: Was the length of the proceedings concerning access unreasonable?

The proceedings, that took two years and seven months (November 1978 to June 1981), were not only decisive for applicant's future relations with her child but also had particular quality of irreversibility, the authorities therefore were under a duty to exercise exceptional diligence. (§70 and §85) Having weighed all the relevant factors (complexity of the case, applicant's behaviour and conduct of the courts concerned) but above all in the light of the importance of what was at stake for the applicant, the proceedings were not concluded within a reasonable time. (§86)

Violation of Article 6 §1 ECHR.

Article 8 ECHR: Did the procedures concerning the restriction (and subsequent termination) of the access unduly interfere with W., B. and R.'s family life?

Although Article 8 contains no explicit procedural requirements, the Court is entitled to have regard to the authority's decision-making process to determine whether it was conducted in a manner that was fair and afforded due respect to the interests protected by this provision. (W. §62, B. §63, R. §67) This process must be such as to secure that the views and interests of the natural parents are made known to and duly taken into account by the authority and that they are able to exercise in due time any available remedies. (W. §63, B. §64, R. §68) In the instant cases the applicants were not sufficiently involved in the authority's decision-making process to provide them with requisite protection of their interests. Consequently the interference was not "necessary" within the meaning of Article 8. (W. §§66-70, B. §§66-70, R. §§71-75)

Violation of Article 8 ECHR.

Case of H. – Article 8 ECHR: Did the length of the proceedings concerning the applicant's access to her child and the subsequent adoption amount to an unjustified violation of her right to respect for her family life?

The proceedings, in addition to their particular quality of irreversibility, lay within an area in which procedural delay may lead to a *de facto* determination of the matter at issue. The effective respect for the applicant's family life required that the question of her future relations with her child should be determined solely in the light of all relevant considerations and not by the mere passing of time, but this had not been the case. (§§89-90)

Violation of Article 8 ECHR.

Case of Pudas v. Sweden, Judgment of 27 October 1987, Series A No. 125-A

In 1980 the County Administrative Board granted the applicant a licence to carry passengers on specified interurban routes. In 1981 the County Traffic Company filed an application with the County Administrative Board for a licence to provide interurban transport on routes covered by the applicant's licence. The company proposed to rationalise existing facilities by replacing the applicant's service with a bus service to be provided under contract by another private transport business. The County Administrative Board granted the company's application and revoked the applicant's licence. The applicant appealed to the Board of Transport claiming that the company's application had been motivated not by any public interest in improving the transport service, but by an arrangement between the company and the other private transport business. According to the applicant, only very serious reasons, such as misconduct of the licence-holder, could justify revocation. This appeal and his further appeals to the government were all rejected. There exists, according to Swedish legislation, the possibility of extraordinary remedy of application to the Supreme Administrative Court to re-open proceedings to challenge the lawfulness of a revocation of a licence.

Article 6 §1 ECHR: Was there a dispute over a right of civil character and if so, was the applicant offered under Swedish law the possibility of having the revocation of his transport licence reviewed by a tribunal?

Applicability: The licence conferred a right in the form of an authorisation to carry out a transport service. The licence did not specify the

conditions on which it could be revoked and the law allows a certain discretion as regards revocation; nevertheless, it follows from general principles that the discretion of the authorities was not unfettered. The applicant was challenging the wisdom of the revocation as well as its lawfulness. The proceedings complained of could – and did – lead to confirmation of the decision being challenged, namely the revocation of the licence; they were therefore directly decisive for the right at issue. Thus there was a "dispute" over a "right". (§§31-34) The concept of "civil rights" is not to be interpreted solely by the reference to domestic law. Article 6 §1 applies irrespective of the status of parties, and of the character of the legislation governing determination of the dispute and of the authority which is invested with jurisdiction in the matter. There are features of public law in this case, but they do not suffice to exclude from "civil rights" the rights conferred on the applicant by virtue of the licence. The maintenance of the licence to which the applicant claimed to be entitled was one of the conditions for the exercise of his business activities. At least in the event that the provision of public transport services is carried out by private persons, it takes the form of a commercial activity, carried out with the object of earning profits and based on a contractual relationship between the licence-holder and the customers. The dispute between the applicant and the authorities therefore concerned a "civil right". Accordingly Article 6 §1 is applicable. (§§35-38)

Compliance: The government's decision rejecting appeals against the revocation of the licence was not open to judicial review as to its lawfulness by either the ordinary courts or the administrative courts or by any other body which could be considered to be a "tribunal" for the purposes of Article 6 §1. The extraordinary remedy of application to the Supreme Administrative Court to re-open proceedings does not meet the requirements of Article 6 §1. (§§40-41) (cf. the Sporrong and Lönnroth judgment.)

Violation of Article 6 §1 ECHR.

Case of Olsson No. 1 v. Sweden, Judgment of 24 March 1988, Series A No. 130

The applicants, who are husband and wife, live in Göteborg and have the children Stefan, born in 1971, Helena, born in 1976, and Thomas, born in 1979. Following a report by the Social District Council which concluded that the children's development was in danger since they were living in an environment which was unsatisfactory due to their

parents' inability to satisfy their needs for care, stimulation and supervision, the County Administrative Court decided in 1980 that they should be taken into care. Following the care decision, the children were placed in separate foster homes situated far from each other and from their parents. Various restrictions were placed on the applicants' access to the children whilst they were in care. The Social District Council and the Country Administrative Court rejected the applicants' requests for the termination of care. However, the Administrative Court of Appeal and the Supreme Administrative Court directed that the public care of the children be terminated. Stefan was then reunited with his parents but the Social District Council prohibited the applicants from removing Helena and Thomas from their respective foster homes. At the time of application to the European Commission of Human Rights, the appeal against this decision was still pending.

Article 8 ECHR : Did the decision to take the children into care, the manner in which it had been implemented and the refusal to terminate care constitute an unjustified violation of the applicants' right to respect for private life ?

The measures at issue amounted to interferences with the applicants' right to respect for their family life : the natural family relationship is not terminated when a child is taken into public care. (§59) The interferences were "in accordance with the law" : having regard to the subject-matter and the safeguards provided against arbitrary interference, the relevant Swedish legislation, though rather general in terms and conferring a wide discretion, was formulated with sufficient precision. (§§61-63) The interferences pursued a legitimate aim namely the protection of health or morals and of the rights and freedoms of the children. (§64) The care decision was supported by "sufficient" reasons. Furthermore, having regard to the facts and to their margin of appreciation, the Swedish authorities were reasonably entitled to think that it was necessary to take the children into care, and that it was necessary for the care decision to remain in force. (§§70-77) However, the measures (placement of the children far from their parents and from each other and the difficulties for the family resulting from this) taken in implementation of the care decision, ran counter to the ultimate aim of the family reunification and were not supported by sufficient reason justifying them as proportionate to the legitimate aim pursued. (§§78-83) To sum up, the implementation of the care decision, but not that decision itself or its maintenance in force, gave rise to a breach of Article 8. (§84)

Violation of Article 8 ECHR.

Case of Berrehab v. the Netherlands, Judgment of 21 June 1988, Series A No. 138

In 1977, Mr Berrehab (applicant), a Moroccan citizen, married Mrs Koster, a woman of Dutch nationality. In 1978 the Ministry of Justice granted Mr Berrehab permission under the Aliens Act of 1965 to stay in the Netherlands "for the sole purpose of enabling him to live with his Dutch wife". The permit was valid until December 1979. Their marriage was dissolved on 15 August 1979. On 22 August 1979 their daughter (also applicant) was born. The Amsterdam Regional Court appointed Mrs Koster as guardian of their daughter and Mr Berrehab as an auxiliary guardian. The Dutch authorities refused to renew the residence permit, and, after his appeals against the refusal, expelled him in 1984.

Article 8 ECHR: Did the refusal to grant a new residence permit and the subsequent deportation amount to an unjustified infringement of the applicants' right to respect for their family life?

The disputed measures amounted to interferences with the applicants' right to respect for their family life, since it in practice prevented them from maintaining regular contacts with each other. (§23) These interferences were in accordance with the Dutch Aliens Act of January 1965. (§24) The act pursued a legitimate aim, namely the economic well-being of the country, as the government was concerned to regulate the labour market because of the population density. (§26) The ECHR does not in principle prohibit the Contracting States from regulating the entry and length of stay of aliens. However, the necessity referred to in Article 8 §2 implies that the interference corresponds to a pressing social need and is proportionate to the legitimate aim pursued. (§28) Having regard to the particular circumstances (previous lawful stay, home, job in the country, real family ties, young child), there was a disproportion between the means employed and the legitimate aim pursued. That being so the disputed measures were not "necessary in a democratic society". (§29)

Violation of Article 8 ECHR.

Article 3 ECHR: Did the refusal to grant Mr Berrehab a new residence permit and his resulting deportation amount to inhuman or degrading treatment?

The facts of the case did not show that either of the applicants underwent suffering to such a degree. (§30)

No violation of Article 3.

Case of the Tre Traktörer Aktiebolag v. Sweden, Judgment of 7 July 1989, Series A No. 159

In 1980 the applicant company, Tre Traktörer Aktiebolag, which managed a restaurant, obtained a licence to serve alcoholic beverages. Licences were regulated by the 1977 Act on the Sale of Beverages. According to this act a licence could be revoked by the County Administrative Board under certain circumstances. After receiving a tax audit report indicating discrepancies in the restaurant's book-keeping, the County Administrative Board decided in 1983 to issue an admonition against the applicant and thereafter renewed the licence. The Social Council appealed to the National Board of Health and Welfare requesting the licence to be revoked. The National Board quashed the decision and referred the matter back for further action to the County Administrative Board. In 1983 the County Administrative Board revoked the licence with immediate effect. Claims for compensation from the state were rejected by the Chancellor of Justice, stating that there was no indication of state liability under the 1972 Tort Liability Act.

Article 6 §1 ECHR: Was there a "dispute" over a "civil" right or determination of a "criminal charge" ? If so, did Swedish law offer the applicant the possibility of having the revocation of its licence reviewed by a tribunal ?

Applicability : The licence conferred the right on the applicant's company in the form of an authorisation to serve alcoholic beverages and to run the restaurant business under the licence, unless it contravened the conditions laid down in the licence or gave rise to statutory grounds of revocation. The applicant was challenging the lawfulness of the revocation. The proceedings led to the withdrawal of the licence, and were thus directly decisive for the right at issue. (§§39-40) The maintenance in force of the licence was one of the principal conditions for carrying on the applicant's business activities. The serving of alcohol in restaurants and bars is entrusted to private persons and companies through licences. Such persons and companies carry out a private commercial activity, based on contractual relationships between the licence-holders and their customers. (§§43-44) In considering whether the licence-withdrawal constituted the determination of a criminal charge, the Court found that although the revocation was a severe measure linked with the licensee's behaviour, it could not be characterised as a penal sanction. (§§45-46) The Court concluded that Article 6 §1 is applicable in its civil but not in its criminal aspect.

Compliance: The decisions determining the dispute were neither taken, nor open to review as to their lawfulness, by any court or other body which could be considered a "tribunal" for the purposes of Article 6 §1. The remedy of tort action only concerned the authorities' liability for fault or negligence and not the correctness in law of the revocation. (§§47-50)

Violation of Article 6 §1 ECHR.

Article 1 of Protocol No. 1 ECHR: Did the revocation of the licence constitute a violation of the applicant company's right to "peaceful enjoyment" of its possessions?

The withdrawal of the licence constituted a measure of control of the use of property (the economic interests connected with the running of the restaurant were "possessions"). (§§53-54) The aim pursued by the 1977 Act and the system of licences was legitimate, namely to control the sale of alcoholic beverages in order to reduce alcohol abuse, which was of general interest. The revocation relied on the 1977 Act. The Court's power to review compliance with domestic law is limited and nothing suggests that it was contrary to Swedish law or that the revocation did not seek the same purpose as the 1977 Act. (§§57-58) The burden placed on the applicant must be weighed against the general interest of the community. In this context the states enjoy a wide margin of appreciation. Having regard to the legitimate aim of Swedish social policy concerning the consumption of alcohol, a fair balance was struck between the economic interests of the applicant company and the general interest of Swedish society. Thus, the measures were proportionate to the aim pursued. (§62)

No violation of Article 1 of Protocol No. 1 ECHR.

Case of Gaskin v. United Kingdom, Judgment of 7 July 1989, Series A No. 160

The applicant was born in 1959 and, following the death of his mother, taken into public care in 1960 by the Liverpool City Council under the Children's Act 1948. Save for a few periods, he remained in voluntary care until 1974, when a care order was made by the Liverpool Juvenile Court after the applicant had pleaded guilty to a number of offences. He ceased to be in the care of the City Council on attaining the age of majority (18) in 1977. During the major part of the period he was in care

he was boarded out with various foster parents. The local authority was under a duty to keep certain confidential records concerning the applicant and his care. The applicant contended that he was ill-treated in care and wished to obtain details thereof. In 1979 the applicant, wishing to bring proceedings against the local authority for damages for negligence, applied for discovery of the local authority's case records. The High Court, interpreting previous case-law, rejected the request on the grounds that his access to the records would be contrary to the public interest. The applicant's appeal against this decision to the Court of Appeal was dismissed and leave to appeal to the House of Lords was refused in 1980. According to a circular by the Department of Health and Social Security issued in 1983, the general policy, pursuant to the Local Authority Social Services Act 1970, governing the disclosure of information in social services case records, should be that persons receiving social services should be able, to a certain extent, to discover what was said about them in the records. Reasons for withholding such information included protecting third parties who had contributed information in confidence and protecting sources and staff's confidential judgments. According to subsequent resolutions by the City Council, information could only be disclosed with the consent of the suppliers thereof, which in the applicant's case resulted in the release in 1986 of 65 documents supplied by 19 persons out of a total of 352 documents contributed by 46 persons.

Article 8 ECHR : Did the City Council's refusal to let the applicant have access to all his case records or the procedure related to his request amount to a violation of his right to respect for his private and family life ?

(The Court did not deal with the refusal of access in the context that the application for discovery of the documents was first done with a view of bringing legal proceedings against the local authority.) The records contained in the file undoubtedly related to the applicant's private and family life in such a way that the question of access thereto falls within the ambit of Article 8. (§37) Although the essential object of Article 8 is to protect the individual against arbitrary interference by public authorities, there may, in addition, be positive obligations inherent in an effective "respect" for family life. (§38) The applicant challenged neither the fact that information was compiled and stored about him nor alleges that any use was made of it to his detriment (cf. the Leander judgment), but rather the failure to grant him unimpeded access to that information. By refusing him complete access to that information,

the United Kingdom could not be said to have "interfered" with his private or family life. What was to be examined therefore was whether handling the applicant's request amounted to a violation of Article 8. (§41) The confidentiality of the contents of the file contributed to the effective operation of the child-care system and, to that extent, served a legitimate aim, by protecting the rights of contributors of information and the children in need of care. (§43) Persons in the situation of the applicant have a vital interest, protected by the ECHR, in receiving the information necessary to know and to understand their childhood and early development. On the other hand, confidentiality is of importance for receiving objective and reliable information and such confidentiality can also be necessary for the protection of third persons. A system which makes access to records dependent on the consent of the contributor can in principle be considered to be compatible with the obligations under Article 8, taking into account the state's margin of appreciation. However, the interests of the individual seeking access to records relating to his private and family life must be secured when a contributor to the records is not available or improperly refuses consent. Such a system only conforms with the principle of proportionality if it provides that an independent authority finally decides on access in cases where a contributor fails to answer or does not consent. No such procedure was available in the present case and accordingly, the procedures followed failed to secure respect for the applicant's private and family life.

Violation of Article 8 ECHR.

Article 10 ECHR: Did the refusal of access to all the applicant's case records amount to a breach of his right to receive information?

The right of freedom to receive information basically prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him (see the Leander judgment). Thus Article 10 does not embody an obligation of the state to impart the information in question and therefore there was no interference with the applicant's right to receive information.

No violation of Article 10 ECHR.

Case of Allan Jacobsson v. Sweden, Judgment of 25 October 1989, Series A No. 163

In 1974 the applicant bought a property of 2 600 m^2 with a one-family house. The property was covered (i) by a subdivision plan according to

which no building could be constructed on a plot of less than 1500 m^2 until sufficient water and sewage facilities had been provided for and (ii) by an area plan which described the property mainly as a public area. The property had also, since 1965, been subject to a series of building prohibitions pursuant to the Building Act 1947. The applicant's requests to the administrative authorities to be authorised to divide the property into two units, for an exemption from the building prohibition and for a building permit to construct a second house and to have decisions to renew the prohibition invalidated, were not granted. The authorities' decisions regarding division of property into units and building permits were subject to judicial review, but the decisions concerning building prohibitions were not.

Article 1 of Protocol No. 1 ECHR: Did the protracted building prohibitions on the applicant's property violate his right to "peaceful enjoyment" of his possessions?

The protracted building prohibitions on the applicant's property constituted an interference with the applicant's right to peaceful enjoyment of his possessions. (§52) The interference was the result of the control of use of property; the applicant's right of property was never rendered precarious (cf. the Sporrong and Lönnroth judgment). (§54) The interference had a basis in the Building Act 1947. As far as the compliance with the 1974 Act was concerned, the Court, considering that its power to review compliance with domestic law is limited, saw no reason to doubt that the interference was in accordance with Swedish law or was aimed at facilitating town planning, which purpose falls within the general interest. (§57) The applicant was left for a very long time in uncertainty as to the possibilities of developing his property. However, it was not established that he had an unconditional right under applicable regulations to build a second house (§60) or that he could not reasonably have been unaware of the state of the law at the time of purchase, conditions for his use of the property not having changed since. (§61) Furthermore, the need to maintain the prohibitions was examined at regular intervals, the local planning situation was very complex and finally having regard to the state's margin of appreciation, the impugned prohibitions could not be considered disproportionate to the legitimate aim pursued. (§§62-63)

No violation of Article 1 of Protocol No. 1 ECHR.

Article 6 §1 ECHR: Was there a dispute over a "civil right" and if so, did the lack of any court remedy to challenge the decisions whereby the building prohibitions on his property were maintained in force violate the applicant's right to a tribunal?

Applicability: Subject to meeting the requirements laid down in domestic law, the applicant could arguably have claimed a "right" to a building permit. The prohibitions severely restricted this "right" and the outcome of the proceedings whereby the applicant challenged their lawfulness was directly decisive for his exercise thereof. There was thus a dispute over a "right". The applicant's "right" to build on his land is of a "civil nature", regardless of the general character of the building prohibitions, that the planning procedure is part of public law and that a building prohibition is a necessary element in urban planning. In sum, Article 6 §1 is applicable. (§§69-74)

Compliance: The dispute could only be determined by the government as the final instance, with no possibility of judicial review by any court or other body which could be considered to be a "tribunal" for the purposes of Article 6 §1. (§76)

Violation of Article 6 §1 ECHR.

Case of Håkansson and Sturesson v. Sweden, Judgment of 21 February 1990, Series A No. 171-A

In 1979 the applicants jointly bought an agricultural estate from a private person at a compulsory sale by auction for 240 000 Swedish crowns. Under the Land Acquisition Act 1979 they were obliged to resell the estate within two years unless they obtained a permit from the County Agricultural Board to retain it. According to the applicants, the County Agricultural Board had stated that they should not have any difficulties in obtaining the requisite permit. However their applications for the permit were rejected on the grounds that the estate ought to be used for the purpose of consolidating other properties in the area that were capable of further development. The Board's decisions were upheld on appeal in the last instance by the government. The applicants brought an unsuccessful action before the Swedish courts to have the estate redeemed by the state. A new compulsory auction was arranged in 1985. The Board bought the property itself for 172 000 crowns, which was the minimum price fixed under the law by two special valuers appointed by the County Administrative Board. The Court of Appeal dismissed

the applicants' requests that the compulsory sale be annulled. There was no public hearing before the Court of Appeal. The Supreme Court refused to grant leave to appeal.

Article 1 of Protocol No. 1 ECHR: Did the refusal to grant the applicants the permit, the compulsory sale and the conditions of this sale constitute an unjustified violation of the right to "peaceful enjoyment" of their property?

There was no dispute about the interference amounting to a deprivation of property. (§43) The aim of the interference was described in the 1979 Act, namely to promote rationalisation of agriculture, which is a legitimate public interest for the purposes of Article 1. (§44) The Court has a limited power to review the compliance with domestic law. In the present case there was no reason to doubt that the interference was in accordance with Swedish law. The applicants could not reasonably have considered the non-official allegations supposedly made by the County Administrative Board as binding under Swedish law. The impugned measures thus were lawful. (§§46-50) The prospective buyers had to bear in mind the risk that they might have to resell the estate on the conditions laid down in the 1979 Act. There were no substantial allegations that the sale was unlawful. Furthermore, having regard to the margin of appreciation enjoyed by the national authorities, the price received by the applicants can be considered to have been reasonably related to the market value of the estate. Thus the applicants had not carried an individual and excessive burden. (§§53-55)

No violation of Article 1 of Protocol No. 1 ECHR.

Article 6 §1 ECHR: Was there a dispute over "civil rights and obligations", and if so, did the lack of any remedy before a tribunal to challenge the decisions not to grant the permit to retain property or the lack of any public hearings before the Court of Appeal constitute breaches of Article 6 §1?

Applicability: The disputes regarding the authorities' refusal to grant the permit required to retain the estate, and the disputes over the lawfulness of the terms of the compulsory resale concerned "civil rights and obligations". (§60)

Compliance: The dispute concerning the permit could be determined only by the government as the final instance with no possibility of judicial review. There was thus a violation of Article 6 §1 on this part. (§63)

As far as the proceedings before the Court of Appeal were concerned, the Swedish law expressly provided for the possibility of holding public hearings where necessary for the purposes of the investigation. Having regard to the fact that the appeal mainly challenged the lawfulness of the auction and to the practice before the Swedish courts that such proceedings usually take place without a public hearing, the applicants must be considered to have tacitly and unequivocally waived their right to a public hearing. Furthermore the waiver was not in conflict with any important public interest which could have made a public hearing necessary. Accordingly, there was no violation of the public hearing requirement in Article 6 §1. (§§67-68)

Violation of Article 6 §1 ECHR (as regards proceedings concerning permit, but not as regards the lack of public hearings before the Court of Appeal).

Case of Powell and Rayner v. United Kingdom, Judgment of 21 February 1990, Series A No. 172

The two applicants lived in the vicinity of Heathrow Airport. Their properties had been rated as concerned noise annoyance (low and high noise annoyance respectively). A certain number of noise abatement measures had been implemented at the airport, which had grown steadily to become one of the busiest international airports in the world. The legal liability of aircraft operators was limited by, *inter alia*, the Civil Aviation Act 1982, section 76 (1) which had the effect of conferring exemption from liability for nuisance in respect of noise emanating from aircraft flying at a reasonable height and observing the relevant air navigation regulations.

Article 13 ECHR: Did the applicants have any effective remedy in respect of their claims under Article 6 §1 and Article 8?

(The compass of the case before the Court was delimited by the Commission's decision on admissibility.)

Claim under Article 6 §1 ECHR (Did the limitation of liability constitute a violation of the right to a tribunal?). (§34): The effect of section 76 (1) of the 1982 Act was to exclude liability for nuisance with regard to the flight of aircraft in certain circumstances with the result that the applicants could not claim to have a substantive right recognised under domestic law to obtain relief for exposure to aircraft noise in those circumstances. To this extent there is no "civil right" to attract the application

of Article 6 §1. In any event, Article 13 does not guarantee a remedy allowing domestic legislation as such to be challenged before a national authority. (§36)

Claim under Article 8 ECHR (Was there an unjustified interference with the right to respect for private life and home?) : Regard must be had to the fair balance that has to be struck between the competing interests of the individual and those of the community. The state enjoys a certain margin of appreciation as to steps to be taken to ensure compliance with the Convention. In this context the following facts must be taken into account : the operation of a major international airport pursued a legitimate aim, namely the economic welfare of the country ; the consequently negative impact on the environment could not be entirely eliminated ; (§42) the noise abatement measures for aircraft using the airport were appropriate ; (§43) the exclusion of liability was not absolute and the states in this social and technical sphere should enjoy a wide margin of appreciation. (§44) In view of these facts, the government cannot arguably be said to have upset the required balance between competing interests of the community and the individual. (§45) No arguable claim of violation of Article 8 and, consequently, no entitlement to a remedy under Article 13 had been made out in relation to either applicant as regards noise caused by aircraft flying at a reasonable height and in compliance with traffic regulations. (§46)

No violation of Article 13 ECHR.

Case of Groppera Radio AG and others v. Switzerland, Judgment of 28 March 1990, Series A No. 173

From 1983, the Groppera Radio AG used a radio station in Italy to transmit radio programmes mainly intended for an audience in Switzerland. The programmes could be received by personal sets or by cable-network companies, which retransmitted them. In 1984 an ordinance adopted by the Federal Council came into force, prohibiting Swiss cable companies from rebroadcasting programmes from transmitters which did not satisfy the requirements of the international agreements on radio and telecommunications. A community-antenna co-operative which broadcast the Groppera AG programmes in particular, continued broadcasting. The co-operative received an order from the Zurich area telecommunications office and thereafter from the head office of the national Post and Telecommunications Authority, requiring it to cancel the retransmissions on pain of committing an offence, as the Groppera Radio AG

broadcasts were unlawful, since they did not comply with international rules. Subsequently the co-operative brought an administrative law appeal to the Federal Court and Groppera Radio AG joined these proceedings. The appeal was dismissed in June 1985, mainly on the grounds that as the transmitter in Italy had been destroyed by lightning in 1984, the appellants no longer had legal interest in taking proceedings.

Article 10 ECHR: Did the ban on cable retransmissions of the applicants' broadcasts infringe their right to freedom of expression?

Applicability: The administrative decisions interfered with the cable retransmission and prevented subscribers from receiving them. Therefore, and because broadcasting and retransmission of programmes (regardless of their content) are covered by the right enshrined in Article 10 §1, the decisions amounted to "interference by public authority" with the exercise of this freedom. (§55)

Compliance: The insertion of the third sentence of Article 10 §1 was due to technical or practical considerations, such as the limited number of frequencies and the large investments required for building transmitters. It also reflected a political concern that broadcasting should be the preserve of the state. Since then changed views and technical progress have resulted in the abolition of many state monopolies. National licensing systems are required for the regulation of broadcasting enterprises at national level and to give effect to international rules. (§60) The purpose of the third sentence is to make it clear that states are permitted to control through a licensing system the way in which broadcasting is organised in their territories, particularly in its technical aspects. (§61) The retransmission came under Swiss jurisdiction. The ban on retransmission was fully consistent with the Swiss local radio system. The interference was in accordance with the third sentence of Article 10 §1. (§§63-64) As regards Article 10 §2: The scope of the concepts of foreseeability and accessibility depends to a considerable degree on the content of the instrument in issue, the field it is designed to cover and the number and status of those to whom it is addressed. In the instant case the provisions of international telecommunications law were highly technical and were primarily intended for specialists who knew, from information given in the Official Collection of Federal Statutes, how they could be obtained. The instruments in question were not lacking in the necessary clarity and precision. (§68) The interference was thus in accordance with the law. It pursued a legitimate aim, namely the protection of the international telecommunications order and the protection of rights of others. (§70) The interference was not excessive

as (i) most Swiss cable companies had ceased retransmitting the programmes, (ii) the Swiss authorities never jammed the broadcasts, (iii) the subscribers continued to receive programmes from several other stations and (iv) the procedure chosen was not a form of censorship. Accordingly the impugned ban was proportionate to the legitimate aim pursued. (§73)

No violation of Article 10 ECHR.

Case of Autronic AG v. Switzerland, Judgment of 22 May 1990, Series A No. 178

In 1982 Autronic AG, a Swiss company specialising in dish aerials, requested permission from the Post and Telecommunications Authority to show a public Soviet television programme at an exhibition in Zurich, a programme which it received directly from a Soviet telecommunications satellite, G-Horizont, by means of a private dish aerial. The authority replied that it could not give its authorisation without the express agreement of the Soviet authorities. In 1983 the authority rejected an application made by Autronic AG seeking a declaratory ruling that the right to receive for private use uncoded broadcasts from telecommunication satellites should not require the consent of the broadcasting state's authorities. The application was rejected. The requirement of such a consent is laid down in the provisions of the International Telecommunication Convention and the Radio Regulations. In 1986 the Federal Court refused to rule on an appeal lodged by Autronic AG on the grounds that the company had no direct economic interest worthy of protection.

Article 10 ECHR : Did the fact that the Swiss Post and Telecommunications Authority made the requested permission subject to the consent of the broadcasting state, constitute an infringement of Autronic's right to freedom of expression ?

Applicability : Article 10 applies not only to the content of information (which can be of a commercial nature), but also to the means of transmission or reception, since any restriction imposed thereon interferes with the right to receive and impart information. It is not necessary to ascertain the reason and purpose for which this right is to be exercised. The decisions complained of amounted to "interference by public authority" with the exercise of freedom of expression. Article 10 is therefore applicable. (§§47-48)

Compliance : The legal basis for the interference was to be found in the provisions of national legislation and of international telecommunication law. The relevant instruments were sufficiently accessible in view of the public for which they were intended. The interference was therefore "prescribed by law" (cf. the Groppera Radio AG judgment). (§57) The interference pursued a legitimate aim, namely the prevention of disorder in telecommunications and the need to prevent the disclosure of confidential information in international correspondence. (§§58-59) As to the requirement "necessary in a democratic society" : States enjoy a certain margin of appreciation in assessing the need for an interference, but this margin goes hand in hand with European supervision. Where there has been an interference with the exercise of rights and freedoms guaranteed by Article 10, the supervision must be strict. (§61) In the light of the technical and legal developments subsequent to the facts of the case, in particular in the legal field (signature of the European Convention on Transfrontier Television ; authorisation given by several states of reception of such broadcasts without giving rise to protests by the other State Signatories to the Convention nor the international authorities), which can be taken into account as a means of interpreting the relevant rules, the decisions were based on interpretations contrary to the international legislation in this field. The Court concluded that the interference was not "necessary in a democratic society" and that, accordingly, there had been a breach of Article 10. (§§62-63)

Violation of Article 10 ECHR.

Case of Obermeier v. Austria, Judgment of 28 June 1990, Series A No. 179

In 1978 the applicant was suspended from his duties as director of the regional branch office of an insurance company following a dispute between him and the company concerning various paid activities which it proposed to withdraw from him. In 1981 he instituted legal proceedings against the suspension and, shortly afterwards, he was dismissed by his employer in the form of "administrative retirement". Prior to the dismissal, the applicant had been declared disabled for the purposes of the Disabled Persons (Employment) Act and the company sought the required authorisation of the Disabled Persons Board for the dismissal. The board gave its consent to the dismissal finding that the relationship of trust between the parties had been irremediably undermined and that the dismissal was not due to the applicant's disability. The applicant challenged the lawfulness of his suspension ; in the alternative

he requested its revocation. The courts found the primary head of claim inadmissible, thus the revocation became the sole object of the proceedings. His action was unsuccessful since the labour courts took the view that, following his dismissal, he no longer had an interest in obtaining the revocation of his suspension. The applicant also pleaded that his dismissal was invalid. He had challenged it both before the relevant administrative authorities and the ordinary courts. The labour courts refused to take any decision as to the validity of the dismissal on the grounds that they were precluded from inquiring into the validity of a dismissal which had received the Disable Persons Board's authorisation. The matter was not yet concluded at the time of the proceedings in the European Court of Human Rights.

Article 6 §1 ECHR: Did the fact that the labour courts considered themselves bound by the administrative decisions deprive the applicant of access to a tribunal? Was the length of the proceedings unreasonable?

According to Austrian law the dismissal of disabled persons is subject to authorisation by an administrative authority, which has to examine whether dismissal is justified from a social point of view. The main aim of the examination is to determine that the real cause of dismissal does not lie in the disablement. The legislature had withdrawn from the courts the power to rule on a preliminary question and had conferred it on the administrative authorities. (§69) It followed that the conditions laid down in Article 6 §1 were met only if the decisions by the administrative authorities binding the courts were delivered in conformity with the requirements of that provision. In the present case the authorities could not be regarded as "independent tribunals". The authorities' decisions could, however, be appealed to an Administrative Court, but it could only determine whether the discretion enjoyed by the administrative authorities had been used in a manner compatible with the object and purpose of the law. Such a limited review could not be considered to be an effective judicial review under Article 6 §1. (§70)

An employee who considers that he has been wrongly suspended by his employer has an important personal interest in securing a judicial review on the lawfulness of that measure promptly. A period of 9 years (1981-1990) without reaching a final decision exceeds a "reasonable time", notwithstanding the complexity of the case. (§72)

Violation of Article 6 §1 ECHR (both as regards access to a tribunal and length of proceedings).

Case of Fredin No. 1 v. Sweden, Judgment of 18 February 1991, Series A No. 192

In 1963 the County Administrative Board had granted Mr Fredin's parents a permit to extract gravel from a pit. However no actual exploitation started. In 1973 an amendment to the Nature Conservation Act 1964 authorised the revocation of permits of the type in question after July 1983. Mr and Mrs Fredin (the applicants) became the sole owners of the land in 1977 and began to work the pit in 1980 and made investments. In 1983 the permit was transferred to them. At the same time they received official notice that the County Administrative Board intended to re-examine the permit question with a view to a possible termination of the activities. In December 1984 the board ordered, *inter alia*, that the permit would be valid until 1987. In 1985 the government dismissed an appeal by the applicants but extended the validity of the permit until 1988. In 1988 extraction of gravel from the pit ceased. The government's decision was not, at the time, open to judicial review.

Article 1 of Protocol No. 1 ECHR: Did the revocation of the exploitation permit amount to an unjustified interference with the right to peaceful enjoyment of the applicants' possessions?

The revocation of the permit interfered with the applicants' right to peaceful enjoyment of their possessions, including the economic interests connected with the exploitation. (§39) The consequences of the revocation of the permit were not so serious as to amount to "deprivation of possessions". Consequently, it must be considered as a "control of use of property". (§§41-47) As to lawfulness and the purpose of the interference: the interference was in accordance with national law, the aim of which was legitimate, namely the protection of nature. Moreover the requirement of foreseeability was satisfied. (§50) The absence of judicial review did not in itself amount to a violation of the article. Proportionality of the interference: Although the applicants suffered substantial losses, they must reasonably have been aware of the possibility that they might lose their permit. Moreover the authorities showed a certain flexibility as to the length of the closing-down period. Having regard also to the wide margin of appreciation enjoyed by the state, it could not be said that the revocation had been disproportionate to the legitimate aim pursued. (§§51-55)

No violation of Article 1 of Protocol No. 1 ECHR.

Article 14 ECHR taken together with Article 1 of Protocol No. 1 ECHR: Were the applicants victims of inadmissible discrimination as they were the only independent operators in the area?

The circumstance that the applicants' pit was the only one to have been closed is not sufficient to support a finding that the applicants' situation can be considered similar to that of other ongoing businesses which were not forced to close. (§61)

No violation of Article 14 ECHR taken together with Article 1 of Protocol No. 1 ECHR.

Article 6 §1 ECHR: Did the absence of any form of judicial review of the decisions to revoke the applicants' exploitation permit constitute a violation of their right to a tribunal?

As the dispute could be determined only by the government as the final instance, with no possibility of judicial review, there was a violation of the applicants' right to a tribunal. (§63)

Violation of Article 6 §1 ECHR.

Case of Moustaquim v. Belgium, Judgment of 18 February 1991, Series A No. 193

The applicant, a Moroccan national, arrived in Belgium in 1965, at the age of two, and lived there with his parents, brothers and sisters. In 1982 he was convicted by the Liège Court of Appeal for twenty-two offences committed while he was still a minor in criminal law and was sentenced to imprisonment. After his release in 1984, he was deported from Belgium according to a royal order, on the grounds that he was a real danger to society and that he had seriously prejudiced public order (*ordre public*). The *Conseil d'Etat* dismissed his application for a stay of execution of the deportation order and his application to have it quashed. The applicant was deported in 1984 after spending 18 months in detention. In 1989 he was authorised by a royal order that temporarily suspended the deportation order to reside in Belgium for a trial period of two years.

Article 8 ECHR: Did the deportation, which had separated the applicant from his parents, constitute an unjustified violation of his right to respect for his family life?

The applicant had lived in Belgium where his family also resided. He had never broken off relations with them. The measures complained of, resulted in his being separated from his family for more than five

years. There was accordingly an interference by a public authority with the right to respect for family life. (§36) The interference was in accordance with the Act of 15 December 1980 on the entry, residence, settlement and expulsion of aliens and was thus "in accordance with the law" (§38) and pursued a legitimate aim, namely the "prevention of crime", and more broadly of "disorder". (§40) The Contracting States have a legitimate concern to maintain public order, in particular in exercising their right to control the entry, residence and expulsion of aliens. However, when decisions constitute an interference with the rights protected by Article 8 §1, they must be justified by a pressing social need and proportionate to the legitimate aim pursued, to be considered "necessary in a democratic society". (§43) Having regard to the particular circumstances (the alleged offences all went back to when the applicant was a adolescent and they were spread over a fairly short period; there was a long interval between the latest offence and the deportation; at the time of the deportation all the applicant's family had been living in Belgium for a long while; the applicant arrived very young in Belgium and had lived there for about twenty years, close to his family, and had had little contact with Morocco) the deportation seriously disrupted his family life and was disproportionate to the legitimate aim pursued. (§§44-46)

Violation of Article 8 ECHR.

Article 14 taken together with Article 8 ECHR: Was the applicant a victim of inadmissible discrimination on the grounds of nationality vis-à-vis *juvenile delinquents who possessed Belgian nationality and those who were citizens of another member state of the European Community, since those two categories could not be deported?*

The situation of the applicant cannot be compared with that of Belgians, who have a right to abide in their own country (see Article 3 of Protocol No. 4). There was an objective and reasonable justification for the preferential treatment given to the citizens of another member state of the European Community, as Belgium, together with those states, belongs to a special legal order. (§49)

No violation of Article 14 taken together with Article 8 ECHR.

Case of Cruz Varas and others v. Sweden, Judgment of 20 March 1991, Series A No. 201

In 1987, Mr Cruz Varas, his wife and their son (applicants) came to Sweden where Mr Cruz Varas applied for political asylum. All of the applicants

were Chilean citizens. In 1988 the Swedish National Immigration Board refused their request for refugee status and decided to expel them to Chile. Their appeal was rejected by the government. Mr Cruz Varas claimed that he ran the risk of political persecution if he returned to Chile. The applicants then alleged to the local police authority that there were impediments to the enforcement of the expulsion order stating that Mr Cruz Varas had new reasons to invoke in support of asylum, namely the risk he ran in Chile of political persecution, torture and possibly death, because of his continued political activities in Sweden. He also added to his original statements that he had been tortured on several occasions in Chile. The police forwarded the file to the National Immigration Board, which referred the case to the government. Before the government, he submitted two medical certificates concerning his allegations of torture. The government found that there was no impediment to the enforcement of the expulsion order. On 6 October 1989 the agent of the government was informed that the European Commission of Human Rights had decided to indicate to the government that it was desirable in the interest of the parties and the proper conduct of the proceedings before the Commission not to deport the applicants to Chile until the Commission had an opportunity to examine the application further. However, Mr Cruz Varas was expelled to Chile later that day. His wife and son remained in hiding in Sweden.

Article 3 ECHR: Did the expulsion to Chile of Mr Cruz Varas constitute inhuman treatment because of the alleged risk that he would be tortured by the Chilean authorities and because of the trauma involved in the expulsion?

Applicability: Expulsion decisions and cases of actual expulsion may incur liability of a state, by reason of its having taken action which has as a direct consequence, the exposure of an individual to ill-treatment as proscribed in Article 3. (§§69-70)

Compliance: The existence of a real risk of an inhuman or degrading treatment must be assessed primarily with reference to those facts which were known or ought to have been known to the state at the time of the expulsion, but the Court is not precluded from having regard to information which comes to light subsequent to the expulsion. (§76) The applicant's credibility could be doubted by his silence as to the alleged torture by the Chilean police until more than eighteen months after his first interrogation by the Swedish police, by the continuous changes in his story, and by the lack of substantiation of his claims of clandestine political activity, as he must have been aware that it was important to

bring these elements to the authorities' attention. Other considerations had to be taken into account: the improvements in the political situation in Chile; the voluntary return of refugees; the particular knowledge and experience of the Swedish authorities in evaluating claims of the present nature by virtue of the large number of Chilean asylum-seekers; the thorough examination of the applicant's case by the Swedish authorities. There was sufficient reason for the Swedish authorities to find that substantial grounds had not been shown for believing that the applicant would be exposed to a real risk of being subject to inhuman or degrading treatment on his return to Chile. (§§78-82) It results from this finding that no substantial basis has been shown for Mr Cruz Varas' fears of expulsion such as to amount to a breach of Article 3. (§§83-84)

No violation of Article 3 ECHR.

Article 8 ECHR: Did the expulsion of Mr Cruz Varas amount to an unjustified violation of the applicants' right to respect for family life?

Recalling that Mr Cruz Varas' wife and son had gone into hiding in order to evade enforcement of the expulsion order and having regard to the evidence adduced and the Court's findings with regard to Article 3, the Court held that there had been no obstacles to their establishing family life in their home country. In those circumstances Sweden cannot be imputed for the resulting separation. (§§87-89)

No violation of Article 8 ECHR.

Article 25 ECHR: Did the failure of the Swedish Government to comply with the Commission's request not to expel the applicants amount to a breach of its obligation not to hinder the effective exercise of the right to petition?

The power to order interim measures could not be inferred from Article 25 or any other source. (§§97-103) The expulsion did not actually hinder the effective exercise of the right to petition. (§104)

No violation of Article 25 ECHR.

Case of Wiesinger v. Austria, Judgment of 30 October 1991, Series A No. 213

In 1975, agricultural land consolidation proceedings under the Upper Austrian Agricultural Land Planning Act 1972 were commenced for

the area where the applicants had their property. In 1978, they were required by the District Agricultural Authority to provisionally transfer plots of agricultural land to third parties, in return for which they were granted rights over other plots. The transfer was done according to a draft consolidation scheme. The applicants had agreed to this plan. In 1979, the municipal council amended a draft zoning plan and the agricultural authorities redesignated the land which had previously belonged to the applicants as buildings plots. From 1982, the applicants, claiming that their former land had increased in value, brought a series of proceedings, *inter alia*, to have that land returned to them or to obtain compensation for their losses. In 1986 the District Authority published the consolidation scheme, which returned to the applicants a part of their former land and assigned to them additional plots. However, they appealed against the plan, claiming a better settlement. The agricultural authorities attempted first to secure a friendly settlement. At the time of the proceedings before the European Court of Human Rights in 1991, the case was still pending before the Constitutional Court.

Article 6 §1 ECHR: Was the length of the consolidation proceedings unreasonable?

Consolidation had started in 1975, but the "dispute" arose in 1982 as the applicants requested the authorities to withdraw them from the consolidation scheme. The dispute had accordingly lasted for more than nine years (1982-1991). (§51) Neither the complexity of the case nor the conduct of the applicants could be held against the applicants. (§§55-58) As regards the conduct of the authorities: since the agricultural authorities had initiated the consolidation process of their own accord, they were under a special duty to act with diligence. (§61) The amendment of the zoning plan by the municipal council upset the balance struck between the different land-owners at the time of the provisional transfer. The adoption of the zoning plan constituted a precondition for the final approval of the consolidation scheme. Accordingly the difficulties in the case stemmed from a lack of co-ordination between the municipal and the agricultural authorities in finalising the plan and the scheme. (§62) After the approval of the consolidation scheme in 1986, it took the agricultural authorities more than four years to determine the applicants' appeals, during which period efforts were made to reach a friendly settlement. The duration of the negotiations exceeded what was reasonable. (§63) With particular regard to the difficulties occasioned by the lack of co-ordination between the authorities, the applicants' case was not determined within a "reasonable time". (§64)

Violation of Article 6 §1 ECHR.

Article 1 of Protocol No. 1 ECHR: Did the situation created by the provisional transfer pending the adoption of the final consolidation scheme constitute an unjustified interference with the applicants' right of property?

The redesignation of the applicants' former land as building plots upset the initial balance of the original draft scheme and created an interference with their property rights. (§70) It had to be settled whether a proper balance had been struck between the demands of the community's general interest and the requirements of protecting the rights of the individual. (§73) In this respect the following considerations had to be taken into account: (i) The purpose of land consolidation was to improve the infrastructure and the pattern of agricultural holdings; (§74) (ii) being in direct contact with the local situation, the Austrian authorities enjoyed in this respect a margin of appreciation in determining what measures were necessary. (§76) Although the maintenance of the situation continued over a long period, other elements were also relevant: the applicants had agreed to the provisional transfer; they had not manifested their disagreement until August 1982; the consolidation scheme reallocated to them part of their former land and they obtained a further improvement of the situation. (§§77-78) Having regard to all the circumstances of the case, the interference could not be held to be disproportionate to the demands of the general interest involved in the consolidation proceedings. (§79) (cf. the Erkner & Hofauer and Poiss judgments.)

No violation of Article 1 of Protocol No. 1 ECHR.

Case of Vilvarajah and others v. United Kingdom, Judgment of 30 October 1991, Series A No. 215

The applicants, five male Sri Lankan Tamils, arrived in the United Kingdom in 1987 and applied for political asylum alleging that they had been victims of army persecution against the Tamil community. Their applications were rejected by the Secretary of State. They applied for a judicial review of the decisions but these applications were ultimately rejected by a judgment of the House of Lords. The applicants were removed to Sri Lanka in 1988. They claimed that after having returned to Sri Lanka they had been arrested, detained and ill-treated by members of the Indian authorities. In 1989 the applicants' appeal against their removal was upheld

by the adjudicator and they were subsequently allowed to return to the United Kingdom and granted exceptional leave to remain until 1992.

Article 3 ECHR: Did the applicants' removal to Sri Lanka amount to inhuman or degrading treatment?

(Applicability: See the Cruz Varas judgment.)

Compliance: The existence of a real risk of inhuman or degrading treatment must be assessed primarily with reference to those facts which were known or ought to have been known to the state at the time of the expulsion, but the Court is not precluded from having regard to information which has come to light subsequent to the expulsion. (§107) The following considerations had to be taken into account: (i) By the time of the expulsions there was an improvement in the situation in the north and east of Sri Lanka and numbers of Tamils were repatriated voluntarily to Sri Lanka under a UNHCR program (§§109-110); (ii) it is not established that their personal position was any worse than that of other Tamils in general or other young male Tamils who were returning to their country and (iii) importance had to be attached to the knowledge and experience that the United Kingdom authorities had in dealing with a large number of asylum seekers from Sri Lanka and to the fact that the personal circumstances of each applicant had been carefully considered by the Secretary of State. (§114) In the instant case substantial grounds had not been established for believing that the applicants would be exposed to a real risk of being subjected to Article 3 treatment. (§115)

No violation of Article 3 ECHR.

Article 13 ECHR: Did the applicants have an effective remedy under British law in respect of the administrative decisions on the asylum requests?

The courts were able to review the Secretary of State's refusal to grant asylum with a view to determining whether it was tainted with illegality, irrationality or procedural impropriety. The courts had also stressed their special responsibility to subject such administrative decisions to the most anxious scrutiny, where an applicant's life or liberty may be at risk. Moreover the practice is that an asylum seeker will not be removed from the United Kingdom until proceedings are complete, once he has obtained leave to apply for judicial review. (§125)

No violation of Article 13 ECHR.

Case of Pine Valley Development Ltd. and others v. Ireland, Judgment of 29 November 1991, Series A No. 222

In 1978 Pine Valley Development Ltd. (applicant) agreed to purchase land in reliance on an outline planning permission, which had been granted to the previous owner by the minister for local government, for an industrial warehouse and office development on the site. However, the site was in an area zoned for further development of agriculture, so as to preserve a "green belt". In 1981 the Pine Valley Development Ltd. sold the land to its parent, Healy Holding Ltd. (applicant). Subsequently the Supreme Court held in a judgment in 1982 that the grant of the outline permission was *ultra vires* and therefore a nullity. As a consequence the value of the property was substantially reduced. As the result of the Supreme Court's decision, legislation was enacted in 1982 with a view to validating planning permissions and approvals. Consequently Pine Valley Development Ltd. applied to the County Council for planning approval but it was refused. Pine Valley Development Ltd., who considered that it was excluded from the benefit of the act, then brought proceedings against the Minister of Environment and the state, seeking damages. In a judgment of 1986 the Supreme Court, upholding a decision of the High Court, held that they (Healy Holdings Ltd. and Mr Healy [applicant], the managing director of Healy Holdings, were joined as plaintiffs) had no cause of action.

Article 1 of Protocol No. 1 ECHR: Did the Supreme Court's decision holding the outline planning permission to be invalid, coupled with the respondent state's alleged failure to validate that permission retrospectively or its failure to provide compensation, constitute an unjustified infringement of the applicants' right to peaceful enjoyment of their possessions?

The impugned interference was in accordance with planning legislation, the aim of which was the protection of the environment. This is clearly a legitimate aim "in accordance with the general interest". (§57) The consequences of the Supreme Court's annulment were not confined to the applicants. The Supreme Court's decision was a proper way of ensuring correct implementation of planning legislation. Moreover the applicants were engaged on a commercial venture and aware of the zoning plan and of the opposition of the local authority to any departure from it. This being so, the interference could not be regarded as a disproportionate measure. (§59)

No violation of Article 1 of Protocol No. 1 ECHR.

Article 14 ECHR taken together with Article 1 Protocol No. 1 ECHR: Were the applicants victims of discrimination as the 1982 Act benefited all the other holders of permissions in the relevant category?

(Not applicable as far as Pine Valley Ltd. is concerned, as it had sold the land prior to the legislation in 1982. [§62]) The government advanced no justification for the difference of treatment between the applicants and other permission holders. (§64)

Violation of Article 14 ECHR taken together with Article 1 of Protocol No. 1 ECHR.

Article 13 ECHR: Did the applicants have an effective remedy before a national authority in respect of their claims?

The applicants could and did raise the substance of their ECHR complaints before the Irish courts in their claim for damages. The effectiveness of a remedy does not depend on the certainty of success. (§66)

No violation of Article 13 ECHR.

Case of Margareta and Roger Andersson v. Sweden, Judgment of 25 February 1992, Series A No. 226-A

Margareta Andersson, born in 1951, and Roger Andersson, born in 1974, are mother and son. In 1985, on application by the Social Council, the County Administrative Court ordered that Roger should be taken into public care on the grounds that his mother's behaviour was jeopardising his emotional and social development. He was placed in a foster home in 1986. Contact between the applicants was restricted by the social authorities. They met with some irregularity, often after long intervals and were closely supervised. In 1987 Roger was permitted to visit Margareta regularly at her own home. Between August 1986 and February 1988 the applicants were prohibited from having contact by correspondence and telephone. The various access restrictions were the subject of a number of largely unsuccessful appeals by Margareta Andersson to the administrative courts.

Article 8 ECHR: Did the restrictions imposed on the applicants' access to each other constitute an unjustified violation of their right to respect for their family life?

The mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life. The fact that a child

is taken into public care does not change this. Telephone conversations between family members are covered both by the notion of "family life" and of "correspondence". The impugned measures amounted to interferences with the applicants' right to respect for their family life and correspondence (§§72-73). The interferences had a basis in Swedish law and were foreseeable. Thus, they were "in accordance with the law". (§§74-85) The relevant Swedish law was clearly aimed at protecting "health or morals" and "the rights and freedoms" of children. The restrictions on access were applied for these purposes, thus serving a "legitimate aim". (§87) The applicants' right to visits had been severely restricted. They had been prohibited from mail and telephone contact for one and a half years. The measures relating to this period had been particularly far-reaching. In order for the measures to be "necessary in a democratic society", they had to be consistent with the ultimate aim of reuniting the applicants. (§95) The reasons adduced by the government were of a general nature and did not sufficiently show such compatibility. The aggregate of restrictions imposed was thus disproportionate to the legitimate aim pursued and was not "necessary in a democratic society". (§§86-97).

Violation of Article 8 ECHR.

Article 13 ECHR: Did the applicants have an effective remedy before a national authority in respect of their claims under Article 8 ECHR?

For the purposes of Article 13 it is sufficient that a legal representative is able to institute and conduct proceedings for a 12-year old child. It was not established that Margaret Andersson was prevented from appealing against restrictions on Roger's behalf. (§§101-104)

No violation of Article 13 ECHR.

Case of Beldjoudi v. France, Judgment of 26 March 1992, Series A No. 234-A

Mr Beldjoudi (applicant), an Algerian national, was born in France in 1950 where he was brought up and had always lived. His parents, brothers and sisters were all resident in France. He was married to a French woman (also applicant) who had always lived in France. Between 1969 and 1978 he was convicted of various criminal offences, including an aggravated theft, for which he was sentenced to several years' imprisonment. In 1979 the Minister of Interior issued a deportation order against

him, on the grounds that his presence in France constituted a threat to public order (*ordre public*). His application for the order to be set aside was dismissed by the Administrative Court in 1988. In the meantime Mr Beldjoudi had been convicted of several other offences. In 1991 the *Conseil d'Etat* dismissed his appeal against the Administrative Court's judgment and the deportation order. At the time of the application to the European Commission of Human Rights, the order had not yet been enforced and Mr Beldjoudi was subject to a compulsory residence order.

Article 8 ECHR: Would the deportation order, if put into effect, constitute an unjustified interference with the applicants' right to respect for their family and private life?

Enforcement of the deportation order would constitute an interference by a public authority with the exercise of the applicants' right to respect for their family life. (§67) The ministerial order was "in accordance with the law" (§69) and pursued a legitimate aim, namely "prevention of disorder" and "prevention of crime". (§70) The Contracting States have a legitimate concern to maintain public order, in particular in exercising their right to control the entry, residence and expulsion of aliens. However, having regard to the particular circumstances of the case: the interference primarily affected the family life of the applicants as spouses, their matrimonial home was in France; Mr Beldjoudi was born in France of parents who were then French and had spent his whole life there and appeared not to have any links with Algeria apart from nationality and had married a French woman; Mrs Beldjoudi was born in France of French parents, had always lived in France and were she to follow her husband, presumably to Algeria, she could have difficulties adapting and there might be real practical or even legal obstacles; it appears that the decision to deport Mr Beldjoudi, if put into effect, would not be proportionate to the legitimate aim pursued. (§§74-79) (cf. the Berrehab judgment). In view of this finding the court did not consider it necessary to examine the complaint concerning "private life". (§80)

Violation of Article 8 ECHR.

Case of Editions Périscope v. France, Judgment of 26 March 1992, Series A No. 234-B

In 1960 *Editions Périscope*, a limited company incorporated under French law, applied to the Joint Committee for Press Publications and Agencies for a certificate of registration for its review *Périscope de l'usine et du*

bureau which would secure certain tax concessions and preferential postal charges. This application and three others were rejected on the grounds that the principal object of the company's publication did not comply with requirements necessary to obtain these advantages. In 1976 the company instituted proceedings in the Paris Administrative Court, claiming compensation for the damage sustained as a result of the refusal to grant the registration certificate. The Administrative Court dismissed the application in April 1981. In an appeal filed in July 1981 the company requested the *Conseil d'Etat* to set aside the Administrative Court's judgment and to order the state to pay damages. This appeal was dismissed in 1985.

Article 6 §1 ECHR: Was there a "dispute" over a "civil right" and was the length of the proceedings brought against the state in the Administrative Court and Conseil d'Etat *unreasonable?*

Applicability: The trial concerned compensation for damage caused by the state by refusing to accord to the company reductions granted to competing undertakings. The company's arguments were sufficiently tenable as the French courts admitted the applications and ruled on the merits of the case. There was therefore a "dispute" over a "right". (§§36-38) The subject matter of the action was pecuniary in nature and founded on an alleged infringement of pecuniary rights. The right was therefore "civil". (§40)

Compliance: The length of the proceedings exceeded 8 years (1976-1985). (§43) This lapse of time was not reasonable because the case was not particularly complex and it was not due to any fault of the company; on the contrary, it made repeated attempts to compel the ministries concerned to submit their memorials more rapidly. (§44)

Violation of Article 6 §1 ECHR.

Case of X. v. France, Judgment of 31 March 1992, Series A No. 236-A

The applicant, born in 1963, was a haemophiliac and had had frequent blood transfusions. In 1985 a blood test showed that he had been infected by HIV between 1984 and 1985. In December 1989 the applicant submitted a preliminary claim for compensation to the Minister for Health, maintaining that he had been infected by HIV as a result

of the negligent delay of the minister in implementing appropriate rules for the supply of blood products. The application was rejected on 30 March 1990, the day before the expiry of the statutory limit of four months to give a reply. On 30 May 1990 he applied to the Paris Administrative Court for annulment of the ministerial decision and for an order of compensation by the state for damages. At the time of the application to the European Commission of Human Rights in February 1991 and the proceedings in the European Court of Human Rights early in 1992, the proceedings in the Administrative Court of Appeal were still pending. The applicant died in February 1992. His parents took his place in the proceedings at the European Court of Human Rights.

Article 6 §1 ECHR : Was the length of the proceedings brought against the state in the administrative courts unreasonable ?

Applicability : Article 6 §1 is applicable irrespective of the parties' status, be it private or public, and of the nature of the legislation which governs the manner in which the dispute is to be determined. It is sufficient that the outcome of the proceedings should be decisive for private rights and obligations. That was the case in this instance. (§30)

Compliance : The period that was taken into consideration began with the applicant's filing the claim with the Minister of Health in 1989 and had not ended by the time of the proceedings at the European Court of Human Rights, which meant that it then had lasted for more than two years. (§31) The applicant's conduct could not be reproached. The case was of some complexity, but the government had been aware that proceedings were imminent and could therefore have acted faster when the proceedings had commenced. (§§33-40) What was at stake in the contested proceedings was of crucial importance for the applicant, having regard to the incurable disease from which he was suffering and his reduced life expectancy. An exceptional diligence was thus called for in this instance notwithstanding the number of other, similar, cases which were pending. (§47) The Administrative Court did not use its powers to make orders for the speeding up of the progress of the proceedings. A reasonable time had already been exceeded when the first instance judgment was delivered and the subsequent proceedings in the Administrative Court of Appeal could not redress this failure, whatever the outcome as to the merits. (§§48-49)

Violation of Article 6 §1 ECHR.

Cases of Francesco Lombardo and Giancarlo Lombardo v. Italy, Judgments of 26 November 1992, Series A No. 249-B and -C

Francesco Lombardo served in the *carabinieri* until 1974, when he was invalided out on account of two illnesses. He had been receiving an ordinary retirement pension since 1975. In 1974 he applied for an "enhanced ordinary pension" on the grounds that the illnesses which had caused his retirement were attributable to his service. In 1977 the Minister of Defence considered that this was true only for one of them. In December 1977 the applicant appealed to the Court of Audit against this decision. The appeal was sustained by a judgment in February 1989.

In 1980 Giancarlo Lombardo brought an appeal to the Court of Audit against an order by the Minister of Justice refusing his request to increase the amount of his pension as a retired judge. The proceedings were adjourned pending the examination of an analogous case. In a judgment of March 1989 the Court of Audit ruled in favour of the applicant's claim in part and ordered readjustment of his pension.

Article 6 §1 ECHR: Were the rights claimed of a "civil" character and was the length of the proceedings before the Court of Audit unreasonable?

Applicability: State intervention by means of a statute or delegated legislation does not prevent the right in issue from having a civil character. What is concerned here is essentially an obligation of the state to pay a pension to a public servant in accordance with the legislation in force. In performing this obligation the state is not using discretionary powers and may be compared with an employer who is a party to a contract of employment governed by private law. Article 6 §1 is therefore applicable. (F. §17, G. §16) (cf. the Feldbrugge judgment.)

Compliance: The complexity of the cases does not in itself justify the length of the proceedings. (F. §22, G. §21) Excessive workload cannot be taken into consideration since Article 6 §1 imposes on the Contracting States the duty to organise their legal systems in such a way that their courts can meet each of the requirements of that provision. (F. §23, G. §22) The delays which have been noted were so substantial that the overall length of the proceedings must be regarded as excessive. (F. §24, G. §23)

Violation of Article 6 §1 ECHR.

Case of de Geouffre de la Pradelle v. France, Judgment of 16 December 1992, Series A No. 253-B

In 1980 the Minister of Environment set in motion proceedings to designate the valley of the River Montane as an area of outstanding beauty. This area included a part of an estate belonging to the applicant. He received formal notice of the commencement of the proceedings and availed himself of his right to make known to the authorities his objections to the proposal. The designation was effected by means of a ministerial decree of 4 July 1983, of which an extract was published in the *Journal Officiel* on 12 July. On 13 September 1983 the Prefect of Corrèze served the decree at the applicant's Paris home. In 1986 the *Conseil d'Etat*, to which the applicant had applied for judicial review of the decree, held the application to be inadmissible because it was out of time. It noted that in the case of a decree which did not require the property owner to alter the state or change the use of the area, the time within which any appeal had to be brought ran from the date on which the designation decision was published in the *Journal Officiel* and not from the (later) date when it was served to the applicant in person.

Article 6 §1 ECHR: Did the fact that the authorities dismissed the applicant's application as being out of time constitute a violation of his right of access to a tribunal?

The right to a court is not a absolute one. It may be subject to limitations but these must not be to such an extent that the very essence of the right is impaired. (§28) French law gave the applicant the possibility of challenging the relevant decree in court. It remains to be ascertained whether the procedure for making such an application was such as to ensure that the right to a court was effective, as required by Article 6. (§29) The applicant should have had a clear, practical and effective opportunity to challenge an administrative act that is a direct interference with his right of property. The complexity of the positive law resulting from the legislation on the conservation of places of interest had been likely to create legal uncertainty as to the exact nature of the decree designating the Montane Valley and as to how to calculate the time-limit of appeals. The applicant was entitled to expect a coherent system that would achieve a fair balance between the authorities' interests and his own. In particular he should have had a clear, practical and effective opportunity to challenge an administrative act that had been a direct interference with his right of property. In sum, the applicant did not have a practical and effective right of access to the *Conseil d'Etat*. (§§31-35)

Violation of Article 6 §1 ECHR.

Cases of Funke, Crémieux and Miailhe v. France, Judgments of 25 February 1993, Series A No. 256-A to -C

In connection with investigations into possible offences against the legislation governing financial dealings with foreign countries, the applicants were, between 1977 and 1983, subject to home searches and seizures of documents by customs officers assisted by the police.

In the Funke case, an order was obtained by the customs authorities from the District Court for attachment of Mr Funke's assets, in lieu of confiscation of undeclared funds and corresponding to the fine payable. Mr Funke refused to produce the statements of certain bank accounts abroad, thus he was fined and ordered to produce the documents on pain of a penalty. Mr Funke had not yet been tried for the offences at the time of his death in 1987.

In the Crémieux case, the proceedings were brought to an end by a discharge order, after the customs authorities agreed to compound with Mr Crémieux. Before the courts Mr Crémieux had unsuccessfully contested, *inter alia*, the legality of the measures taken against him.

In the Miailhe case, the appeal brought before the ordinary courts in order to declare the seizures null and void was unsuccessful because of the alleged lack of jurisdiction of the courts. Finally an investigating judge made orders discharging one of the members of the Miailhe family. As for the others, the public prosecution and the proceedings for imposition of customs penalties were barred by the Criminal Court as a result of changes in the criminal law.

Article 6 §1 ECHR: Did Mr Funke's criminal conviction for refusal to disclose documents asked for by the customs infringe his right to a fair trial?

Unable or unwilling to procure them by any other means, the customs attempted to compel the applicant to provide evidence of offences he had allegedly committed. There was no justification for such an infringement of the right of anyone "charged with a criminal offence" to remain silent and not to contribute to incriminating himself. (§44)

Violation of Article 6 §1 ECHR.

Article 8 ECHR: Did the searches and seizures by customs officers in the applicants' home unduly infringe their rights to respect for their private life, their home and their correspondence?

Searches and seizures effected at home constituted an interference with the applicants' rights to respect for their private lives, their correspondence

and, as regards Mr Funke and Mr Crémieux, their homes. (F. §48, C. §31, M. §28) The interferences pursued a legitimate aim, namely the economic well-being of the country. (F. §52, C. §35, M. §33) As regards whether the interferences were "necessary in a democratic society" : states encounter serious difficulties in the prevention of capital outflows and tax evasion and may consider it necessary to have recourse to measures such as house searches and seizures in order to obtain evidence of exchange-control offences and to prosecute those responsible. Nevertheless, the relevant legislation and practice has to afford adequate and effective safeguards against abuse. (F. §56, C. §39, M. §37) That had not been so in these cases : at the material time the customs authorities had very wide powers, in particular the exclusive competence to assess the expediency, number, length and scale of inspections. Above all, in the absence of any requirements of a judicial warrant, the restrictions and conditions provided by law appeared too lax and full of loopholes for the interferences with the applicants' rights to have been strictly proportionate to the legitimate aim pursued. (F. §57, C. §40, M. §38)

Violation of Article 8 ECHR.

Case of Salesi v. Italy, Judgment of 26 February 1993, Series A No. 257-E

In February 1986 the applicant instituted proceedings against the state at the Rome Magistrate's Court, seeking payment of a monthly disability allowance, which the Lazio Social Security Department had refused her. In December 1986 the court ordered the Minister of the Interior to pay the allowance requested. This decision was upheld by the District Court in 1989. In 1991 the Court of Cassation dismissed the appeal lodged by the Minister, which judgment was filed in March 1992.

Article 6 §1 ECHR : Was the length of the proceedings, which the applicant had brought in the civil courts against the state, unreasonable ?

Applicability : Today the general rule is that Article 6 §1 does apply in the field of social insurance (cf. the Feldbrugge judgment). However, the present case concerned welfare assistance. There are differences between social insurance and welfare assistance, but at the present stage of development of social security law they cannot be regarded as fundamental. State intervention is not sufficient to establish inapplicability of Article 6 §1. Despite the public law features, the applicant was not affected in her relations with the administrative authorities as such

acting in the exercise of discretionary powers; she suffered an interference with her means of subsistence and was claiming an individual, economic right flowing from specific rules laid down in a statute giving effect to the constitution. The protection of this basic right came within the jurisdiction of an ordinary court. Article 6 §1 is therefore applicable. (§19)

Compliance: The period to be considered ran from the applicant's institution of proceedings in February 1986 until March 1992 when the Court of Cassation dismissed the minister's appeal, thus lasting more than six years. (§20) The case was not complex and the applicant's conduct did not substantially contribute to the length of the proceedings. The excessive length of the proceedings was due to the authorities' behaviour. The backlog of cases which existed before the Court of Appeal could not be taken into consideration since Article 6 §1 imposes on the Contracting States the duty to organise their legal systems in such a way that their courts can meet each of the requirements of that paragraph. (§24)

Violation of Article 6 §1 ECHR.

Case of Schuler-Zgraggen v. Switzerland, Judgment of 24 June 1993, Series A No. 263

In 1976 the applicant, who was then working for an industrial company, was granted half an invalidity pension by a compensation office as she had contracted tuberculosis. She was dismissed with effect from 1979 on account of her illness, and she was subsequently granted a full pension. Following a medical examination of the applicant, the Invalidity Insurance Board cancelled her pension in 1986. It ruled that her family circumstances had changed after the birth of her son in 1984 and that her health had improved. In 1987 her appeal to the Canton of Uri Appeals Board for Invalidity Insurance was dismissed. During the proceedings before the board she was not allowed to have the documents in her medical file handed over to her. She lodged an appeal with the Federal Insurance Court. In 1988 the Federal Insurance Court allowed in part an administrative-law appeal, holding that she was entitled to a half-pension if she was in financial difficulties. The court ordered the Appeals Board to produce all documents for her inspection. There was no hearing in the Federal Insurance Court. The court considered to what extent the applicant was restricted in her activities as a housewife but not her ability to work in her former job, as it proceeded on the assumption

that, having a young child, she would have given up employment even if she had not had health problems. The court remitted the case to the Compensation Office, which decided that she could not claim any pension since her income had exceeded the maxima applied.

Article 6 §1 ECHR: Was the applicants' right to a fair trial infringed because she had insufficient access to the file of the Appeals Board and because there was no public hearing in the Federal Insurance Court?

Applicability: The Court stated in earlier cases (see the Feldbrugge and Salesi judgments) that as a general rule, Article 6 §1 applies in the field of social insurance, including welfare assistance. State intervention is not sufficient to establish that Article 6 §1 is inapplicable. Despite the public law features, the applicant was not only affected in her relations with the administrative authorities as such but also suffered an interference with her means of subsistence and was claiming an individual, economic right flowing from specific rules laid down in a federal statute. Article 6 §1 is therefore applicable. (§46)

Compliance: The procedure before the Appeals Board had not enabled the applicant to have a complete, detailed picture of the particulars supplied to the Board. But the Federal Insurance Court had remedied this shortcoming by requesting the board to make all the documents available to the applicant, who had been able to forward the file to her lawyer. Hence the impugned proceedings, taken as a whole, had been fair. (§52) The applicant had unequivocally waived her right to a public hearing. Since the dispute was highly technical, it did not appear that it raised issues of public importance such as to make a hearing necessary. Its private nature would have deterred the applicant from having the public present. It was understandable that the national authorities should have regard to demand of efficiency and economy and the systematic holding of hearings could be an obstacle to the particular diligence required in social-security cases. There has accordingly been no breach of Article 6 §1 in respect of the oral and public nature of the proceedings before the Federal Insurance Court. (§58)

No violation of Article 6 §1 ECHR.

Article 14 taken together with Article 6 §1 ECHR: Did the assumption made by the Federal Insurance Court amount to inadmissible discrimination on the grounds of sex?

The Federal Insurance Court had adopted in its entirety the Appeals Board's assumption that women gave up work when they gave birth to a child. The assumption constituted the sole basis for the reasoning

and introduced a difference of treatment based on the ground of sex only. The advancement of the equality of the sexes is a major goal in Council of Europe member states and very weighty reasons would have to be put forward before such a difference of treatment could be regarded as compatible with the Convention. In the instant case there was no reasonable and objective justification. (§67)

Violation of Article 14 taken together with Article 6 §1 ECHR.

Case of A. v. France, Judgment of 23 November 1993, Series A No. 277-B

In 1980 Mr G. informed a Chief Superintendent, the Head of the Central Office for the Prevention of Serious Crime, of an alleged plan, instigated by the applicant, Mrs A., to murder Mr V. The superintendent agreed that Mr G. should telephone from the superintendent's office to the applicant at her home to discuss possible methods for carrying out the crime. The conversation was recorded on a tape which was kept in the police records office. The applicant filed complaints claiming that the recording of a conversation conducted in a private place by a person, without the latter's consent, amounted to invasion of privacy and breach of the confidentiality of telephone communications. In 1985 prosecution of Mr G. and the superintendent was refused on the grounds in particular that, in the circumstances of the case, the applicant's conversation fell outside the scope of the concept of private life.

Article 8 ECHR: Did the recording of the telephone conversation unduly interfere with the applicant's right to respect for her correspondence and private life?

The undertaking complained of depended on a private citizen and a police officer working together. The public authorities were therefore involved to such an extent that the state's responsibility under the ECHR was engaged. In any event the recording represented an interference in respect of which the applicant was entitled to the protection of the French legal system. The undertaking constituted a interference with the applicant's right to respect for her correspondence. In these circumstances it is not necessary to consider whether it also affected her "private life". (§§36-37) It had not been effected pursuant to a judicial procedure and had not been ordered by an investigating judge as was required by French law. Consequently the recording had no basis in domestic law. (§§38-39)

Violation of Article 8 ECHR.

Case of Bendenoun v. France, Judgment of 24 February 1994, Series A No. 284

In 1976 after the customs authorities had sent a file to the Tax Revenue Authority containing reports from an investigation concerning alleged customs and exchange-control offences, the Revenue audited the accounts of a company of which the applicant was chairman, managing director and principal shareholder. The Revenue found that a number of transactions had not been entered in the accounts and made a supplementary tax assessment. Criminal proceedings ended with a judgment of the criminal court in which the applicant was given, *inter alia*, a suspended sentence of imprisonment for tax evasion. The prosecutor had obtained the file opened on the applicant by the customs. The applicant challenged the amount of the supplementary assessment that had been raised on his company and on his own income, and appealed to the Regional Commissioner of Revenue. The appeals were turned down. The applicant then brought proceedings in the Administrative Court and persuaded the president of that court to request the public prosecutor to produce the entire case file assembled by the customs but the prosecutor refused to do so. The applicant appealed to the *Conseil d'Etat* which ruled against him in 1986.

Article 6 §1 ECHR: Did the refusal to give to the applicant access to the whole customs file constitute a breach of the applicant's right to a fair trial (equality of arms)?

Applicability: As regards the general aspects of the French system of tax surcharges where the taxpayer had not acted in good faith, having regard to the large number of offences, Contracting States must be free to empower the Revenue to prosecute and punish them, even if the surcharges imposed as a penalty are large ones. Such a system is not incompatible with Article 6 as long as the taxpayer can bring any such decision before a court that affords the safeguards of that provision. (§46) In the instant case, most of the aspects had a criminal connotation and made the charge in issue a criminal one: (i) The offences came under a provision of the General Tax Code which covers all citizens in their capacity as taxpayers and lays down certain requirements, to which it attaches penalties in the event of non-compliance; (ii) the tax surcharges are intended as a punishment to deter re-offending and not as compensation for damages; (iii) they are imposed under a general rule whose purpose is both deterrent and punitive; and (iv) the

surcharges were very substantial and if the applicant was unable to pay he was liable to be committed to prison by the criminal courts. Article 6 §1 is therefore applicable. (§47)

Compliance: The documents whose production the applicant complained he had sought in vain, were not among those relied on by the tax authorities. The concept of fair trial may however entail an obligation on the Revenue to agree to supply the litigant with certain documents from the file on him or even with the file in its entirety. However it is necessary that the person concerned should have given, even if only briefly, specific reasons for his request. The applicant did not give such reasons. This omission was all the more detrimental to his case as he was aware of the existence and the content of most of the documents. Moreover, he had access to the complete file at any rate during the criminal investigation. (§52)

No violation of Article 6 §1 ECHR.

Case of Van de Hurk v. the Netherlands, Judgment of 19 April 1994, Series A No. 288

In 1984, the applicant, a dairy farmer, assumed certain financial commitments in order to extend his cow-shed and consequently to keep more dairy cattle. A dairy farmer could only produce a certain quantity of milk and a penalty, or additional levy, had to be paid for any surplus. The applicant was granted a reference quantity which in his contention was insufficient for him to be able to meet his financial commitments. He failed in claiming an extra levy quantity on the grounds of the commitments assumed. The applicant filed an objection with the Minister of Agriculture and Fisheries; this was dismissed on the grounds that the increase in capacity of the applicant's cow-shed was insufficient. The applicant appealed to the Industrial Appeals Tribunal. The applicant submitted his own estimate of the sum he had invested. The minister replied to this. At a public hearing the applicant continued to contest the minister's method of calculation. The Industrial Appeals Tribunal rejected the applicant's appeal, explicitly refusing to consider the price for the investment per square meter of the new shed, put forward by the applicant at a hearing, on grounds of belatedness. According to the 1954 Industrial Appeals Act, which remained in force until 1994, the minister had the power to set aside or suspend the execution of a judgment by the tribunal if the consequences of the judgment were "contrary to the general interest". No use was ever made of this power.

Article 6 §1 ECHR: Was the applicant's case determined by an "independent and impartial tribunal", given the fact that the minister could set aside or suspend a judgment of the tribunal? Had he been afforded a "fair hearing" by the tribunal which had disregarded his arguments put forward at the public hearing?

The power to give a binding decision, which may not be altered by a non-judicial authority to the detriment of an individual party, is inherent in the very notion of a tribunal, and can also be seen as a component of the independence required by Article 6 §1. (§45) Whether or not the requirements of Article 6 have been met cannot be assessed with reference to the applicant's chances of success alone, since this provision does not guarantee any particular outcome. (§47) But Dutch law allowed the minister to deprive a judgment of the tribunal of its effect, to the detriment of an individual party. One of the basic attributes of a tribunal was therefore missing. It was not remedied by the availability of a form of subsequent review by a judicial body that afforded all the guarantees required by Article 6. (§§52 and 54)

It is not for the Court to criticise the method of calculation chosen by the tribunal. The applicant produced new figures at the latest possible stage, namely at the oral hearing after the minister had responded in writing to his written pleadings. Thus the tribunal did not violate the principle of equality of arms. (§60)

Violation of Article 6 §1 ECHR as regards independence and impartiality. No violation regarding "fair hearing".

Case of Fayed v. United Kingdom, Judgment of 21 September 1994, Series A No. 294-B

In 1985, acting through their company, The House of Fraser Holdings PLC, the Fayed brothers acquired ownership of the House of Fraser PLC. The takeover was vigorously opposed by the rival company Lonrho PLC. In 1987 the Secretary of State for Trade and Industry appointed two inspectors under the Companies Act 1985 to investigate the circumstances surrounding the takeover. In their report, the inspectors concluded that the Fayed brothers had dishonestly represented their origins, their wealth, their business interests and their resources prior to the takeover. The report was widely made public and reported through media. Any civil action on defamation brought by the applicants against the inspectors or the Secretary of State would have been met by a

defence of privilege. Although the administrative law remedy of judicial review was available to the applicants against the inspectors or the Secretary of State if a procedural impropriety could be claimed, this judicial review would not have enabled the applicants to argue that the findings were simply erroneous.

Article 6 §1 : Did the investigation by the inspectors and the limitation of the applicants' ability to challenge the inspectors' conclusions, amount to denial of effective access to a tribunal ?

As regards the investigation by the inspectors : in order for the applicants to be entitled to a hearing before a tribunal, there must exist a "dispute" over a "civil right". The inspectors' published findings damaged the applicants' reputations. The purpose of the inspectors' inquiry was to ascertain and record facts, not to resolve any dispute. It could not be said that the inquiry "determined" the applicants' civil right to a good reputation for the purposes of Article 6 §1, or that the result of the enquiry was directly decisive for that right. Investigative proceedings of this kind fall outside the ambit and intendment of Article 6 §1. Article 6 §1 is thus not applicable. (§§55-63)

Proceedings to contest the inspectors' findings : (The question of applicability was not considered necessary to settle in the circumstances.) The aim pursued by the system under the Companies Act 1985 was legitimate, namely the furtherance of the public interest in the proper conduct of the affairs of public companies. Hence the investigation and the publication of the report pursued legitimate aims of public interest. The limitation on the ability to take legal proceedings against the inspectors or the Secretary of State also pursued a legitimate aim in that they were acting in furtherance of an overriding interest of social importance, here specifically needed for the inspectors to make their reports with courage and frankness. (§§69-70) The limitations on access to a court may be more extensive when regulations of activities in the public sphere are at stake than in relation to litigation over the conduct of persons acting in their private capacity. Businessmen actually involved in the affairs of large public companies lay themselves open to close scrutiny of their acts. Moreover the investigation concerned persons who had themselves sought a public profile. Regard had to be given to the safeguards which attended the investigative functions, intended to ensure a fair procedure and the reliability of findings of facts. Having found the aim of not only making but also publishing the reports to be legitimate, the test of proportionality cannot be applied in such a way as to render

publication impracticable. In the light of the foregoing considerations, the limitations complained of can be said to have been proportionate to the legitimate aim pursued. (§§71-82)

No violation of Article 6 §1 ECHR.

Case of Hentrich v. France, Judgment of 22 September 1994, Series A No. 296-A

In 1979 the applicant and her husband bought agricultural land in Strasbourg. In 1980 the Commissioner of Revenue informed them that because the price paid was too low, he intended to exercise, for the benefit of the Treasury, the right of pre-emption, provided for in the General Tax Code, over the property they had acquired, against payment of the purchase price increased by 10% by way of indemnity. In 1980 the applicant brought an action in the *Tribunal de Grande Instance* (TGI) to have the pre-emption decision quashed. The TGI dismissed her action stating, *inter alia*, that "it is sufficient for the price to appear to the Revenue to be too low, without its having to determine the reason why it is too low, which may in fact have nothing to do with tax evasion ...". In appeals before the Court of Appeal and then the Court of Cassation the applicant and her husband argued that the right of pre-emption was exercised at the discretion of the state, which did not have to prove the allegation that the price was too low nor allow for the dispossessed purchaser to show that the price was normal. The appellate courts dismissed the appeals in 1985 and 1987 respectively.

Article 1 of Protocol No. 1 ECHR: Did the pre-emption amount to an unjustified infringement of the applicant's right to "peaceful enjoyment" of her possessions?

The exercise of the right of pre-emption was aimed at preventing the non-payment of higher registration fees, not to punish tax evasion. The prevention of tax evasion is a legitimate objective which is in the public interest. (§39) However, the pre-emption operated arbitrarily, selectively and was scarcely foreseeable, and it was not attended by the basic procedural safeguards. In particular the relevant provision of the General Tax Code as applied to the applicant did not satisfy the requirements of precision and foreseeability. There were no adversarial proceedings that complied with the principle of equality of arms, enabling argument to be presented on the issue of underestimation of the price and consequently on the Revenue's position. Therefore, the

pre-emption decision could not be regarded as lawful. (§42) As regards proportionality : the Revenue might exercise its right of pre-emption for the sole purpose of warning others against any temptation to evade taxes. This right, which did not seem to have any equivalent in other Convention States, did not apply systematically, but only rarely and scarcely foreseeably. Furthermore, the state had other methods at its disposal for discouraging tax evasion : legal proceedings to recover unpaid tax, imposition of tax fines and the threat of criminal proceedings. (§47) As to the risk run by a purchaser to become subject to pre-emption and therefore penalised by the loss of his property solely in the interests of deterring possible underestimations of price, merely being reimbursed for the price paid – increased by 10 % – and the costs and fair expenses of the contract, could not compensate for the loss of property acquired without fraudulent intent. (§48) Thus, the applicant bore an individual and excessive burden, which could have been rendered legitimate only if she had had the possibility – which she had not – of effectively challenging the measure. The fair balance which should be struck between the protection of the right of property and the requirements of general interest was therefore upset. Thus the interference was not proportionate to the legitimate aim pursued. (§49)

Violation of Article 1 of Protocol No. 1 ECHR.

Article 6 §1 ECHR : Did the Revenue and the courts fail to give the applicant a fair hearing (equality of arms) ? Was the length of the proceedings unreasonable ?

The requirement of "equality of arms" implies that each party must be afforded a reasonable opportunity to present his case under conditions that do not place him/her at a substantial disadvantage *vis-à-vis* his/her opponent. This requirement was not satisfied in the present case : on the one hand the tribunals in fact allowed the Revenue to confine the reasons for the pre-emption to stating that the sale price was too low. These reasons were too summary and general to enable the applicant to mount a reasoned challenge to that assessment. On the other hand, the tribunals declined to allow the applicant to establish that the price agreed corresponded to the real market value. There was therefore a breach of Article 6 §1 in this respect. (§56)

The length of the proceedings (1980-1987) was attributable to the backlog of business in the Court of Appeal and to the fact that the Court of Cassation wished to hear jointly cases that raised similar issues. Those circumstances cannot justify the substantial delay. This being so,

and considering what was at stake for the applicant, the lapse of time was not "reasonable". There was therefore a breach of Article 6 §1 also in this respect. (§61)

Violation of Article 6 §1 ECHR.

Case of Katte Klitsche de la Grange v. Italy, Judgment of 27 October 1994, Series A No. 293-B

The applicant owned land in Tolfa in the Province of Rome. In 1966 the District Council approved a plan submitted by the applicant for the development of the land, including a housing scheme, and the text of an agreement which was intended, *inter alia*, to apportion the costs of putting in necessary infrastructure. The agreement was signed in 1968. The applicant sold a number of plots on the land and a number of plot owners were granted building permits. In 1969 a new land-use plan for Tolfa classified part of the land belonging to the applicant as an area in which building was prohibited. In 1976 the Lazio Regional Administrative Court annulled the plan as far as the applicants's property was concerned. In 1979 the Regional Council classified the applicant's land as a site to be protected, prohibiting among other things all construction. In 1984 the applicant brought proceedings for the enforcement of the judgment of the Regional Administrative Court and to be granted building permits. The *Consiglio di Stato* however dismissed the applicant in 1986, declaring that the 1976 judgment had been automatically enforceable and that the matter of building permits was not covered by that judgment. In 1978 the applicant had brought an action in the civil courts against the District Council, the Regional Authority and the Ministry of Public Works seeking compensation for a *de facto* expropriation. This claim was finally dismissed in 1985. The last judgment was deposited with the registry of the court in 1986.

Article 1 of Protocol No. 1 ECHR: Did the prohibition on building and the lack of compensation constitute an unjustified violation of the applicant's right to "peaceful enjoyment" of his property?

The mere approval of the land-use plan was sufficient to consider that the applicant's exercise of his right to the peaceful enjoyment of his possessions had been restricted. The restriction did not involve "deprivation of property" or "control of the use of property", but an interference with the applicant's "right of ownership". (§40) The decision of the Regional

Administrative Court had the effect of reinstating the legal situation at the time of the development agreement. The applicant could therefore have applied, but did not, for the authorisation necessary to continue with the housing scheme. There was never an absolute prohibition on building on all the applicant's land (§46). The conditions required in the Italian case-law for compensation (restrictions on a property must be severe and of unlimited duration so that they amount to a *de facto* expropriation) were not satisfied in the present case. In addition, the Town Planning Act made no provision for restrictions and prohibitions deriving from the land-use plans. Hence the applicant could not claim compensation for violation of a right. (§47) Accordingly the balance between the interests of the community and those of the applicant was not upset. Thus, the interference was justified. (§48)

No violation of Article 1 of Protocol No. 1 ECHR.

Article 6 §1 ECHR: Was the length of the compensation proceedings unreasonable?

The period to be taken into consideration ran from 1978, when the applicant instituted proceedings in the civil court, until 1986, when the final judgment was deposited with the registry. Having regard to all the circumstances of the case and the complexity of the facts and the legal issue involved, the length of the proceedings could not be regarded as excessive, in particular since the decisions concerned such a sensitive area as town planning and the protection of the environment and did have important repercussions on the Italian case-law concerning the distinction between a right and a legitimate interest. (§§61-62)

No violation of Article 6 §1 ECHR.

Case of Beaumartin v. France, Judgment of 24 November 1994, Series A No. 296-B

In 1973 the *Société immobilière du Karmat El Hadj*, a property company under Moroccan law, was deprived of an estate under a Moroccan Government Decree whereby agricultural land belonging to foreigners was nationalised. The applicants were the company's main shareholders, partly directly and partly through another company. Under a Franco-Moroccan Protocol concluded in 1974, the Moroccan Government paid

the French Government a lump sum as compensation for the damage suffered by the owners concerned. The Protocol stated that the French Government should be responsible for apportioning that sum among the beneficiaries, who should be natural French nationals that were individual or joint landowners or members of partnerships or companies, or that suffered the consequences of the nationalisation in any other capacity. In 1980 the interministerial committee responsible for apportioning this sum compensated the applicants as natural persons on the basis of the shares they held in the *Société immobilière* but refused to pay them compensation in their capacity as shareholders in the other company. In 1980 the applicants challenged this decision in the Administrative Court, which forwarded the file to the *Conseil d'Etat* in 1981. In 1986 the *Conseil d'Etat* stayed the proceedings until the Minister for Foreign Affairs had given his opinion on the interpretation of the Protocol. In 1989 the *Conseil d'Etat* held that it was bound by the minister's interpretation and found against the applicants.

Article 6 §1 ECHR: Was the length of the proceedings before the administrative courts unreasonable? Were the applicants given a fair hearing by the Conseil d'Etat *which held itself to be bound by the minister's interpretation of the relevant provisions?*

Applicability: The dispute originated in an expropriation measure and related to the principle of the right to compensation and/or the extent of reparation. It thus directly affected the applicants' property right, which was a civil right; the outcome of the dispute, which depended on the interpretation of the treaty, was directly decisive for a right of that nature. Article 6 §1 is accordingly applicable. (§28)

Compliance: (The length of the proceedings.) The period to be taken into consideration began with the filing of the application with the Administrative Court in 1981 and ended in 1989 when the *Conseil d'Etat* delivered its judgment. The applicants contributed to prolonging the proceedings for over a year. The case was difficult. However, there were long periods of stagnation of the proceedings in the *Conseil d'Etat*, the respondent ministry filed its pleadings after waiting for twenty months and the court took five years to hold its first hearing. This cannot be regarded as "reasonable". There was therefore a violation of Article 6 §1 in this respect. (§§30-33)

(The fairness of the proceedings/independence of the tribunal.) The *Conseil d'Etat* referred to a representative of the executive for a solution to the legal problem before it. The minister's involvement, which was

decisive for the outcome of the legal proceedings, was not open to challenge by the applicants, who, moreover, had not been afforded any possibility of giving their opinion on the use of the referral procedure and the wording of the question. Only an institution that has full jurisdiction and that is, *inter alia*, independent of the executive and also of the parties, can be considered a "tribunal". In the instant case the *Conseil d'Etat* did not fulfil those requirements. (§38) In sum the applicants' case was not heard by an independent tribunal with full jurisdiction and accordingly there was a violation of Article 6 §1 in this respect. (§§38-39)

Violation of Article 6 §1 ECHR.

Case of Stran Greek Refineries and Stratis Andreadis v. Greece, Judgment of 9 December 1994, Series A No. 301-B

Under a contract concluded in 1972 between the Greek State, which at the time was governed by a military junta, and Mr Andreadis, the latter undertook, through the Stran Company, to build and operate an oil refinery. The state failed in its undertaking to acquire the land on which the refinery was to be built. When democracy had been restored, the government, in 1975, terminated the contract under Law No. 141/1975 on the termination of preferential contracts concluded during the military regime. The Stran Company brought an action before the Court of First Instance for repayment of the costs it had incurred up to the time. The case was referred to arbitration, which was concluded in 1984 with an award partly in favour of the applicants. In 1984 the state challenged the award in the Court of First Instance claiming that the arbitration clause in the contract was void. The Court of First Instance and then the Court of Appeal found against the state, the latter stating that the termination of a contract, for whatever reason, did not bring an end to the power of arbitrators designated to hear disputes which had arisen while the contract was valid. In 1987 when the case was pending before the Court of Cassation the parliament passed a law (No. 1701/1987) which provided that all clauses including arbitration clauses in preferential contracts concluded under the military regime were revoked and that any arbitration award was void; it also provided that all claims arising from the termination of these contracts were time-barred. In 1989 the Court of Cassation held Law No. 1701/1987 to be constitutional and in 1990 it set aside the Court of Appeal's judgment and declared void the arbitration award.

Article 6 §1 ECHR: Had the enactment of Act No. 1701/1987 and its application in the applicants' case deprived them of their right to a fair trial ("equality of arms")? Was the length of the proceedings to determine the validity of the arbitration award unreasonable?

Applicability: (As to the Court's case-law, see the Allan Jacobsson judgment.) The applicants' right under the arbitration award was "pecuniary" in nature, as had been their claim for damages allowed by the arbitration court. Their right to recover the sums thus awarded was therefore a "civil right", whatever the nature of the contract under Greek law. It follows that the outcome of the proceedings brought in the ordinary courts by the state to have the arbitration set aside was decisive for a "civil right". Article 6 §1 is therefore applicable. (§40)

Compliance: In litigations involving opposing private interests, "equality of arms" implies that each party must be afforded reasonable opportunity to present his/her case under conditions that do not place him/her at a substantial disadvantage *vis-à-vis* his/her opponent. (§46) The intervention of the legislature took place at a time when judicial proceedings, in which the state was a party, were pending. (§47) The principle of the rule of law and the notion of fair trial preclude any interference by the legislature with the administration of justice designed to influence the judicial determination of a dispute. In the instant case, the state infringed the applicants' rights under Article 6 §1 by intervening in a manner which was decisive to ensure that the imminent outcome of proceedings in which it was a party, was favourable to it. (§§49-50) As regards the length of the proceedings to determine the validity of the arbitration: it cannot be regarded as excessive. (§55)

Violation of Article 6 §1 ECHR in respect of "fair trial"; no violation in respect of the length of the proceedings.

Article 1 of Protocol No. 1 ECHR: Did the adoption of Act No. 1701/1987 and its application have the effect of depriving the applicants of their property rights?

At the moment when Law No. 1701/1987 was passed the arbitration award conferred on the applicant a right in the sums awarded. The ordinary courts had held that there was no ground for annulment of that right. Accordingly, the right constituted a "possession". (§62) The a further actions to recover the sums in question. Thus, there was an interference with the applicants' property right. (§67) The international case law recognises that states have sovereign power to terminate

contracts concluded with private individuals provided they pay compensation ; the termination of contract does not however take effect in relation to arbitration clauses. (§72) According to the Court of First Instance and the Court of Appeal, the applicants' claims originated before the termination of the contract and were not invalidated thereby. (§73) The intervention in form of a law, Law No. 1701/1987, upset the balance that must be struck between protection of right to property and requirements of public interest. The interference was thus not justified. (§74)

Violation of Article 1 of Protocol No. 1. ECHR.

Case of Lopez Ostra v. Spain, Judgment of 9 December 1994, Series A No. 303-C

In 1988 a plant for the treatment of liquid and solid waste from tanneries in the town of Lorca in Murcia began to operate a few metres from the applicant's home. At its start-up, the fumes from it caused health problems and nuisance to many local people, including the applicant. This prompted the municipal authorities to temporarily evacuate the people living near the plant, and eventually, in the light of expert opinions produced by the relevant authorities, order partial cessation of its operations. Since certain nuisances persisted, the applicant made an application to the *Audencia Territorial* seeking protection of her fundamental rights. In 1989 and 1990, the *Audencia Territorial*, the Supreme Court and then the Constitutional Court found against the applicant. In 1989 relatives of the applicant, who lived in the same building as she did, brought proceedings against the municipality and the tannery company in the Murcia High Court alleging that the plant was operating unlawfully. The court ordered that the plant should be closed until licences required by law were obtained. However, the enforcement of this order was stayed following an appeal by the town council and the tannery company. In 1991, following complaints by the same relatives, criminal proceedings were instituted against the tannery company for an environmental health offence. The investigating judge decided to close the plant, but after an appeal lodged by the Crown Counsel, this measure was suspended for a period of two years. These cases were still pending at the time of trial before the European Court of Human Rights. In February 1992 the applicant and her family were rehoused in a flat in the town centre for which the municipality paid the rent. A year later they bought a house in a different part of town.

Article 8 ECHR: Did the local authorities' inactivity in respect of the nuisances constitute an unjustified violation of the applicant's right to respect for her home?

Severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely without, however, seriously endangering their health. A fair balance must be struck between the competing interests of the individual and of the community as a whole, whether the question is analysed in terms of a positive duty of the state or in terms of an interference by a public authority. In any case the state enjoys a certain margin of appreciation. The waste-treatment plant was built to solve a serious pollution problem but the plant itself caused nuisance and health problems to many local people. The town council reacted by evacuating the people and by closing part of the plant, but it could not be unaware that the environmental problems continued. The municipality failed to take the measures necessary for protecting the applicant's right to respect for her home and for her private and family life and, as well as the Crown Counsel, resisted judicial decisions to that effect, which contributed to prolonging the situation. The fact that for one year the municipality had borne the expenses of renting a flat in the town centre had not afforded redress for the nuisance suffered for three years nor for the inconveniences of moving house. Having regard to the foregoing, and despite the state's margin of appreciation, no fair balance had been struck between the interest of the town's economic well-being and the applicant's effective enjoyment of her right to respect for her home and her private and family life. (§§46-58)

Violation of Article 8 ECHR.

Case of Schouten and Meldrum v. the Netherlands, Judgment of 9 December 1994, Series A No. 304

Mr Schouten was the sole director of a company that provided physiotherapy. Mr Meldrum was a self-employed physiotherapist with a practice of his own. Their business included making specialist equipment available to other physiotherapists in return for a percentage of their turnover. In March 1987 and October 1987, respectively, the Occupational Association responsible for the Health Sector (BVG) took the view that the physiotherapists were employees and the applicants the social equivalent of employers, and required the applicants to pay contributions under various social security laws. In March 1987 and December 1987, respectively, the applicants lodged objections with the

BVG and requested formal confirmation of its decisions, with a view to lodging appeals. The BVG gave such confirmation on 9 December 1988 and 1 May 1989, respectively. In 1991 the Appeals Tribunal and the Central Appeals Tribunal dismissed the applicants' appeal.

Article 6 §1 ECHR: Was the length of the procedures before the BVG unreasonable? Did the fact that the BVG was able to delay the start of judicial proceedings constitute a breach of the right to a fair trial?

Applicability: This was the first time the Court had to rule on the applicability of Article 6 to a dispute concerning contributions under the social security schemes, as distinct from entitlements to benefits under such schemes (see the Feldbrugge, Salesi and Schuler-Zraggen cases). The features of private law (the personal and economic nature of the obligation *vis-à-vis* the state; the link between social insurance schemes and the contract of employment; the similarity between social security schemes and private insurance) dominate those of public law (the character of the legislation, even though state intervention is not in itself sufficient to characterise contributions payable under the schemes as falling within the public law sphere; the compulsory nature of the schemes; state responsibility for social protection). There was thus a dispute over "civil rights and obligations". Thus, Article 6 §1 is applicable. (§§49-60)

As regards the reasonable time of the length of the proceedings: The time criticised ran from when the applicants requested formal confirmation of the decision from the BVG until the BVG gave such confirmation, which amounted to nearly two years and one year and five months respectively. The case was of some complexity. The behaviour of the applicants was such that they could not be blamed in this case. The BVG was responsible for the time lapse. Moreover, the applicants were charged with interest on the sums, even for the period before the BVG gave its formal confirmations. The BGV had a great workload, but Article 6 obliges contracting states to organise their judicial systems so as to meet its requirements. There was thus a violation of Article 6 §1. (§§61-69)

As regards the fairness of the proceedings, it was not established that the applicants' position before the courts would have been any different had the delay in question not occurred; the applicants had alleged that the BVG had been able to select among the pending cases those which would be brought before the Appeals Tribunal and the Central Appeals Tribunal first, giving the opportunity to influence the case-law

of those tribunals. Nor did it appear that the applicants were prevented from presenting whatever arguments they wished. There was therefore no violation of Article 6 §1 in this respect. (§71)

Violation of the Article 6 §1 ECHR only as regards the "reasonable time" requirement.

Case of Gasus Dosier- und Fördertechnik GmbH v. the Netherlands, Judgment of 23 February 1995, Series A No. 306-B

In 1980 the applicant company, Gasus, a limited liability company under German law, agreed to sell a concrete-mixer to a company in the Netherlands, named Atlas, retaining ownership until the price had been paid in full. Atlas failed to pay more than part of the price. While the machine was being installed, the Dutch authorities, in accordance with the 1845 Tax Act, seized all movable goods on Atlas's premises for forced sale, in pursuance of execution writs issued by the tax collector for non-payment of taxes. Gasus was not informed of the seizure. At a meeting which no Gasus representative attended, it was decided to sell Atlas's assets to another company, B, for a lump sum which would then be divided between the tax authorities and a financial institution. The assets were transferred to B along with the concrete-mixer. In 1981 the applicant filed an administrative objection against the seizure with the tax authorities, but this was rejected. The applicant then initiated two sets of civil proceedings for the return of the machine and for damages, *inter alia*, against the tax authorities, but all claims were dismissed.

Article 1 of Protocol No. 1 ECHR: Did the seizure of the machine by the tax authorities and the sale of it unduly infringe upon Gasus's right to peaceful enjoyment of its possessions?

The seizure and sale of the concrete-mixer constituted an "interference" with the applicant's right "to the peaceful enjoyment" of a "possession". (§53) The interference was the result of the tax authorities' exercise of their powers under the 1845 Act, the purpose of which was to regulate the collection of direct taxes, including the enforcement of unpaid tax debts. It cannot be concluded that the 1845 Act is not aimed at "securing the payment of taxes" or that using the powers conferred by it constitutes a "confiscation". (§59) Article 1 §2 must be construed in the light of the principle laid down in the article's first

sentence (see the AGOSI judgment). Accordingly, an interference must achieve a "fair balance" between the interests of the community in general and the individual's fundamental rights. (§52) The power to recover tax debts against goods which were in a debtor's possession although owned by a third party was not an uncommon device to strengthen a creditor's position in enforcement proceedings, which is not per se incompatible with Article 1. Nonetheless the character of the legislation by which the state created such powers for itself is not the same as that of legislation granting similar powers to narrowly defined categories of private creditors. (§66) In assessing the proportionality of the powers used in the present case, the following elements have to be taken into consideration : It is apparent that whoever sells goods subject to retention of title is not interested so much in maintaining the link of ownership with the goods as in receiving the purchase price, and a state might therefore legitimately differentiate between retention of title and other forms of ownership. (§68) ; the applicant company was engaged in a commercial venture which by its very nature involved an element of risk and was sufficiently aware of this and could have eliminated the risk altogether by declining to extend credit or by obtaining additional security ; the owners of goods subject to seizure had knowingly allowed them to serve as furnishings of the tax debtor's premises ; under Dutch law, third parties whose goods are seized under the 1845 Act, might have the use that had been made of the powers conferred thereby adequately reviewed by a tribunal under a procedure which met the requirements of Article 6 §1 ECHR. (§73) The requirement of proportionality has therefore been satisfied. (§74)

No violation of Article 1 of Protocol No. 1 ECHR.

Case of Air Canada v. United Kingdom, Judgment of 5 May 1995, Series A No. 316

In 1987 an aeroplane worth over £60 million owned and operated by Air Canada, was found to contain 331 kg of cannabis resin at London Heathrow Airport. This was the latest in a series of alleged breaches of security involving Air Canada. Officers of the Commissioners of Customs and Excise seized the aircraft under the Customs and Excise Management Act 1979 as liable to forfeiture. No reasons were given to the applicant company at the time for the decision, either to seize the aircraft or to levy the penalty. Later the commissioners returned the aircraft on payment of £50 000. Air Canada challenged before the High Court the

commissioners' assertion that the aircraft was liable to forfeiture. The commissioners initiated condemnation proceedings before the same court to confirm, *inter alia*, that the aircraft was liable to forfeiture. The High Court ruled that the forfeiture was unlawful. This decision was overruled by the Court of Appeal in 1990, which condemned the aircraft as forfeited. Air Canada was subsequently refused leave to appeal to the House of Lords.

Article 1 of Protocol No. 1 ECHR: Did the seizure of the aircraft and return subject to payment constitute an unjustified interference with the applicant company's right to "peaceful enjoyment" of its possessions?

The seizure amounted to a temporary restriction of the use of the aircraft and did not involve a transfer of ownership. Since the sum required for the release of the aircraft had been paid, the condemnation decision did not deprive Air Canada of ownership. The interferences amounted to a "control of the use of property". (§§33-34) The interferences were in conformity with English law and conformed to the general interest in combating international drug trafficking. (§§40-42) It would have been open to the applicant company to have instituted judicial review proceedings to challenge the failure of the Commissioners of Customs and Excise to provide reasons for the seizure of the aircraft. The scope of judicial review under English law was sufficient to satisfy the requirements of Article 1 §2. (§44) Taking into account the large quantity of drugs, its street value, as well as the value of the aircraft, the requirement to pay £50000 was not disproportionate to the legitimate aim pursued. (§47) A fair balance had been achieved between the demands of the general interest of the community and the requirement of the protection of the individual's fundamental rights. There was thus no violation of Article 1 of Protocol No. 1. (§48)

No violation of Article 1 of Protocol No. 1 ECHR.

Article 6 ECHR: Was the applicant company subject to a criminal penalty or did the seizure amount to a determination, without court proceedings, of the company's civil rights and obligations?

The fact that the property rights of the applicant company were adversely affected could not itself lead to the conclusion that a "criminal charge" had been brought against it (see the AGOSI judgment). (§54) As regards the determination of civil rights and obligations, the applicant company had access to court since the commissioners (once the

seizure of the aircraft had been challenged) were required by law to take proceedings for forfeiture. Furthermore, it was open to the applicant company to bring judicial review proceedings contesting the commissioners' decision to require payment as a condition for the return of the aircraft. (§§57-63)

No violation of Article 6 §1 ECHR ("civil rights"); as regards "criminal charge": not applicable.

Appendix 2 : Examples of implementation of the principles in Council of Europe member states

Contents

The countries from which examples are given are marked in italic print[1]

1. The information given in this appendix was provided in 1994/95 by national delegations of the countries concerned and compiled and edited by the Council of Europe Secretariat (Directorate of Legal Affairs).

Chapter 1 – Scope of the principles, rule of law background and definitions of the terms used

Austria (definition of the "person(s) concerned" by an administrative act)

The law affords rights to individuals to protect and further their interests; however, it does not, and cannot, acknowledge the individual interests of each person; this means that certain interests take precedence whilst the interests of other individuals are neglected. Where such conflict of (public and/or private) interests is to be decided by an administrative authority, the legislator will not only advise the authority how to solve the conflict, but also provide for a procedure, in the course of which, the persons whose interests are deemed to be relevant can look after their interests (even if they, as the case may be, have little chance of succeeding). Frequently the law is designed to exclusively assert the public interest *vis-à-vis* individuals without thereby granting rights to other individuals that might be interested in the implementation of the law, for instance of administrative penal law.

Where express provisions are lacking, it is up to the authority applying the law, in the last instance the Administrative Court, to decide whether, in the light of the given legal provisions, certain interests of certain persons are legally relevant. Only such persons are entitled to require compliance by the authority with (only) the respective legal provisions. In general, for instance, economic interests are, as such, not legally relevant.

For reasons of legal security, laws frequently specify which persons are entitled to participate in a procedure and, sometimes, even which provisions grant (or do not grant) rights to them. For example, in procedures concerning authorisations for industrial plants, "neighbours" are entitled to participate in the proceedings, the term "neighbour" being defined as any person whose life, health or property could be endangered by the establishment, the existence or the operation of the plant, or who could be bothered by its emissions, with the exclusion, however, of persons staying only temporarily near the plant, but including the holders of accommodations, hospitals, schools etc., as regards the protection of persons regularly staying there.

Neighbours are to be summoned (in general) not individually, but by announcements posted in the adjacent houses and on the municipal notice board. Only neighbours who object to the permit before the end of the oral hearing retain party standing throughout the rest of the procedure.

The building regulations of the Austrian *Länder* usually specify in detail who are the "neighbours" within the meaning of the respective laws (for example, the owners of real property within 15 meters of the building), and which provisions grant rights to them (thus in some *Länder* neighbours have rights as regards fire protection standards, while in other *Länder* they do not).

Party standing is often granted expressly to authorities or institutions such as those established for the protection of special interests, for example the professional corporations or the municipality concerned and (in an environmental context) citizens' initiatives.

Greece (definition of "administrative law" and "administrative decisions")

Administrative law is a particular branch of public law containing the special legal rules which are applicable to the administration. The criteria for classifying legal rules within the corpus of administrative law are :

– their applicability to the administration ;

– their specific nature as compared with rules of private law, because they deal with situations which private law regulates either not at all, or in a different way.

The rules of administrative law relate to :

– the legal means through which the administration may act ;

– the organisation and operation of the state and other public corporate bodies, their staff and their assets and liabilities ;

– judicial control of their activities, etc.;

– the activity and the assets and liabilities connected with the exercise of public power by public corporate bodies.

But what is the specific nature of the rules of administrative law ? They relate directly or indirectly to the exercise of public power, that is to say, to the power of administrative bodies to impose legal rules unilaterally, independently of the will of the public, or contrary to it (by imposing an obligation to behave in a particular way).

The characteristics of private law, by contrast, are the principles of equality of will, and freedom to contract. The activity of the state and other public corporate bodies is expressed through judicial decisions (which fall into the two broad categories, administrative and contract) and material operations.

Under the definition of "administrative decision" adopted by Professor E. Spiliotopoulos: "The administrative decision is the demonstration of the will of an administrative body which may or may not follow a certain procedure and which imposes a legal rule unilaterally. It is therefore the production of a legal rule solely at the will of the administrative body."

Consequently, an administrative decision is the administrative body's legal means of exercising public power.

It is possible to create individual or impersonal rules, general or specific in content, by administrative decisions. They may be divided into two broad categories: individual administrative decisions and regulatory decisions. The latter gives rise to a "general and abstract" legal norm.

Chapter 2 – Substantive principles

I – Lawfulness *(Austria, Greece, Slovenia, United Kingdom)*

Austria

Article 18, paragraph 1 of the Austrian Federal Constitutional Law (B-VG) stipulates:

"The entire public administration shall be based on law."

The Austrian constitutional doctrine bases the principle of lawfulness on this sentence. Special attention is given to the requirement of the law being sufficiently specific with respect to the behaviour of administrative authorities: According to the case-law of the Constitutional Court, the law must be as specific as necessary for enabling the Constitutional and Administrative Courts to assess whether administrative acts are in line with the respective legal provisions. If the law entrusts an administrative authority, for instance a federal minister, with the issue of the detailed regulations, it must in any case determine all the essential elements of their contents.

The term "law" means an act of parliament published in the official law gazette. The considerably strict case-law of the Constitutional Court is one of the reasons for the high production of laws (before the accession of Austria to the European Union, every year more than 100 laws on federal level, an average of about twenty to thirty laws in each *Land*, plus about forty international treaties ranking as laws were adopted).

In compliance with the case-law already mentioned, the legislature must not use wordings such as "as a general rule" or "except of special cases" without indicating the exceptions that it has in mind. Not only the sphere of competence, but also the powers conferred on an administrative authority, must be laid down in detail by law.

On the other hand, the constitution allows for discretion to be conceded by the law to the administrative authorities since, according to Article 130, paragraph 2 B-VG, no illegality exists where legislation forbears from the establishment of a binding rule on an administrative

authority's conduct, leaving the determination of such conduct to the authority itself, and the authority has made use of this discretion in the spirit of the law (such discretion is frequently indicated by the law in saying that the authority "may" [ie., need not necessarily] act in a certain way).

This, however, means according to the case-law of the Constitutional Court, that a law is unconstitutional if the "spirit of the law" by which the administrative authority is guided when choosing among the possibilities that the law has left to it, cannot be recognised.

The Constitutional Court (which also has the power to repeal laws or individual legal provisions with a view to removing unconstitutionalities) has been criticised for not giving a precise definition of the degree of determination that must be achieved by the law. The court has, however, derived some more principles from the general rule of determination : When establishing rules interfering, or likely to interfere, with constitutional rights (in so far as they are subject to restrictions to be prescribed by law) the law must describe the restrictions with particular distinctness, depending also on the intensity of the interference at stake. The necessary degree of determination is also dependent on the subject to be regulated : In tax law and in administrative penal law, the court recognised a specific need for exact legal determination (so that, for instance, a sanction on "violation of the moral-religious sentiment" was disapproved). As regards, for example, the regulation of the economy (such as that of prices) or regional planning, the court tolerated rules which were rather unspecific as to the result of their application, but required that even general administrative regulations implementing such rules be based on a fact-finding procedure to be determined by law.

As regards the scope of the principle of lawfulness, the case of conflicts between legal provisions belonging to different sources of law deserves attention. Obviously laws must comply with the constitution and so must administrative regulations and decisions with laws. This implies a hierarchy of norms ; which, however, does not mean that an administrative authority or a court is entitled to give precedence to the norm higher in rank, refusing to apply a law deemed unconstitutional or a regulation deemed unlawful. Such questions can be solved only by the Constitutional Court. Thus the constitution obliges administrative authorities to keep acting unlawfully – from one point of view – by applying, for example, administrative regulations contrary to statute law until such regulations are repealed by a judgment of the Constitutional Court.

Greece

The principle of lawfulness has a special place in Greek administrative law. In accordance with this principle, the administration may not act either *contra legem* or *praeter legem*, but at the same time it must act *secundum legem*, in compliance with and within the framework of the rule of law. This principle emanates from the provisions of the constitution which define the law-based state. According to the council of state's case-law, the administration is always bound to subordinate its action to the law. It can only exercise regulatory powers delegated by a formal law adequately specifying the object and extent of the delegated powers.

Every administrative act of an individual nature must be based on a law in the material sense. Greek administrative law does not tolerate autonomous action by the administration. There is, however, an exception as regards "acts of government". This category of acts is excluded from control by way of appeal for setting aside. They are specified only in a list of council of state judgments. Case-law has established that appeals are not receivable against:

– acts relating to the country's international relations; and

– acts relating to relations between the legislative and executive powers or to national security, etc.

There is no place in Greek administrative law for the application of the law of necessity other than within the constitutional framework or in application of the principle of "legitimate (licit) unlawfulness".

The council of state has very recently given two decisions sanctioning the ministerial practice by which ministers on certain occasions exercise regulatory powers by decree and without legislative delegation; they are then submitted to parliament, which validates them with retroactive effect.

According to these decisions, ministerial edicts which violate the constitution cannot be validated retroactively. The rules thus established can therefore be applicable only in the future.

The administration's power to take regulatory decisions (its regulatory power) is specified in Article 43 of the Greek Constitution of 1975. It lays down that:

– The president of the republic shall issue the decrees required for the execution of laws; he may never suspend the application of laws nor exempt anyone from their execution.

– On the proposal of the competent minister, the issuance of regulatory decrees shall be permitted by virtue of special authorisation by law and within the limits of such authorisation. Authorisation for the purpose of issuing regulatory acts by other administrative agents shall be permitted in cases concerning the regulation of specific matters or matters of local interest or of a technical and detailed character.

– Under laws voted by the plenary sitting of parliament, authorisation may be granted for the issuance of regulatory decrees for the regulation of matters specified by such laws. These laws shall outline the general principles and directives of the regulation to be followed and shall set time-limits within which the authorisation must be used.

The principle of lawfulness is reinforced by Article 95 of the present (1975) constitution which establishes the competence of the Greek council of state to annul administrative decisions which violate this principle. The competence of the council of state comprises :

– The annulment on application of executive decisions of administrative authorities where they have exceeded their powers or are in breach of the law ;

– Appeal on application against the decisions of administrative tribunals if they have exceeded their powers or are in breach of the law ;

– Judgment on administrative disputes which are submitted to it by virtue of the constitution or the laws ;

– The drafting of all regulatory decrees.

The law may empower ordinary administrative tribunals on another level to judge certain categories of cases within the jurisdiction of the council of state, though reserving judgment to the council of state in the final instance.

The administration is bound to comply with the council of state's decisions to set aside. The law specifies that any offending (administrative) body shall be liable for any breach of this obligation.

Slovenia

The principle of lawfulness, one of the basic principles of the Act on General Administrative Procedure (Official Gazette of the SFRY, No. 18/65, 24/65, 4/77, 11/78, 32/78, 9/86, 47/86) requires that the

state authorities, companies, other organisations, communities and individuals, acting in administrative matters, take decisions on the basis of law or other regulations of state authorities and of general acts of companies and other organisations, themselves issued on the basis of public authorisation. All the decisions of administrative authorities, whenever deciding on administrative matters, shall have basis in law or any other regulation or general act. This means that the authorities shall carry out the procedure in administrative matters under the rules of general or special administrative procedure (procedural lawfulness) and take decisions in accordance with the material regulation (material lawfulness). Thus, the rights, obligations or legal benefits may be recognised, imposed, expanded, narrowed or changed only to the extent and in the way it is defined by law or some other regulation.

The principle of lawfulness originates also in the Constitution of the Republic of Slovenia (Official Gazette of the RS, No. 33/91), which defines in its Article 153, paragraph 4, that all individual acts and activities of the state authorities, local community authorities and of the bearers of public powers must have basis in law or in a legal regulation.

The authorities that carry out administrative procedures must always strive for strict implementation of the basic principle of lawfulness, to which all other principles of administrative procedure are subordinated. Legal means should be made to enable a party or a person involved in a procedure, or any other person affected by the decision, to contest the written order of an administrative authority in cases of breach of lawfulness, that is, decisions taken contrary to the rules. Legal remedies defined by the constitution and by legislation enable the affected person to challenge the conformity of a concrete administrative act (a rule or a decree) with the law or other regulations.

United Kingdom

Every act of an administrative authority which affects the legal rights, duties or liberties of any person must be based in law. There are two main strands to the principle of lawfulness. First the authority must act within the powers conferred on it by law, and must comply with the specific requirements of the authorising law. A duty to consult or to observe time-limits might be examples. Secondly it must abide by certain other principles of law. These include (1) the two elements of natural justice : the rule that a person has a right to be heard and the rule against bias ; (2) the prohibition on exercising a power for an improper purpose ; (3) the rule against unlawful sub-delegation of a decision-making power, for example, to another minister or to an outside body.

Although the United Kingdom has no written constitution, certain principles may be said to be constitutional principles. For example, no money may be levied to the use of the Crown without the concern of parliament.

Where a court decides, for example, that a power has been used for an improper purpose, the administrative authority must abide by that decision in its future exercise of the power, until such time as the legislation is changed so as to legitimise the use of the power for that purpose.

There are a number of administrative rules, such as codes of practice, instructions to officials and interpretative guides. Their legal status, and the weight to be attached to a breach of them, will depend on the relevant statutory provisions and judicial decisions.

The courts have said that "it is a fundamental rule of English law that no statute shall be construed so as to have a retrospective operation, unless its language is such as plainly to require such a construction." (Lindley, LJ, in Lauri v. Renad [1892] 3 Ch. 402 @ 421.) The rule applies even more strongly where the statute might impair an existing right or penalise an act done before its passing.

II – Equality before the law *(Austria, Greece, Hungary)*

Austria

Article 7, paragraph 1 of Austrian Federal Constitutional Law (B-VG) stipulates:

"All nationals are equal before the law. Privileges based upon birth, sex, estate, class or religion are excluded."

This right has, in practice, turned out to be the most important constitutional right. From it the Constitutional Court derived a general requirement of objectivity directed also to the legislator. According to this case-law, only distinctions justified with regard to the matter at stake are admissible. The legislator can, however, take average circumstances as a basis and is conceded a political latitude. There is no special protection of duly acquired rights, however, and retroactive laws may be contrary to equality by disappointing the "legitimate trust" individuals are entitled to place in a present legal situation. Laws become unconstitutional as a consequence of changes in the factual situation which require a different regulation.

As regards administrative acts, grave legal mistakes on behalf of the authority are also qualified as contraventions against the rule in question and so are actions against good faith.

Due to the concept of a general rule of objectivity and "fact-mindedness", no special importance is given to the aspects of sex etc., which are expressly mentioned in the constitutional text, since distinctions "justified by the matter" would not constitute "privileges". A few years ago, the granting by law of widows' pensions while denying widowers' pensions was disapproved (because legislators were expected to take into account the increase in women's employment and legal equality in matrimonial law) by the Constitutional Court as well as a lower retirement age for women. The provisions on prohibition of women's night-work, on the other hand, were upheld.

The constitutional provision quoted initially offers protection only to nationals. A separate constitutional law, however, prevents the legislative and executive powers from any distinction on the sole grounds of race, colour, national or ethnic origin, allowing, subject to Article 14 ECHR, the assigning of special rights or obligations to Austrian nationals. This constitutional law is understood as impeding, in particular, any distinction lacking justification within the meaning mentioned above among non-nationals (mutual preferential treatment of nationals of certain states on the basis of international treaties can be expected to be justified).

Greece

This constitutional principle, according to which "citizens are equal before the law", is a strict legal rule, the transgression of which, is unconstitutional. The principle under discussion relates not only to those who apply the law but also to the legislative authority itself and requires not only equality before the law but also equality of the law itself, in the sense that the law must introduce equal rights for citizens. Distinctions based on differentiation cannot be excluded, but the constitution forbids arbitrary distinctions which create privileges and favours for no plausible reason.

Article 4 of the present constitution provides that:

- All Greeks are equal before the law;
- Greek men and women have equal rights and equal obligations;
- All persons possessing the qualifications for citizenship as specified by law are Greek citizens. Withdrawal of Greek citizenship shall be permitted only in case of voluntary acquisition of another

citizenship or of undertaking service in a foreign country contrary to the national interests, under the conditions and procedure more specifically provided by law ;

– Only Greek citizens shall be eligible for public service, except as otherwise provided by special laws ;
– Greek citizens contribute without distinction to public charges in proportion to their means ;
– Every Greek capable of bearing arms is obliged to contribute to the defence of the fatherland as provided by law ;
– Titles of nobility or distinction are neither conferred upon Greek citizens nor recognised.

The principle of equality obliges the legislator to grant equal treatment to citizens in the same circumstances. Consequently, this principle is not violated "if the law grants what is due to each person according to his qualities or special capacities".

This principle also constitutes a legal limitation on the administration. The principle requires that the goods and services produced by state agencies or other public corporate bodies should be produced in compliance with legislation and with the principle of equality (the equality of individuals *vis-à-vis* the public services). Parties are equal before the courts, having the same rights and duties and the same means of defending their position (equality of parties).

Hungary

The Hungarian Constitution, besides guaranteeing various human rights including the principle of equality before the law, specifically forbids discrimination of any kind, such as on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.

Equality before the law is also a fundamental principle in Hungarian administrative law. It provides that in administrative procedures every person, whether Hungarian or foreigner, is equal before the law, and that their cases shall be treated and decided upon without any discrimination or partiality.

To ensure the implementation of this principle, the act provides that everyone can use his or her native language in an administrative procedure, and that no one may suffer any disadvantage for having no knowledge of Hungarian.

Moreover, the administrative authority is obliged to provide adequate information to the parties to the administrative procedure in order to ensure the practice of their rights.

III – Conformity to statutory aim *(Germany)*

Germany

In German administrative law, the conformity of statutory aim is a very important principle. It refers to the way administrative authorities use their discretionary powers. The Code of Administrative Procedure and the Code of Procedure for the Administrative Courts lay down that even where they enjoy discretionary powers, the administrative authorities have to respect the conformity of their administrative acts to the statutory aim and the principle of lawfulness. In case of breach of these principles, the administrative acts can be annulled by the (higher) administrative authorities or by the administrative courts (for example, the refusal by authorities to deliver a licence for the sale of goods in public premises for irregular reasons such as private interests of civil servants or public interests without reference to the claimed licence).

IV – Proportionality *(Ireland)*

Ireland

It should be kept in mind that there is no code of administrative law in Ireland. Though many statutes lay down rules within their respective fields of application which belong to the sphere of administrative law, and though these rules adhere to the principles which have been recognised by the courts as applicable to that sphere, there are many areas in which relations between the individual and the administration are engaged in which judge-made law, derived from the Constitution of Ireland and from the common law rules of natural justice, is the source of the rights, powers and duties to which these relations give rise.

Furthermore, subject only to specific exceptions of a more or less *ad hoc* nature, the Irish courts, in judicially reviewing administrative acts, do not act as courts of full appeal from the administrative authorities. They are confined to reviewing the legality of such acts and to granting appropriate relief, most usually by quashing the contested act (*certiorari*), by making an order of prohibition, or by ordering the administrative

authority to take specified action (*mandamus*) and by granting ancillary relief by way of declaration, damages or injunction or a combination of such reliefs. *Certiorari*, prohibition and *mandamus*, as well as relief by way of injunction, are discretionary remedies, but the courts exercise their discretion according to well-established principles. In a suitable case the court will grant an interlocutory injunction. These reliefs are now available by means of streamlined procedures for judicial review which were introduced in 1986. The new procedures have proved a highly effective means of bringing the administration rapidly before the courts.

The principle of proportionality as defined in the handbook is well established and recognised in the laws of the civil law countries and has been accepted and applied on numerous occasions by the Court of Justice of the European Communities in the law of the European Union.

By contrast, the principle of proportionality has not traditionally been given express recognition in the common law countries.

However, recent judicial decisions indicate that the principle of proportionality is gaining gradual recognition in the Irish Courts. There appear to be three reasons for this:

First, it is possible to regard the principle of proportionality as an aspect of "reasonableness" which is one of the tests upon which the courts may assess the validity of an administrative act under the principles defined in the "Wednesbury" decision of the English Court of Appeal in 1948, which have effectively been adopted by the courts of most, if not all, other common law countries. The concept of "reasonableness" does not involve the court's substituting its own decision for that of the administrative authority. In applying the principles laid down in that case, the courts in Ireland may be said to adopt a concept of "reasonableness" which encompasses proportionality, or the lack of it, in an administrative act.

Second, the Constitution of Ireland (Article 40.1) lays down the principle of equality before the law. This constitutional principle is a suitable vehicle for the recognition in Irish law of the principle of proportionality in the sense that where differences of treatment occur, they may have to be justified by the application of what is in effect a proportionality test having regard to the differing circumstances of the cases concerned.

Third, the principle of proportionality has in any event entered Irish law through the law of the European Communities.

The concept of proportionality has been referred to in judgments in purely domestic matters as diverse as the application of the immigration laws to a case where the deportation of the applicant would involve breaking up his family, and the question whether the revocation of a tour operator's licence would cause damage to the licensee which would be disproportionate to the degree of his default under the relevant legislation. Proportionality has even been referred to as a constitutional principle in the sense that the punishment must be fitted to the crime (and indeed to the criminal). It thus appears now to be formally recognised by the courts in the spheres of constitutional, criminal and administrative law. This is not surprising if one views it as an aspect of "reasonableness".

V – Objectivity and impartiality *(Finland, Ireland)*

Ireland (objectivity)

This requirement is that all factors relevant to a particular decision should be taken into account, while giving each its proper weight. Factors which are not relevant must be excluded from consideration in the taking of an administrative act.

The principle is applicable irrespective of whether the powers exercised by the administrative authority are discretionary or not but it is in the context of the exercise of discretionary powers that its application seems most likely to arise in practice.

It has also to be recognised that there is a particularly close link between the limits of the purpose for which a statutory power has been granted on the one hand, and the factors which are relevant to the exercise of that power on the other hand. The court may or may not have the benefit of explicit guidance contained in the relevant statute as to what considerations are or are not relevant. To the extent that such explicit guidance is not given, or, where it is given, is not exhaustive of such considerations, the court will have to consider the purposes for which the statutory power has been granted in order to decide what considerations must or may be taken into account by the administrative authority and what considerations may not be taken into account.

Thus, "objectivity" and "conformity to statutory aim" (the principle that an administrative act must not be taken for an improper purpose) to some extent overlap.

The following are examples of cases in which the requirement of objectivity either appears from the relevant Irish law or has been applied by the courts:

- The Local Government (Planning and Development) Acts lay down that a planning authority, in dealing with an application for planning permission, is restricted to considering the proper planning and development of the area of the authority (including the preservation and improvement of the amenities thereof), regard being had to the provisions of the statutory development plan, the provisions of any special amenity area relating to the said area and to other specified matters. Failure to address these considerations, or the taking into account of other considerations extraneous to them, would render a decision of the planning authority liable to be quashed by the courts.
- In an immigration case, in which the proposed emigrant had been refused "leave to land" (a necessary preliminary to consideration of a request by the applicant to be admitted to the state as an immigrant) the High Court ruled that the applicant's inadequate knowledge of English was an irrelevant factor which the administrative authority should have not have taken into account in reaching its decision.
- A similar refusal on the ground that the applicant would be unable to support himself was upheld.
- The Minister for Defence exercised a statutory discretion to reduce the applicant's statutory army pension because the applicant had received £60000 damages in a civil action for the injury which was the basis for the pension. The decision was quashed because the minister had ignored representations from the applicant which demonstrated that because of the circumstances of his case, substantial deductions from the sum of £60000 should have been made for the purpose of calculating the true value to the plaintiff of the award of damages and therefore the fair and reasonable amount of any reduction of his pension.

Finland (impartiality)

In Finnish administrative law, the principle of impartiality has traditionally been seen as closely linked with the principle of objectivity. Public administration has primarily been connected with an emphasised demand for objectivity and impartiality. In the background lies the

idea of administrative authorities and officials doing their duties without any unacceptable external influences or striving for their own benefit. The public's confidence in the administration and its officials is also built on this concept.

In Finnish legislation, there has been an attempt to secure the impartiality of administration in different ways. The most important provisions in this aspect are the ones concerning disqualification. Disqualification means the existence of a relationship between an official and a certain matter or its parties which may put the trust in the official's impartiality at risk. A disqualified person may not consider the matter or be present at the proceedings, except where because of the nature of the matter the disqualification cannot affect the decision, or where the proceedings cannot be postponed.

There are also provisions intended to ensure the impartiality of the performance of official duties in the legislation concerning officials and in criminal legislation. An official cannot, for example, receive economic or other benefits if this can weaken the confidence in him or the authority in question. Also, an official cannot have a secondary occupation that might endanger confidence in the impartiality of his performance of official duties.

Disqualification of officials

The provisions concerning the disqualification of officials are included in the Administrative Procedure Act of 1982 (598/82). The provisions concern both government officials and municipal officials. Section 10 of the Administrative Procedure Act lists the grounds for disqualification of an official, that is, when an official shall be considered disqualified.

Firstly, an official shall be disqualified if he or his close relative is a party. In this case, disqualification occurs if the decision in the matter has an immediate effect on the interests, rights or obligations of the official or his close relative. An official is, for example, disqualified to appoint a member of his family or another close relative to an office, to grant an economic benefit or to make any other decision (for example, decide on the granting of a driver's licence).

Secondly, an official shall also be disqualified, if he or his close relative can be expected to derive particular benefit or suffer particular loss as a result of a decision in the matter. This means that disqualification can occur even if the decision has only an indirect effect on the official or his close relative. A planning decision in a municipality, for example, can have an effect on the value of land owned by an official or his close relative.

Thirdly, if an official or his close relative acts as counsel to or as representative of a party or of a person who can be expected to derive particular benefit or suffer particular loss as a result of the decision in the matter, disqualification exists. According to this provision an official is disqualified to handle, let us say, a matter concerning his underage child. Disqualification would also occur when a close relative of the official acts as counsel for or represents the underage child. In cases like these, the official has to withdraw from the handling of the matter.

Fourthly, disqualification occurs if an official is in an employment relationship or in a commission relationship relating to the subject of the proceedings with a party or a person who can be expected to derive particular benefit or suffer particular loss as a result of the decision in the matter. In these cases a situation of disqualification can occur when an official, for example, has a secondary occupation in a company whose matter he has to consider as a part of his official duties.

Fifthly, an official is disqualified if he is a member of the board of directors of a comparable body, or the managing director, or in a comparable position in an entity, foundation or institution under public law which is a party or which can be expected to derive particular benefit or suffer particular loss as a result of the decision in the matter. The public's confidence in the impartiality of the officials is undermined especially when, in a matter handled by an official, a legal person – one of the managers of which is that same official – is a party or has a significant and real interest in the matter. An official is, for example, disqualified to grant aid to a company of which he is a member of the board of directors. If the official owns shares in the company, it does not, however, disqualify him.

Finally, the grounds for disqualification mentioned above are completed by a so-called general clause. According to the clause, an official is disqualified also if confidence in his impartiality is at risk for any other particular reason. Such a particular reason which might endanger the impartiality of an official would be, for example, close friendship or a dispute with a party.

The provisions on disqualification do not as such deny officials the right to be active in associations or participate in other activities. Such a general commitment does not disqualify an official. Disqualification always occurs in a certain, concrete situation. As a rule, the official himself has to find that he is disqualified to handle a matter. If an official is disqualified, the matter has to be given to another official for handling.

Disqualification in local government

Disqualification also concerns the elected municipal officials, who are provided for in the Local Government Act of 1995. In the act, a difference has been made between elected councillors and other elected representatives. A councillor in the municipal council is disqualified to handle a matter which concerns him personally or his close relative. The concept of "personally" has been interpreted quite literally : only in matters that expressly concern himself and his close relative is he disqualified. Membership of the managing bodies of a company or an association does not make an official disqualified to handle matters concerning them if he does not *de facto* have a dominant position in the organisation.

The provisions mentioned above are applied to elected municipal representatives, such as members of the municipal executive board or the municipal boards. In Finland, the municipal manager is considered to be a municipal official to whom the mentioned provisions of disqualification are applicable.

There are differences between the councillors and other elected representatives when it comes to the effect of disqualification. It is accepted practice that a councillor can participate in the handling of a matter concerning himself and address the meeting. But he cannot participate in the making of actual proposals and decisions. Other elected representatives, on the other hand, can neither be present nor participate in the handling of such a matter. This means they are ruled by the same provisions as officials.

Plans for reform

Plans are being made in Finland for a revision of the provisions on disqualification. The debate in this matter has risen from the big reform of public administration that was initiated in the late 1980s. New kinds of administrative units have been introduced in central state administration and the provision of public services has been transferred to state-owned companies and commercial enterprises. As a result of the reform, the participation of especially different ministry officials in the administrative bodies of offices, institutions and corporations subordinate to the ministries, has grown. This has led to disqualification problems, which in their turn have endangered the impartiality of the administration and weakened the citizens' trust in the appropriate use of public power. There have been similar problems when the provision of services and duties in municipal administration has been assigned to commercial enterprises.

It is intended to solve the present problems by revising the provisions on disqualification in the Administrative Procedure Act of 1982. The primary idea, however, has been not to revise the provisions more than required to ensure impartial administration.

Ireland (impartiality)

Partiality must be distinguished from bad faith. Bad faith implies a dishonest or corrupt motive ; a lack of impartiality implies bias. The two may overlap.

The requirement of impartiality applies to the administrative authorities as well as to the courts. It applies to the former irrespective of whether they are exercising the (limited) judicial functions which are sometimes conferred on them in specific areas, or exercising quasi-judicial functions, or exercising purely administrative functions.

The courts have most often required that a "real likelihood" of bias be demonstrated for the principle to be invoked successfully against an administrative act, but in some cases a "reasonable suspicion" of bias has been held to be sufficient, on the basis that justice must not only be done, it must also be seen to be done. The courts have applied the principle that justice must be seen to be done, in cases where a question of possible bias has been raised, with particular strictness to their own functions. As for administrative authorities, the "reasonable suspicion" test seems more likely to be applied in a case where such an authority is exercising a judicial or quasi-judicial function than when it is exercising a purely administrative function.

The assessment of the likelihood or possibility of bias is directed to the personnel concerned in the taking of the act. A decision of an authority is liable to be struck down if even one of its constituent members involved in taking the contested act is considered to be affected by bias. The following are considerations which are liable to be viewed by the courts as indicating bias :

- The fact that a member of the authority has a material (for example, a pecuniary) interest in the decision.
- The existence of a family, business or other close personal relationship (or enmity) between such a member and a person having an interest in the decision.
- The prior involvement of such a member in a previous decision in circumstances which indicate that he has prejudged the case.

– The existence of prejudices with regard to the matters at issue which indicate bias.

The maxim *nemo iudex in causa sua* is not, however, as a rule, applied in such a way as to prevent servants of an administrative authority – provided that they discharge their functions fairly and impartially – from participating in the adoption of an administrative act by the authority on the sole ground that the authority has itself an interest, by virtue of its administrative responsibilities concerning the policy of the enabling legislation, in the decision it has to take.

Under the Ethics in Public Office Act, 1995, which applies to the discharge of all official functions, not merely to the taking of administrative acts, civil servants occupying designated positions must disclose, according to procedures laid down in the act, all their material interests (including those of their families) which are of such a nature that they could materially influence the performance of their official functions. Disclosure is to the appropriate "relevant authority" for the particular person subject to the obligation. The obligation of disclosure also arises where the person concerned knows that he has a material interest of the kind mentioned in a particular case. There are parallel provisions for ministers and members of the *Oireachtas* (parliament). The act establishes a Commission to receive and investigate complaints of non-compliance.

VI – Protection of good faith and vested rights
(Greece, Netherlands)

Greece

The general principle of good faith, which stems from private law, is also used in the case-law of the *Conseil d'Etat* of Greece (the Supreme Administrative Court of the country) as regards public law (for example, law on social security). As the acts taken by the Social Security Fund are administrative acts in Greece, the administrative judge has jurisdiction.

According to the case-law, the general principle of good faith must characterise the relations between the Social Security Fund and the persons insured.

Particularly, the revocation even of an illegal act taken by the Social Security Fund, and which is favourable to the person insured, is not admitted where a long time span has elapsed since that act has been taken and where the person insured, trusted in good faith in the recognition of

a right obtained by that act. When, for example, a person has regularly paid contributions to the Social Security Fund, erroneously believing that this instance is competent for his case, the fund cannot refuse to pay benefits to that person especially for old age or incapacity, even thought not competent, the fund must pay the benefits claimed.

Netherlands

The principle of good faith, as formulated in the handbook, includes several elements which are strongly linked. If an administrative authority makes promises to a person or raises expectations – for instance that the person will get a building permit – the person concerned may generally trust that the authority fulfils its promise or meets the expectations. If an authority, after weighing all relevant interests, has taken a decision in favour of a person concerned, it may not withdraw or change that decision without good reasons. In general, administrative authorities must be consistent in their behaviour.

Promises and expectations

For answering the question if a certain promise must be kept or an expectation must be met, several aspects are important in practice. Has the promise been made or have the expectations been raised by the administrative authority itself or, for instance, by a civil servant or by another administrative authority than the competent one? To what extent will the authority be bound by a promise made by a civil servant? To what extent may a promise be honoured *contra legem*? To what extent may interests of third parties influence the decision to honour a promise or to meet an expectation?

The principle of good faith as such has not been laid down in a specific act in Dutch law but rather in the case-law of the administrative courts. The wordings differ between the courts. The Central Council of Appeal (*Centrale Raad van Beroep* – the appellate court competent for disputes concerning the legal status of civil servants and for disputes concerning social security and what is connected with that) often states that "expectations, based on good grounds, shall, if in some degree possible, be honoured". The Industries Appeals Court (*College van Beroep voor het Bedrijfsleven* – the court competent for many financial and economic disputes) used to state that the administration "must act in accordance with the expectations which it has raised, unless special circumstances occur which could justify a deviating behaviour".

A general formulation, distilled from Dutch jurisprudence, can be taken from the handbook on Dutch administrative law (*Hoofdstukken van Administratief Recht*, written by Van Wijk and revised by Konijnenbelt and Van Male): "The person who has trusted on good grounds that an administrative authority would follow a specific policy or would take a specific decision, is protected by the principle of good faith, in particular if he or she, in accordance with that trust, has done things that he or she would not have done otherwise or would have done in another way". Three important factors are imbedded in this formulation:

- May the expectation raised be attributed to the administrative authority that was competent in taking the decision?
- Were the expectations reasonably justified, in the sense that the person concerned could reasonably trust that the administrative authority would act in a specific manner?
- Has the person concerned, as a consequence of the trust that he or she put on the raised expectations, done anything relevant which he or she would not have done otherwise, as a result of which he or she has suffered damage?

If the answers to all these questions are affirmative, the trust will normally have to be honoured.

Revocation and changing of decisions

The principle of good faith is of particular importance in judging the competence to revoke or change decisions. Many Dutch acts contain provisions on the cases in which and the circumstances under which a decision may be changed or revoked. These regulations can be formulated in a very detailed or a very global manner. For instance, section 8.25 of the Act on Environmental Protection gives a global regulation: a permit may in part or in whole be revoked – *ex nunc* – "if the building [...] causes intolerable negative consequences for the environment". This ground for revocation concerns in fact the change of relevant circumstances and is in general necessary for all decisions which produce their effects not only for one moment in time but over a longer period; a permit in matters of environment is a good example of such a decision. The administrative authority, however, may not revoke the decision on this ground without further ado. The principle of good faith implies that the authority should first try other ways of minimising the negative consequences for the environment. Therefore, the same act lays down that revocation on the ground of section

8.25 is only permitted if an amendment of the decision, with more severe conditions, is not sufficient (section 8.23 of the Act on Environmental Protection). Thus, the principle of good faith is codified in this act for a certain type of environmental decision.

Dutch law also knows more specific rules on revocation. In many acts there is a section that provides that a permit or licence may be revoked (sometimes even with retroactive effect) if it occurs that the holder of the permit, in order to obtain the permit, provided the wrong information.

Revocation of decisions concerning subsidies

For some types of decisions, namely those concerning subsidies, the case-law has been codified in specific sections of the General Administrative Law Act. The sections in question will come into force in some years from now (1995). The key sections are the following:

– The granting of a subsidy (i.e., the promise to provide the subsidy, a promise which precedes the activities for which the subsidy is meant) may, with retroactive effect to the moment at which the subsidy was granted, be revoked or changed:
  - if the activities for which the subsidy is meant have not taken place or will not take place;
  - if the person concerned has not fulfilled his or her obligations;
  - if the person concerned has provided wrong or incomplete information; or
  - if the granting was otherwise unjust and the person concerned should have realised that.

– As long as the amount of the subsidy has not been fixed (i.e., the definitive decision on the amount of the subsidy takes place after completion of the activities for which the subsidy is meant), the granting of the subsidy may, with due observance of a reasonable time-limit, be changed or revoked:
  - in so far as the granting is unjust; or
  - in so far as changed circumstances or changed policies stand in the way of maintaining the granting. If the administrative authority changes or revokes the granting of a subsidy on this latter ground, it has to compensate the financial damage which the person concerned has suffered by acting in legitimate expectancy of the subsidy.

– The decision on the amount of the subsidy may, with retroactive effect to the moment at which the amount of the subsidy was fixed, be revoked or changed :

  - on the ground of facts or circumstances which the administrative authority was not aware of when it took the decision on the amount of the subsidy, and which would have led to a lower amount ;
  - if the amount was unjust and the person concerned should have realised that ; or
  - if the person concerned has not fulfilled the obligation after the decision on the amount.

The decision on the amount may not be changed or revoked after five years.

VII – Openness *(Austria, Greece, Italy, Netherlands, Portugal, Sweden)*

Austria

All authorities entrusted with federal, *Land* or municipal administrative duties as well as those of other public law corporate bodies are, by virtue of the Federal Constitution (Article 20, paragraph 4), obliged to impart information about matters pertaining to their sphere of competence in so far as this does not conflict with a legal obligation to maintain secrecy ; an onus on professional associations to supply information extends only to members of their respective organisations and this inasmuch as fulfilment of their statutory functions is not impeded.

A general legal obligation to maintain secrecy is imposed on the persons in charge, with the authorities mentioned above, as regards all the facts of which they have obtained knowledge exclusively from their official activity and whose concealment is enjoined on them in the interest of the maintenance of public peace, order and security, of universal national defence (which is described as aiming at preserving the federal territory's outside independence as well as its inviolability and its unity, especially as regards the maintenance and defence of permanent neutrality, and as comprising military, intellectual, civil and economic national defence), of external relations, in the economic interest of a public law corporate body, for the preparation of a ruling or in the preponderant interest of the parties involved.

Even apart from the legal obligations to maintain secrecy, the duty to impart information is not unlimited. Information has to be given only to an extent such as not to impair the performance of the other duties of the administration. Requests for information have to be dismissed if they are found to be "malicious" or "mischievous".

In practice, duty to provide information is understood as relating to information already at the authority's disposal only ; there is no duty of the authority to elaborate details, to give legal opinions (in case the legal situation is not clear) or to assess hypothetical facts.

Requests for information can be made also orally or by telephone. If it is not sufficiently clear which information is desired the authority can insist on a written request.

The authority has to provide the information within eight weeks ; if this is impossible, the applicant has to be informed thereof. In case the information is refused, a formal decision (which is subject to administrative and/or judicial review) has to be issued upon request of the private person involved.

There is no express regulation on how the information has to be given. Thus it is for the authority to assess how to comply properly with its duty to impart information. It is assumed that oral requests will in general be complied with (immediately) in the same way and that written requests will be answered (within the delay of eight weeks) in writing. Private persons do not have the right to inspect the files or to receive copies of documents.

There are a number of more detailed regulations pertaining to special types of information, that is, essentially registered data.

Greece

The right of access to administrative documents has been established in the Council of state's case-law. Invoking the general principles of administrative law, it recognised the duty of public services to provide individuals with administrative documents concerning them, at their request. Later on, this was explicitly laid down in law in 1986 (Law No. 1599 of 1986). According to this law, individuals have the right to know the contents of administrative documents, which are defined as documents drafted by administrative bodies in the public sector (state, local authorities, public corporate bodies, etc.) with the exception of those which relate to the private or family life of third parties.

The competent department may refuse access in cases where the exercise of this right appears prejudicial to the secrecy of debates in the cabinet or other governmental bodies, or to secrecy relating to national defence, the security of the state, public safety, the nation's foreign policy, etc.

It should be noted that the right of access to administrative documents is expressly recognised and granted not only to those entitled to a prior hearing (based on Article 20 Paragraph 2 of the Constitution), but also to every citizen or resident of the country.

The body competent to deal with a request for access must act within one month and give reasons for any refusal.

Italy

Article 22 of Law No. 241 of 7 August 1990 reads:

"In order to ensure openness of administrative activities as well as to promote their impartiality, the right of access to administrative documents, pursuant to the modalities set out in this law, shall be granted to any person who is entitled to such a right for protecting legally relevant interests."

Article 25 of Law No. 241 of 7 August 1990 reads:

"1. The right of access shall be exercised by examining and making copies of the administrative documents according to the modalities and limitations set out in this law. No charge shall be due for the examination of the aforementioned documents. Copies of the said documents shall be granted upon payment of the reproduction costs, without prejudice to the provisions in force concerning stamp duty as well as to the payment of the costs for research and examination.

2. Any request concerning the access to documents shall have to be grounded. The said request shall be made to the branch of the administration which issued the aforementioned documents or where the latter are kept permanently.

3. Access to documents may only be refused, deferred or limited in the cases and to the extent specified in Article 24; a statement of reasons shall have to be provided in all cases.

4. After thirty days have elapsed from the request with no results, the said request may be considered to have been rejected.

5. A complaint may be lodged within thirty days against the administrative decisions concerning the right of access, as well as in the cases provided for under paragraph 4, with the Regional Administrative Court(s) (*Tribunale*

amministrativo regionale). The administrative court shall decide on the matter in the judges' council chamber within thirty days of the expiration of the terms for depositing the said complaint at the court's offices, after having heard the counsellors for the parties which requested to be heard. The court's decision may be appealed against, within thirty days of its notification, to the council of state (*Consiglio di Stato*), which shall decide on the matter according to the aforementioned modalities and terms.

6. Should a complaint be partially or totally sustained by the court, the administrative judge – if legitimated to do so – shall provide that access be granted to the requested documents."

Netherlands

The *Wet Openbaarheid van Bestuur* (Act on Openness of Administration, abbreviated as "*WOB*") lays down that everyone has the right to make a request to an administrative authority for information contained in documents concerning a specific administrative matter. In the request, the applicant must mention the administrative matter or the document on which he or she wants to receive the information. A request for information must be granted, unless exceptions provided for in the *WOB* are applicable.

The *WOB* not only regulates the information given on request but also determines that administrative authorities must give information *ex officio* about the policy-making (including the preparation and the execution of the policy) if this is in the interest of a good and democratic administration. The information must be given in a comprehensible form and in such a way that as many citizens as possible can take note of it. It should also be brought to their knowledge in due time, so that they can submit their observations to the administrative authorities.

Information will not be given if the interest of giving the information is outweighed by one of the following interests :

– the relations of the Netherlands with other states or with international organisations ;

– the economic or financial interests of the state or other public corporations ;

– criminal investigation and prosecution ;

– inspection, control and supervision by or on account of administrative authorities ;

– the respect of an individual's privacy ;

– the interest which somebody might have in being the first to have the information ;

– the aim not to grant a disproportionate advantage or disadvantage to some persons or corporate bodies or to third parties.

Specific regulations are made for the handling of a request for information. The rejection of a written request, in whole or in part, must be in written form. The rejection of an oral request must also be in written form, if the applicant asks for this. If the information concerns someone else, that person will be consulted. He or she can require that the information be given in writing and that he or she receive a copy of it.

Specific regulations are also made for the situation in which information is requested on documents which are drafted for internal consideration. In that case, no information will be given on personal views of policy. Nevertheless, such information, for the purpose of a good and democratic administration, can be given in a form which does not allow for the identification of persons, unless the person(s) concerned accept(s) that the full information be given.

The rejection of a request must be sufficiently motivated, in conformity with the *Algemene Wet Bestuursrecht* (General Administrative Law Act). Persons concerned may appeal against the rejection before an independent judge, after an internal review by the administrative authority has been made.

Portugal

Access to files is covered by Article 268 of the Portuguese Constitution.

The legislation on such access – Article 1 of Law No. 65/93 of 26/8/93 – states that the principles of disclosure, openness, equality, justice, and impartiality must be respected.

Access to the files of the administration is generally guaranteed for all without any need to establish a particular interest (Article 7 of Law No. 65/93).

There is a limitation only in respect of personal documents, that is, those which contain appraisals or other information, the disclosure

of which would reveal confidential matters concerning the private lives of identified or identifiable individuals.

Access to such personal documents is restricted to the person concerned by them or to third parties who can establish a direct and personal interest.

Medical information may be disclosed to the person it relates to only by a doctor chosen by that person.

Article 11 of Law No. 65/93 states, with regard to the question of access, that the administration is obliged to publish, at intervals of not more than six months, all circulars, directives, and documents containing interpretations of legal provisions.

Reasons must be stated for any denial of access to files (Article 15 of Law No. 65/93).

Any person who objects to being denied access to the files may lodge a complaint with an independent institution operating under the aegis of the parliament – the Commission for Access to Administrative Documents (CADA).

The CADA draws up a report on the complaint (Article 16 of Law No. 65/93), which it forwards to the administration and to the person concerned.

If the administration continues to deny access, the person concerned may lodge an appeal with the Administrative Court (Article 17 of Law No. 65/93) by means of a special appeals procedure which can result in an injunction being issued against the administration. Action can be brought against those responsible in the event of failure to comply with such an injunction.

Sweden

Open government, and especially free public access to official records and protection afforded to those who give information to the media, are fundamental principles laid down in the Swedish Constitution which guarantee citizens' access to information on public matters. These principles form an inalienable part of the Swedish political and cultural heritage. They promote the democratic process, the rule of law and the effectiveness of public administration.

The principle of free access to official documents was formulated for the first time in the 1766 Freedom of the Press Act, and it has been applied in Sweden for over 200 years. As the name indicates, the Freedom

of the Press Act introduced the freedom to publish in print. It also established an important feature of Swedish public law, namely the principle of publicity. With few exceptions, the act gave each Swede free access to the documents kept by the authorities as well as the right to publish such documents. The Freedom of the Press Act was called a fundamental law.

Sweden still has such a fundamental law, now of 1949 with amendments. A fundamental law ranks higher in hierarchy than laws and other legal norms in Sweden. To amend or repeal a fundamental law such as the Freedom of the Press Act, the *Riksdag* has to take two identical decisions with a general election in between.

The 1949 Freedom of the Press Act (FPA) affords protection of the freedom of the press in some important respects. One of them is that it promotes the supply of information by two series of rules : the principle that documents of public authorities shall be accessible to one and all (FPA, Chapter 2), and rules protecting those who communicate information orally or in writing with a view to its publication (FPA, Chapter 1, Article 1, paragraphs 3 and 4 ; and Chapter 3).

The principle of access to official documents can be defined as the principle according to which the activities of the administration shall be conducted under the control of the public and with its insight into it. Under this principle it is not enough for the authorities to give comprehensive information about their work. The public activities shall instead be open to the citizens and the media in such a way that they can obtain information according to their own choice, independently of the information services of the authorities.

The principle of public access serves three main ends. It constitutes a guarantee of legal security, of efficiency of administration and of true political democracy. Concerning especially legal security, the principle constitutes an active means for ensuring a correctly functioning administration not merely in view of the fact that the person who is involved in a dispute with an authority has access to the file that is relevant to him or her. But it even offers the possibility for every citizen and the press and other mass media to obtain information from all official documents kept by an authority. The right to access can not only prevent and repair error in the work carried out by the administration, it can also counteract indolence and passivity on the part of the administration. In that sense it also promotes the effectiveness of the administration. The importance of the principle for the development and strengthening

of political democracy lies above all in the fact that insight into the administration provides a sound basis for political debate.

The Freedom of the Press Act, Chapter 2, Article 1, prescribes that in order to encourage the free exchange of opinions and the enlightenment of the public, every Swedish subject shall have free access to official documents. Thereby it is emphasised that access to documents is a part of the civil rights of freedom of speech and information and one of the conditions for a free democratic exchange of views.

The principle of the public nature of official documents extends to both central and local authorities. Sound recordings, video tapes and electronic data processing records are treated as are documents in the traditional sense. Both documents drawn up within a public authority and documents received by the authority are covered if they are in the authorities' custody (FPA, Chapter 2, Article 3, paragraph 1).

A document is deemed to have been received by an authority when it has arrived at such an authority or is in the hands of a competent official. Recordings are deemed to have been received by the authority when they have been made available to the authority for transcription in such a way that they can be read or listened to, or otherwise rendered comprehensible. A document is deemed to have been drawn up by a public authority when it has been despatched. A document which has not been despatched is deemed to have been drawn up when the matter or case to which it relates has been finally settled by the authority, or, if the document does not relate to a specific matter or case, when it has been finally checked and approved by the authority, or when it has been finalised in some other manner.

According to the Freedom of the Press Act, any official document which may be made accessible to the public, shall be produced forthwith, or as quickly as possible, at the place where it is kept, and free of charge, to any person who desires to have access to it, in such a manner that it can be read, listened to, or otherwise taken knowledge of. Likewise, any person shall be entitled on request to obtain for a fixed fee, a transcript or copy of an official document or of that part of it which may be accessible. No public authority may inquire into a person's identity on account of his or her request for access to an official document, or inquire as to the purpose of his or her request, except in so far as such inquiry is necessary in order to enable the authority to ascertain whether or not any obstacle exists to prevent the release of the document. A public authority shall, however, be under no obligation to make available a record for electronic data processing in any form other than a print-out.

Any party concerned in a case or other matter is free to study the written material which constitutes the basis for the authority's deliberations. A consequence of free public access to official documents is that he or she is also entitled to have access to the documents in other similar cases so as to enable him or her to form an opinion on the common practice of the authority. A consequence which is perhaps even more important is that the press, radio and television also have access to and may examine the documents of public authorities. The awareness that files and records are accessible to all is supposed to make the authorities more careful and reduce the risk of arbitrary action. It is often said that this accessibility contributes to making corruption a virtually unknown phenomenon in the Swedish administration.

Another element in the Swedish system is that the civil right of freedom of speech applies also to civil servants and others who are active in the public field and that it also comprises the information the civil servant has acquired at work. Of interest in this context are also the rules on the protection of informants, that is, the right for everyone, except in exceptional cases, to pass on information on any subject whatsoever to the media for publication. However, it does not mean that the information is made public in the sense that it becomes accessible to the general public. It is in principle only a possibility for the individual civil servant, without the risk of punishment, damages or other sanctions, to pass on information for publication (*inter alia* to the media) about what goes on in his or her field of activity.

Even if the principle of public access to official documents, the freedom of speech of civil servants and the protection of informants are inalienable parts of the Swedish legal system, they cannot be without exceptions. According to the Freedom of the Press Act, the right of access to official documents may be restricted, but only if the restrictions are necessary having regard to certain interests where the need for secrecy is especially strong. According to the Freedom of the Press Act these interests are (1) the security of the state or its relations with a foreign state or an international organisation, (2) the central financial policy, the monetary policy or foreign exchange policy of the state, (3) the activities of a public authority for the purpose of inspection, control or other supervision, (4) the activities of public authorities to prevent or prosecute crime, (5) the economic interests of the state or the communities, (6) the protection of the personal integrity or economic circumstances of the individual and (7) the interest of preserving animal or plant species. Any restriction of the right of access to official documents shall be scrupulously specified in a special act, at present the 1980 Secrecy Act.

Every assessment of whether the principle of free access shall give way to a need for secrecy must be based on a balance of interests. If there is a noteworthy interest of insight, the free access should stand aside only if this is regarded as necessary having regard to important opposite interests. The mere fact that secrecy would facilitate the work of the authority can never be a sufficient reason for secrecy. Neither can the desire of a private individual for information concerning him to be kept confidential alone constitute a reason for secrecy. Should the request of access be refused by an authority other than the *Riksdag* or the government, the applicant should be able to appeal to a court of law.

As a complement to the duty of the authorities to make official documents available, they are also obliged on request to supply extracts from an official document in their custody, for example by telephone or letter. This principle is laid down in the Secrecy Act. Besides the right of access to official documents and the duty to supply extracts from an official document, the authorities also have to provide information, guidance, advice and other such help to private subjects in matters relating to the sphere of activities of the authorities. This duty to render service is laid down in the Swedish Administrative Procedure Act of 1986 (see below, the Swedish submission on Chapter 3, I). However, these two duties are of course also limited, *inter alia,* by restriction of secrecy.

Chapter 3 – Procedural principles

I – Access to public services *(Austria, Portugal, Sweden, Turkey)*[1]

Portugal (duty to take a decision)

Administrative bodies in Portugal have a duty to take a decision on all matters falling within their competence which are submitted to them by private individuals (Article 9 of the Code of Administrative Procedure).

However, this duty does not apply if, during the previous two years, a decision has already been taken on a similar request from the same person, presented on similar grounds (*ibidem*).

Furthermore, this duty applies only if the request was presented within any time-limit stipulated in the legislation.

The duty to take a decision can be seen as an extension of the right of petition which is enshrined in Article 52 of the Portuguese Constitution and is further provided for in Law No. 43/90 of 10/8/1990.

Although the theoretical basis suggested for the duty to take a decision is the right of petition, the same link can be said to exist with regard to administrative procedures initiated by the administration. Support for this view can be found in the principle of trust, whereby citizens may legitimately expect that, if the administration initiates a procedure concerning them, it will complete it.

The accepted view is that this general duty to take a decision applies also to all complaints and appeals – even to those classified as "optional" (i.e., relating to administrative acts which may already be subject to judicial appeal).

1. The information contained in this section is set out not in the (alphabetic) order of the countries concerned, but in the order in which the specific topics are addressed in the main part of the handbook.

The comprehensive nature of the duty to take a decision means that it applies also to material measures and operations. Consequently, these cannot be considered exempt from external review.

Any material measure or operation which restricts the legitimate rights or interests of private individuals, must, in order to be legal, be based on a previous decision (Article 151 of the Code of Administrative Procedure).

The Supreme Administrative Court has ruled that, in order to comply with the duty to take a decision, it is not necessary to take a decision on the merits. The administration also complies with its duty to take a decision by defining its position on procedural matters (*locus standi*, competence, time-limits).

The general sanction which the law provides (Article 109 of the Code of Administrative Procedure) for failure by the administration to give a reply, is that the person concerned may, after a period of three months, consider such failure to be a negative decision, which enables him or her to lodge an appeal against it.

However, in a very large number of situations – especially in the case of applications for authorisations, approvals or licences – the same code (Article 108) states that failure by the administration to take a decision within three months is equivalent to approval of the application.

Turkey (duty to take a decision)

The citizen's right to appeal to the administrative authorities derives from the constitutional right of petition (constitution, Article 74). According to this article :

> "Citizens have the right to apply in writing to the competent authorities and the Turkish Grand National Assembly with regard to requests and complaints concerning themselves or the public. The result of the application concerning himself or herself shall be made known to the petitioner in writing. The way of exercising this right shall be determined by law."

The public authority is required to examine the appeal on its merits and to advise the applicant in writing within a reasonable time of the action taken in response to the appeal.

According to Article 10 of the Administrative Procedural Law (Law No. 2577) if there is no response within sixty days, the appeal is considered as rejected and the appellant has the right to bring an action before the Administrative Court.

Sweden (duty of the administrative authorities to provide service)

The Swedish Administrative Procedure Act now in force (the APA of 1986) not only contains rules that are needed in order for authorities to handle administrative matters in a correct manner but also rules which aim at improving the service of the authorities to the public.

When the old APA of 1971 was replaced by the APA of 1986, it was stated in the *travaux préparatoires* that it is not sufficient that the procedure and decisions of the authorities are correct in a formal legal sense (by impartial, thorough and uniform handling). Authorities must also give speedy, simple and clear answers and lend the individual a helping hand. As part of the efforts to deepen and strengthen legal security, the act was therefore enlarged and was partly given a new direction. The aim was to avoid complications, reduce waiting periods and make it easier for the individual to deal with the authorities.

Therefore, rules concerning, among other things, the duty of administrative authorities to provide service were introduced in the APA (Articles 4 and 5). These provisions provide certain basic requirements for the service that authorities shall give not only to parties and others who may be affected by the outcome of a case, but also to citizens in general and representatives of the mass media who might, for example, make an inquiry about provisions in force or about the practice of the authorities in a given area. In principle, the provisions also apply to the administrative activities of the courts. In the Administrative Courts Procedure Act (ACPA) there are rules concerning the administration of justice of the general administrative courts. Certain purely administrative matters regarding these courts are also regulated by the APA.

According to the first provision (Article 4, paragraph 1) each authority shall provide information, guidance, advice and similar assistance to anyone concerning matters falling within the domain of its competence. The assistance shall be given to the extent that is deemed appropriate with regard to the quality of the matter, the person's need of assistance and the activity of the authority.

This means that authorities shall help individuals – that is individual persons, business firms, organisations and other private subjects – to look after their rights in administrative matters. Assistance can mean, for example, information on how to make an application or advice as to which documents should be enclosed or giving help in filling in forms. The provision does not only apply to assistance on a formal level. When necessary and appropriate, the authorities also have to guide the individual

by taking the initiative for further investigation or limiting an investigation to what is necessary, or by focusing the attention of the individual on the fact that there is another and better way of attaining what he or she is striving for, etc. The duty to provide guidance, as a rule, applies regardless of the existence of a request. Through this provision the "principle of officiality", considered to be applicable in administrative law, is expressed. This principle means that authorities have to see to it that a matter is investigated to the extent that its nature requires. As far as the administrative courts are concerned, the "principle of officiality" has been introduced in the ACPA.

The obligation, which is formulated in a general way, is not unlimited. One limitation lies in the rules on secrecy, which are to be found above all in the Secrecy Act (1980:100). The degree of service to be provided has to be decided in each case. The authority must take into consideration the nature of the question, the individual's need of assistance and its own activities. This means, among other things, that authorities can refuse to let the public see documents which are not official in the sense of the principle of public access (see above, the Swedish practice of Openness, Chapter 2, VII), when this is needed in order to give them time to carry out their work. Authorities can and should also adjust their service to their workload and resources.

Authorities can also limit their duty to provide service according to what they consider to be generally suitable, but they have to give objective reasons. Authorities with very wide fields of activities are not supposed to function as general centres of information. Furthermore, authorities shall of course not give advice on how to avoid compliance with legal rules. The individual's need of assistance should be weighed against reasons which speak against assistance being given. In matters in which there are several parties with conflicting interests, it is the nature of the question which is of importance. It must be taken into consideration that help, which the authority gives to one party, can sometimes be of disadvantage to the other party and harm people's confidence in the impartiality of the authority.

According to the same provision (Article 4, paragraph 2) questions have to be answered as soon as possible. The third paragraph prescribes that if someone turns to the wrong authority by mistake, that authority should send him or her to the proper one.

The significance of the second paragraph is that an authority to which an inquiry has been addressed must give some sort of answer. If, for instance, the authority finds that it cannot or should not give

information, it must at least declare this to the person who has asked to be informed. The third paragraph deals with assistance in matters belonging to the fields of other authorities. Every authority shall help the individual regardless of whether he or she contacts the authority orally or in writing. This duty is not unconditional. The authority does not have to do extensive work in order to answer questions which do not concern its own working area.

The second provision of the APA (Article 5) prescribes that the authorities shall receive visits and telephone calls from private persons. Where particular times for this have been decided, the public shall be informed about them in an appropriate way.

It is an irremissible demand that authorities should be accessible to the public. The provision does not, for example, prevent authorities from limiting their telephone service to certain hours a day when necessary. Authorities must, of course, try to be accessible to the public as much as possible – taking into account available resources and the demand for service due to the nature of their activities. The right of access to official documents, protected by fundamental law, is also of importance (see above, Chapter 2, VII).

In general, the assistance offered should be free of charge, unless the authority has been given the right in a statute to charge for a specific kind of service. An individual who is displeased with the way an authority applies the provisions of the APA can turn to the Parliamentary Ombudsmen (JO), who supervise the application in public service of laws and other statutes (see below, the description of the Swedish Parliamentary Ombudsmen, JO, Chapter 5, III). JO have, in several cases, expressed opinions on the application of these provisions.

According to the Swedish Tort Liability Act, the state or a municipality can be liable to pay compensation on condition that an error or an omission has been committed during the exercise of public authority. Hence, it follows that advice and information to the public, as well as other forms of service that society offers in principle, do not lead to indemnity liability. Incorrect information concerning the exercise of public authority can, however, produce liability to pay compensation.

Austria (use of languages)

According to Article 8 of the Federal Constitutional Law (B-VG) German is the official language of the state, without prejudice to the rights granted to the linguistic minorities by federal law. Those rights

as regards (among others) administrative procedures, are set out in a detailed manner in the provisions reproduced below. The "authorities and agencies" referred to therein have been specified by federal government ordinances designating, in the first line, the district and commune authorities of the traditional settlement areas of the autochthonous Croat and Slovene ethnic groups for the use of the respective languages as additional official languages. The same use of languages with regional authorities (including the central authorities of the *Land*) is limited to cases related to the aforementioned territories. The latter is inadmissible with authorities whose seat is outside the *Land* where the ethnic group lives, especially with the central federal authorities.

Federal Act of 7 July 1976 on the Legal Status of Ethnic Groups in Austria (Ethnic Groups Act) :

"Chapter V – Official language

Section 13

1. Those responsible for the authorities and agencies [...] shall ensure that the language of an ethnic group can in accordance with the provisions of this chapter be used in business with such authorities and agencies.

2. In transacting business with an authority or agency within the meaning of paragraph 1 anyone may use the language of an ethnic group [...]. Where however a representative of any such authority or agency performs an official act which to achieve its purpose must be implemented at once, no one shall evade or refuse to comply with such official act on the sole ground that it is not being performed in the language of the ethnic group concerned.

3. Officials of authorities or agencies other than those specified in paragraph 1 who have a command of an ethnic group's language should use that language in oral communications where this facilitates the transaction of business with individuals.

4. The supplemental use of an ethnic group's language shall be admissible in official announcements of a general nature by communes where an ethnic group's language is accepted.

5. The provisions relating to the use of an ethnic group's language as an official language shall not apply to the internal business of authorities or agencies.

Section 14

1. Written or oral applications acceptable in virtue of this act in the language of an ethnic group shall, when they are placed on record (in writing), forthwith be translated or be ordered to be translated by the authority or agency where they have in accordance, with competence, been filed, unless such action is clearly unnecessary. If such applications are forwarded, they shall be accompanied by the German translation.

2. Should the authority or agency, because it lacks jurisdiction, send an application in the language of an ethnic group to another agency or authority where that language is not accepted, the use of that language shall be deemed to constitute a technical defect. Unless the rules applicable to the proceedings concerned provide otherwise, such applications shall be returned for rectification within a specified time; if the application is re-submitted together with a translation within that time, it shall be deemed to have been filed on the day on which it was first received by the authority.

3. Where a party to (participant in) a matter or other private individuals (witnesses, experts, etc.) are required to use official forms, a translation of the form in the language of the ethnic group shall upon request be supplied. The answers required shall be entered in the official form and the ethnic group's language can be used in so far as this does not run counter to international commitments.

Section 15

1. An individual who intends to use the language of an ethnic group at a court session or other oral transaction shall notify the authority or agency forthwith after service of the summons; additional costs incurred due to culpable failure to make such notification can be imposed on the individual concerned. This responsibility does not apply to proceedings conducted on the basis of an application filed in the language of an ethnic group. Unless it is withdrawn, the notification shall be deemed to extend for the whole duration of the proceedings.

2. When an individual uses the language of an ethnic group in proceedings, the matter shall be transacted both in that language and in German upon the motion of any party to (participant in) the matter in so far as the proceedings are of concern to the mover. This shall also hold good for the oral promulgation of decisions.

3. If the official in charge of the proceedings lacks command of the language of the ethnic group, an interpreter shall be employed.

4. Paragraph 2 notwithstanding, oral hearings (sessions) may be conducted entirely in the language of the ethnic group before an official with command of the language of the ethnic group and in which only persons willing to use the language of the ethnic group take part. This shall also hold good for the oral communication of decisions, which shall, however, also be taken down in German.

5. Where in any of the cases mentioned in paragraphs 1 to 4, a written record is to be made, it shall be both in German and in the language of the ethnic group. If the clerk to the proceedings lacks command of the language of the ethnic group, the authority or agency shall forthwith have a version of the record made in the language of the ethnic group.

Section 16

Decisions and orders (including the summons) which require forwarding and which relate to applications filed in the language of an ethnic group or to proceedings already conducted in the language of an ethnic group shall be executed in that language and in German.

Section 17

1. If, contrary to the provisions of this act and in so far as paragraphs 2 and 3 do not provide otherwise, German or the language of an ethnic group is not used, or the use of an ethnic group's language is not accepted, the entitlement to due process of law by the party to whose prejudice the infraction has occurred, shall be deemed to have been infringed at the stage of the proceedings.

2. Where, contrary to Section 15, the hearing in criminal proceedings has not also been conducted in the ethnic group's language, this shall constitute nullity within the meaning of Section 281 (1, iii) of the Criminal Procedure Rules, 1975. Whereas this ground for nullity cannot be invoked to the prejudice of a mover under Section 15 (2), it can operate in his favour irrespective of whether the formal contravention could influence the decision [Section 281 (3), Criminal Procedure Rules, 1975].

3. A breach of Section 15 of this act shall constitute nullity within the meaning of Section 68 (4,d) of the General Administrative Procedure Act, 1950.

Section 18

Public records and civil status registers shall be kept in German.

Section 19

1. Land registry papers written in the language of an ethnic group shall only be treated as such if they contain in German, the designation as a land registry matter, the designation of the realty or title to which the entry is to refer, and the type of entry requested. Where such specifications are absent, only the subsequent German translation shall be treated as a land registry paper.

2. If the instrument, which is to be the basis for an entry, is in the language of an ethnic group, the court shall forthwith make or have a translation made; Section 89 of the Land Registry Act, 1955 shall not apply.

3. Copies of, and extracts from, entries in a land registry shall on request be issued as translations in the language of an ethnic group and official certificates given in that language.

4. The provisions of paragraphs 1 to 3 hereof shall be analogously applied to the deposit of instruments.

Section 20

1. Where the instrument, which is to be the basis for an entry to be effected in a civil status register of Austrian origin, is written in the language of an ethnic group, the registry office shall forthwith make or have a translation made.

2. Extracts from civil status registers and other instruments shall on request be issued by the registry office as translations in the language of the ethnic group.

Section 21

In so far as notaries act as agents of a court which accepts the language of an ethnic group, the foregoing provisions of this chapter shall be analogously applicable.

Section 22

1. Costs of, or fees for, translations which an authority or agency is required to make or have made under this act shall be defrayed *ex officio*. In assessing any lump sum contribution to costs under Section 381 (1, i) of the Criminal Procedure Rules, 1975, the cost of an interpreter's services employed pursuant to this act shall not be taken into account.

2. (Constitutional provision) Where proceedings are also transacted in the language of an ethnic group, only two thirds of the actual time expenditure (the duration of the proceedings) shall be taken as the basis of assessment for fees payable to a territorial authority and calculated according to time expenditure or with this being taken into account.

3. If a document has in direct pursuance of this act to be issued in two official languages, only one version shall be liable to stamp duties.

4. Where a party to (participant in) proceedings is represented or defended by a lawyer, criminal defence counsel, or notary, the federal government shall defray the fee of any such lawyer, defence counsel, or notary for the last third of such hearings (sessions) if conducted also in the language of an ethnic group. Payment of this fee shall be claimed, on pain of forfeit, before the end of each session or hearing by submitting a statement of costs ; the judge shall forthwith determine the fee and instruct the accountant-general to disburse this amount to the lawyer, defence counsel, or notary. This additional expense on fees shall be assessed as if an opponent of the rightful claimant were legally bound to compensate him for these costs.

Chapter VI – Final provisions

Section 23

Federal personnel employed by an authority or agency specified in Section 2 (1, iii), who have command of the language of an ethnic group accepted and who use it in implementation of this act, shall be entitled to an allowance in accordance with public service pay regulations.

[...]"

Spain (use of languages)

The administrative procedure is conducted in the official language.

In those communities (the Spanish territorial structure is composed of autonomous communities) that have more than one official language, the person concerned can choose the language of the procedure. But if there are documents or evidence which will produce effects outside the autonomous committee in question, they will be translated into the national language.

If there are two or more persons concerned in a procedure and they do not agree on the language to be used, the national language will be used. In such a case, the documents or evidence requested by the persons concerned will be given in the official language chosen by them.

Austria (costs)

Frequently more than one permit (sometimes to be issued by different authorities) is required for a single project, consequently involving more than one procedure. In such cases it is desirable and sometimes prescribed by law that oral hearings and inspections to be held in the course of each procedure, be fixed for the same date and that all the decisions required be (at least if the parties involved are the same) taken in a single administrative act. Sometimes the law transfers competences from one authority to another which has to conduct another relevant procedure.

An instrument for saving costs on behalf of both authorities and parties is the preclusion by the law of objections which a person concerned could have raised, but did not raise, at the latest, during the oral hearing.

II – Right to be heard *(Austria, Greece, Netherlands, Spain, Sweden)*

Austria

The right to be heard is one element of the legal position of a party to an administrative procedure. Party standing is granted by the law to persons who, in the view of the legislator, are (in a sufficiently direct way) concerned (see above, "person(s) concerned", Chapter 1, III).

The rules of administrative procedure are contained in the General Law on Administrative Procedure. The laws governing the various fields of administration may include specific additional provisions. The federal constitution allows for deviations from such laws in the rules of the General Law on Administrative Procedure only where such deviation is requisite for regularisation of the matter at hand.

In general, the taking of an administrative act has to be preceded by an investigative procedure, the purpose of which is both to ascertain the facts relevant for settling the administrative matter and to give the parties an opportunity to assert their rights and legal interests.

In some cases, however, the law provides for the taking of administrative acts without a previous hearing of the persons concerned. Such action is allowed where :

- imminent danger requires unpostponable measures ; or
- the imposition of payments according to a fixed yardstick is at stake ; or
- in the context of administrative sanctions, the contravention was observed by an official in the exercise of his or her duties or was established by means of automated monitoring and the sanction imposed does not exceed a certain amount.

In these cases the person concerned can nevertheless file an objection with the administrative authority, which in this case has to open an ordinary procedure, the objection having suspensory effect save, in the case of imminent danger.

Parties to an administrative procedure are entitled to inspect the files. If parts of the files are excluded from inspection for reasons such as commercial secrecy, this has to be applied to all the parties in the same way. The parties may take copies on the spot or have copies made according to the technical means at their disposal, and at their own cost. Refusal by the administrative authority of inspection of the files is no separate administrative act but touches the lawfulness of the administrative act taken at the end of the procedure.

Oral hearings are not mandatory unless the laws governing the various fields of administration provide for them. Thus in most cases it is up to the discretion of the administrative authority whether an oral hearing should be conducted or not. If however, the administrative authority denies a party's request that an oral hearing be conducted, it must give the reasons. In the course of an oral hearing, each party must be given the opportunity to bring forward all aspects of the matter, to produce evidence and to comment on all the evidence at hand as well as on the applications made by other parties. One crucial consequence of the conducting of an oral hearing is the preclusion of objections which could have been, but were not, raised by third parties (duly summoned) in the course of the oral hearing. If, on the other hand, the administrative authority receives new evidence after the oral hearing, the parties must again be given the opportunity to comment on it.

Greece

The interested party's right to a prior hearing is enshrined in the 1975 Constitution (Article 20, paragraph 2). It is an individual right.

The Council of State's case-law has recognised it since 1960. It accepted that the individual's right to a prior hearing emanated from the general principles of administrative law.

The principle is directly binding on administrative bodies because they are required to apply it even in the absence of a legislative or regulatory text providing for its application in a given case. The administration has a corresponding duty to invite the interested party to a hearing before the administrative decision which concerns him or her is issued. The administration must place at the disposal of the interested party, all the elements of the file which he or she needs to defend his or her interests.

The Council of State's case-law does not insist on a prior hearing :

– in the case of regulatory decisions (because the regulatory activity is not covered by Article 20, paragraph 2 of the constitution) ;
– if the decision to be taken is based on purely objective information (the exercise of the right of defence is linked to a certain responsibility or to the conduct or personal attitude of the interested party) ;
– in cases involving the competence of the administrative body ;
– in a case where an administrative decision is taken in reaction to a request by the interested party (in this case his objections or arguments may be presented in the request).

The right to be heard may be exercised in written or oral form. Obviously, in a particularly urgent case, an exception to the right to be heard may be accepted. This is also the case where the success of an action in the public interest depends on the administration's intentions towards the individual being kept secret. In the latter case the administration must ensure that the right to be heard is exercised at least after the decision is taken.

If the right of the defence is denied, the individual may bring :

– a non-contentious administrative appeal ;
– an appeal for annulment before the Council of State or the administrative courts (in certain cases there may be an appeal in full jurisdiction) ; and
– an action for damages before the administrative courts.

Netherlands

Dutch law does not include a general obligation for administrative authorities to inform persons concerned as soon as an administrative procedure has started. Such a general obligation would, if applicable to all decisions of the administration, lead to much useless bureaucracy. The important point, however, is that an administrative authority involves a person concerned in the decision procedure at a point of time, and in such a way, that this can contribute to ensuring the quality of the decision. In Dutch law this standard is laid down in a system of regulations in the *Algemene Wet Bestuursrecht* (General Administrative Law Act).

Generally, paragraph 3.2 of the *Algemene Wet Bestuursrecht* stipulates that an administrative authority, in preparing a decision, must collect the necessary knowledge of the relevant facts and interests ; the administrative authority must have an overview of the interests at stake. Depending on the circumstances, this obligation implies that the administration must actively involve certain persons or corporate bodies in the preparation of decisions.

An administrative procedure can start in two ways : either on a citizen's initiative (by way of a formal application) or at the administration's initiative (*ex officio*). If there is a formal application by a person concerned, that person obviously knows that a procedure has been started. For that situation paragraph 4.7 of the *Algemene Wet Bestuursrecht* holds explicitly that the applicant must have the opportunity to make his view known if the administrative authority plans to reject the application and if the rejection were founded on information concerning the applicant, which differs from that which the applicant himself describes. Thus, the applicant can submit the relevant facts, evidence and arguments.

For decisions that are prepared *ex officio*, paragraph 4.8 of the *Algemene Wet Bestuursrecht* lays down what follows. If an administrative authority plans to take a decision against which a person concerned is likely to raise objections, the authority must give that person the opportunity to state his or her points (if the decision were founded on information which has not been provided by the person concerned). This rule is also applicable to decisions taken in response to a request made in the name of the applicant by someone else.

The *Algemene Wet Bestuursrecht* lays down specific procedures to be followed in preparing decisions in which the interests of a large number of persons are involved. These procedures include a deposit

for public inspection and the public announcement of it in journals or other publications with wide circulation. In certain cases a public hearing must be held.

It is necessary to emphasise the possibility of internal review by the administrative authority (*bezwaarschriftprocedure*). Before taking a case to the administrative courts, the persons concerned have the possibility – and even the duty – to ask the administrative authority to reconsider the decision. Thus, eventual deficiencies in the decision can be rectified. It can be conceived, for example, that the administrative authority has not given one or more persons concerned the opportunity to submit their views. The internal review procedure can lead to a reviewed decision.

Spain

In Spanish administrative law, the right to be heard is granted in the following ways:

Persons concerned have the right to submit facts, arguments or evidence during the administrative procedure and before the decision is taken. The administrative authority has the duty to consider them in the decision.

- The administrative authority must inform the person concerned in proper time and by appropriate means that it has begun an administrative procedure and that the private person has a right to submit facts, evidence and arguments. This principle is applicable when the administrative authorities initiate an administrative procedure which could affect the private person's rights, interests or liberties, and when a private person initiates an administrative procedure which may affect another private person's right, interests or liberties.
- The procedural submissions must be made in writing or at least be transformed into written form by the administrative authority.
- The language of the procedure will be the official one.

In those communities (the Spanish territorial structure is composed of autonomous communities) that have more than one official language, the person concerned can choose the language of the procedure. But if there are documents or evidence which will produce effects outside the autonomous committee in question, they will be translated into the national language.

If there are two or more persons concerned in a procedure and they do not agree on the language to be used, the national language will be used. In such a case, the documents or evidence requested by the persons concerned will be given in the official language chosen by them.

In all the administrative procedures, just before the decision is taken, the person concerned has the right to knowledge of all documents, evidence or arguments on which the administrative authority could base its decision. After that, he or she can make new submissions. The administrative authority does not have this duty when there are no other submissions than those of the person concerned (in these cases, the arguments, evidence or documents on which the administrative authority could base its decision are already known to the person concerned).

As a corollary of this right, the administrative authority can open the procedure to "public information", which means that any person can take part in the procedure in whole or in a part and submit arguments, facts or evidence. This option is taken when the procedure affects collective interests, or when other circumstances could admit this form of participation in the procedure.

Sweden (specific right to information of persons concerned)

The Swedish Administrative Procedure Act (APA) of 1986 contains two provisions (Articles 16 and 17) concerning the right of parties to have access to information.

Article 16 reads:

"Any applicant, complainant or other party is entitled to have access to the material that has been brought into the case, provided that the case concerns the exercise of public authority upon someone. The right of access applies with the restrictions prescribed in Chapter 14, Article 5 of the Secrecy Act (1980:100)."

Article 17 reads:

"No case may be decided without the applicant, the complainant or any other party having been informed about any piece of information that has been brought into the case by someone else besides himself and having been given an opportunity to respond to it, provided that the case concerns the exercise of public authority upon someone. The agency may, however, decide the case without this provision having been observed:

1. if the decision does not cause any prejudice to the party, if the piece of information is of no importance or if such measures for some other reason are obviously unnecessary;

2. if the case concerns appointment to an office, admittance to non-compulsory education, issuance of diplomas or grades, appropriation of research grants or comparable matters and a determination is not being considered in a higher instance after a complaint;

3. if it is feared that otherwise the execution of the decision in the case would be rendered considerably more difficult; or

4. if the decision cannot be postponed.

The agency determines whether the notification shall be effected orally, by ordinary letter, by serving the material or in some other way.

The duty to notify applies with the restrictions prescribed in Chapter 14, Article 5 of the Secrecy Act (1980:100)."

The rules laid down in the above articles – the right of party access to information and the principle of communication – are fundamental principles of Swedish administrative law. They constitute important safeguards of legal security. They ensure the party the possibility to refute statements and to complete the material of the file. They also make it possible for the party to check that the authority handles his or her case in the correct manner, for example that the investigation proceeds with due speed and efficiency.

According to the wording of the two provisions, the rules only apply if the case involves "exercise of public authority". By this concept, which is important in Swedish legislation, is meant such public activity which entails exercise of power in order to decide on a benefit, right, duty, disciplinary measure, termination of employment or on comparable matters. As for cases other than those which involve the exercise of public power, authorities are not prevented from complying with the principles of party access and communication, even though it is not prescribed in law that they should do so.

The object of party access and communication is all "the material that has been brought into the case", irrespective of whether it has come from the outside or consists of internal documents drawn up within the authority. According to the main rule laid down in Chapter 2 of the Freedom of the Press Act (FPA), all official records are public in the sense that they are accessible to everybody and, thus, also to a party. The right of parties to be informed, however, goes further than that. It also covers internal documents of the authority that have not yet become official, because they are not in their final form according to the definitions of the FPA. The right to access also applies to confidential documents with the exception, though, of the restrictions prescribed in Chapter 14, Article 5 of the Secrecy Act.

The party also has a right to be informed of material other than documents, such as objects, visual observations and oral information. Oral information that can affect the outcome of the case must be recorded, entered in the file and communicated to the party. The parliamentary ombudsmen have emphasised on several occasions that material other than documents is covered by the communication requirement, and the Supreme Administrative Court has in several cases reversed decisions based on oral statements of which the party had not been made aware.

Pursuant to Article 14 of the Computer Act, authorities using computers in the handling of cases generally have a duty to keep the information in the file in intelligible form.

As mentioned earlier, both the principle of party access and that of communication are subject to certain restrictions under the Secrecy Act. According to Chapter 14, Article 5 of that act, a party is, as a rule, entitled to be informed of confidential material. In exceptional cases, however, he or she may be refused access to such material, namely if with regard to a public or private interest, it is of particular importance that the information classified as secret not be disclosed. In such a case, if the party is in need of the information in order to be able to defend his or her rights, the authority must inform him or her in some other way, of the contents of the material, provided this can be done without serious damage to the interest which the secrecy classification is meant to protect. The authority can for instance deliver an extract of those parts of the document that do not have to be kept secret or make a written summary of the contents of the document.

It is to be observed that the duty to inform a party of the material that has been introduced into the case by someone else (Article 17) applies even though the party has not asked for information.

The duty to inform can be carried out in the way the authority considers to be the most appropriate in view of the particular circumstances of the case. Occasionally, the party is informed by means of a telephone call or during a visit to the authority, but normally the information is in writing. Usually a copy of the document is sent to the party with a request that if he or she wants to reply, he or she should do so before a certain date or within a certain period of time. The reply made by the party does not have to be in writing. If he or she wishes, he or she can reply by telephone or when visiting the official dealing with the case. The official must then see to it that notes of the reply are entered in the file.

The communication requirement is not as extensive as the right to party access. Certain exceptions to the main principle of communication have been regarded as necessary in order to meet the demand for speed and efficiency.

The various kinds of exceptions are enumerated in Article 17. Thus an authority can refrain from communication if such action is obviously unnecessary, if the case concerns appointment to an office, etc. (unless a decision is being reviewed on appeal), if it is feared that otherwise the execution of the decision would be rendered considerably more difficult, and if the decision cannot be postponed. Decisions to confiscate goods, or prohibiting someone from leaving the country can be mentioned as examples of cases in which the execution of a decision could be rendered more difficult, if the principle of communication had to be observed. The expression "if the decision cannot be postponed" refers primarily to situations where it is a question of averting an acute danger to life, health or property.

Authorities are never allowed to refrain from communication because they consider themselves too busy. Failure to follow the rules of communication can lead to a decision being set aside on appeal.

The Swedish Administrative Courts Procedure Act (ACPA) of 1971, which applies to the administration of justice by the administrative courts, contains similar rules on party access to information and communication as those of the APA (Articles 10-12, 18, 19 and 43 of the ACPA). The rules of the ACPA regarding communication, however, are more detailed than those of the APA. One noticeable difference is that the party must reply in writing unless the court decides that the reply may be given at an oral hearing.

III – Representation and assistance (*Austria, Germany, Lithuania, Spain*)

Austria

Persons concerned can choose to be represented unless their personal presence is required. Mandates can be given orally before the authorities. Solicitors and notaries need not prove their powers. In the absence of doubt, the authorities need not insist on express authorisation in the case of relatives or employees of persons concerned or in the case of functionaries of professional or other organisations. Persons concerned can be accompanied by legal counsel without prejudice to their right to express their will themselves.

Germany

The German administrative courts – and the administrative authorities too – have to deal with many cases, especially in the field of environmental protection, in which often more than one or two persons concerned are involved. As there are to date more than fifty persons concerned and these persons are not represented, the courts – and outside the courts the administrative authorities – are enabled by law to order that the persons concerned have to engage a common representative, if this is necessary to bring the case to the end. If the persons concerned disregard such an order, the administration authorities or – if the cases are brought to the courts – the courts themselves may assign a common representative instead of the persons concerned.

Lithuania

Legal provisions concerning representation are laid down in the Civil Code and in the Code of Civil Procedure and they mainly deal with procedures in court, but they may also be applied in administrative procedures.

Article 33, part 5 of the Code of Civil Procedure of Lithuania lays down that "Rights and legal interests of children under 15 years of age and persons who are considered totally incapable because of a mental disease or imbecility shall be represented in court by their legal representatives – parents, foster-parents, or tutors ... " – in administrative procedures, such as, for instance, the assignment of a pension. This means that the persons concerned may not be involved in any procedure without their legal representatives, be it in administrative procedures or in court.

Another type of representative are persons who have authorisation from the person concerned. Authorisation is the written enablement of one person (principal) to another person (representative) for representation of the principal in relation to third persons (Article 67 of the civil code). The representative has the right to act on behalf of the principal. The representative may act in such manner as the authorisation allows. The persons concerned may also be represented by their attorneys, assistants of attorney, or persons who have a licence as a lawyer issued by the Ministry of Justice (Article 48 of the Code of Civil Procedure). The authorisation has to be approved by a notary.

Article 52 of the Code of Civil Procedure deals with persons who may not be representatives: persons who are under 18 years old; persons who are under the supervision of a tutor; or persons who have lost their right to earn a living as an attorney, etc.

Spain

The person concerned has the right to be represented throughout an administrative procedure in which he or she is involved.

Any person with legal capacity can act on behalf of another in an administrative procedure.

In general, any kind of representation is accepted. But in certain cases (submission of complaints, administrative remedies, refusal of rights or interests), the representation must be formally justified. On these occasions, the lack of a formal accreditation does not affect the act if such lack is corrected afterwards.

In administrative procedures concerning a large number of persons, the person designated by the group will be considered the representative. If no representative is designated, the administrative authority will consider the person who appears in first place as the group's common representative.

IV – Time-limits (*Austria, Italy, United Kingdom*)

Austria

Administrative authorities are bound to decide on an application without unnecessary delay, at the latest within six months after the lodging of the application. After expiry of this time-limit, and upon further application by the applicant, competence devolves to the higher or appellate authority. The same holds true in the case of delay on behalf of the newly competent authority and so forth, until the highest authority is reached. In case of delay, on behalf even of the highest authority, the case will, upon application, be decided by the Administrative Court. Delays which are not exclusively the fault of the authority are excluded from the time-limit. Some of the laws governing the various fields of administration provide for shorter or longer time-limits or for other legal consequences such as the application being deemed to be granted.

Italy

Article 2 of Law No. 241 of 7 August 1990 reads:

"1. Where a procedure is instigated by the public administration or by an individual, [it] shall be concluded by the taking of an express decision.

2. The different branches of the public administration shall set out, for the different types of procedure, the terms within which the said procedures are to be concluded, subject to specific provisions by laws or regulations on this matter. The aforementioned terms shall begin from the date when the procedure was commenced upon the administration's own motion or from the date when the request from a third party was received.

3. Should the public administration fail to comply with the provisions of paragraph 2, the aforementioned terms shall be of thirty days.

4. Any decisions made pursuant to paragraph 2 shall be publicised as provided for by the specific regulations."

Case-law (on silent consent) :

Silent consent applies only to those cases where an express provision allows the silence of the administration, owing to the specific circumstances, to be interpreted in a positive sense, having thus analogous force with an authorisation (T.a.r. Campania, 22 March 1978, No. 325).

United Kingdom

Legislation may lay down time-limits within which an administrative authority must take decisions, and acts done after the expiry of statutory time-limits may be held by the courts to be invalid. However, the courts adopt a flexible attitude : they may take into account the purpose of a time-limit and the effect of its breach and decide that an act should not be invalidated.

But even where there are no time-limits laid down in legislation, undue delay may amount to unreasonableness, which is one of the grounds for judicial review of administrative action. Examples include :

– failure to give two police officers formal notice of complaints against them for over two years ; this was held to invalidate the disciplinary proceedings against them ;

– failure to give a British patrial, who was entitled by statute to enter the country without let or hindrance, a certificate of patriality except by an administrative procedure which would take over a year ; the court ordered the Home Office to grant the certificate ;

– excessive delay by the tax authorities.

V – Notification, statement of reasons and indication of remedies (*Greece, Italy*)

Greece

There are no general provisions on the statement of reasons for administrative decisions in Greek administrative law, as no code for non-contentious administrative proceedings has yet been drawn up.

The law only expressly requires reasons to be stated for administrative decisions in certain precise cases. However, the Council of State has recognised the existence of the administration's legal obligation to give reasons for its decisions in most cases in very clear case-law since 1929. According to this case-law, giving reasons for administrative decisions constitutes a general principle of law emanating from the principle of lawfulness. The administration must give reasons for its decisions not only because a legislative provision expressly requires it, but also because their nature requires it. In both cases, measures are required to ensure that the administrative decision is lawful and that the courts can review it in relation to misuse of powers.

The following are examples from among the large group of decisions for which reasons must be given because of their nature:

– decisions which are unfavourable to the person concerned;

– decisions which abolish a right, change a favourable legal situation or refuse a benefit, etc.

In principle, reasons must be given for decisions which are taken in the exercise of discretionary powers by the administration. The statement of reasons for these decisions constitutes a guarantee that the discretionary power complies with the spirit of the law, is in the public interest which the law serves and is exercised within the assigned limits.

According to the Council of State's case-law, if the law expressly requires reasons to be given for an administrative decision, those must appear in the text of the decision or at least in a document to which the text refers.

If reasons are not given, the judge may declare the decision invalid on grounds of a formal defect.

In a case where an administrative decision requires reasons to be given by its very nature, the judge may find them in the case file. If no reasons are given in the file the judge may declare the decision void for violation of the legal rule.

Case-law is not clear with regard to the statement of reasons for regulatory decisions. However, impelled by the need for judicial control, the courts seek the reasons for certain regulatory provisions in the case file. In this way they can verify whether the power delegated by law has been exercised in the conditions and within the limits fixed by the law.

It should be noted that absence of a statement of reasons or an insufficient statement of reasons is the most usual ground for invalidating an administrative decision and it is the argument most frequently used by the parties.

Italy

Article 3 of Law No. 241 of 7 August 1990 reads:

"1. A statement of reasons shall be provided for any administrative act, including those related to administrative organisation, public competitions and employees, except in the cases provided for under paragraph 2. The aforementioned statement shall specify the questions of fact and of law underlying the decision by the administration, as related to the results of the inquiry.

2. No reasons must be stated with respect to regulatory provisions and to those of a general character.

3. Where the reasons for the aforementioned decision are to be found in another administrative act, to which reference is made in the report accompanying the said decision, the latter shall have to specify and make available, pursuant to this law, the aforementioned act as well."

Case-law:

– Any administrative acts imposing limitations on an individual's freedom require, for their very nature, that adequate reasons be stated, so as to allow inferring the considerations underlying the administration's decision. (T.a.r. Sicilia, *sez. I*, Catania, 7 October 1991, No. 689).

– An act that has been challenged cannot be said to lack reasons when the latter are to be found in previous acts pertaining to the same procedure. (*Cons. giust. amm. sic.*, 24 June 1991, No. 271).

– The need for reasons to be stated, regardless of the act to which they apply, does not represent merely a formal requirement, but rather serves two main purposes: informing those concerned as to the reasons warranting a limitation of their rights and abilities, and allowing the court judging on lawfulness to assess whether

the aforesaid reasons are not conceptually biased and are consistent with the statutory aim. (T.a.r. Sicilia, *sez. I*, 16 April 1991, No. 234).

- The public administration is not bound to disclose the reasons supporting administrative acts where the latter add to the rights and liabilities of those concerned, who had requested such acts to be adopted, and do not appear to depart from provisions adopted to protect conflicting or adverse interests. (T.a.r. Veneto, *sez. I*, 27 June 1992, No. 244).
- It is deemed that a statement of reasons has to be provided in respect of acts which, though adopted in favour of a party, may adversely affect the interests of the other party. (*Consiglio di Stato, sez. V*, 15 November 1991, No. 1311).
- A statement of reasons for an administrative act is said to be ob relationem when it does not actually include the discussion contained in another document into the report accompanying the aforementioned act, but rather makes reference to the said document by stating that its contents are fully accepted without being quoted, and clearly mentions the source to which reference is made. (*Consiglio di Stato, sez. IV*, 25 November 1991, No. 976).

VI – Execution of administrative acts (*Portugal*)

Portugal

General principle

Portugal's legal system follows the "continental" model, which gives administrative authorities power to implement their acts by force, without having to refer them to a court first (Article 149 of the Code of Administrative Procedure – CAP).

However, this general principle is subject to one restriction and one exception.

The restriction applies to obligations requiring a person simply to do something (apart from handing over a material thing) which only he or she can do.

Acts creating such obligations may be implemented by force only when the law explicitly allows this, and when neither fundamental constitutional rights nor human rights are violated.

The exception concerns the implementation of administrative acts requiring the payment of a certain amount of money. In this case, the only admissible form of coercion is to open legal proceedings, using a simplified procedure (Article 149, No. 3 of the CAP).

Conditions for lawfulness of implementation

Initial act:

Except in a state of emergency, the authorities may take no physical act or measure which restricts the subjective rights or legally protected interests of individuals, unless they have first issued an administrative act making this lawful (Article 151, No. 1 of the CAP).

This means that physical acts or measures which have not been rendered lawful by a prior administrative act are patently unlawful and have no legal force.

Observance of legal procedures and terms:

The authorities are not free to choose how administrative acts are to be implemented.

The CAP (Article 149, No. 2) establishes that acts may be implemented only according to the procedures and terms prescribed by law.

Prior notification:

The decision to implement the administrative act must be notified to the person concerned before it is implemented.

Notice of this decision may be given at the same time as notice of the act itself (Article 152, Nos. 1 and 2 of the CAP).

Proportionality

In implementing administrative acts, the public authorities must, as far as possible, use means which, while guaranteeing the full achievement of their aims, affect the rights and interests of individuals as little as possible (Article 151, No. 2 of the CAP).

Some commentators argue that, since proportionality is a general principle, and enshrined in the constitution, it must also apply to the implementation of acts favourable to individuals.

Monitoring

The relationship between administrative acts and their implementation:

The CAP (Article 151, No. 3) allows individuals to take action in the administrative or ordinary courts against implementing acts or measures which exceed the limits of the act which is to be implemented.

The soundest approach interprets this principle broadly, that is, it allows appeals against implementation measures which are not in conformity with the act to be implemented because they exceed, are inconsistent with, or even fall short of its scope.

Unlawful implementation:

Unlawful implementing acts and measures may also be attacked in the courts, provided that they are not unlawful because the administrative act which they are intended to implement is itself unlawful (Article 151, No. 4 of the CAP).

Final comment

There is still little case-law on these provisions, since the CAP only came into force in 1992.

The CAP nevertheless provides the first comprehensive legal framework for the implementation of administrative acts.

It also does this in a manner consistent with the rule of law, paying special attention to adequate protection of the legitimate rights and interests of individuals.

Chapter 4 – Special issues with impact both on the substantive and the procedural principles applicable

I – Additional guarantees for private persons as regards administrative sanctions (*Austria, Estonia, Finland, Spain*)

Austria

In Austria, punishment of offences is to a large extent conferred upon administrative authorities which, therefore, are responsible also for the prosecution of acts deemed extremely harmful to society and dispose of quite considerable sanctions.

There is no code of administrative offences which would define the offences to be sanctioned by administrative authorities and the respective sanctions to be imposed. This is done by the numerous laws governing the various fields of administration. One typical example is the Traffic Regulations Code which lays down the duties of traffic participants in about hundred articles while one further article contains six paragraphs each of which defines both a range of sanctions imposable (for example, a minimum and a maximum fine as well as a minimum and a maximum time of arrest should the fine not be paid) and up to (only) ten offences for which the same range of sanctions is relevant; one of these offences is the "general" one, covering "other violations" of the Traffic Regulations Code and of the administrative acts based on it.

There is also an Administrative Penal Law which contains general and procedural provisions. Among them is the rule that in general, negligent behaviour is sufficient (intent is not required) for the constituting of an offence. Negligence is to be assumed if the occurrence of damage or of a danger is no constituent element of the offence in question, and the person prosecuted does not substantiate that his or her act was neither wilful nor negligent. Ignorance of a legal provision excuses the offender only if he or she proves that it was not his or her fault and if he or she could not recognise the wrong of his or her behaviour otherwise.

Estonia

Administrative sanctions are imposed by authorised officials or administrative courts in strict accordance with their competence and with the law.

For the commitment of an administrative offence :

– pecuniary punishment, or

– deprivation of a special right, or

– detention,

may be imposed on the offender. Deprivation of special rights may be imposed separately or in addition to another sanction.

The amount of a pecuniary sanction depends on the minimum daily salary as established by the government. The minimal fine is equivalent to 1/2 of the daily minimum salary, the maximum to 200 daily minimum salaries. The maximum pecuniary sanction may be imposed only by a judge. An official entitled to impose pecuniary punishment may impose a fine not exceeding 10 minimum daily salaries ; a police officer may impose a fine of up to 100 daily minimum salaries ; inspectors of protection of labour, consumer protection, competition, standardisation, health protection, taxes or border-guards may impose a fine up to 50 minimum daily salaries. A fine not exceeding 5 minimum daily salaries may be collected immediately. The court decision imposing a pecuniary punishment comes into force immediately.The payment has to be made in 15 days.

The special rights here include the right to drive a motor vehicle or aircraft, and the right of hunting or fishing. A person may be deprived of his or her right for a period up to three years and not less than 15 days.

Detention may be imposed by a judge for a period up to 30 days. The following may not be detained : pregnant women, persons who alone take care of a child not older than 15 years, minors, handicapped persons, the president of the republic, members of the government, members of the Estonian Parliament, members of the National Court, the auditor-general, the legal chancellor.

In case of a minor offence, the administrative judge or a competent official may replace an administrative sanction with reprehension.

Administrative sanctions do not apply to a person subjected to disciplinary rules unless otherwise provided. Disciplinary or non-judicial punishment shall be imposed on such persons.

Non-judicial punishments are : reprehension, fines not exceeding the sum of 10 daily salaries, removal from office for a period up to 10 consecutive days without salary, removal to a less well paid office, removal from office. The official or institution entitled to impose non-judicial punishment is the employer.

Finland

In Finland, there are many administrative sanctions in use which are aimed at the individual citizen. They are linked to different kinds of social action and their purpose varies considerably. Part of the sanctions are pecuniary, while others are of some other kind. Some of them may be a lot more severe than fines issued by the courts.

All administrative sanctions in use are based on acts of parliament. The most important administrative sanctions are the following :

- conditional imposition of a fine ;
- the threat that something will be done at the offender's expense (threat of doing) ;
- the threat that something will be interrupted at the defaulter's expense (threat of interruption) ;
- sanctions as regards taxation ;
- penalty fares in public transportation ;
- parking tickets ; and
- fees for excess load.

In the Conditional Fine Act, enacted in 1990, there are provisions on the conditional imposition of a fine, the threat of doing and the threat of interruption, which can all be imposed on private citizens as sanctions for not fulfilling a legal obligation. They are indirect coercive measures, which are imposed in order to ensure the fulfilment of an obligation. The aim is to get the party to fulfil his or her obligation. The most important and most generally used of these measures is the conditional imposition of a fine. This means that a person is ordained to observe an order or prohibition under the threat of a fine. The fine can be either a certain sum or a running sum that grows with time. The threat of interruption means that work or other action, or the use of a machine, is interrupted if the order or prohibition is not observed. The most important users of these measures are county governments, municipal building boards, labour protection authorities, the Market Court and the Water Rights Courts.

In cases where there is a conditional imposition of a fine or a threat of doing or interruption, the legal safeguards for the parties is secured in different ways. In all cases, the hearing of a party before making a decision is an absolute requirement. There is also a right to appeal to the Supreme Administrative Court as regards the imposition and execution of a conditional fine, a threat of doing or a threat of interruption. However, in urgent cases it is generally possible to prescribe that a decision be carried out in spite of an appeal.

Crimes against public finances are criminalised in the Finnish Penal Code. In a general court, the sentences for tax fraud and petty tax violations, for example, are imprisonment or fines. Furthermore, the tax legislation contains provisions according to which the authorities can impose punitive tax increases or other economic sanctions on taxpayers for negligence or similar reasons. A punitive tax increase can be financially significant in comparison to, for example, a small penal fine. The legal safeguards for taxpayers have been taken into consideration by the fact that there is a right to appeal to an administrative court in decisions concerning taxation.

A person travelling by public transportation (underground, trains, buses, etc.) without a ticket can be demanded to pay a penalty fare. The penalty fee is considerable compared to the price of a ticket, but it cannot be higher than 30 times the price of the cheapest general bus fare. The penalty fare is imposed by ticket inspectors. The passenger has a right to appeal against a penalty fare to an administrative court.

Parking tickets are payments that are imposed for petty offences when stopping or parking a vehicle. Parking tickets are imposed by the police authorities. In some cities the task has been given to municipal parking supervisors. If the person in question considers the parking ticket to have been imposed without due reason, he or she has the right to make a protest to the parking supervisors within the term of payment. The supervisor must take a decision on the matter without delay and attend to the servicing of the decision to the protesting party. There is a right to appeal against an unfavourable decision to an administrative court.

Fees for excess load are payments to the state, imposed for carrying excess load with a motor vehicle. The size of the fee depends on the excess load. The fee is imposed by the police authorities, and there is a right to appeal against a decision to an administrative court.

In all, sanctions imposed by administrative authorities are fairly common in Finland. The advantages of administrative sanctions seem to be that one does not have to impose penal punishments for minor offences. However, with regard to legal safeguards, sanctions which imply considerable financial consequences for citizens may be imposed by means of a relatively expeditious procedure. Furthermore, administrative sanctions and penal punishments can sometimes overlap. When talking about legal safeguards, it is important to mention the Constitutional Rights Reform, which entered into force on 1 August 1995, and through which the following provision was included in the constitution: "Publicity of the proceedings as well as the right to be heard, to receive a decision with stated reasons and to appeal against the decision as well as any other safeguards of fair trial and good government shall be secured by an act of parliament."

Imposing an administrative sanction does not necessarily prevent the same act from being judged in court as a criminal case. But a court decision can in some cases prevent the handling of the same case in administrative procedure.

Spain

Administrative sanctions are administrative acts which impose a penalty on private persons on account of conduct contrary to the applicable rules. The sanction, whether pecuniary or not, cannot result in any case directly or indirectly in the privation of freedom.

The general principles of criminal law are applied in the Act on Administrative Sanctions.

The principle of lawfulness in the field of administrative sanctions has the following consequences:

- The power to impose administrative sanctions can only be exercised by the administrative authority who is competent to do so by law. This competence cannot be delegated to other authorities.
- The administrative offences, the circumstances in which sanctions might be imposed and the types of the sanctions applicable, must be laid down by law.
- No administrative sanction can be imposed on account of an act which, at the time when it was committed, did not constitute conduct contrary to the applicable rules.

– The Act on Administrative Sanctions can be applied retroactively when it favours the person on whom the administrative authorities are considering imposing a sanction.

– Analogy may not be used in the field of administrative sanctions.

In the sphere of the sanctioning power, the principle of proportionality implies the following:

– The sanction imposed should strike a fair balance with the offence committed.

– In order to impose the adequate sanction, the administrative authority must take into account:

  - the fraud, fault or active negligence;

  - the importance of the damage produced; and

  - the recidivism, if applicable.

The burden of proof is on the administrative authorities. In case of doubt, the decision should be in the private person's favour.

The rules on prescription of offences and sanctions are laid down by the law.

A person can not be administratively penalised twice for the same act on the basis of the same rule of law.

When a penal procedure is initiated on account of a specific act, any administrative sanctioning procedure initiated earlier on and referring to the same act and the same person, must be suspended until the penal procedure ends.

In these cases, if the person is sanctioned by the Criminal Court, the administrative authority cannot sanction him or her for the same conduct. If the person is not guilty under penal law, the administrative sanctioning procedure, which was suspended, will be continued, and the facts that have been proven in the judicial procedure will bind the administrative authority in its decision. (These are the cases in which the same conduct may imply an administrative offence and a penal offence.)

If the law so provides, the administrative authority can adopt provisional measures for securing the efficiency of the final decision.

The final decision must be motivated and take into account the facts, evidence and arguments put forward during the procedure. The administrative authority cannot base its decision on facts, evidence or arguments which have not been included in the procedure.

II – Revocation of administrative acts (*Austria, Denmark, Hungary, Ireland, Italy, Netherlands, Spain*)

Austria

As a general rule, administrative authorities cannot revoke their own acts. After an administrative act has become final, because no appeal is admissible against it, the act can be changed or annulled by the administration only under certain conditions. The finality of administrative acts is considered as an aspect of legal security and of public peace.

The exceptions are essentially the following ones :

– the *ex officio* alteration and revocation of administrative acts ;

– the resumption of proceedings ; and

– the restoration to one's original legal position (*restitutio in integrum*).

The ex officio *alteration and revocation of administrative acts*

The following administrative acts can be changed or annulled *ex officio* by the administrative authority which had issued the act, or by the senior authority :

– administrative acts from which no right ensues to anyone (for example, acts imposing sanctions) ;

– other administrative acts to the extent that this (action) is necessary and unavoidable in order to eliminate a deplorable state of affairs endangering the life or health of people, or to ward off severe losses to the national economy.

It should be emphasised that no one is entitled to a claim to the exercise of the power to alter or remedy an administrative act.

The following administrative acts can be declared void *ex officio* by the senior administrative authority :

– administrative acts issued by an authority not competent for the case or by a committee composed in a wrong way ; this defect remains relevant for three years only ;

– administrative acts, the implementation of which would result in a contravention to criminal law ;

– administrative acts, the implementation of which is impossible ;

– administrative acts suffering from a defect entailing voidness, by virtue of an express provision as may be contained in the laws governing the various fields of administration.

The resumption of proceedings

The resumption of proceedings is another means by which formal *res judicata* can be overridden. Proceedings can be resumed if :

– the administrative act was obtained by false pretences ; or
– new facts or evidence have come to light which could not be presented during the proceeding through no fault of the litigant party, and knowledge of which would have resulted in an administrative act with a different sentence ; or
– the administrative authority had solved a preliminary question relevant for the case with a result different from the one reached in the meantime by the authority which is competent for the solution of that question as the main question.

Proceedings can be resumed *ex officio* or in response to an application. An application must be filed within two weeks from the time when knowledge of the ground for resumption was obtained.

The restoration to one's original legal position (restitutio in integrum)

A party that fails to meet a deadline or attend an oral hearing, thereby incurring a legal disadvantage, can have its original legal position restored upon request if the said party can show satisfactorily that it was prevented by some unforeseen or unavoidable event from meeting the deadline or appearing at the hearing and is not itself at fault, or is guilty only of a minor inadvertence. The application for restoration must be filed within two weeks of the cessation of the obstacle. At the same time that it applies for restoration, the party should perform the action it previously failed to carry out.

Restoration can also be effected if a party failed to meet an appeal deadline because the administrative act incorrectly stated that an appeal was inadmissible.

Denmark

Under Danish law, revocation traditionally means the fact that the administrative authority changes its own valid administrative act at its own initiative.

Therefore, the following description only deals with the question of the extent to which Danish administrative authorities can revoke valid administrative acts. The question of the extent to which administrative acts that are invalid can be nullified by an administrative authority or a court are not dealt with.

The Danish Constitution contains no rules which regulate the question of the right of public authorities to revoke administrative acts. Nor is the question of the powers of public authorities to revoke administrative acts exhaustively regulated in Danish legislation. The legislation does, however, have some individual provisions which regulate, more or less expressly, the question of revocation. Where the legislation contains such provisions, the question of the extent of such powers of revocation will, as a starting point, be decided upon by the ordinary interpretation of the individual legal provisions.

In addition to these individual legal provisions, the question of the powers of public authorities to revoke administrative acts can be regulated by a ministerial order issued under the authority of an act.

Finally, revocation of administrative acts may take place in some cases without any express statutory authority. The rules on revocation in such situations are unwritten, based on principles of administrative law as well as, to some extent, on case-law, ombudsman practice and administrative practice. The ordinary principles regarding revocation are assumed to be applicable not merely in totally unregulated cases, but are also assumed to apply in connection with the interpretation of rules in cases regulated by statute or ministerial orders issued under the authority of an act.

In connection with the non-statutory powers of revocation, it may be stated in general terms that the decisive factor concerning this question is the weighing between the need for stability and the interests on which the wish to change the administrative act is based. The evaluation of whether revocation can take place will, under Danish law, depend on a concrete weighing of the relevant elements, including especially the concrete reason for the revocation by the administrative authority, the effect of the revocation on the party concerned, and the nature of the original administrative act. Furthermore, in connection with the evaluation as to whether revocation can take place, importance may be attached to specific reservations regarding revocation on the part of the administrative authority in the original administrative act.

Hungary

In Hungarian administrative law, the revocation of administrative acts is partly linked to the question of their lawfulness. The general rule is that an administrative act cannot have retroactive effect. Special rules can be found specified by law, when an administrative decision has some defect or is unconstitutional or breaches the law.

The authority may correct or change its decision if it contains some misprint or miscalculation.

The administrative authority may revoke its decision at its own initiative if the authority recognises that its decision is unlawful, provided that no decision has yet been taken by a higher authority or court on the same case.

Upon request of the party in the procedure, the authority may also revoke its decision if it agrees with the party, provided that there is no opposing party in the case.

A decision can only be revoked within one year after notification of the original decision. The revocation may not affect individual rights obtained or practised *bona fide*.

Ireland

The principle of *functus officio* in administrative law (it applies also to courts and tribunals) is that an administrative authority, once it has validly exercised its statutory function by taking a decision, exhausts that function and has no power to revoke that decision (or, indeed, to amend it or take any further action regarding it). The principle contemplates the power of an authority to revoke its own act as opposed to the power of another authority or a court to take such a step. However, it is subject to a number of important qualifications :

– The statutory power or function conferred on the administrative authority may be of such a nature that it has to be exercised on a continuing basis in order to achieve the policy of the statute, and therefore the administrative authority has inherent jurisdiction to revisit the particular case, notwithstanding that it has previously acted.

– A decision by an administrative authority to refuse a benefit to an applicant will more readily escape the application of the *functus officio* principle than a decision to grant an application. This may, however, be due to the fact that, depending on the

nature of the case, it may be open to the unsuccessful applicant to bring a fresh application so that the administrative authority may in effect alter its previous decision in a fresh procedure. The grant or refusal of licences would provide examples of this qualification.

– It is in any event a common practice in modern statutes or subordinate legislation conferring power, to take administrative acts to include provisions which expressly authorise the authority to revoke or amend such acts. Where this may involve detriment to an individual, the rules of natural justice must be followed.

The rule of *functus officio* should be distinguished from the rule of *res judicata*. Typically, the principle of *res judicata* arises from judgments of the courts which determine legal rights and legal issues as between parties to proceedings. Once a judgment of a court has become final, it binds the parties both as to the order made and as to the issues decided, and these cannot be reopened by the parties in subsequent proceedings.

It would appear that the principle of *res judicata* has also been accepted as applicable to decisions of administrative authorities exercising judicial functions (i.e., determining rights and obligations, albeit of a limited nature, between parties) in matters in the nature of legal proceedings. However, the statute governing the case may expressly provide for the review (including revocation) by the authority of its decision.

A source of possible confusion with regard to the doctrine of *functus officio* is the general rule for the construction of statutes, contained in the Interpretation Act, 1937. This act states that statutory powers and duties may in the absence of a contrary intention contained in the statute, be exercised and performed from time to time as occasion requires. This rule does not create a general inherent jurisdiction in administrative authorities to revoke or amend their acts where these have legal consequences.

Italy

Annulment

Acts of revocation are instruments used by the public authorities to cancel acts they had adopted earlier and, in so doing, terminate the legal relationships which derive from them.

The first act of revocation we shall examine is annulment.

Any act which is legally or substantively flawed can be annulled. It can be cancelled *ex tunc* by a later act, declaring it invalid. These acts of annulment take different forms and may be issued at various stages.

Firstly, the decision to annul an act may be taken before that act – although complete in all respects – is issued. Annulment in this case results from preventive review (the Court of Audit does not register the act, nor does the CORECO or Regional Review Committee reject it), and an instrument is issued, indicating that the act is legally flawed, and ordering its annulment.

Secondly, action to annul a flawed act may be taken between the date on which it is issued and the date on which it becomes enforceable. During this period, any interested party may apply to the administrative authorities or courts to set the allegedly invalid act aside. If the application succeeds, the authority or court concerned issues an order annulling the flawed act.

Lastly, administrative authorities have power to protect their own acts, and this includes the general right to annul an act *ex officio* at any time following its issue.

However, when a flawed act is withdrawn by the authority which issued it, before it has been reviewed and rejected, this is not regarded as an annulment. As in the case of procedural acts, an act issued in respect of an act which is void, and hence incapable of producing effects, also counts as a withdrawal.

Here, we shall merely discuss *ex officio* annulment ; annulments resulting from a review or an application to an administrative authority will be dealt with separately.

An act may be annulled *ex officio* by the authority that issued it (self-annulment), by a higher authority with power to supervise and act for its subordinate authorities (hierarchical annulment) and by the government, which has power, under Section 6 of the consolidating Local Government Act, to annul legally flawed administrative acts at any time, no matter which authority issued them. Governmental annulment is pronounced by presidential decree, by decision of the Council of Ministers, which first consults the Council of State (*Consiglio di Stato*).

Acts of self-annulment or hierarchical annulment must have the same form as the act which is being annulled, and the same procedure, too, must be followed. The act of annulment must also give sufficient reasons, relating either to the flaw noted or to the existence of a public interest necessitating annulment.

Except in the rare cases where *ex officio* annulment is mandatory, annulment of an act is discretionary. This means that the authority concerned must ensure that annulment is genuinely in the public interest at the time and assess the extent of that interest. In some cases, changes in subjective legal situations or the nature of the public interests served by an act may make it necessary, as a matter of public policy, not to annul it, in spite of its legal flaws. There must be no doubt that annulment serves the public interest better than the act which is being annulled. If that act already serves the public interest it was issued to promote, or if its legal and practical consequences have modified the public and private interests at stake to a point where trying to achieve the original aim no longer seems expedient, then there is no reason to annul it.

Annulment has *ex tunc* effect from the date of issue of the flawed act, which thus becomes void from the outset. It follows that all effects produced in the meantime are cancelled. Only effects which are irreversible or which, although deriving from the annulled act, have since been separately enforced by another instrument (for instance, when disposable state assets have been acquired under an annulled act, but enjoyment over a long period of time has established title separately) remain intact.

Lastly, when the annulled act is linked with other acts, it is necessary to determine whether the connection is organic or merely occasional. In the latter case, those other acts remain fully independent of the annulled act and are not affected by the decision to annul it; in the former, they also become void, while remaining in force, until separate decisions are taken to annul them.

Repeal

An act of repeal sets aside another act which, although not flawed, produces effects which are no longer in keeping with the public interest it was introduced to serve.

While annulment affects acts which are void from the outset, repeal applies to acts which were lawful to start with, but whose effects are no longer consistent with the public interest, either because the public policy situation has changed since it was issued or because the objective conditions on which it was based no longer apply.

Power to repeal, that is, power to stop pursuing an objective pursued in the past, is given to the public authorities with the constant aim of serving that same public interest which the repealed act was intended

to promote. In other words, the repeal and issuing of acts are both part of the same process of active administration, since public authorities are supposed to have power to ensure that the effects produced and administrative relationships engendered by their acts remain consonant with the public interest – and this includes power to withdraw or amend these acts, when that interest so requires.

It follows that power to repeal an act lies with the authority which issued it, or – unless it has sole discretion in such matters – a superior authority, with power to supervise and act for subordinate authorities.

The act of repeal must have the same form as the act which is being repealed, and both must be issued according to the same procedure.

Since the act is being repealed, not because it was or is invalid, but simply because the factual and legal circumstances have changed and it is no longer expedient that the relationships and effects it generates should continue, repeal obviously takes effect *ex nunc*. In other words, none of the act's past effects are cancelled. This means that only acts which have extended, ongoing effects can be repealed, and never acts which have immediate, short-term effects, unless those effects have not yet been produced.

Just as it leaves the past effects of an act intact, so repeal does not affect vested individual rights acquired under that act. This does not apply, however, to individual rights derived from other rights, which are always subordinate to the public interest, and lapse when that interest no longer exists. An example here would be individual rights based on a concession relating to goods or services (rights of enjoyment and use), which last only as long as the relationship resulting from the concession exists. Consequently, when the act is repealed, these individual rights are terminated.

The term "repeal" is sometimes used of the setting aside of an act which give a person certain legal rights (such as concessions, licences or permits) because that person has failed to comply with statutory requirements or obligations laid down in the act in question. This kind of repeal, known as deprivation or disentitlement, is in fact a penalty. It counts as repeal in the true sense only if non-compliance with the obligations inherent in the relationship created by the public authority's act has made such a change in the real situation, as compared with that which existed when that act was issued, that there is no longer any justification for continuation of the relationship itself, which has become contrary to the public interest.

Disentitlement

An act of disentitlement sets aside an administrative act and the relationship it creates, either because the beneficiary has failed to discharge his obligations and duties (we have already seen that disentitlement is sometimes regarded, wrongly, as repeal), or because he has demonstrably ceased to fulfil the criteria for continuance of the relationship.

Unlike annulment or repeal, disentitlement does not involve reassessment of the lawfulness or expediency of the act; on the contrary, it is solely based on assessment of the beneficiary's conduct, or on certain essential subjective and objective criteria.

A declaration of disentitlement may constitute a penalty, when it results from the beneficiary's failure, through action or omission, to fulfil his obligations, or a review measure, when it results from his ceasing to satisfy certain criteria.

When the beneficiary fails to discharge his obligations, the public authority decides – unless the act itself provides that certain conduct leads to loss of entitlement – whether this failure warrants disentitlement. In general, it must assess the objective seriousness of the action or omission, whether it has been (or may be) repeated, and the extent of the beneficiary's responsibility.

In principle, this assessment is also necessary when the beneficiary has failed to pursue or has discontinued the agreed activity, except when the issue is failure to begin the activity within the specified time-limit; in this case, the decision is based solely on assessment of the time-limit's utility.

Disentitlement because certain criteria, either subjective (e.g., nationality or the right to practise certain professions) or objective (e.g., hygiene or safety conditions), are no longer satisfied is determined solely by the fact that this is so. These are criteria which must be satisfied not only for a relationship to be valid when it is first established, but also for it to continue; if they are not satisfied, the act is flawed from the outset and is therefore subject to annulment rather than disentitlement.

In procedural terms, when disentitlement constitutes a penalty, it would seem necessary to notify the person concerned of the accusations against him or her, but this is not essential when disentitlement results from a review procedure.

Disentitlement decisions take effect *ex nunc*. The past effects of the terminated act are unaffected. In certain specified cases, the effects of disentitlement may be back-dated to the time when the required criterion was no longer fulfilled or the event which led to disentitlement occurred.

Netherlands:

See under: "Protection of good faith and vested rights" (Chapter 2, VI).

Spain:

Spanish law considers the revocation of administrative acts as an exception to the principles of security of the law and legitimate trust. Therefore, the regulation of this possibility tends to protect the individual rights and interests of the persons concerned.

Spanish administrative law distinguishes between acts which declare or state individual rights and acts which do not have this effect or which sanction the person concerned.

Acts which declare or state individual rights can be revoked in whole or in part, either at the request of a person concerned or at the administration's own initiative after previous consultation with the Council of State (the supreme consultative body for the government and the administrative authorities), if:

– the administrative act is unlawful; and

– the revocation procedure starts no longer than four years after the taking of the act.

In the absence of these circumstances, the administrative authorities must declare that the act jeopardises the public interest and challenge it before the courts. In the judicial procedure, the individuals who are interested in maintaining the challenged act can defend it. Such procedure must be initiated no longer than four years after the taking of the act challenged.

Acts which do not declare or state individual rights and/or which contain sanctions can be revoked at any time under certain administrative procedures.

The administrative authorities can correct at any time, at the request of a person concerned or at their own initiative, the material, mathematical and other non-legal errors in their acts.

If a revocation procedure has been initiated, the administrative authorities competent for such a revocation can suspend the implementation of the act in order to protect the public interest when it outweighs the private interests.

In addition, administrative authorities can, at any time, either on the initiative of a person concerned or on their own initiative, and after consultation of the Council of State, state the "total nullity" – which cannot be corrected – of :

- acts which jeopardise the essential meaning of the constitutional rights ;
- acts adopted by authorities without territorial or material competence ;
- acts with an impossible content ;
- acts that imply a criminal offence or that have been adopted as a consequence of a criminal offence ;
- acts adopted in complete ignorance of the legal procedure applicable ;
- acts which declare rights without any basis in law ;
- administrative regulatory acts contrary to superior guidelines or rules.

III – Protection of personal data (*Sweden*)

Sweden

The Swedish Data Act of 1973 regulates the use of personal data files. "Personal data files" are those files, lists and other notes in which automatic data processing is used and which contain personal data on an identifiable physical person. Manual files are not covered by the act.

The present act stipulates that there has to be a controller responsible for every automated personal data file. The controller of the file is the natural person, agency or legal person who decides on the information in the file and can, when need be, modify the file or transform the contents of the file into a readable form.

According to the provisions of the act, anyone who wishes to create an automated personal data file is obliged to notify the Swedish Data Inspection Board (*Datainspektionen*) and obtain a licence. Such a licence gives the controller of the file the right to create and operate an unlimited amount of files relating to the specific licence obtained.

Apart from the licence requirement, the Act of 1973 contains provisions regarding certain sensitive personal data files, for which special

permission of the board is needed. Among the special categories of personal data for which particular safeguards are provided, are data relating to criminal convictions or detention based on administrative decisions, data concerning health or sexual life or revealing racial origin, political opinions, religion or other beliefs.

Permission is also needed to maintain files containing qualifying statements on persons. Files containing information on persons without a specific connection to the controller also require permission. If there is a specific connection between the controller of the file and the person registered, the files are exempt from this permission requirement. Examples of such privileged files are files with information on clients, customers, members of organisations, etc., or employees. "Cross-matching" of files, that is, transfer of data from one file to another and joint processing of several personal data files, also requires permission from the board.

The Data Inspection Board can grant permission only if there is no reason to believe that the automatic data processing of the personal data file would unduly infringe the registered person's right to privacy.

The transfer of a file to another country also needs permission from the board, unless the transfer takes place to a country which has signed the 1981 Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data. Permission can only be granted if the board can expect that such a transfer does not infringe the registered person's right to privacy.

There are also certain provisions regarding the storage of personal data files in archives.

The Data Inspection Board supervises the controllers of the files and the general application of the act.

If processing of personal data has infringed or could be expected to unduly infringe the right to privacy, the board can set specific conditions for the processing of data or, if it is not possible to revise the contents of the file in any other way, prohibit the controller from processing the file or withdraw permission once granted.

Since 1 January 1995, the board has had the power to make general rules for data processing in different sectors. Earlier on, this possibility was exclusively in the hands of the government and parliament.

Appeals against the board's decisions generally go to an Administrative Court, but in some cases to the government.

The government has set up a special parliamentary commission to draft totally new data protection legislation within the framework of the EU Directive. The commission will finish its work before the end of March 1997.

Chapter 5 – Control of the effective application of the substantive and procedural principles

I – Judicial review (*Austria, Estonia, Finland, Germany, Greece, Ireland, Italy, Netherlands, Portugal, Romania, Turkey, United Kingdom*)

Austria

In Austria, legal control of the administration is performed by superior administrative authorities, various independent administrative tribunals, the Administrative Court and the Constitutional Court (and in some matters administrative decisions are made void at the time of the lodging of a suit with an ordinary court which, however, does not review the administrative decision, but rather decides the case without regard to the previous, administrative procedure).

The decisions of the authorities of last instance, with the partial exception of the independent administrative tribunals mentioned, are subject to review by the Administrative Court, and all administrative decisions of last instance (but not the decisions of the Administrative Court) are subject to review by the Constitutional Court. In general, an applicant has to exhaust two (in some cases only one, in others even three and in exceptional cases four) administrative instances before appealing to a court.

The difference between a court and an independent administrative authority needs explanation. A court is composed of judges, sometimes supplemented by participants from the people (e.g., juries). Judges are permanently appointed professionals who are bound by no instructions in the exercise of their office and enjoy the guarantees of irremovability (subject to judicial decision) and untransferability. They retire at an age fixed by law (Articles 87-88 of the Federal Constitution).

Independent administrative tribunals may encompass one or even more judges, but the additional members (who can be taken from the administration) lack the degree of independence described above. They

too, are bound by no instructions, but are appointed only for a certain period, for example six years, or represent, perhaps, delegates of public corporations. However, these tribunals are independent and impartial tribunals for the purpose of Article 6, paragraph 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

One major example of independent administrative tribunals is the "Autonomous Administrative Tribunals" in the *Länder*, competent especially for appeals in administrative penal matters and the control of administrative acts (other than decisions) which affect the rights of persons directly (Article 129a, 129b of the federal constitution), as well as for other matters which by the laws regulating the various areas of the administration are assigned to them. As regards independence and impartiality, the federal constitution prescribes that:

- the *Land* governments appoint members for a period, to be specified by *Land* law, of at least six years;
- the members of the Autonomous Administrative Tribunals are not bound by any instructions in the performance of the tasks referred to them;
- business shall be distributed in advance among members of the Autonomous Administrative Tribunals for the period regulated by *Land* legislation;
- business assigned to a member of an Autonomous Administrative Tribunal in accordance with this arrangement may only in case of impediment be taken from him at the ruling of the Chairman;
- members of the Autonomous Administrative Tribunals may, before expiry of the period of appointment, be removed from office only in the legally specified instances and only on the resolution of the Autonomous Administrative Tribunal;
- the members of the Autonomous Administrative Tribunals must be jurists; for their period of office, the members of the Autonomous Administrative Tribunals may not practise any activity liable to raise doubts as to the independent conduct of their office.

The Administrative Court is designed, in principle, to review legal and procedural questions only (excluding, in particular, the discretion left to an administrative authority; viz. Article 130 of the federal constitution; the exemption of certain independent administrative tribunal

decisions from the Administrative Court's jurisdiction has already been mentioned). There is no such restriction for the Constitutional Court, which controls administrative decisions, however, only with regard to their constitutionality (Article 144 of the federal constitution). Both courts can annul, but not modify, administrative decisions.

Administrative acts of a general nature (ordinances) are binding unless they are annulled by the Constitutional Court upon request of, in particular, a person whose rights are affected (Article 139 of the federal constitution).

The independent administrative tribunals mentioned above are chiefly entrusted with the review of decisions issued by other administrative authorities, thereby exercising judicial control within the meaning of Chapter 5, Section I of this handbook. Some of them, however, act in some matters as authorities of first and (at the same time) last instance, being subject only to the limited control by the Administrative Court and the Constitutional Court, as described above.

At present, an upgrade of the Autonomous Administrative Tribunals in the *Länder* to courts within the meaning (set out above) of the federal constitution is under consideration. Such courts (of which there would be one in each *Land* and, possibly, a federal court of first instance) would then be competent for judicial review at first instance in almost all fields of administration, and possibly also be vested with powers to replace administrative decisions by their own ones.

Estonia

In the Republic of Estonia everybody has the right to appeal to the court if one's rights or liberties have been violated, including the right to request judicial review of an administrative act. The rules for it are provided by the Constitution of Estonia and the court system.

Constitutional Grounds

The Constitution of the Republic of Estonia provides that everybody has the right to be protected by law against arbitrary treatment by state authorities.

Anyone whose case is being tested by a court of law is entitled to request that any pertinent law, or other legal act or procedure, be declared unconstitutional.

Everyone has the right to be present at his or her trial.

Everybody has the right to compensation for moral and material injuries resulting from any unlawful action.

"Everybody" includes natural as well as legal persons and their associations (the latter are entitled to appeal to the court if the law or their statutes so provide).

Justice is administered only by the courts. The courts are independent in their work and administer justice in accordance with the constitution and laws. If any legal act is in conflict with the constitution it may not be applied by any court.

Court System

The system of courts in Estonia was established by the constitution and by the Law on Courts of 1991.

The court system of Estonia comprises three levels of courts.

The courts of the first instance are rural and city courts, as well as administrative courts. In the first level courts civil, criminal and administrative matters are heard by a single judge or, where the law so requires, by a judge and at least two associate judges. Cases involving violations of administrative laws are heard by a single judge. According to Articles 18 and 19 of the Law on Courts there are administrative judges serving in rural and city courts; where necessary, separate administrative courts are formed. They hear all the cases involving violations of administrative law which are within their jurisdiction by virtue of law. The more specific act is the Law on Procedure in Administrative Courts.

The courts of the second instance are district courts which review the decisions of the rural and city courts by way of the appeal procedure. At least three judges participate at sessions of the councils of a district court.

The highest court is the National Court (the *Riigikohus*). The National Court reviews the court decisions by way of the cassation procedure, dealing with appeals on points of law only. The National Court also works as a constitutional court.

There is a possibility under the law to establish special courts. However, no such tribunals or courts have been set up in Estonia.

The task of the courts is to protect everybody's rights and legal interests. The right to protection by the court is afforded to foreign and stateless persons as well as to citizens of Estonia. Justice is administered under the principle of equality of persons before the law and the courts.

The hearings in court are public. However, in cases determined by law the court may hear a case in a closed session. Court decisions are made public.

Every person is entitled to legal consultations at all stages of court proceedings. The court may, considering the insolvency of a natural person, impose all or part of the costs of legal aid on the state.

In criminal court proceedings, the counsels for the defence should be attorneys.

The administration of justice is financed by the state and the state compensates for the damages arising from a court error or from illegal actions by the court during the administration of justice.

Judicial review and control of administrative acts

The judicial review of administrative acts is ensured by everybody's right to appeal to court if one's rights or liberties have been violated.

The matter is regulated more specifically by the Law on Procedure in Administrative Courts of 1993. This law provides for the jurisdiction of administrative courts and the procedure to be followed in court.

In cases concerning administrative law, justice is administered by a single judge serving in a rural or city court or by a separate administrative court. The regulations on administrative courts are confirmed by the Minister of Justice of Estonia.

The administrative court has jurisdiction over all cases concerning :

– the complaints and protests regarding any act of an executive government institution, local government institution or minorities' cultural autonomy organ or their officials ;
– complaints on the decisions of electoral commissions ;
– complaints regarding administrative contracts ;
– alleged breaches of the rules laid down in the Code of Administrative Law ;
– other cases as specified by law.

If there is a pre-judicial procedure established for solving a dispute, the administrative court will admit the case only if all special remedies have been exhausted.

Administrative courts do not admit any complaint or protest related to any dispute under civil law, or complaints on legislative acts. Applications and complaints on legislative acts – laws, presidential decrees, government and ministerial regulations and general acts of local governments – fall within the jurisdiction of the National Court. Civil law cases are within the jurisdiction of the city or rural courts of the first instance.

Conclusively, the administrative court only admits appeals on the acts that are individual measures, namely decisions, arrangements and orders.

Acts of the following organs, institutions and officials may be challenged before administrative courts:

- government, ministries, board, inspection bodies or any other governmental institution or official;
- Council of a Cultural Autonomy of Minorities, its administrative organs and officials;
- head or members of a county government, county administrative organs and their officials;
- Local Government Council, its administrative organs and officials;
- other autonomous institutions or their officials;
- prefect of the police, police commissioners, notaries, registrars;
- governing body or official of a non-profit making organisation or their associations.

A complaint or protest does not suspend the administrative act. However, the judge may suspend it on the request of the complainant.

The complaint or protest should, except where otherwise provided by law, be submitted within one month from the day the complainant learned, or should have learned, about the violation of his or her rights or liberties. The court should hear the case during a period not exceeding one month after the complaint has been submitted to court.

The court may decide only on the questions referred to it.

The court may dismiss the case if the complainant, who is obliged to appear in court, fails to do so and has not informed the court previously. The court closes the case if the complainant relinquishes his or her claim or if a solution was reached through pre-judicial procedure and the violated rights and liberties have been restored.

Remedies

The administrative court may in its judgment :

– declare that the administrative act partly or wholly violates the principles of law and oblige the respective authority to reconsider the case and adopt a new act or decision ;

– refuse the complaint ;

– terminate or suspend, for the purposes of the violation of the law, the activities of a non-profit making organisation or its association and impose fines on it.

The judgment or decree of the court of the first instance will enter into force ten days after the rendering of the judgment if there has been no appeal or complaint to the higher court. If there has been an appeal, the judgment will come into force with the rendering of the decision by the district court. An appeal has to be examined within one month.

The appellate court may decide the case without hearing the parties if :

– the appellant had no right to appeal ;

– the rules of court procedure have been violated ; in this case the district court will revoke the judgment of the administrative court and refer the case back for reconsidering.

The district court may :

– quash or alter the judgment or decree of the administrative court and render a new judgment or decision ;

– quash the judgment or decree and refer the case back to the first instance for reconsidering ;

– refuse the appeal.

The judgment of the court of the second instance will come into force on the day of rendering.

Within one month from the public announcement of the decision, an appeal may be referred to the National Court if the complainant believes that :

– the law has not been applied correctly ; or

– the rules of court procedure have been violated.

The National Court controls only the legality and does not evaluate facts.

When appealing to the National Court, a sum of money has to be deposited. If the National Court dismisses or refuses the case, the sum is forfeited.

The appellant has to seek a permission to proceed in the National Court. The permission is given within two weeks if the legality of the decision of the district court is disputable and the case is important for the uniform application of law.

The National Court will hear the case within a period of one month, in exceptional cases within a period of three months.

The administrative cases are usually heard by three members of the Administrative Council of the National Court or by the entire Administrative Council if there are different opinions. On particular occasions provided by law, the members of other councils may participate in hearings or the case may be heard in a plenary session of the National Court.

The National Court may:

– refuse the appeal; or

– quash the judgment of the district court and refer the case for reconsideration to another district court or to the same district court with different judges; or

– alter the judgment or give a new one if there is no need for additional information or evaluation of facts.

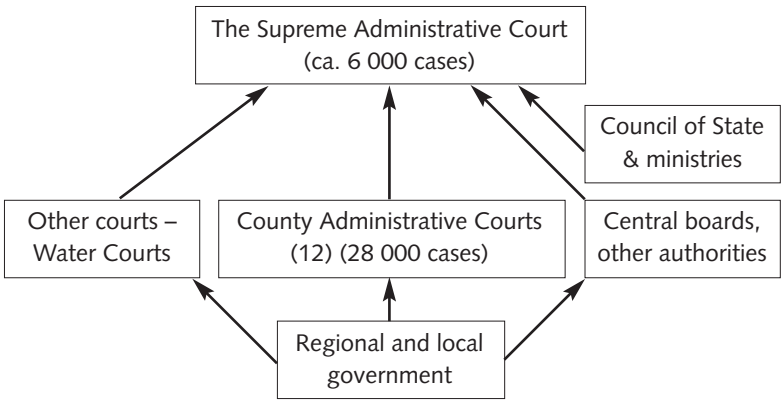
The judgment of the National Court comes into force on the day when it is pronounced.

Finland

Administrative courts and appeal authorities

One of the main features of a constitutionally governed state is that the legality of an action of an administrative authority can be called for examination in a court. The most essential legal remedy in administrative matters is the right of appeal against an administrative decision before a court.

In Finland the two-tiered system of the judiciary and the jurisdiction has been affirmed in the constitution. For civil and criminal cases there are general courts (ordinary courts) and for administrative-judicial appeals there are administrative courts. Simplified, the appellate system in administrative matters in Finland is organised as follows:



Two features are typical of the Finnish system. First, the administrative court system functions on two levels (the Supreme Administrative Court and the county administrative courts). Secondly, various other bodies, which are not in fact courts of law, act in certain matters as appellate instances as well.

The Supreme Administrative Court consists of the president and about 25 justices. It is divided into four units. As a general rule, five members of the court constitute a quorum. In 1995 it decided 6 000 appeals. The average time for reaching a decision was nine months.

There are 12 county administrative courts, which are regional administrative courts. All the county administrative courts are divided into units of three judges. They decide altogether 28000 appeal cases per year. The size of the county administrative courts varies. The biggest county administrative court (in Helsinki) dealt with 10 800 cases and the smallest (in Åland) with 250 cases. The average time for reaching a decision was about a year.

In addition there are separate appeal instances, first and foremost certain special courts (the Water Courts). Secondly, administrative-judicial appeals, on appointments for example, are considered by the Council of State, the ministries and the central boards. Thirdly, some bodies of a board or a committee type consider certain appeals as well (e.g., the Asylum Board).

Comparisons with other countries

In other countries the appeal against administrative decisions is organised in various ways. The major difference lies in whether there are administrative courts for judiciary control of administrative matters or whether this jurisdiction belongs to the ordinary courts which consider civil and criminal cases. However, the division between the administrative court system and the unified court system is not very strict. As a rule, the countries without general administrative courts have several special authorities for judicial review of administrative action, where the matter has to be considered before bringing it before an ordinary court. This has also influenced the development of procedural rules applied in administrative-judicial appeals. Special units for administrative-judicial appeals might have been established in the ordinary courts. This, too, reduces the differences between the two basic systems.

In many countries the internal appeal remedies in the administration have a great significance. It might be compulsory to use these remedies before bringing the matter before a court.

Among the Nordic countries, Denmark, Iceland and Norway belong to those countries which do not have separate administrative courts. In these countries the jurisdiction in administrative disputes belongs to the general courts. Beside these, there are special authorities for judicial review of administrative action in certain fields. Among other European countries there is a corresponding system (for example in Spain, the United Kingdom and Ireland). Definitely the most common system in western Europe is the one in which there are separate administrative courts for administrative-judicial appeals, or at least for a great part of them. Among the Nordic countries, Finland and Sweden have a very similar system. Judicial review of administrative action is organised in this manner also in Austria, Belgium, France, Germany, Greece, Luxembourg, Poland, Portugal, Switzerland and Turkey. Many countries in central and eastern Europe are currently establishing a system of legal security in administrative matters.

Appeal as a remedy

The right to appeal against administrative decisions is one of the basic features in the Finnish legal system. It is the most essential legal remedy in the judicial review of administrative action. This means that appeal to superior authorities is as a rule allowed if it is not specifically forbidden. The general right to appeal is considered to include the use of ordinary channels of appeal.

There are two kinds of appeals: first, the ordinary administrative-judicial appeal used against decisions made by the state administrative authorities; and secondly, the municipal appeal used against decisions made by the municipal authorities. These types of appeal differ from each other to a certain extent as will be explained further on.

Which are the authorities whose actions are appealable? The basic rule is that the decisions of all administrative authorities are appealable. Only appeals against administrative action taken by the president of the republic are not allowed. This means that, for example, the decisions made by the Council of State and the ministries are appealable. Decisions made by various private corporate bodies which have been given administrative duties are, however, not appealable in general. Appeals against these decisions are allowed only when specifically laid down in law.

What about the object of the appeal? The appeal is directed against administrative decisions only, not against administrative activities in general. The basic presumption is that only actions with definite and direct legal effect are appealable. There is, however, a problematic question concerning the so-called "norm decisions" and appeal against them. The appealability of these decisions has not been specifically regulated. It is clear that decrees issued by the president of the republic as well as "norm decisions" made by the Council of State, the ministries and the subordinate authorities, cannot be disputed in courts, whereas, according to judicial practice, a municipal appeal can be directed against a municipal statute (bylaw) given by the municipal council.

Who has the right to appeal? In general only a party to an administrative procedure is entitled to appeal, that is, a person whose interests, rights or obligations are directly affected by the consequences of the decision. Thus, the right to appeal is accorded to a person, whose interest or right to a service has been refused in an administrative decision or whose application for a licence has been rejected. Similarly, a person on whom an obligation has been imposed (e.g., to pay taxes or make public payments) is entitled to appeal. In certain matters the circle of people entitled to appeal is, however, wider. For example, in appointments to public offices the rival applicants have the right to appeal as well.

In principle, associations are granted a right to appeal according to the same rules as applied to private individuals. If an application made by an association is rejected or an obligation is imposed on the association, it is entitled to appeal. But an association is not entitled to appeal on the ground that the administrative decision affects its field of activity.

For example, an association for the protection of the environment is not entitled to appeal against a decision which grants permission of activity to a polluting plant.

Does an administrative authority have the right to appeal? According to the basic rule, authorities are entitled to appeal if this is expressly regulated. For example, a tax authority can appeal against a tax decision. An authority does not have a party status on the basis that it has made the decision subject to the appeal. The municipal organs have, however, a special status. For example, if a decision made by a municipal organ has been quashed, the municipality has the right to appeal against this decision.

The municipal appeal differs crucially from the ordinary administrative-judicial appeal in respect of *locus standi*. Beside the parties directly involved, all members of the municipality have the right to appeal. A member of the municipality can appeal, however, only on three grounds. He or she may refer to a procedural fault, a question of jurisdiction or the allegation that the decision is otherwise illegal.

In some matters, the appeal can be made only if the administrative court grants the permission to appeal. For example, in taxation matters permission is granted only either in order to establish a precedent or on the basis of interest. The basis of precedent means that permission is granted because it is important to get a decision from the Supreme Administrative Court in order to promote coherence in the application of law. On the basis of interest, permission to appeal can be granted if the interested party shows that the appeal is of great significance to him or her also in respects other than those involved in the case in question. In practice, permission to appeal on the basis of interest is seldom granted.

A reform, which came into force at the beginning of December 1994, widened the system of permission to appeal to all taxation matters. At the same time, the grounds for permission were expanded. According to the bill, permission could be granted on two other bases in addition to the present basis of precedent. In the first place, permission may be granted if there is a special reason for bringing the case before the Supreme Administrative Court because "an obvious error occurred in the matter". Secondly, permission may be granted if there is "another weighty reason" for it. The present basis of interest is not expressly mentioned in the proposal, but it would be included in the "weighty reasons".

In some administrative matters, a prohibition to appeal has been enacted. This means that the decision cannot be appealed against although the sort of decision in question is appealable. If an appeal is made in spite of the prohibition, it will be dismissed. The prohibition to appeal does not prevent the use of extraordinary channels of appeal (for example an incorrect decision can be annulled by the author of the act).

New Administrative Courts Procedure Act

Finland has detailed provisions on the procedure to be observed in general courts of law. The provisions regulating the judicial procedure of the administrative courts have been very fragmentary. Since 1986 a proposal for a new administrative courts procedure act constituting a general act on the judicial procedure of the administrative courts has been under preparation. It is to deal with ordinary and extraordinary appeals against administrative decisions.

The act will be comprehensive. It will contain 82 sections with provisions on :

– the right of appeal,
– appeal authorities,
– appeal instructions,
– the effect of an appeal on the implementation of a decision,
– the right of action,
– disqualification,
– general provisions on the consideration of a case in court,
– oral proceedings,
– means of evidence,
– decision-making,
– extraordinary appeals,
– litigation expenses.

One of the most significant changes is the increased use of oral proceedings. According to current legislation, the administrative courts may arrange oral proceedings, but this has only been done on extremely rare occasions. The bill for the new act is also based on a primarily written administrative court procedure. An increased use of oral proceedings

is, however, proposed in the act, which can often benefit the clarity of a case. Oral proceedings would not be an alternative to written proceedings but a complementary form of procedure. When drafting the bill it was suggested that finding out the facts and the controversial points of a case could be done more efficiently by means of oral proceedings. Oral procedure promotes concentrated and direct consideration. It may also consolidate confidence in the administrative courts.

In February 1996, the government submitted a Bill on Administrative Courts Procedure to parliament. The reform should enter into force on 1 December 1996.

Special legal remedies

Extraordinary appeal (legal review of a closed case) :

An administrative decision settles a legal relationship permanently. From the point of view of predictability of administrative measures and public confidence, it is important that administrative decisions become legally binding ; final. This means that an appeal cannot be lodged against a decision irrespective of whether the reason for this is that the appeal period has expired, that there is a prohibition against appeal or some other kind of appeal restriction. In certain exceptional cases, extraordinary channels of appeal may, however, be used.

The most important of the extraordinary appeals is the repealing of an administrative decision. This can be done if a procedural error has occurred, the wrong law has evidently been applied or if the decision has been made on the basis of flawed evidence. The repeal of a decision can be applied for by the persons who have been granted right to appeal in the matter. The repeal can also take place at the initiative of an authority. The petition for repeal must be made within five years to the Supreme Administrative Court, which takes the final decision in the matter.

Restitutio fatalium (restoration of expired time) :

In certain cases, expired time can be restored. The object of an application for restoration of expired time can only be a statutory period of time set for the institution of an appeal or other measure. The precondition for restoration of expired time is that a legal impediment or some other weighty reason has prevented observation of the set time, e.g., the appeal period. The Supreme Administrative Court decides the matter on application, which is to be made within one year from the expiration of the period in question.

Complaint against administrative action :

A complaint can be lodged against the administrative action of an authority. The complaint can be described as a freely formulated written notification that the action forming the object of the appeal is faulty. Typical of this complaint is, that it will not lead directly to the nullification or revision of the decision or action complained against. It can, however, indirectly lead to prosecution of, or disciplinary measures against, the official concerned, or to the repeal of the decision or to legislative measures. The complaint can concern not only decisions made by an administrative authority but also such factual administrative action against which appeals cannot be lodged.

Complaints against administrative action can be lodged with a higher authority or an authority responsible for the general supervision of administrative activities. In Finland, there are two authorities responsible for the general legality control : the Chancellor of Justice of the Council of State and the Parliamentary Ombudsman. According to the distribution of work between these two, the Parliamentary Ombudsman is primarily responsible for complaints against the defence forces, the border guard service, the police, the prisons and other closed institutions.

Germany

General

The basis for the work of the judiciary in the field of public law in the Federal Republic of Germany is paragraph 4 of Article 19 of the Basic Law, the first sentence of which states :

> "Should any person's right be violated by public authority, recourse to the court shall be open to him."

This provision fully guarantees, as a formal fundamental right of the individual, judicial control over all acts of the administration that might violate the rights of a citizen ; it supplements and safeguards the substantive fundamental rights. Its primary importance is beyond contention. The "recourse" referred to in the provision means the administration of justice as defined in Articles 92, *et seq.* of the Basic Law. These articles provide constitutional guarantees of the personal and professional independence of judges, the prohibition of extraordinary courts, the right to the jurisdiction of one's lawful judge and entitlement to a hearing in accordance with the law, to cite some examples. Article 19 (4) of the Basic Law is seen as the constitutional guarantee of an independent

administrative jurisdiction in the substantive sense. The provision rules out the exemption from judicial control of any executive act that might violate the rights of a citizen. This restriction of the cases where a citizen's own rights are violated, illustrates the constitutional focus on the individual. The institution of administrative jurisdiction in the substantive sense, serves first and foremost to protect subjective public rights, control of the administration being a subsidiary and somewhat consequential purpose. A system that is more closely related to objective legal control, though also taking account of the effects on the individual, is found only in the review of regulatory norms that is incumbent upon the higher administrative courts within the scope of so-called "abstract judicial reviews" – a secondary function which, although by no means unimportant, is a largely untypical activity of the administrative judiciary.

The requirement of a formally separate administrative jurisdiction, as distinct from ordinary civil and criminal jurisdiction, cannot be clearly deduced from the Basic Law, which thereby reveals a certain ambivalence. It does create, at least as an institutional guarantee, various branches of jurisdiction in public law, by charging the federal republic in Article 95 to establish, for instance, supreme administrative, fiscal and social courts. This implies an obligation to provide the corresponding lower courts within the constituent states. Moreover, paragraph 4 of Article 19 lays down, in its second sentence, that:

> "If jurisdiction is not specified, recourse shall be to the ordinary courts".

This reveals a certain preference for the catch-all role of the traditional courts of justice. There are primarily historical reasons for that. The catch-all clause in favour of ordinary jurisdiction no longer has any practical significance today because it is overridden by a simple general legislative clause favouring administrative jurisdiction. Under the first sentence of section 50 (1) of the Rules of the Administrative Courts,

> "recourse to the administrative courts ... is available in all public disputes not relating to constitutional law, in so far as the disputes are not explicitly assigned by federal law to another court".

The exception contained in the second half of the sentence is intended both to demarcate between the administrative jurisdiction and the other branches of jurisdiction under public law (namely fiscal and social jurisdiction), and to permit the establishment of distinct judicial channels for administrative matters, for instance, in the sphere of service regulations.

No one should overlook the fact that there is also a price to pay for devolving the protection of administrative rights to separate courts. It used to be feared that such a measure would stifle the efficiency and decisiveness of the administration. This spectre has been resurrected in updated form under the heading of number and stringency of controls. It influences thinking on reforms such as concentration of the control exercised by administrative courts and a reduction in the number of stages of appeal. A system of administrative jurisdiction is also more able to check on the exercise of discretion by administrators. The wide-ranging, perceptive and complex debates that are currently raging around the dogmatic figures of the limits of discretion, the undefined concept of law and the scope for the evaluation of judgment, would perhaps not have developed in their present form, if the autonomy of a system of administrative jurisdiction limited to reporting violations of rights did not repeatedly make it necessary to define the limits of control.

As has been mentioned, there is no uniform jurisdiction for matters of public law in the Federal Republic of Germany. There are (besides some special forms) three separate branches, which have a historical basis and are constitutionally safeguarded by Article 95 of the Basic Law, namely general administrative jurisdiction, fiscal jurisdiction (which primarily covers taxation disputes) and social jurisdiction (which essentially covers matters concerning the state system of social insurance).

The structure and manning of the courts are varied. The administrative and social courts are organised in three tiers. In the domain of administrative jurisdiction, the lowest level consists of 49 Administrative Courts, the next tier has 16 Higher Administrative Courts, and at the top of the pyramid is the Federal Administrative Court. Social jurisdiction is exercised by approximately 70 Social Courts, by 17 Higher Social Courts and by the Federal Social Court. This fiscal court system has two tiers, 19 Regional Fiscal Courts serving as courts of first instance and the Federal Fiscal Court serving as the appellate instance but restricted to hearing appeals on points of law.

Particularly in the field of administrative jurisdiction, this basic model is often overridden by federal legislation that precludes or limits appeals, or else by the transfer of original jurisdiction in certain cases to the Higher Administrative Court, which was in fact conceived essentially as an appellate court, or even, in a few exceptional cases, to the Federal Administrative Court. Responsibilities for instituting proceedings and the proper stages of appeal are not very clearly defined at present. The underlying trend in the last few years has been to reduce appeals and to shift original jurisdiction in important cases to the Higher Administrative Court.

The participation of lay persons as honorary judges, at least in proceedings leading to a judgment, is provided for in all courts with jurisdiction over social matters, and is mandatory, by virtue of federal law, in administrative and fiscal courts. *Land* legislation may also prescribe the involvement of honorary judges, and most of the *Länder* have done so. Lay people do not sit on the benches of the Federal Administrative Court or Federal Fiscal Court.

The three areas of jurisdiction in public law are subject to three distinct codes of procedure, namely the Rules of the Administrative Courts of 1960 (the amendment of which entered into force on 1 January 1991), the Rules of Fiscal Courts of 1965 (which were amended with effect from 1 January 1993), and the Social Courts Act of 1953 (which is due to be amended).

The present legal situation, however, is a good deal more complex. It is not uncommon for provisions of substantive administrative law to lay down special arrangements of a procedural nature on certain points. In the numerically very important area of asylum law, the law on asylum procedure contains stringent special provisions.

For the sake of better comprehension, the following outline is based on the system of general administrative jurisdiction.

The appeals system in administrative law

The Rules of the Administrative Courts recognise three judicial remedies : appeals on points of fact and law, appeals on points of law only, and complaints. The following are their common features :

- suspensive effect (interruption) : the lodging of an appeal delays the entry into force of the contested court decision ; and
- devolutionary effect (submission) : the case is brought before the higher instance, which thereby assumes responsibility for the appeals procedure.

Appeals on points of fact and law

Pursuant to Section 124 (1) of the Rules, the parties to proceedings are entitled to appeal on points of fact and law to the Higher Administrative Court against decisions of the court of first instance. Below certain stipulated values, however, such an appeal is dependent on explicit authorisation in the original judgment (Section 131).

The primary conditions of admissibility for an appeal on points of fact and law are the general conditions of recourse. In particular, only the party aggrieved by the original judgment may legitimately lodge an appeal.

The statutory time-limit for such appeals is one month (first sentence of Section 124 (2) of the Rules). They must be submitted in writing to, or recorded in writing by, the clerk of the court. They may also be lodged with the Higher Administrative Court within the statutory time-limit (Section 124 (2)). According to the first sentence of Section 124 (3), the minimum content for a notice of appeal is the designation of the contested judgment and a specified application.

The facts and evidence advanced as grounds for the appeal should be stated (second sentence of Section 124 (3) of the Rules). But this is purely a regulatory provision, the non-fulfilment of which does not alter the admissibility of the appeal.

The Administrative Court submits the notice of appeal with the case files to the Higher Administrative Court. Should the appeal prove admissible, the Higher Administrative Court undertakes a fresh examination of the factual and legal aspects of the case ; it therefore also considers any new facts and evidence that may emerge (Section 128 of the Rules). Statements and evidence that the administrative court of first instance has (legitimately) rejected on grounds of belated submission are not considered in the appellate proceedings either (Section 128a (2)). The Higher Administrative Court, as the appellate tribunal, is thus also a court of trial. In all other respects, the provisions governing proceedings before an administrative court of first instance also apply, pursuant to Section 125 (1), to appellate proceedings. A judgment is handed down on the appeal. Inadmissible appeals may be dismissed by virtue of a formal court decision.

Appeals on points of law only

Within the system of administrative jurisdiction, the sole instance for appeals on points of law only is the Federal Administrative Court. Section 57 (1) of the Rules lays down the principle of compulsory legal representation in proceedings before the Federal Administrative Court. Public corporations and authorities may be represented by their own lawyers.

An appeal on points of law only is basically reserved for judgments of the Higher Administrative Courts (Section 132 (1) of the Rules). Judgments resulting from judicial reviews (see 8 above) and decisions taken by administrative courts that are not classified as judgments, are not susceptible to such appeals.

To be admissible, an appeal on points of law must be explicitly authorised in the judgment passed by the Higher Administrative Court (Section 132 (1) of the Rules). Under section 132, it is to be authorised only if :

– the case is of fundamental significance ;

– the judgment diverges from a decision taken by the Federal Administrative Court or by the Joint Panel of Supreme Federal Courts and depends on that divergence ; or

– a procedural irregularity on which the decision may rest is asserted and found to have occurred.

Under Section 133 of the Rules, a "non-admission complaint" may be filed if the Higher Administrative Court does not authorise an appeal on points of law.

An appeal on points of law may be filed by any party who is aggrieved by a contestable decision. In principle, such an appeal may only be based on a violation of federal law. Cases involving *Land* law are not therefore subject to this type of appeal.

An appeal on points of law must be submitted within one month to the court whose judgment is contested (Section 139 (1) of the Rules). It must designate the contested judgment (third sentence of Section 139 (1)). A statement of grounds for appeal is to be submitted within two months of the contested judgment being served, although this period may be extended by the court (Section 139 (3)). The absence of a statement of grounds renders an appeal on points of law inadmissible.

The appeal on points of law must contain a specific application and must cite the allegedly violated legal norm, or if appropriate, the criticised procedural irregularity (fourth sentence of Section 139 (3) of the Rules).

In examining an appeal on points of law, the Federal Administrative Court is bound by the factual findings enumerated in the contested judgment (Section 137 (2) of the Rules).

Where an appeal on points of law is founded, Section 144 (3) of the Rules permits the Federal Administrative Court :

– either to rescind the contested judgment and to decide the case itself ; this is only possible if the factual findings of the lower court provide sufficient grounds on which to base a decision ;

– or to rescind the contested judgment and refer the case back to the lower court to be considered and decided in another way ; this course of action may be taken if not all of the relevant facts have been determined yet.

Complaints

According to Section 146 (1) of the Rules, a complaint relates to those separately contestable decisions of the Administrative Court which are not enacted as judgments or as formal concluding decisions under Section 84.

There is basically no right of complaint against decisions of a Higher Administrative Court (Section 152 of the Rules).

The right to file a complaint belongs to anyone affected by a contestable decision. The time-limit for complaints is two weeks from the promulgation of the decision (Section 147 (1) of the Rules). In complaint proceedings, unlike appellate proceedings, the court of original jurisdiction has the power, under Section 148 (1), to provide redress if it deems the complaint to be founded. If the Administrative Court does not provide redress in response to the complaint, it is to submit the complaint, along with the relevant files, to the Higher Administrative Court without delay.

As distinct from other contestable remedies, the complaint has no suspensive effect (Section 149 of the Rules).

The decision of the Higher Administrative Court on the complaint is handed down as a formal decision (Section 150 of the Rules). No further appeal is admitted against this decision.

Greece

Greece established administrative tribunals as long ago as 1833 when the so-called Audit Department was established as an administrative body and an administrative tribunal.

This was followed by the setting up of the Council of State, a special section of which was empowered to give direct judgments in certain "contentious administrative" matters and appeals, against decisions of the Audit Department. In 1838, "first and second instance" administrative tribunals were established. It was possible to appeal directly to the Council of State against decisions of courts of second instance. Under this system the administrative and civil courts exercised judicial review over the administration.

These administrative tribunals were abolished by the Constitution of 1844 (see Articles 101 and 102), and cases previously submitted to them were heard by the civil courts. Thus, the civil courts became the ordinary courts dealing with administrative disputes. It was a unitary

system of jurisdiction under which the civil courts exercised control over the administration. It should be noted, however, that under this system it was possible to introduce courts with special jurisdiction by means of specific laws.

This system was retained in the constitutional texts of 1864 and 1911. Thereafter, the Constitution of 1927 kept the same control system and restored the Council of State, which was then established by Law No. 3713 of 1928. Provisions for the creation of administrative courts with general powers ("ordinary" administrative courts) were established later in Article 82 of the Constitution of 1952. The administrative courts were empowered to judge administrative disputes. However, the constitution authorised the provisional retention of the single jurisdiction system until these courts were established. It should be noted that the existing powers of the Council of State had been preserved. The only "ordinary" administrative courts established under the 1952 Constitution were fiscal courts with special jurisdiction and the single jurisdiction system was retained.

The present Constitution of 1975 establishes a complete system of administrative justice. All types of administrative disputes fall, without exception, within the competence of the administrative tribunals.

The general features of the system are as follows:

– All administrative appeals for setting aside are referred to the Council of State. Certain categories may be submitted in the first instance to administrative courts (see Article 95, paragraphs 1 and 2 of the 1975 Constitution). Under this constitutional provision, certain aspects are submitted to the administrative appeals courts under Law No. 702 of 1977.

– The following cases have been brought within the jurisdiction of the ordinary administrative courts, under special provisions:

  - certain actions which are subject to full jurisdiction relating to tax legislation imposed in favour of territorial authorities; these actions are removed from the competence of special administrative courts;

  - certain actions for setting aside which become subject to full jurisdiction, for example in cases relating to social security, the protection of handicapped persons, etc.

When Law No. 1406 of 1983 came into force, certain categories of dispute which were regarded as subject to full jurisdiction were transferred to the ordinary administrative courts.

Under the system adopted by the constitution (Article 95), any enforceable decision emanating from an administrative authority, whether regulatory or of an individual nature and whether express or tacit (omission), is subject to judicial review, which is exercised by the Council of State and the administrative courts. In the latter case the Council of State is the appeal court.

Review takes place through appeals for setting aside on grounds of *ultra vires* or appeals in full jurisdiction. Enforceable decisions arising from non-contentious administrative appeals (non-procedural hierarchical or non-contentious appeals) may be contested by an appeal for setting aside or by appeal in full jurisdiction, depending on the case.

These administrative decisions arising from a non-contentious appeal are enforceable if they admit or reject the appeal (the latter case presupposes that the administrative authority has re-examined the case in the light of new elements brought to its knowledge by the appeal).

The lodging of a non-contentious appeal has a very important consequence : the time period for the introduction of a contentious appeal against the decision to which the non-contentious appeal relates is interrupted for 30 days. Decisions arising from a formal non-contentious administrative appeal action are enforceable in principle and may be contested by appeal for setting aside or in full jurisdiction.

Case-law recognises the following distinction : in the case of a formal non-contentious appeal, the sole object of which is to review the legality of an administrative decision, the granting of the appeal may be the subject of a contentious appeal. It generally admits that the decision which is the subject of the non-contentious appeal may be the subject of a contentious appeal and that in this case, the time period for the introduction of the latter is interrupted for 30 days.

On the other hand, in the case of a formal non-contentious appeal, the object of which is to confirm either the expediency alone or both the legality and expediency of the administrative decision, the granting or rejection of the appeal may be the subject of an administrative appeal, even if the rejection is tacit. In this case, a formal non-contentious appeal action is a condition of admissibility of a contentious appeal. The judge rules the appeal for setting aside or full jurisdiction inadmissible, if it is against a decision which is subject in law to formal non-contentious appeal, the right to which has not been exercised by the appellant.

Decisions of the administration which set down rules (regulatory decisions) are regarded as administrative decisions in Greek administrative law.

These decisions may be challenged before the Council of State by appeal for setting aside on grounds of abuse of authority. It is a direct judicial review, but it does not exclude an indirect review (incidental review) of these decisions by the Council of State and the administrative courts. Such review is exercised by way of an objection of illegality raised by the parties to an action and often *ex officio*, for example if the regulatory decision is unconstitutional.

Ireland (provisional protection)

The courts in Ireland have wide powers to grant provisional protection in the form of interlocutory injunctions in court proceedings, and such powers may be exercised against the public authorities no less than against private persons. This jurisdiction, though discretionary, is exercised according to settled principles.

In deciding whether to grant an interlocutory injunction against a public authority the court considers whether the case made by the applicant for the injunction raises "a serious question to be tried". The court does not attempt at that stage to try to resolve conflicts of evidence on questions of fact, or to resolve difficult questions of law. The test as to whether there is "a serious question to be tried" has also been expressed as the question whether the applicant has "a statable case".

The applicant must also show that the balance of convenience lies in favour of the granting of an interlocutory injunction. This involves balancing the damage which would be done to the public interest by the granting of an injunction against the public authority on the one hand, and that which would be suffered by the applicant if an injunction were refused on the other hand. As a general rule the applicant has to show that if the injunction were not granted he would suffer irreparable damage and that a subsequent award of damages against the state would not be an adequate remedy.

The court in its discretion may refuse to grant an interlocutory injunction where there has been undue delay by the applicant in seeking it, or where the applicant does not come to court "with clean hands". An example of the latter type of case is one in which the court, seized of an application by the owners of a sea fishing boat to restrain the enforcement against them of certain conditions imposed on them by the Minister for Fisheries in a sea fishing licence in respect of that boat, were refused an injunction having regard to the fact that they had a substantial previous record of convictions for infringements of the fisheries laws.

The court will normally require an undertaking from the successful applicant for an interlocutory injunction that he will make good any damage suffered by the defendant in the event that he should subsequently fail in his substantive proceedings. In practice, however, it may not be possible for a public authority to quantify the injury to the public interest which has been suffered as a result of the granting of an injunction, and in such a case the undertaking as to damages may be of no value.

It has been decided (in an action brought by the state to compel compliance with a statute) that the courts will in an appropriate case, grant an interlocutory injunction which is mandatory in nature.

The reach of the jurisdiction of the courts to grant injunctions against public authorities is illustrated by the following examples:

– An act of parliament, in conferring power on the competent minister to lay down conditions which were to be complied with by sea fishing boats, conferred express power to lay down requirements as to the nationality of members of the crews of such boats. The Supreme Court in 1985, in proceedings in which both the constitutionality of the minister's power (and of the way he had exercised it in the particular case), and the compatibility of that power with European Community law, were at issue, granted an injunction restraining the enforcement of the statute against the applicant pending trial of the action. (This decision was made prior to the judgment of the Court of Justice of the European Communities, given in a different case, to the effect that national courts must be empowered to grant provisional protective relief in cases involving alleged infringements of European Community law.)
– In 1987 the High Court granted to a private plaintiff, an injunction which restrained the deposit of the government of Ireland's instrument of ratification of the Single European Act (an international agreement which amends the European Community Treaties). The Court considered that there was a serious issue to be tried as to whether the Single European Act was in accordance with the Constitution of Ireland, and that the balance of convenience (including the possible consequences of the state's ratification being held to be unconstitutional *ex post facto*) favoured the granting of an injunction. More fundamentally, the court upheld the plaintiff's standing to seek the injunction and ruled that its constitutional jurisdiction to review acts of government extended even to such a case.

In other judgments, however, the courts have indicated a reluctance to grant injunctions restraining the application of statutes (which for this purpose should be distinguished from the exercise of statutory powers, whether discretionary or not, laid down in subordinate legislation rather than by the statute itself), save in exceptional circumstances. The fact that the provision in question is penal (i.e., involves a possibility of criminal prosecution and conviction), is a relevant factor in this regard.

It has also been laid down that, for constitutional reasons, an injunction may not be granted against the state itself. However, this restriction would appear to be of procedural rather than substantive significance, since it is difficult to conceive of any area of state action in which a competent state authority (as opposed to the state itself) cannot be made the object of the injunction, thus giving the court jurisdiction to grant the injunction sought. Thus, an injunction can be granted against a minister of the government or against any other public authority. (The government as such is not a legal person under the Constitution of Ireland, and hence cannot be made the object of an injunction.)

Italy (provisional protection)

Article 21 of Law No. 1034 of 6 December 1971 reads:

[...]

"If the complainant, by alleging serious and irreparable harm resulting from the enforcement of the administrative act, requests that the latter be suspended, the regional administrative court (*Tribunale amministrativo regionale*) shall decide on the matter by issuing an order, for which reasons must be stated, in the judges' council chamber. The counsellors for the persons concerned must be heard in the judges' council chamber, where they requested to do so."

[...]

Article 33 reads:

"The decisions taken by regional administrative courts (*Tribunali amministrativo regionali*) shall be immediately enforceable.

Lodging of a complaint with the Council of State (*Consiglio di Stato*) shall not suspend the enforcement of the decision challenged.

If the enforcement of a decision may result in serious and irreparable harm, the Council of State may, at the request of the person concerned, provide for the suspension of the enforcement with an order to be issued in the judges' council chamber, stating the relevant reasons.

The Council of State shall decide on the request for suspension during the hearing next to the date when the complaint was filed. The counsellors for the persons concerned shall be heard in the judges' council chamber, if they requested to do so."

Case-law :

– In any administrative procedure, the granting of a suspension of the act challenged, a precautionary measure aimed at re-establishing the *status quo*, which is modified by the aforementioned act, must be regarded as a type of provisional protection which is instrumental to and complements the administrative act and is invoked in order to ensure that the execution of the said act is carried out on a more specific basis ; hence, the power to modify, create or promote lawful relationships falling within the scope of the interests exercised, except where the suspension is revoked owing to subsequent ceasing of the situation to be safeguarded or revocation is requested, exclusively in the cases provided for by the law. In both instances an action shall be brought by the persons concerned before the court which had provided for the aforementioned suspension. (*Consiglio di Stato*, sez. V, 25 May 1987, No. 327).

– Where the administrative judge has suspended an act challenged, the public administration may not substitute itself for the judge in assessing the serious and irreparable harm resulting from the execution of the aforementioned act ; hence, the public administration may not fail to execute the aforesaid order for suspension by reason of its ruling out of the serious and irreparable harm acknowledged by the judge. (*Consiglio di Stato*, sez. I, 21 January 1977, No. 2622/76).

– The effects of provisional protection may also be achieved by means other than suspension of the formal effects of the act challenged ; hence the administrative judge may order that the goods held in the occupant's possession be returned, in order to achieve the substantive effects of the decision for the suspension of the decree of occupation, excluding those manufactured goods which were meanwhile produced and were intended for public use. (*Consiglio di Stato*, 1 June 1983, No. 14).

Netherlands

In all cases in which a private person's interests are affected by an administrative decision, that person has access to an independent and

impartial tribunal. Practice shows that the length of the procedures are generally acceptable. The procedural regulations provide for a trial. They also provide for the possibility of a public hearing. Indeed, the tribunal can omit a public hearing, for instance, if an appeal will probably be dismissed, but insistence may lead to the holding of a public hearing. The procedure affords an effective remedy in that the tribunal has the competence to take a decision which replaces the original decision which it has – in whole or in part – annulled ; in addition, the tribunal may adjudicate a compensation.

The system of judicial remedies is the result of lengthy development which is still continuing. The rendering in this report on the Dutch national situation is thus expressly an "instantaneous photograph" ; in the meantime, legislation is being prepared which will make the system more uniform and streamlined.

As late as the eighties there was no possibility of appeal against a number of administrative decisions before an independent tribunal, but only before the Crown (i.e., the government). If someone lodged an appeal before the Crown, the advice of an independent body had to be sought, namely a section of the Council of State (the highest advisory body of the Crown), but such advice could be overruled by the Crown. This gap in the judicial remedies, stated by the European Court of Human Rights in the Benthem case, was thereupon sealed temporarily by the civil courts, which regarded themselves as being competent. A definitive provision was made with the passing of comprehensive legislation which came into force in January 1994. The *Algemene Wet Bestuursrecht* (General Administrative Law Act) and other acts brought unity to the system of judicial remedies, although some specific judicial tribunals still exist.

The system of the Algemene Wet Bestuursrecht

The *Algemene Wet Bestuursrecht* gives the general framework for access to the administrative tribunals.

The principal rule is that every person whose interest is directly concerned by an administrative decision (i.e., a written decision of an administrative authority, containing an act in public law) can lodge an appeal before the administrative law section of one of the nineteen county courts. In matters concerning decisions of the provinces, municipalities, etc., the competent court is the court of the city where the

administrative authority resides. If decisions of other authorities – including the central government – are concerned, the competent court is determined by the city where the person concerned lives.

Appeal is possible not only against explicit administrative decisions, but also against refusals to decide or even when the administrative authority remains silent. If, for example, somebody applies for a licence or an unemployment benefit and the administrative authority neglects its duty to react within a certain time span, the person concerned can lodge a complaint.

No appeal can be made against a number of specific types of decisions, such as general regulations, decisions concerning the preparation of acts within the field of private law, results of an examination and the like. Disputes about such cases can be brought before the county court for civil law.

Unlike civil disputes, there is no need for representation in the administrative contentions procedure. Persons concerned and administrative authorities may act themselves and have no duty (but are entitled) to be represented or assisted by a lawyer or another person. The applicant against an administrative decision has to pay a fee. The sum depends on the applicant (person or corporate body) and on the type of dispute. It ranges from Dfl. 50 to Dfl. 400. The tribunal can condemn the administrative authority to reimburse the fee to the person concerned and to pay the costs of the trial.

Procedural regulations make a distinction between a normal trial, a simplified trial and an accelerated trial. The tribunal must come to a verdict within six weeks after the investigation has been closed (usually by a public hearing). The court can:

- declare itself incompetent;
- dismiss the appeal;
- declare the appeal ill-founded;
- declare the appeal founded.

If the decision is judged to be unlawful and the appeal is declared founded, the administrative decision will normally be annulled in whole or in part. The court can order the administrative authority to take a new decision but it can also take the decision itself. If the appeal is declared founded, the court can condemn the administrative authority to pay compensation for the damage suffered by the person concerned.

Before any appeal before the administrative court, the person concerned must try to settle the dispute with the administrative authority in an internal review (the *bezwaarschriftprocedure*: see below the report on the Dutch national situation, Chapter 5, II, "Internal review by the administrative authorities"). The aim is to prevent the courts from being needlessly overloaded with disputes that could be settled between private persons and administrative authorities. The internal review also serves to clarify the case before it is brought before the court.

It is of great importance that the person concerned can put the case to the court in order to request provisional measures while the internal review by the administrative authority is still under way, provided that an immediate intervention by the court is necessary. In practice, a suspension of the administrative decision is very often requested. The effect of the administrative decision can be suspended until the dispute is definitely settled, either in the internal review or by the court. The court decision concerning the provisional measures can in certain circumstances finish the dispute definitely.

Appeal to a higher court is possible against judgments of the county court. It will be lodged either before the *Centrale Raad van Beroep* (Central Council of Appeal) in Utrecht or the *Afdeling Bestuursrechtspraak van de Raad van State* (Department of Administrative Law of the Council of State) in The Hague. The *Centrale Raad van Beroep* is the appellate court competent for disputes concerning the legal status of civil servants and for disputes concerning social security and connected issues. The *Afdeling Bestuursrechtspraak* is the appellate court for other disputes. The procedural regulations are basically the same as for the county courts.

Specific administrative tribunals

Beside the main procedure described above, there are specific procedures for specific subdivisions of administrative law. For disputes on taxes, for example, the five *Gerechtshoven* (Courts of Justice) are competent ; cassation is possible at the *Hoge Raad* (Supreme Court). For disputes about decisions based on a large number of socio-economic regulations there is a specific tribunal, the *College van Beroep voor het Bedrijfsleven* (Industries Appeals Court) ; there is no possibility of appeal to a higher court. Another (very) specific tribunal – the *College van Beroep Studiefinanciering* (Court of Appeal for Scholarships) – is competent for disputes concerning credit facilities for students. For a certain number of other matters, the *Afdeling Bestuursrechtspraak van de Raad van State* is the competent tribunal, not as a court of higher appeal but as first and only court.

Portugal (provisional protection)

Conditions

The only provisional measure expressly provided for in Portuguese law is suspension of the effect of the administrative act (although, to some extent, legal doctrine and the courts take the view that the right to access to justice, as enshrined in the constitution, justifies the adoption of other, unspecified measures). In accordance with Article 76 of the Law on the Procedure of Administrative Courts (LPTA), the administrative court must suspend the effect of an administrative act if the following three conditions are all satisfied:

– the enforcement of the administrative act is likely to cause the individual an injury which it would be difficult to make good;
– the suspension will not cause serious damage to the public interest; and
– the proceedings do not reveal any strong indication that the appeal is unlawful.

In the case of a claim for a sum of money, satisfaction of the second condition is sufficient, provided a surety is paid.

There are two points of special interest in these conditions:

– The judge is not authorised to assess the degree to which the first two conditions are fulfilled; he must decide whether they are met or not;
– The third condition is not concerned with the concept of *fumus boni juris*, that is, the probability that an appeal will succeed, on the grounds of the apparent illegality of the administrative act. It is concerned simply with the probable decision (based, for example, on the *locus standi* of the appellant and compliance with time-limits), positive or negative, on the substance of the case.

Administrative acts already implemented

It would at first sight appear that, logically, it is not possible to suspend the effect of acts already implemented. Legally speaking, however, there may be an argument in favour of such a suspension. It is for that reason that Article 81 of the LPTA states that suspension of an administrative act already implemented is possible, if such a suspension can be helpful with regard to the present or future effect of the act in question.

Provisional suspension

Article 80 of the LPTA provides for a system of provisional suspension which is very favourable to the appellant. In accordance with this provision, the administrative authority, when informed of the lodging of an appeal, may not begin or continue the implementation of the administrative act until the court has issued its decision, unless the authority can establish, in a statement setting out the grounds for its decision, that it is a matter of extreme urgency for the public interest for the act to be implemented immediately. If this is not the case, the authority must prevent the implementation of the administrative act. If it implements the act anyway, the court can declare such implementation null and void, without prejudice to any civil or criminal responsibility attaching to such failure to comply with the court ruling.

Romania

Administrative proceedings were institutionalised in Romania in 1864 by the founding of the Council of State, an advisory body attached to the government, which was also given the powers of an administrative court.

During a second phase, between 1865 and 1904, these powers were assigned to the ordinary courts.

The third phase, from 1905 to 1948, falls into two periods, governed by two successive laws :

– The 1905 Act on Reorganisation of the Court of Cassation set up a special section within the Court of Cassation ;

– The Act of 23 December 1925, which was based on the Constitution of 1923, laid down the principle that administrative proceedings were a matter for the courts.

During the ensuing period, from 1948 to 1967, there was no judicial supervision of administrative decisions involving direct action (the institution of administrative proceedings was abolished by Decree No. 128/1948).

The 1965 Constitution led to the adoption of Act No. 1/1967 concerning the hearing by the courts of applications brought by persons whose rights had been violated by unlawful administrative decisions.

This act was repealed by Act No. 29/1990 on Administrative Proceedings. The 1990 Act gives individuals and corporations a powerful defence against improper action by the authorities, making it possible

to ensure the lawfulness of official decisions, make good the damage done to individuals by unlawful decisions, and punish persons who have misused their authority in taking these decisions.

Although the number of official decisions exempt from court supervision is still fairly large, the number of decisions which can be attacked in the courts is greater now than it was under Act No. 1/1967.

In supervising official decisions, the courts have power to remedy any misconduct on the part of the authorities which enforce the law. This is why the administrative proceedings provided for in Act No. 29/1990 have the full force of other court proceedings. They are brought against the authority concerned as they would be against any other person, and the court may order that full restitution be made to the person whose rights have been violated, and even that material and non-material compensation be made for the damage suffered. The proceedings may also take the form of proceedings to have an official decision set aside on grounds of illegality, if this is all the applicant is seeking.

The conditions applying to administrative proceedings under Act No. 29/1990 follow.

Status of the applicant

Under Section 1 of Act No. 29/1990, the applicant's status in administrative proceedings is conditional, first of all, on his or her having the right to bring legal proceedings. Administrative proceedings may be brought either by individuals or by corporate bodies. Here, note should be taken of a change introduced by Act No. 29/1990.

Act No. 1/1967 – inspired by the 1923 Constitution and the 1925 Act on Administrative Proceedings – described the applicant in general terms as "the person who has suffered damage" (Article 107 of the 1923 constitution) and "the person who claims to have suffered damage" (Section 1 of the 1925 Act). The intention was to emphasise that anyone could bring proceedings, regardless of his or her legal standing *vis-à-vis* the administrative authority in question. The legal capacity to bring proceedings was implied as a necessary condition for the bringing of administrative proceedings.

Today, the status of the plaintiff, whether individual or corporation, in administrative proceedings, is dependent on a legal relationship between the plaintiff and the administrative authority. It derives from the special character of administrative decisions, which are enforced automatically. It should be noted that the individuals who may initiate

proceedings include both private individuals and civil servants working for the authorities in question. As for corporate bodies, it should be noted that Act No. 29/1990 also allows independent bodies to bring administrative proceedings if they have legal dealings with the authorities in question. (Section 14 (d) of Act No. 1/1967 had eliminated this possibility.) It applies, for example, to universities (in application of the principle of independence of the universities) and to local government bodies (in application of the principle of local self-government).

Violation of a subjective right recognised in law

The Act on Administrative Proceedings permits initiating proceedings only when subjective rights, which are recognised in law, have been violated. Thus, the plaintiff must have a subjective right which the authority in question is obliged to respect or realise in his favour. The existence of a legitimate interest is not sufficient – the plaintiff must show that a subjective right has been violated.

As for the categories of rights which may provide a basis for administrative proceedings, Act No. 29/1990 stipulates only that these rights must be recognised by law. This is why it is not possible to list the rights recognised in law which, if violated, would entitle an individual or corporate body to bring administrative proceedings. The essential point is that the plaintiff should be the possessor of a legal right.

Apart from showing that a right recognised by law is at issue, the plaintiff must also show that the administrative proceedings affect a genuine interest, since there can be no proceedings unless some interest is at stake. For instance, even if he or she can show that the authority in question has violated a right, the plaintiff may not apply to the courts to set aside an official decision which the authority has itself annulled and which has produced no legal effects.

Violation of a right recognised in law is further defined by Section 1 of Act No. 29/1990, which lays down that the violation must result from an administrative decision or from an administrative authority's arbitrary refusal to grant an application concerning a right recognised in law. It should be added that Section 1 (2) states that failure to reply within 30 days of the date on which the complaint is registered, constitutes unjustified refusal.

Section 1 gives the impression that it applies to several types of conduct which can lead to violation of the rights of an individual or corporate body:

– violations resulting from an administrative decision;

– violations resulting from an administrative authority's unjustified refusal ; or

– violations resulting from failure to reply within the legal time-limit.

In fact, there is only one cause – violation of a right by an administrative decision.

Administrative decisions exempt from court supervision under the Act on Administrative Proceedings

The following kinds of decisions cannot be challenged before the courts :

– Decisions concerning relations between the Parliament or the President of Romania and the government. These decisions regulate the respective powers of parliament, the president and the government. The issues which they determine are political, not administrative. They may not be made the subject of administrative proceedings, and the courts may not review them on the basis of complaints alleging unlawfulness and aiming at compensation to the plaintiff for damage suffered ;

– Administrative decisions on organisational matters by the bodies which run parliament ;

– Administrative decisions concerning the state's internal and external security ;

– Administrative decisions on the interpretation and execution of international instruments to which Romania is a party ;

– Administrative decisions taken by the government in special circumstances to avert or remove the effects of a public danger ;

– Military decisions ;

– Administrative decisions for which a special law specifies another judicial procedure ;

– Decisions taken by the state, acting as a corporate body, in the administration of its assets ;

– Administrative decisions taken in the exercise of hierarchical supervision ;

– Administrative decisions concerning the amounts of taxes, fines and rebates specified in the laws on taxation ;

– Administrative decisions relating to the courts.

Turkey

Basic principles of the judicial control of administrative acts

Article 125/I of the 1982 Constitution lays down the rule that "all acts and actions of the administration shall be subject to judicial review". The last paragraph of the same article completes the system of judicial control of the administration by stating as a second rule: "The administration shall be liable for damages caused by its own acts and actions". These two rules, which compose a single fundamental rule, should be borne in mind when interpreting the exceptions to judicial review.

The following acts and actions, which are definitely "administrative" in nature, fall outside the scope of administrative justice as guaranteed under the constitution (Articles 125, 129, 159 and 160):

- The acts of the president in his own competence, such as appointment of rectors or members of the State Supervisory Council.
- Decisions of the Supreme Military Council such as, for example, the promotion and retirement of generals.

Article 125 (paragraph 6) authorises the parliament to pass laws restricting the issuance of stay orders in cases of state of emergency, martial law, mobilisation, state of war, and for reasons of national security, public order and public health. Likewise, there is no judicial control of the decisions of the Supreme Council of Judges and Public Prosecutors regarding the appointment, transfer, and promotion of judges and decisions of the Court of Accounts concerning acts and accounts of the responsible officials.

According to Article 125:

- "in suits filed against administrative acts the time-limit runs from the notification";
- "judicial power is limited to the control of the legality of administrative acts and actions";
- "no judicial ruling shall be passed which restricts the exercise of the executive function or which disregards the nature of the forms and principles prescribed by law or which would lead to the elimination of discretionary power".

Other principles of judicial review include:

- the retroactive effect of a decision of annulment;

- the reviewable character of discretionary power;
- written, simple, inexpensive procedure;
- the inquisitorial nature of administrative adjudication and the active role of the judges of administrative courts;
- a two-tier judicial review;
- suspension of the enforcement and the binding force of the act in question before final ruling;
- liability with or without fault.

Organisation of the administrative courts

The Turkish system of administrative courts stems from the French one. As a general principle, all governmental cases governed by administrative law fall within the competence of the administrative courts, except for a very limited number of cases referred by the law to the ordinary courts.

The administrative courts include the Council of State, subordinate courts of the regions below the Council of State, and the Supreme Military Administrative Court.

Council of State

The Council of State is, in its judicial capacity, the highest administrative court, mainly with appellate jurisdiction. It reviews administrative cases as a court of first instance however, when it is required to do so by law. It also functions as a court of conflicts charged with the solution of disputes on competence, venue and conjunction. Finally, it is the duty of the Council of State to eliminate conflict between the judgments of its chambers and to unify the opinions.

The judicial branch of the Council of State now consists of eight judicial chambers. One plenary session of the members of the chambers is held for administrative cases, another one is held for tax cases and the General Assembly meets for the unification of judgments.

Each chamber convenes with five justices and renders majority judgments. The plenary sessions review cases involving the validity of regulatory acts, such as regulations of the Council of Ministers, and cases in which the trial court has insisted on its previous judgment after initial reversal by a chamber.

As a court of appeal, the Council of State either affirms or quashes and refers the case back to the lower court ; it may also decide on the merits.

Justices of the Council of State are appointed by the Supreme Council of Judges and Public Prosecutors and the President of the Republic. The Chief Justice and his deputies, the Chief Public Prosecutor, and the heads of chambers are elected for four years by the general assembly. Membership of judicial chambers is confined to those who have some legal training. The personnel of the Council of State also includes prosecutors, similar to the French "*commissaires du gouvernement*", and rapporteur judges.

The Supreme Military Administrative Court

Members of the Supreme Military Administrative Court are all military personnel, either military judges or high-ranking officers of the armed forces. The jurisdiction of the court comprises cases arising from administrative acts and actions including those made by civilian authorities, but involving military personnel and relating to military services.

Members of the court are appointed by the president of the republic. The Chief Justice, the Chief Public Prosecutor and heads of chambers are appointed from among military judges sitting at the court according to rank and seniority.

The judicial function is carried out by three chambers, the general assembly and the plenary session of chambers composed of certain members. Each chamber has eight members, but convenes with five, provided that the majority of the members are judges, and decides by majority.

Judgments rendered by the court are not reviewed by the Council of State. However, the losing party may move for reconsideration by the same chamber.

Subordinate administrative courts

In 1982, three laws established the first tier of administrative courts in Turkey on a regional basis. Each judicial region comprises one or more provinces.

The courts found in the regions are : administrative courts and tax courts, both courts of first instance with general jurisdiction, and the regional administrative court. The administrative courts review all administrative cases (actions for annulment, full remedy actions) which are

not within the jurisdiction of the Council of State as a court of first instance or the Supreme Military Administrative Court. The same principle applies to tax courts which review only tax cases. Both courts are composed of three judges and decide by majority. Some minor cases listed in the organic law (No. 2576), however, are reviewed by a single judge. Judgments of three-judge courts may be appealed before the Council of State, but judgments rendered by single-judge courts are only reviewed by the regional administrative court.

Regional administrative courts, in addition to their role mentioned above, function as courts of conflicts at the regional level and solve problems of competence, venue and matters of conjunction. These courts are composed of one chief judge and two judges and decide by majority.

All subordinate court judges are appointed, supervised, and promoted by the Supreme Council of Judges and Public Prosecutors.

Judicial remedies

Action for annulment:

An action for annulment is the principal remedy against illegal administrative acts, regulations and bylaws. Here the complainant seeks the annulment of the administrative act retroactively on the ground of its illegality.

In order to commence an action for annulment, the plaintiff should be in a position to sue, which implies the existence of an adverse effect of the decision to be reviewed on his or her interest. The decision of the administration must be of an executory nature and be final, all administrative remedies must be exhausted, and a sixty-day time-limit should not have expired.

Since the commencement of this type of action does not automatically suspend the legal effect of the act reviewed – except in tax cases – the plaintiff should request a stay order. The constitution, in Article 125, states the requirements for the issuance of a stay order by the administrative court: if the implementation of an administrative authority "would result in damages which are difficult or impossible to compensate, and at the same time this act is clearly unlawful, then a stay order may be decided upon, by stating the reasons thereof." A stay order is a temporary remedy which has binding and restoring effect until the final decision is rendered.

The administration must comply with court decisions and take all necessary and proper action within sixty days. Otherwise both the agency – and, in a case of deliberate non-execution, the official concerned – will be liable for damages.

Full remedy action :

A full remedy action may be brought by a complainant who alleges that the administration has infringed his or her right, thereby entitling him to compensation. This action is available not only for administrative acts, but for actions (material acts) as well.

In order to commence a full remedy action, the plaintiff should be in a position to sue, which means the existence of concrete, personal and material damage arising from the act or action of the administration.

The beginning of the time-limit for bringing the action differs according to the origin of the damage, depending on whether it is an act or action.

Full remedy action is a suit where the liability of the administration is reviewed. To decide in favour of the plaintiff, the court should either find a service fault committed by the administration or should base its judgment on the theory of liability without fault.

Cases of service fault involve some defect or failure in the establishment or operation of the public service in question. In other words, there is either non-action, late action, or improper action. Service fault also appears when mishandling of public affairs has expressed itself in an illegal decision.

Liability without fault is a rapidly expanding ground for recovering damages in certain circumstances. According to this principle, what is done in the general interest, even if done lawfully, may give rise to a right to compensation when an exceptional burden falls on one particular person. Besides, the activities of the state, even when conducted without fault, may in certain circumstances constitute a risk. The fundamental principle of equity or social risk has been grounds for holding the administration liable for damages caused by its acts or actions without fault.

A combination of service fault and personal fault of an official of the administration results in joint liability. The injured person, however, must sue the administration and collect damages from it. The administration, in turn, should sue the official before the ordinary courts for the ultimate division of responsibility.

United Kingdom

The judicial review of administrative action is governed by Section 31 of the Supreme Court Act 1981 and Order 53 of the Rules of the Supreme Court. Changes made in 1977 and 1981 have simplified and clarified the procedure, and there has been a continuing growth in the number of applications for judicial review in the last 30 years (there were 160 applications for leave to apply for judicial review in 1974, 1 529 in 1987 and 2 886 in 1993). (Further changes may follow as result of recommendations which have been made by the government's law reform body, the Law Commission, and in a review of the civil justice system as a whole.)

Jurisdiction is exercised by the Divisional Court of the Queen's Bench Division of the High Court. Because of the importance of the subject, only the High Court has jurisdiction ; in most other non-criminal matters, county courts also have jurisdiction. Unlike many countries, England does not have a separate administrative court with judges who hear no other type of case. Judges of the Queen's Bench Division may also hear private law cases and criminal cases ; however, there is a large measure of specialisation, in that only judges who are specially nominated may hear judicial review applications and similar cases such as appeals from administrative tribunals.

An application for judicial review may be made by anyone with "a sufficient interest in the matter to which the application relates". The courts have usually interpreted this requirement in a liberal way, so that, for example, pressure groups such as Greenpeace may be permitted to make applications. A second requirement is that, in order to filter out hopeless applications, the leave of the court is needed before an application can proceed. An application for leave is normally dealt with on paper, and may be renewed if it is refused. In the interests of good administration, the applicant must apply for leave for judicial review without delay and in any event within three months. This period can be extended by the court, but sometimes, even if the application is made within three months, it will be held not to have been made promptly.

The courts have said that in most cases where there is a method of appeal alternative to judicial review, that method must be followed first. They may also hold that the claim should have been brought as a private law matter rather than as one of public law.

The full hearing of the application for judicial review will nearly always be in public, at the Royal Courts of Justice in London. It takes the same form as most other cases in that the applicant puts his case

first and has a right to reply after the respondent has put his case. It is also open for any other person who has been served in the proceedings to be heard. Because the facts are seldom in dispute, evidence is usually given in writing.

The court may take any of a wide range of orders:

- *certiorari*, quashing a decision (the commonest order);
- *mandamus*, ordering a person or authority on whom a duty is imposed by public law to carry out that duty;
- prohibition, preventing a person or authority from acting unlawfully;
- injunctions, including interim injunctions;
- declarations, as to a person's rights or the legality of an action;
- damages, if they could have been awarded had the claim been in private law and not by way of judicial review.

These orders are discretionary. A court may refuse to grant relief if, for example, the applicant has acquiesced in the decision or previously waived his right to challenge it. It should also be noted that by *certiorari*, the court does not substitute its own decision for that of the administrative authority; it merely quashes the decision and orders that the authority take it again, lawfully. This demonstrates that judicial review is concerned with the legality, not the merits, of administrative acts.

The mechanics of judicial review in Scotland (where there are far fewer cases) differ from those in England. Leave to apply is not required, and there is no fixed time-limit for applications. Nor is the distinction between private law and public law drawn. But the grounds for judicial review are substantially the same, as are the powers of the court (other than the power to make interim injunctions against the Crown).

In many areas, statute provides for an appeal to the High Court or the Court of Appeal from administrative decisions of a minister or an appellate administrative tribunal. This may be an appeal on the facts or law, or on the law only. The legal principles which govern judicial review, such as bias, failure to comply with prescribed procedures or consider relevant evidence, will usually apply equally to such appeals. Statutory appeals, however, cover an enormous range of situations, and may, where the appeal is by way of rehearing, enable the disputed decision to be reconsidered on its merits. Recommendations have been made for consolidating this very varied jurisdiction, and changes may follow.

II. – Internal review by the administrative authorities (*Bulgaria, Hungary, Netherlands*)

Bulgaria

Bulgarian legislation provides procedures pursuant to which administrative acts are subject to the internal control of the administration. These procedures are regulated by the Law on Administrative Procedures, which codifies the procedure on issuing administrative acts with a single addressee, as well as their administrative and court appeal and enforcement. Therefore, Bulgarian legislation regulates the procedures for internal control over the administration only for the single addressee acts issued by it, as well as over the refusal to issue such acts. Individuals and organisations may, within short time-limits set out in the law, contest both the factual correctness and the legality of an administrative act which concerns them. By means of a protest, the prosecutor may also challenge the legality of an administrative act. Administrative acts may be appealed against before the superior administrative authority by filing the appeal or protest through the authority which has issued the administrative act. The authority which has issued the act is thus provided with the opportunity to re-examine its decision, to withdraw or amend it, or to issue the act or document which it has refused to issue or has omitted to do within the prescribed time-limits. (The law equates the silence of the administrative authority, of which the issuing of the act or document was requested, to a refusal.) If this authority finds that grounds do not exist for re-examination of its decision, it must forward the appeal to the superior authorities. The superior authority may either repeal the administrative act or reject the appeal. In case of an illegal refusal to take an act, the superior authority obliges the subordinate authority to issue, within a specified time-limit, the act or document. When, instead of the repealed act, another act must be issued, the superior authority issues the act in question itself, if the facts of the issue are clear, or obliges the subordinate authority to do so, while observing the respective mandatory instructions.

According to the Law on Administrative Procedures of 1970, the lodging of an appeal before a superior authority was a *conditio sine qua non* for challenging acts before the courts. According to the 1979 version of the same law it was sufficient, that the interested individuals or organisations wait for the expiration of the time-limits for appeal before the administration before challenging the act before the courts.

The law provides for yet another possibility of internal control in cases where individuals or organisations have missed the time-limits

for appealing against the administrative act both before the superior authority and before the courts. In these cases, the appeal may be lodged with the superior authorities, or respectively the authority which has issued the act, within one year of the arising of the grounds for repeal of the administrative act. The grounds for repeal are expressly listed in the law itself and represent essentially new circumstances which were unknown and therefore were not taken into account when the act was issued.

Hungary

In Hungarian administrative law there is a general possibility for internal review within the administrative system.

According to the Act on Administrative Procedure the party to the procedure may submit an appeal against the administrative decision (act) within 15 days of the notification thereof. Beside the party, anyone else whose interest is directly affected by the decision has the right to appeal.

If an appeal is submitted against the decision, it has a delaying force on the implementation of the decision, unless immediate implementation was ordered by the authority. Immediate implementation is ordered if it is necessary to protect public safety, to avoid fatal danger, or if postponement of the implementation would cause significant and irreparable damage, or if alimony was the subject matter of the decision. Immediate implementation is ordered in the original decision itself with accurate reasoning.

No appeal can be submitted against decisions of the government or a member of government, or if appeal is restricted by law to judicial review.

The appeal can be submitted to the authority which made the original decision. The authority has to present the appeal with all documents of the case to its superior authority within eight days.

The superior authority examines the decision and the complete prior procedure regardless of the person or the reason for appeal. As a result of its examination, the superior authority may confirm, change or annul the original decision. In case of insufficient information or if there is a need for further investigation, the superior authority may order the administrative authority acting in the first instance to conduct new proceedings, or it may take its own measures to find all the relevant facts for a new decision.

Netherlands

As stated in the report on the Dutch situation concerning the judicial review (see above, Chapter 5, I), the person who has the right to appeal against an act, first has to try to settle the dispute with the administrative authority by an internal review. This is called the *bezwaarschriftprocedure*. By doing so, one tries to prevent the courts from being needlessly overloaded with disputes that can still be settled. The internal review also allows for the "crystalisation" of the legal situation before it is brought before the courts.

The internal review does not replace but rather precedes the appeal to the administrative court, although one of the main consequences of the internal review is, in fact, that fewer cases are brought before the courts. An administrative decision made further to an internal review (the ruling) can always be brought before the court.

Important elements of the internal review

The most important provisions of part 6.2 ("General provisions on objections and appeals") and of part 7.2 ("Special provisions on objections") of the General Administrative Law Act are the following:

- The notice of objection must contain at least a description of the decision against which the objection is brought and the grounds of the objection.
- The time-limit for lodging a notice of objection is six weeks.
- If a notice of objection (the same applies to an appeal to a court) is lodged with an administrative authority or an administrative court which lacks jurisdiction, the notice must be transmitted as soon as possible to the competent authority or court, and the sender notified.
- The objection does not stay the implementation of the decision against which it is brought, unless provided otherwise.
- No fee is payable for the processing of an objection.
- Before an administrative authority rules on an objection, it gives the interested parties the opportunity to be heard, unless:
  - the objection is manifestly inadmissible or manifestly ill-founded;
  - the interested parties have stated that they do not wish to exercise their right to be heard; or
  - the objection is completely satisfied and the interests of other interested parties have not been prejudiced as a result.

- Interested parties may submit further documents until ten days before the hearing ; for inspection by interested parties, the authority deposits the notice of objection and all other documents relating to the case at least one week prior to the hearing.
- Unless the hearing is conducted by the administrative authority itself or by the chairman or a member thereof, the hearing is conducted by a person (for instance a civil servant) who was not involved in the preparation of the disputed decision or by two or more persons of whom the majority, including the person chairing the hearing, were not involved in the preparation of the disputed decision. A specific regulation comes into force if a committee is installed which not only hears the parties but also gives an opinion to the administrative authority, while the committee is independent of the authority itself.
- At the request of the interested party witnesses and experts may be heard.
- If facts or circumstances which may be of importance to the ruling on the objection become known to the administrative authority after the hearing, this has to be communicated to the interested parties, and they have to be given the opportunity to be heard on the subject.
- The administrative authority gives a ruling within six weeks after receipt of the notice of objection. The administrative authority may postpone the ruling for a maximum of four weeks and further postponements are possible if the person who has lodged the notice of objection agrees to this.
- If the objection is admissible, the disputed decision is reconsidered on the basis thereof ; if the reconsideration provides grounds for doing so, the administrative authority repeals the disputed decision and, if necessary, makes a new decision replacing it.
- The ruling on the notice of objection is based on proper reasons, which must be stated when the ruling is published.
- Specific regulations apply if a special advisory committee is established for the preparation of the ruling and the committee consists of a chairman and at least two members, and the chairman is not part of or employed under the responsibility of the administrative authority. In that case :
  - the hearing is conducted by the committee ;
  - the committee decides on the application of several procedural obligations ;

- an agent of the administrative authority is invited to attend the hearing;
- the opinion of the committee is given in writing and includes a report of the hearing;
- the time-limit for the ruling of the administrative authority is four weeks longer;
- if the administrative authority, in giving the ruling, does not follow the opinion of the committee, the reasons why the opinion was not followed are stated in the ruling and the opinion is published together with the ruling.

Possibility of bringing a case to court during the internal review

It is of great importance that, already during the internal review by the administrative authority, the person concerned may bring the case to court in order to request provisional protection, provided that an immediate intervention of the court is necessary. In practice, a suspension of the administrative decision is very often requested. The effect of the administrative decision can be suspended until the dispute is definitely settled, either in the internal review or by the court. With the decision concerning the provisional arrangement, the court can, in certain circumstances, finish the dispute definitely.

III. – External review of the ombudsman type (*Finland, Lithuania, Portugal, Sweden*)

Finland

The Finnish ombudsman institution is one of the oldest in the world. The office of the Parliamentary Ombudsman was established in Finland in 1919 by the Constitutional Act which states the essential features of the position and functions of the ombudsman. More detailed provisions are given by parliament in the so-called Instructions for the Parliamentary Ombudsman, issued in 1920.

The ombudsman is elected by parliament for a four-year period by secret ballot and without formal nomination of candidates. According to section 49 of the Constitutional Act the ombudsman must be "a person distinguished for his or her knowledge of the law".

An Assistant Parliamentary Ombudsman is elected to assist the ombudsman and, if necessary, to replace him. A deputy replaces the assistant ombudsman in that task when the latter is prevented from doing so. The above-mentioned provisions regarding election procedures and term of office apply also to the assistant ombudsman and the deputy.

There is a staff of about 30 persons in the Office of the Ombudsman. Half of them are lawyers.

In Finland, there is also another supreme authority for control of legality, namely the Chancellor of Justice. In addition, there are a few special ombudsmen, for example the Consumer Ombudsman, the Data Protection Ombudsman, the Equality Ombudsman and the Ombudsman for Foreigners. The Chancellor of Justice and the special ombudsmen are appointed by the president of the republic.

Jurisdiction of the Parliamentary Ombudsman

The main function of the ombudsman is to supervise the legality of the actions of officials and authorities. All officials and authorities fall under the jurisdiction of the ombudsman, including courts and prosecutors. The only exceptions are the president of the republic, the Chancellor of Justice and the members of parliament. In 1990, amendments were made to the Constitutional Act, expanding the powers of the ombudsman to also cover employees of public corporations and others who are performing a public function.

In 1995, parliament adopted an amendment according to which the ombudsman shall also supervise the application of civil and human rights when performing his or her duties. This amendment entered into force in August 1995. Because a significant number of complaints made to the ombudsman already dealt with civil and human rights questions, the amendment has not widened the jurisdiction of the ombudsman as such. It did, however, emphasise the supervision of civil and human rights as part of the functions of the ombudsman.

In practice, there is a division of labour between the Parliamentary Ombudsman and the other supreme authority for legal control, the Chancellor of Justice. The ombudsman oversees, in particular the police, the defence forces, prisons and other closed institutions. The Chancellor of Justice functions as high guardian of the law within the Council of State, that is, the Cabinet of Ministers. He personally attends the sessions of the Council of State, including those where matters are presented to the president. Furthermore, the Chancellor acts as the highest public prosecutor in Finland and supervises the activities of the public prosecutors.

Each year, the Parliamentary Ombudsman submits a report to parliament on the course of his official duties and also on the standard of judicial practice and any defects that he or she has noticed in the legislation. The ombudsman can submit a special report to parliament on a certain matter, if he or she considers it necessary. In 1993, the ombudsman submitted his first special report concerning provisions on disqualification.

Practice

The ombudsman receives more than 2 000 complaints yearly. In 1993, the total number was 2 254, in 1994, 2 398 and in 1995, 2 645. There are no requirements as to the form of the complaint. The ombudsman can also start investigations on his own initiative.

The ombudsman has unlimited right to inspect all official and public institutions and authorities. Inspections are made primarily of closed institutions and the units of the defence forces. About 80 inspections are made yearly. In 1993, 77 sites were inspected, in 1994, 87 sites and in 1995, 60 sites.

The ombudsman is free to choose the way he proceeds when handling a case and deciding on the final measure. The strongest measure is prosecution. This, however, happens very rarely. In 1993, the ombudsman brought charges against a former member of the Council of State in the High Court of Impeachment, by decision of parliament. In most cases where an official or an agency has acted wrongly, the ombudsman expresses his critical opinion, and gives a reminder. About 10% of the complaints investigated lead to measures by the ombudsman.

Lithuania

The institution of the *Seimas* controller (ombudsman) was introduced recently in Lithuania. Every citizen who considers that his or her rights or freedoms are violated by "bureaucracy" or abuse of an official position, may apply to the controller for investigation of the case. The ombudsman investigates the citizen's complaints concerning abuse of an official position or "bureaucracy" with regard to the following officials: employees of the institutions of the state government and administration, employees of the local councils and their departments or authorised persons whose duties embrace the performance of organisational, managerial or administrative functions. The ombudsman also investigates citizens' complaints referred to them by *Seimas* (parliament) members, provided that the complaints correspond to the requirements set

forth in the law on the *Seimas* ombudsman. The jurisdiction of the ombudsman does not encompass investigation of the activities of the president, the members of the *Seimas*, the judges of the Constitutional Court, the Supreme Court and other courts, the procedural actions of the prosecutors, investigators or interrogators, the activities of the prime minister, the state controller and the government (as a collective institution) or the local government councils and their boards (as a collective institution).

Upon completing an investigation, the ombudsman adopts one of the following decisions:

- to refer the material to investigative bodies, if elements of crime are found;
- to bring a court action recommending that the courts dismiss officials guilty of abuse of their official position or of "bureaucracy", with the exception of officers who are appointed by the president or who are appointed or elected by the *Seimas*, and to suggest that moral and material damage, which the person suffered by reason of the violations committed by officials, be compensated;
- to recommend that the departmental collective institution or head of the institution wherein the investigation was conducted or a superior institution, impose disciplinary penalties on the officials guilty of violations;
- to bring the fact of negligence in work, non compliance with laws, or violation of professional ethics or "bureaucracy" to the attention of the officials concerned;
- to reject the complaint if the violations specified therein are not confirmed; or
- to notify the *Seimas* or the President of Lithuania of the violations committed by ministers or other officials accountable to the *Seimas* or the president (with the exception of the categories of officials enumerated above).

Portugal

Institutional position of the ombudsman

The position of the ombudsman (*Provedor de Justiça*) is established by Article 23 of the constitution. The ombudsman is therefore a constitutional body which cannot be abolished by the normal legislative process.

The same Article 23 of the constitution states that the ombudsman is an independent body. This means that he or she is independent not only *vis-à-vis* the executive power but also *vis-à-vis* parliament. Consequently, parliament, after having elected the ombudsman, cannot give him or her instructions or dismiss him or her before the end of his or her term of office.

Tasks

The principal task of the ombudsman is to defend the fundamental rights of citizens. This is why the provision which establishes his office (Article 23) is contained in part I of the constitution, devoted to "Fundamental Rights and Duties". In line with this view, Article 1 of the Ombudsman Act (Law No. 9/91 of 9/4/1991) states that the principal task of the body in question is to defend the legitimate rights, liberties and interests of citizens, the second being to review the legality and justice of the activities of the administration.

Scope of the review

In accordance with Article 2 of the Ombudsman Act, the ombudsman may review not only the activities of the central, regional and local administration and public undertakings, but also those of concessionary companies and companies in which public bodies have a majority shareholding. This provision is seen as a response to the move towards (partial) privatisation, the intention being to keep within the remit of the ombudsman undertakings whose management is, in effect, in the hands of public bodies.

Relationship with other review bodies

Article 4 of the Ombudsman Act lays down that his or her activities are independent of the administrative and judicial review instruments. Consequently the ombudsman can investigate a situation even if it is already being considered by a Court. In practice, the ombudsman does not give a ruling if there is any doubt as to the facts or the law. However, the ombudsman does give a ruling if he or she considers that the issue is so clear that it would be unjust to require an individual to assume the burden of the delays and costs of the judicial procedure in order to obtain a satisfactory result.

Powers

The ombudsman has the following powers, in addition to those normally conferred on ombudsmen. He can :

- ask the Constitutional Court to declare unconstitutional any provision whatsoever (Article 281 of the constitution);
- ask the Constitutional Court to rule that the behaviour of the parliament or the government has been unconstitutional by omission – for example if a legislature has failed to pass legislation which would be essential for the implementation of a particular provision in the constitution (Article 283 of the constitution);
- undertake the defence, against any public institutions or entities, of wide-ranging interests (health, education, environment, etc), in accordance with a law to be published – Article 20 of the Ombudsman Act;
- make public the fundamental rights of citizens – also Article 20 of the Ombudsman Act.

Sweden

One of Sweden's special institutions of control outside the court system is the Office of the Parliamentary Ombudsmen (JO). Sweden's first Parliamentary Ombudsman was appointed in 1810, but the idea of an ombudsman dates back to 1713.

The control of government is divided between parliament (the *Riksdag*) and the Parliamentary Ombudsmen in such a way that the *Riksdag* supervises the government (i.e., cabinet) and the individual ministers, whereas the ombudsmen on behalf of the *Riksdag* supervise state and local government administrative authorities as well as the courts.

The administrative system

The reason for the division of the control of government is to be found in Sweden's special administrative system. In Sweden, an individual Cabinet Minister is not head of a ministry in the usual sense, and the administrative authorities have an independent position in relation to the government and the *Riksdag*. This means, *inter alia*, that an individual minister is not allowed to give orders to the authorities. This can be done only by the cabinet as a whole, principally in general terms, for example, by issuing decrees.

Furthermore, no authority (not even the government) or the *Riksdag* is allowed to determine how an administrative authority shall make its

decision in a particular case concerning the exercise of public authority against a private subject or concerning the application of an act of law. In this respect the administrative authorities enjoy the same degree of independence as the courts of law. Another characteristic of the administrative system is that public officials are personally responsible. Consequently, an individual cabinet minister is not personally responsible for the single actions of an authority or an official, and of course not for a decision of a court of law.

Constitutional provisions

The most important provisions concerning the Swedish Parliamentary Ombudsmen are laid down in the Constitution of 1974. According to these provisions, the ombudsmen shall supervise, under instructions laid down by the *Riksdag*, the application in public service of laws and other statutes. An ombudsman may initiate legal proceedings in the cases indicated in these instructions. Further provisions concerning the ombudsmen are set forth in the *Riksdag* Act.

The Office of the Parliamentary Ombudsmen

According to the *Riksdag* Act, there are four Parliamentary Ombudsmen, of whom the Chief Ombudsman is the administrative head of the Office of the Ombudsmen and decides the main thrust of its activities. The ombudsmen, who are prominent and highly qualified lawyers, are appointed without reference to their political views by the *Riksdag* for a term of four years. The election of the Chief Parliamentary Ombudsman is conducted separately and the others are elected individually. At the request of the Standing Committee on the Constitution, the *Riksdag* may relieve of his mandate an ombudsman who has forfeited the confidence of the *Riksdag*. Two of the ombudsmen are, for the moment, women. Each ombudsman has a supervision area of his or her own. They are assisted by a staff of about 50, of whom about 30 are lawyers. Only an ombudsman is authorised to sign a final decision.

Duties

The instructions to the Parliamentary Ombudsmen are issued in general terms by an act of law decided by the *Riksdag*. The ombudsmen are supposed to work independently of the political authorities. The main object is to safeguard the principle of the rule of law and protect the rights and freedoms of the individual as laid down in the constitution and the laws.

According to their instructions, the ombudsmen ensure that those exercising public activity observe the laws and other statutes and that they fulfil their obligations in all respects. It is the particular duty of the ombudsmen to ensure that courts of law and administrative authorities observe the provisions of the constitution concerning objectivity and impartiality, and that the rights and fundamental freedoms of citizens are not encroached upon in the processes of public administration.

The ombudsmen shall also take action to remedy deficiencies in legislation. If they should find reason to raise the question of amending legislation or any other measure the state should take, an ombudsman may, after having consulting the Chief Ombudsman, present a statement on the subject to the *Riksdag* or the government.

Jurisdiction

The Parliamentary Ombudsmen supervise the action of all state and local government authorities (including the courts), officials and others holding posts with these authorities, and others holding posts or performing commissions or contracts that involve the exercise of public authority, in so far as this relates to their said activity. Excluded from the ombudsmen's supervision are two categories of persons. The first are the members of the decision-making political assemblies (the *Riksdag*, county councils and municipal councils), and the second are the government and its individual cabinet ministers.

Powers of the ombudsmen and their supervision

The Parliamentary Ombudsmen exercise supervision by examining complaints received from the general public and by carrying out inspections and other investigations they find necessary. Reports in the mass media are other sources of information used by the ombudsmen.

The investigatory powers of the ombudsmen are laid down in the constitution. An ombudsman may be present at the deliberations of a court or an administrative authority and has access to the minutes and other documents of any such court or authority. Each person who comes under the supervision of an ombudsman must provide him or her with information and statements on request. A public prosecutor shall assist the ombudsmen on request.

The supervision is mainly directed at the implementation of the laws and other regulations on which public administration is based and takes place at the level of the individual.

The ombudsmen cannot change judgments or decisions, but they have the right to express an opinion on the way public authorities have handled a case. Nor can they order a court or an authority to act in a certain way. The role of the ombudsmen is, instead, based on the principle of personal accountability of every official for his or her decisions. An ombudsman may also make pronouncements aimed at promoting uniform and proper application of legislation.

The ombudsmen do not interfere in the decision-making activities of the courts, since the courts carry out their duties in an independent way, subject only to the contents of the law. The main concern in supervising the courts, which has historical grounds, is instead to ensure that the cases are tried according to the rules on court procedure and that judgment is rendered within reasonable time.

The Office of the Parliamentary Ombudsmen has a prosecuting role, but prosecutions are not very frequent. The right to prosecute negligent officials gives a special weight to the critical pronouncements made by the ombudsmen. If in the course of an investigation, the ombudsman finds that there is reason to believe that an official has committed a crime in his job, the ombudsman has the same obligation to start a criminal investigation as a public prosecutor.

The ombudsmen also have the right to report a negligent public servant for dismissal or disciplinary measures to the body which has the authority to decide on such measures. If an authority has made a decision on disciplinary responsibility or dismissal or debarring from the duties for reasons of criminal offence or negligence of duty, the ombudsman may take the case to a court of law to have the decision changed.

Handling of complaints

The handling of complaints from the general public is the main task for the ombudsmen. In recent years they have received about 4 000 complaints a year. The largest categories of complaints refer to social welfare, prison administration, the police and the courts of law.

There are no restrictions on turning to the ombudsmen and no real formal requirements, except that complaints should be in writing. However, the ombudsmen are not bound to investigate every single complaint. They are allowed to choose which complaints should be dismissed, removed from the list of cases, handed over to another supervisory body or investigated. Only in exceptional cases will the ombudsmen deal with matters dating back more than two years. Persons who write to the ombudsmen receive a reply, provided they have given their name and address.

The Parliamentary Ombudsmen may make inquiries and obtain whatever information they consider necessary. Normally an ombudsman does not intervene while the matter is pending in a court or an appeal is still possible. Letters to and from the ombudsmen are official documents and can be examined by any member of the public, with the exceptions provided for in the Secrecy Act. The authority concerned will be informed that a complaint has been made, and it will usually be quick to rectify any error that has occurred. Matters therefore are often cleared up while complaints are being processed.

Each year, the ombudsmen rule that errors and omissions have occurred in about 500 cases. Some of them result in prosecution or disciplinary action (eg., warning or deduction from salary). In others, the ombudsman's decision will criticise the person or authority responsible, in more or less severe terms. The ombudsman then makes a statement as to whether, in his or her opinion, the act or decision of the public servant is unlawful or inappropriate. As said before, an ombudsman may also make pronouncements aimed at promoting uniform and proper application of legislation. During a period of one year, about ten percent of the complaints concluded resulted in admonition or other criticism. Most investigations by the ombudsmen show that no one is at fault.

Annual reports

The Parliamentary Ombudsmen publish an annual official report of between 500 and 600 pages containing a review of their work in the past financial year, statistics and a selection of their decisions. The report is submitted to the *Riksdag* and is studied by the Standing Committee on the Constitution which also examines the ombudsmen's decisions. A summary in English has been published in every annual report since 1969.

Chapter 6 – Public liability and reparation (*Austria, Bulgaria, Estonia, Germany, Spain*)

Austria

Public liability is basically defined by the constitution. According to Article 23 of the federal constitution, the legal entities – the federation, *Länder*, municipalities and other public bodies (institutions) – are liable "for any damage caused to whomsoever through unlawful action by persons acting as their organs in the enforcement of the laws" (paragraph 1).

The repeated clause "in the enforcement of the laws" serves to limit the scope of liability. Only judicial organs and the sovereign administration are subject to the liability of authorities as organs, whereas bodies entrusted with legislative (control) functions and the administrations of nationalised enterprises engaged in private-sector economy are not. In the latter case, liability is regulated exclusively by civil law. The distinction is often extremely difficult, particularly since we are usually dealing with non-formal physical acts.

With a few exceptions, public liability follows the rules of private law. By way of such exception, the organs themselves are not liable to the persons seeking compensation. They are, however, subject to recourse. "If they are guilty of a wilful act or gross negligence", they are liable to the legal entity for the damages for which the latter has indemnified the party seeking compensation (Article 23, paragraph 2, federal constitution).

If third (private) persons or the plaintiff have contributed to the damage, the rules of private law apply unchanged; (consequently) there is no public liability if the damage would have been avoided by lodging a remedy.

The action of the organ is attributed to the functionally competent body; it is not the organisational position, but the fulfilment of functions and the executive competency which are decisive. Therefore, the federation is held responsible for damages on the part of *Land* organs acting in a field where they are subject to (possible) instructions of federal government (indirect federal administration); the federation or

the respective *Land* is liable for action on the part of municipalities under delegated powers (which is subject to instructions by the federation or *Land*). An amendment in 1989 (*Federal Law Gazette* 343) gave the party seeking compensation the possibility to hold responsible, the legal entity identified by organisational criteria, which in turn can claim reimbursement from the functionally responsible entity.

It is worth mentioning that competence in first instance in public liability cases, is reserved to regional courts.

Unlawfulness of administrative decisions, however, can be stated only by the Administrative Court, to which the court seized with a respective complaint will turn. (It should be noted that unlawfulness is not sufficient for liability, since not every legal view taken by the authority but disapproved by the Administrative Court would involve negligence.)

Bulgaria

The Law on the Liability of the State for Damages Inflicted Upon Individuals has been in force in Bulgaria since 1988. According to this law the state is liable to its citizens for damages inflicted upon them by illegal acts, actions or omissions of its organs and officials in, or in connection with, performance of their administrative duties. Individuals may seek compensation for the damages inflicted upon them by illegal acts, after such acts are repealed as illegal. The organ which has repealed an illegal act must explain to individuals the procedure under which they may receive compensation. Compensation can be received for all material and moral damages. The state's liability is objective – it owes compensation regardless of whether the officials of its administration have acted in fault when issuing the administrative act. The requests for compensation are made in a judicial proceeding.

According to Bulgarian legislation, individuals are entitled to be compensated by the state also in cases where legal acts of its administration have caused damages. The type of compensation (cash, property, etc.), as well as the procedure through which it may be requested, are laid down in the very legislation where the acts and actions which have caused the damages are regulated. For example, if for a given public purpose, the state expropriates an individual's property, the individual may seek its cash equivalent or another property in compensation. Pursuant to the restitution laws, new types of compensation have appeared for individuals who were deprived of their ownership, whether legally or illegally, in the process of nationalisation of enterprises, commercial facilities, residential property and land in the decades following

1944. Where such ownership cannot be restored in its real boundaries to the former owners (individuals or their organisations), they are compensated through different forms including another property (land), cash compensation, interests or shares in companies or bonds in the forthcoming mass privatisation process with which they may purchase interests or shares in state enterprises undergoing privatisation. The two latter types of compensation are appropriate in cases where, for example, an industrial enterprise was nationalised and in which, for its enlargement, reconstruction or modernisation, the state's participation is considerably larger than the restitution claimed by the former owner.

Estonia

Under Article 25 of the Constitution of Estonia, everyone is entitled to compensation for moral and material damages resulting from an unlawful action. The same principle is stated in the General Disposition of the Estonian Civil Code.

In principle, the person who caused the damages must duly and fully make compensation for all damages to a natural or legal person or to property, unless he or she can prove that the damage was not caused through his or her fault. However, in some cases provided by law, the damages must be compensated for, even if there was no fault of the person who caused the damages.

The damages resulting from a lawful act need not be compensated for. There is no compensation if the damages resulted :

- from a rightful act ; or
- because of the fulfilment of obligations ; or
- with the consent of the injured person ; or
- during the capture of a convicted criminal, if damage was caused to him or her ; or
- in a state of distress ; or
- due to *force majeure*.

If the damages arose due to the negligence of the person seeking compensation, or both the person seeking compensation and the person who caused the damages, the latter need not compensate, or need compensate only partly, for the damage.

If damage is caused by an organisation or a person acting on behalf of it, the organisation is liable for damages. The damages caused by government institutions or officials are compensated by the state.

The amount of compensation, if not agreed upon, is determined by the courts.

If damages are not compensated for voluntarily, the person seeking compensation may refer the case to court. The claims for compensation of damages are examined by the rural or city court of the first instance, according to the Law on the Procedure in Civil Court. In criminal procedure, the claim for compensation of damages resulting from a crime may be submitted to the court of the first instance.

If a claim for compensation of damages resulting from an administrative act has been submitted to the court while there is a case concerning the complaint or protest on that act pending before an administrative court, the proceedings in a rural or city court shall be suspended until the judgment of the administrative court has been rendered.

The judgment will be implemented after a period of 10 days if there has been no appeal to a higher court. However, in cases where bodily harm was caused, or where suspension would cause additional damages or render reparation impossible, the court may order immediate implementation.

Germany

Scope and background

Liability of the public authorities to compensate an individual for any loss or injury caused to him or her may arise in various situations. It may arise for a breach of contract, a tort, expropriation or quasi-expropriation of property, sacrifice by an individual in the public interest (*Aufopferung*) or under any other special situation contemplated in legislation.

German law on state liability is codified in Section 839 of the German Civil Code. The material part of Section 839 reads:

> "If an official wilfully or negligently commits a breach of duty incumbent upon him towards a third party, he shall compensate the third party for any damage..."

To make sure that officials do not misuse the immunity from personal liability granted to them, Article 34 of the Basic Law also reserves a right to the state to recover damages from the official concerned, if the breach of duty on his part is wilful or grossly negligent.

Section 839 of the code, however, refers only to liability based on fault. It does not touch upon the aspect of liability which arises, irrespective of fault, from unequal burdens imposed on an individual in the interest of the community.

Article 34 of the Basic Law guarantees a basic right to property and permits its expropriation only for the public weal, by or pursuant to a law which provides for the nature and extent of compensation. With this, the obligation to pay compensation for the expropriation of property becomes absolute.

There is no similar guarantee of compensation for other sacrifices (*Aufopferung*) of an individual in the public interest. It was, however, recognised that an individual must be compensated for any unequal burdens lawfully imposed on him or her in the interest of the general public. Any doubt in this respect was removed by a larger division of the Federal Court of Justice in its judgment of 9 June 1952, in which it held that compensation must also be paid for illegal intrusion into the pecuniary rights of an individual, which it designated as quasi-expropriation (*enteignungsgleicher Eingriff*). This decision has created a division between the intrusions in pecuniary rights (*vermögenswerte Rechte*) and non-pecuniary rights (*nichtvermögenswerte Rechte*). While intrusion in the former is covered under the newly created concept, the intrusion into the latter has been left to the old notion of sacrifice (*Aufopferung*). But the legal position with respect to both is the same and, accordingly, the liability to pay compensation arises as much for illegal and culpable intrusions as for legal and non-culpable intrusions. The main impact of the distinction between the two kinds of rights has been that the scope of expropriation covered by Article 14 of the Basic Law has been widened, and the one of sacrifice, reduced to rights relating to one's person, body or health. Later on, the Federal Court of Justice also clarified that a claim of quasi-expropriation is complementary to a claim of tortious liability of the state and that the two claims may be joined together. To that extent at least, quasi-expropriation becomes relevant to explaining the general tortious liability of the state.

General tort liability

Persons exercising a public office :

Tortious liability of the state or public authorities arises for the wrongs of any person exercising a public office, irrespective of whether such person is in the employment or service of the state or another public authority. Although Section 829 of the German Civil Code speaks

of "an official", as did Article 131 of the Weimar Constitution, the courts have always taken a very liberal approach on the matter and have held the state liable, even if the person who acted on behalf of it had no formal appointment from the state.

The shift to "any person" who is entrusted with a public duty in Article 34 of the Basic Law represents this liberal approach. The courts have held that the state cannot escape its liability by handing over a public duty or authority to a private person.

Breach of duty :

For the purpose of tortious liability of the state or public authorities, the word "duty" has received a very liberal interpretation and is determined on the basis of the legal principles relating to that duty, including the judicial interpretation, precedents, official orders, and contract of service. The law also requires that officials observe the principles of good morals and of reasonableness or proportionality (*Verhältnismäßigkeit*) and official secrecy. Furthermore a citizen's justified expectations should not be belied.

Public authorities are also under an obligation to observe the normal care which an individual is obliged to observe towards others. Even in the course of duty, they are under an obligation to observe all the traffic rules and avoid accidents or injuries to other persons.

The observance of duty requires an orderly action on the part of the authorities. For instance, information or advice must be given accurately and on time.

There is no clear case establishing the liability of public authorities for non-action (omission), but German scholars assert that a breach of duty arises as much from non-action as from wrongful action. If the authorities do not provide the benefits or facilities which they are under an obligation to provide under the law, they must be held liable for the injuries caused by such non-performance. Perhaps the cases of non-exercise of discretion cited below may also be taken as examples of non-performance. Administrative courts held that the authorities are liable for damages if they do not dispose of an application within a reasonable time.

Abuse or illegal exercise of discretion makes the public authorities liable for any injuries caused to an individual. German law makes no general exception in favour of the discretionary decision. But mere unsuitability (*Unzweckmäßigkeit*) of the decision is not enough. There must be a clear case of misuse amounting to its illegality.

Duties towards third parties :

Section 839 of the German Civil Code, as well as Article 34 of the Basic Law, deal with duties towards third parties. They do not address violation of the rights of an individual and it is therefore not necessary for a breach of duty that an absolute right or legally protected interest be violated. Whether a person is a third party or not for the purposes of a duty imposed upon an authority, depends on whether the object of the duty is to safeguard directly the interest of that person. Whether the power of an authority to act also implies a corresponding duty towards a private person, depends on whether the power is given to the authority exclusively in the interest of the general public or also in the interests of a specific person. If for instance a policeman remains inactive while a theft is being committed, he is in breach of his official duty towards the owner, because his power to interfere is conferred on him not merely in the interests of the general public, but at the same time, in the interest of each single individual.

Exercise of public office :

Article 34 expressly mentions that the state is liable only if the breach of duty is committed in the exercise of public office. Therefore, the state is not liable for any injury caused by an official while he is not performing any public duty entrusted to him. For example, the state is liable for any injury in a motor accident caused by a civil servant while using a vehicle for official purposes but not when using it for his or her private purposes. But if the accident occurs in the course of duty, it is immaterial whether the vehicle is private or official. Thus, the state was held liable for damage resulting from an accident caused by a doctor on duty, even though he was using his personal car.

Fault and strict liability :

Fault – wilful or negligent breach of duty – is the basis of the tortious liability of the state under Section 839 of the German Civil Code. Therefore the courts refused to award damages to a plaintiff who had an accident due to the failure of traffic lights. The courts said that the German system of law was based on the principle of fault, and the court could not create a strict liability.

However, the liability of the state for the sacrifice by an individual in the public interest (*Aufopferung*), as discussed below, has all the potential of developing into a liability for risk as exists in French law.

Liability for legislative changes:

The question of the liability of the state for injuries caused to an individual by legislative action of the state is still open. In a decision of 29 March 1971, the Federal Court of Justice left the matter open by saying that inaction of the legislation refers to the general public and not to any particular person or persons, and therefore an individual could be considered a third party within the meaning of Section 839 of the German Civil Code only in very exceptional cases (e.g., when legislation is to the benefit of very few individuals only).

Limits of liability:

Apart from limits on the liability of the state such as may be imposed under special law, Section 839 of the German Civil Code provides for three limitations. Firstly, an official, or the state on his behalf, cannot be held liable for negligence if the party seeking compensation can obtain compensation in another manner, such as under a contract, or a law or out of social insurance. Secondly, the state is not liable for any breach of duty committed by an official in the discharge of judicial functions, unless the breach of duty is punished with a public penalty to be enforced by criminal proceedings. But this protection is available only to the judges in the restrictive sense of Article 97 of the Basic Law and does not apply to the administrative authorities exercising any judicial functions. Lastly, the duty to grant compensation does not rise if the party seeking compensation has wilfully or negligently omitted to avert the damage by availing a legal remedy. Thus, a person cannot first connive at the damage and then claim damages.

Liability for "quasi-expropriation" and sacrifice

Liability for "quasi-expropriation" (*enteignungsgleicher Eingriff*):

In its famous judgment of 9 June 1952, the Federal Court of Justice held that under the Basic Law, the state is always under an obligation to pay compensation for quasi-expropriation. That judgment involved three different cases. In one of them the defendant authority requisitioned the house of the plaintiff and illegally allotted it to a family which never occupied the house. The house remained vacant and the plaintiff asked compensation for the loss of rent. In another case, the house of the plaintiff was illegally allotted to a person who did not pay part of the rents to the plaintiff, and the plaintiff asked the defendant authority who had allotted it, to pay. In the third case, the plaintiff was a dentist practising in one town and, for lack of accommodation, living

in another town. The defendant authority allotted a family house to him for his practice, but before the plaintiff could occupy the house he was arrested and the defendant authority, without informing him or his family, allotted that house to another person without any legal basis. On release, the plaintiff had to continue to travel between home and work and claimed damages for this. The Court found that in all these cases, the plaintiffs were unlawfully deprived of their property or pecuniary right and that this would have amounted to expropriation under Article 14 of the Basic Law had it been done lawfully. It held that an unlawful intrusion into the rights of an individual by the state or public authorities is to be treated as expropriation, if in view of its effect it would have amounted to an expropriation had it been it lawful, and which amounts to a "special sacrifice" (*Aufopferung*) of the affected person. Thus the liability of the state to pay compensation for unlawful intrusion into the pecuniary rights of an individual, irrespective of the fault of the administrative authorities, was established whenever such intrusion amounted to an unequal burden on an individual in the public interest.

Simple non-action on the part of a public authority, however, does not amount to quasi-expropriation. Thus, a plaintiff whose house was requisitioned for the official purpose of the British authorities within their zone, failed to receive damages on the ground that other houses in the area were not requisitioned in turn. The court held that mere non-observance of a public duty was not enough to create a claim of quasi-expropriation.

Liability for "sacrifice" (*Aufopferung*) :

With the creation of the basic right to property and its expansion to cover quasi-expropriation, the original liability for such burdens has not been confined to pecuniary rights. A claim of "special burdens" or "sacrifice" can be made when a sovereign act interferes with the non-pecuniary rights or legal values, such as life, health, physical integrity or personal freedom, by imposing a special burden on an individual in the interest of the general public. The legality or illegality of the act, as well as the question of whether it is with or without fault, is irrelevant. The liability of the state in such cases is based on the principle of the social welfare state (*Sozialstaat*) and the rule of law (*Rechtsstaat*) as enshrined in Article 20 (1) of the Basic Law.

A claim for compensation for special sacrifice is, however, admissible only where an individual suffers special damages which other persons in similar situations are not required to suffer. If he or she suffers a damage in sharing a general risk, the person cannot rely on a claim

for sacrifice (*Aufopferung*). Thus, a student failed to recover damages for the injuries suffered by him in an accident during gymnastic exercises at school. Similarly, in a case in which a former soldier succeeded in claiming damages for mishandling by doctors of the injuries he suffered during war, the court clarified that soldiers have one general claim for damages on the grounds of special sacrifice for injuries or death in the course of their duties, because the law requires all able-bodied persons to serve society. In the same case, the court also clarified that even in those cases where claims for sacrifice are allowed, the compensation is paid only for injuries that can be counted in terms of money and not for non-pecuniary injuries such as psychological pain.

Although the claims for compensation for sacrifice have acquired constitutional status through the pronouncements of the courts and require the legislator to honour them, there is nothing that prevents the legislator from making special legislative arrangements for the recovery of damages for such sacrifices under specific laws or through a system of social insurance.

Remedy of "nullifying the consequences"

German law has recently developed a remedy called "nullifying the consequences" (*Folgenbeseitigungsanspruch*). It sanctions a breach of duty on the part of the administrative authorities.

In a decision of 25 August 1971, the Federal Administrative Court held that the remedy of nullifying the consequences has its foundation in the Basic Law and can be found in the right to freedom or in the requirement of a legal basis for any act; it can be availed of not only against executed administrative acts, but also against simple administrative activities. It can be used as a basis for a request to withdraw a defamatory statement (material act), or for protection against emission from public enterprises, for example. It may also be used to set aside the continuing consequences of an illegal act. A higher administrative court held that a neighbour who has won a suit for the illegal granting of a construction permit, also has a claim for the demolition of the already completed construction.

Spain

Individuals have the right to receive compensation from the administration for any damage suffered to their goods or rights, except in cases of *force majeure*, if the damage is a consequence of the (regular or irregular) functioning of public services.

In any case, the damage has to be effective, economically evaluatable and personalised in relation to an individual or group of individuals.

When the administration acts in private law relations, it is directly responsible for the damages caused by its employees to private persons. In this case, the employee's acts will be considered as administrative acts.

Individuals will be able to claim compensation directly from the administration in question.

If the damage was caused by fraud, fault or active negligence by the official or public employee, the administration, after paying the compensation, will be able to request reimbursement from their employee.

Such liability should be pondered by taking into account the following circumstances:

– the importance of the damage produced;

– whether the agent acted intentionally or not;

– the professional responsibilities of the agent;

– the causal link between the agent's act and the damage done.

The civil and criminal responsibility of the administrative agents will be engaged according to the civil and criminal law.

Appendix 3: Council of Europe documents

Texts reproduced in this appendix

1. European Treaty Series

Texts not reproduced in this appendix

Conventions:

European Convention on the Calculation of Time-Limits (Basel, 16 May 1972, ETS No. 76)

European Agreement on the Transmission of Applications for Legal Aid (Strasbourg, 27 January 1977, ETS No. 92)

European Convention on the Service Abroad of Documents Relating to Administrative Matters (Strasbourg, 24 November 1977, ETS No. 94)

European Convention on the Obtaining Abroad of Information and Evidence in Administrative Matters (Strasbourg, 15 March 1978, ETS No. 100)

Convention on the Participation of Foreigners in Public Life at Local Level (Strasbourg, 5 February 1992, ETS No. 144)

Recommendations:

Recommendation No. R (81) 1 on regulations for automated medical data banks (23 January 1981)

Recommendation No. R (83) 10 on the protection of personal data used for scientific research and statistics (23 September 1983)

Recommendation No. R (85) 20 on the protection of personal data used for the purposes of direct marketing (25 October 1985)

Recommendation No. R (86) 1 on the protection of personal data used for social security purposes (23 January 1986)

Recommendation No. R (87) 15 regulating the use of personal data in the police sector (17 September 1987)

Recommendation No. R (89) 2 on the protection of personal data used for employment purposes (18 January 1989)

Recommendation No. R (90) 19 on the protection of personal data used for payment and other related operations (13 September 1990)

Recommendation No. R (95) 4 on the protection of personal data in the area of telecommunication services, with particular reference to telephone services (7 February 1995)

Convention for the Protection of Human Rights and Fundamental Freedoms

(The "European Convention on Human Rights", Rome, 4 November 1950, ETS No. 5)

The governments signatory hereto, being members of the Council of Europe,

Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10th December 1948 ;

Considering that this declaration aims at securing the universal and effective recognition and observance of the rights therein declared ;

Considering that the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of human rights and fundamental freedoms ;

Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend ;

Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration,

Have agreed as follows :

Article 1 [Obligation to respect human rights][1]

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

1. The headings indicated between square brackets are those which "are to be inserted into the text of the Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols" according to the appendix to Protocol No. 11.

Section I

Article 2 [Right to life]

1 Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2 Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

a in defence of any person from lawful violence;

b in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

c in action lawfully taken for the purpose of quelling a riot or insurrection.

Article 3 [Prohibition of Torture]

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 4 [Prohibition of slavery and forced labour]

1 No one shall be held in slavery or servitude.

2 No one shall be required to perform forced or compulsory labour.

3 For the purpose of this article the term "forced or compulsory labour" shall not include:

a any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;

b any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;

c any service exacted in case of an emergency or calamity threatening the life or well-being of the community;

d any work or service which forms part of normal civic obligations.

Article 5 [Right to liberty and security]

1 Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

a the lawful detention of a person after conviction by a competent court;

b the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

c the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

d the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

e the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

f the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2 Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3 Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4 Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5 Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

Article 6 [Right to a fair trial]

1 In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2 Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3 Everyone charged with a criminal offence has the following minimum rights:

a to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

b to have adequate time and facilities for the preparation of his defence;

c to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

d to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

e to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 7 [No punishment without law]

1 No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2 This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when

it was committed, was criminal according to the general principles of law recognised by civilised nations.

Article 8 [Right to respect for private and family life]

1 Everyone has the right to respect for his private and family life, his home and his correspondence.

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 9 [Freedom of thought, conscience and religion]

1 Everyone has the right to freedom of thought, conscience and religion ; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2 Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 10 [Freedom of expression]

1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.

2 The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of

national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 11 [Freedom of assembly and association]

1 Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2 No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the state.

Article 12 [Right to marry]

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

Article 13 [Right to an effective remedy]

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Article 14 [Prohibition of discrimination]

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political

or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 15 [Derogation in time of emergency]

1 In time of war or other public emergency threatening the life of the nation, any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2 No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

3 Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

Article 16 [Restrictions on political activity of aliens]

Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

Article 17 [Prohibition of abuse of rights]

Nothing in this Convention may be interpreted as implying for any state, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

Article 18 [Limitations on use of restrictions on rights]

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

Sections II to IV

(dealing with the European Commission of Human Rights and the European Court of Human Rights) *(Not reproduced)*

Section V

Articles 57 to 59, 61 to 63, 65 and 66 *(Not reproduced)*

Article 60

Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party.

Article 64

1 Any state may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this article.

2 Any reservation made under this article shall contain a brief statement of the law concerned.

Protocol No. 1 to the European Convention on Human Rights

(Paris, 20 March 1952, ETS No. 9)

The governments signatory hereto, being members of the Council of Europe,

Being resolved to take steps to ensure the collective enforcement of certain rights and freedoms other than those already included in Section I of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention"),

Have agreed as follows:

Article 1 [Protection of property]

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Article 2 [Right to education]

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the state shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

Article 3 [Right to free elections]

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

Article 4 [Territorial application] *(Not reproduced)*

Article 5 [Relationship to the Convention]

As between the High Contracting Parties, the provisions of Articles 1, 2, 3 and 4 of this Protocol shall be regarded as additional articles to the Convention and all the provisions of the Convention shall apply accordingly.

Article 6 [Signature and ratification] *(Not reproduced)*

Protocol No. 4 to the European Convention on Human Rights

(Strasbourg, 16 September 1963, ETS No. 46)

The governments signatory hereto, being members of the Council of Europe,

Being resolved to take steps to ensure the collective enforcement of certain rights and freedoms other than those already included in Section 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4th November 1950 (hereinafter referred to as the "Convention") and in Articles 1 to 3 of the First Protocol to the Convention, signed at Paris on 20th March 1952,

Have agreed as follows:

Article 1 [Prohibition of imprisonment for debts]

No one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation.

Article 2 [Freedom of movement]

1 Everyone lawfully within the territory of a state shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2 Everyone shall be free to leave any country, including his own.

3 No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of *ordre public*, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

4 The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.

Article 3 [Prohibition of expulsion of nationals]

1 No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the state of which he is a national.

2 No one shall be deprived of the right to enter the territory of the state of which he is a national.

Article 4 [Prohibition of collective expulsion of aliens]

Collective expulsion of aliens is prohibited.

Article 5 [Territorial application] *(Not reproduced)*

Article 6 [Relationship to the Convention]

1 As between the High Contracting Parties, the provisions of Articles 1 to 5 of this Protocol shall be regarded as additional articles to the Convention, and all the provisions of the Convention shall apply accordingly.

2 *(Not reproduced)*

Article 7 [Signature and ratification] *(Not reproduced)*

Protocol No. 7 to the European Convention on Human Rights

(Strasbourg, 22 November 1984, ETS No. 117)

The member states of the Council of Europe signatory hereto,

Being resolved to take further steps to ensure the collective enforcement of certain rights and freedoms by means of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention"),

Have agreed as follows:

Article 1 [Procedural safeguard relating to the expulsion of aliens]

1 An alien lawfully resident in the territory of a state shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:

a to submit reasons against his expulsion;

b to have his case reviewed; and

c to be represented for these purposes before the competent authority or a person or persons designated by that authority.

2 An alien may be expelled before the exercise of his rights under paragraph 1.a,b and c of this article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.

Article 2 [Right of appeal in criminal matters]

1 Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.

2 This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.

Article 3 [Compensation for wrongful conviction]

When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed, or he has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to the law or the practice of the state concerned, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

Article 4 [Right not to be tried or punished twice]

1 No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same state for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that state.

2 The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the state concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

3 No derogation from this article shall be made under Article 15 of the Convention.

Article 5 [Equality between spouses]

Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution. This article shall not prevent states from taking such measures as are necessary in the interests of the children.

Article 6 [Territorial application] *(Not reproduced)*

Article 7 [Relationship to the Convention]

1 As between the States Parties, the provisions of Articles 1 to 6 of this Protocol shall be regarded as additional articles to the Convention, and all the provisions of the Convention shall apply accordingly.

Article 7, paragraph 2 and Articles 8 to 10 [Signature and ratification, Entry into force, Depositary functions] *(Not reproduced)*

Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data

("Convention on Data Protection", Strasbourg, 28 January 1981, ETS No. 108)

Preamble The member states of the Council of Europe, signatory hereto,

Considering that the aim of the Council of Europe is to achieve greater unity between its members, based in particular on respect for the rule of law, as well as human rights and fundamental freedoms;

Considering that it is desirable to extend the safeguards for everyone's rights and fundamental freedoms, and in particular the right to the respect for privacy, taking account of the increasing flow across frontiers of personal data undergoing automatic processing;

Reaffirming at the same time their commitment to freedom of information regardless of frontiers;

Recognising that it is necessary to reconcile the fundamental values of the respect for privacy and the free flow of information between peoples,

Have agreed as follows:

Chapter I – General provisions

Article 1 – Object and purpose

The purpose of this convention is to secure in the territory of each Party for every individual, whatever his nationality or residence, respect for his rights and fundamental freedoms, and in particular his right to privacy, with regard to automatic processing of personal data relating to him ("data protection").

Article 2 – Definitions

For the purposes of this convention :

a "personal data" means any information relating to an identified or identifiable individual ("data subject") ;

b "automated data file" means any set of data undergoing automatic processing ;

c "automatic processing" includes the following operations if carried out in whole or in part by automated means : storage of data, carrying out of logical and/or arithmetical operations on those data, their alteration, erasure, retrieval or dissemination ;

d "controller of the file" means the natural or legal person, public authority, agency or any other body who is competent according to the national law to decide what should be the purpose of the automated data file, which categories of personal data should be stored and which operations should be applied to them.

Article 3 – Scope

1 The Parties undertake to apply this convention to automated personal data files and automatic processing of personal data in the public and private sectors.

2 Any state may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, or at any later time, give notice by a declaration addressed to the Secretary General of the Council of Europe :

a that it will not apply this convention to certain categories of automated personal data files, a list of which will be deposited. In this list it shall not include, however, categories of automated data files subject under its domestic law to data protection provisions. Consequently, it shall amend this list by a new declaration whenever additional categories of automated personal data files are subjected to data protection provisions under its domestic law ;

b that it will also apply this convention to information relating to groups of persons, associations, foundations, companies, corporations and any other bodies consisting directly or indirectly of individuals, whether or not such bodies possess legal personality ;

c that it will also apply this convention to personal data files which are not processed automatically.

3 Any state which has extended the scope of this convention by any of the declarations provided for in sub-paragraph 2.b or c above may give notice in the said declaration

that such extensions shall apply only to certain categories of personal data files, a list of which will be deposited.

4 Any Party which has excluded certain categories of automated personal data files by a declaration provided for in sub-paragraph 2.a above may not claim the application of this convention to such categories by a Party which has not excluded them.

5 Likewise, a Party which has not made one or other of the extensions provided for in sub-paragraphs 2.b and c above may not claim the application of this convention on these points with respect to a Party which has made such extensions.

6 The declarations provided for in paragraph 2 above shall take effect from the moment of the entry into force of the convention with regard to the state which has made them if they have been made at the time of signature or deposit of its instrument of ratification, acceptance, approval or accession, or three months after their receipt by the Secretary General of the Council of Europe if they have been made at any later time. These declarations may be withdrawn, in whole or in part, by a notification addressed to the Secretary General of the Council of Europe. Such withdrawals shall take effect three months after the date of receipt of such notification.

Chapter II – Basic principles for data protection

Article 4 – Duties of the Parties

1 Each Party shall take the necessary measures in its domestic law to give effect to the basic principles for data protection set out in this chapter.

2 These measures shall be taken at the latest at the time of entry into force of this convention in respect of that Party.

Article 5 – Quality of data

Personal data undergoing automatic processing shall be:

a obtained and processed fairly and lawfully;

b stored for specified and legitimate purposes and not used in a way incompatible with those purposes;

c adequate, relevant and not excessive in relation to the purposes for which they are stored;

d accurate and, where necessary, kept up to date;

e preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which those data are stored.

Article 6 – Special categories of data

Personal data revealing racial origin, political opinions or religious or other beliefs, as well as personal data concerning health or sexual life, may not be processed automatically unless domestic law provides appropriate safeguards. The same shall apply to personal data relating to criminal convictions.

Article 7 – Data security

Appropriate security measures shall be taken for the protection of personal data stored in automated data files against accidental or unauthorised destruction or accidental loss as well as against unauthorised access, alteration or dissemination.

Article 8 – Additional safeguards for the data subject

Any person shall be enabled:

a to establish the existence of an automated personal data file, its main purposes, as well as the identity and habitual residence or principal place of business of the controller of the file;

b to obtain at reasonable intervals and without excessive delay or expense, confirmation of whether personal data relating to him are stored in the automated data file as well as communication to him of such data in an intelligible form;

c to obtain, as the case may be, rectification or erasure of such data if these have been processed contrary to the provisions of domestic law giving effect to the basic principles set out in Articles 5 and 6 of this convention;

d to have a remedy if a request for confirmation or, as the case may be, communication, rectification or erasure as referred to in paragraphs b and c of this article is not complied with.

Article 9 – Exceptions and restrictions

1 No exception to the provisions of Articles 5, 6 and 8 of this convention shall be allowed except within the limits defined in this article.

2 Derogation from the provisions of Articles 5, 6 and 8 of this convention shall be allowed when such derogation is provided for by the law of the Party and constitutes a necessary measure in a democratic society in the interests of :

a protecting state security, public safety, the monetary interests of the state or the suppression of criminal offences ;

b protecting the data subject or the rights and freedoms of others.

3 Restrictions on the exercise of the rights specified in Article 8, paragraphs b, c and d, may be provided by law with respect to automated personal data files used for statistics or for scientific research purposes when there is obviously no risk of an infringement of the privacy of the data subjects.

Article 10 – Sanctions and remedies

Each Party undertakes to establish appropriate sanctions and remedies for violations of provisions of domestic law giving effect to the basic principles for data protection set out in this chapter.

Article 11 – Extended protection

None of the provisions of this chapter shall be interpreted as limiting or otherwise affecting the possibility for a Party to grant data subjects a wider measure of protection than that stipulated in this convention.

Chapter III – Transborder data flows

Article 12 – Transborder flows of personal data and domestic law

1 The following provisions shall apply to the transfer across national borders, by whatever medium, of personal data undergoing automatic processing or collected with a view to their being automatically processed.

2 A Party shall not, for the sole purpose of the protection of privacy, prohibit or subject to special authorisation transborder flows of personal data going to the territory of another Party.

3 Nevertheless, each Party shall be entitled to derogate from the provisions of paragraph 2 :

a in so far as its legislation includes specific regulations for certain categories of personal data or of automated personal data files, because of the nature of those data or those files, except where the regulations of the other Party provide an equivalent protection ;

b when the transfer is made from its territory to the territory of a non-Contracting State through the intermediary of the territory of another Party, in order to avoid such transfers resulting in circumvention of the legislation of the Party referred to at the beginning of this paragraph.

Chapter IV – Mutual assistance

Article 13 – Co-operation between Parties

1 The Parties agree to render each other mutual assistance in order to implement this convention.

2 For that purpose :

a each Party shall designate one or more authorities, the name and address of each of which it shall communicate to the Secretary General of the Council of Europe ;

b each Party which has designated more than one authority shall specify in its communication referred to in the previous sub-paragraph the competence of each authority.

3 An authority designated by a Party shall at the request of an authority designated by another Party :

a furnish information on its law and administrative practice in the field of data protection ;

b take, in conformity with its domestic law and for the sole purpose of protection of privacy, all appropriate measures for furnishing factual information relating to specific automatic processing carried out in its territory, with the exception however of the personal data being processed.

Article 14 – Assistance to data subjects resident abroad

1 Each Party shall assist any person resident abroad to exercise the rights conferred by its domestic law giving effect to the principles set out in Article 8 of this convention.

2 When such a person resides in the territory of another Party he shall be given the option of submitting his request through the intermediary of the authority designated by that Party.

3 The request for assistance shall contain all the necessary particulars, relating *inter alia* to :

a the name, address and any other relevant particulars identifying the person making the request ;

b the automated personal data file to which the request pertains, or its controller ;

c the purpose of the request.

Article 15 – Safeguards concerning assistance rendered by designated authorities

1 An authority designated by a Party which has received information from an authority designated by another Party either accompanying a request for assistance or in reply to its own request for assistance, shall not use that information for purposes other than those specified in the request for assistance.

2 Each Party shall see to it that the persons belonging to or acting on behalf of the designated authority shall be bound by appropriate obligations of secrecy or confidentiality with regard to that information.

3 In no case may a designated authority be allowed to make under Article 14, paragraph 2, a request for assistance on behalf of a data subject resident abroad, of its own accord and without the express consent of the person concerned.

Article 16 – Refusal of requests for assistance

A designated authority to which a request for assistance is addressed under Articles 13 or 14 of this convention may not refuse to comply with it unless :

a the request is not compatible with the powers in the field of data protection of the authorities responsible for replying ;

b the request does not comply with the provisions of this convention ;

c compliance with the request would be incompatible with the sovereignty, security or public policy (*ordre public*) of the Party by which it was designated, or with the rights and fundamental freedoms of persons under the jurisdiction of that Party.

Article 17 – Costs and procedures of assistance

1 Mutual assistance which the Parties render each other under Article 13 and assistance they render to data subjects abroad under Article 14 shall not give rise to the payment of any costs or fees other than those incurred for experts and interpreters. The latter costs or fees shall be borne by the Party which has designated the authority making the request for assistance.

2 The data subject may not be charged costs or fees in connection with the steps taken on his behalf in the territory of another Party other than those lawfully payable by residents of that Party.

3 Other details concerning the assistance relating in particular to the forms and procedures and the languages to be used, shall be established directly between the Parties concerned.

Chapters V and VI – Consultative Committee, Amendments (Not reproduced)

Chapter VII – Final clauses

Articles 22 to 24 – Entry Into force, Accession by non-member states, Territorial clause *(Not reproduced)*

Article 25 – Reservations

No reservation may be made in respect of the provisions of this convention.

Articles 26 and 27 – Denunciation, Notifications *(Not reproduced)*

Resolution (76) 5 on legal aid in civil, commercial and administrative matters

(Adopted by the Committee of Ministers on 18 February 1976 at the 254th meeting of the Ministers' Deputies)

The Committee of Ministers,

Considering that with a view to eliminating economic obstacles to legal proceedings and permitting persons in an economically weak position more easily to exercise their rights in member states, it is expedient to ensure equality of treatment in granting legal aid to nationals of member states of the Council of Europe and to those aliens for whom such equality of treatment appears to be most justified,

Recommends to governments of member states to accord under the same conditions as to nationals, legal aid in civil, commercial and administrative matters irrespective of the nature of the tribunal exercising jurisdiction :

a. to natural persons being nationals of any member state,

b. to all other natural persons who have their habitual residence in the territory of the state where the proceedings take place.

Explanatory memorandum

1. At their 9th Conference held in Vienna on 30 and 31 May 1974, the European Ministers of justice, having examined the reports submitted by the Ministers of Justice of Italy and Austria, recommend the Committee of Ministers of the Council of Europe "to instruct the European Committee on Legal Co-operation to study the problem of economic and other obstacles to civil proceedings at home and abroad in the light of the discussions at the 9th Conference, the examination of which might be entrusted to a committee of experts".

2. Harmonisation of national systems of legal aid is likely to facilitate matters for persons in an economically unfavourable situation, but such harmonisation calls for detailed studies which are at present being carried out within the Council of Europe.

It is apparent that, pending the outcome of these studies, it was already possible to ensure some degree of harmonisation in respect of

equality of treatment to be granted in each member state between the nationals of these states and foreign nationals and that it was urgent to take steps to this end, having regard to reforms pending in several countries.

3. There are indeed fairly wide divergencies among the legal systems of member states with regard to legal aid to foreign nationals.

In some countries all foreign nationals are entitled to legal aid in the same way as the nationals of those countries, without regard to their nationality or residence (Cyprus, Denmark, Norway, United Kingdom).

In other countries, foreign nationals who have their habitual residence there are entitled to legal aid on the same basis as nationals of those countries; other foreign nationals are entitled thereto only if that right has been recognised in international treaties (France, Sweden and, *de facto*, the Netherlands and Switzerland).

In a third category of country, foreign nationals are entitled to such aid only if reciprocity is guaranteed by convention, legislation or *de facto* (Austria, Federal Republic of Germany, Greece, Iceland, Turkey).

Lastly, in a fourth category of country, reciprocity provided for by convention is required (Belgium, Italy, Luxembourg). Some countries have several systems as regards non-resident aliens.

In Ireland, there is as yet no statutory system of legal aid. However, legal aid for needy persons is provided in certain circumstances on an administrative basis. Legal aid and advice is also available to a limited extent from private organisations. To the extent that such legal aid is available, no distinction is made between nationals and foreigners.

4. The Committee also found that, with a few exceptions, the nationals of a Council of Europe member state could be granted legal aid in the territory of the other member state, in pursuance of the 1905 and 1954 Hague Conventions relating to Civil Procedure,[1] the 1955 European Convention on Establishment,[2] or bilateral agreements.

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1. Parties to the 1954 Hague Convention are: Austria, Belgium, Denmark, France, the Federal Republic of Germany, Italy, Luxembourg, the Netherlands, Norway, Sweden, Switzerland and Turkey.

The 1905 Hague Convention relating to Civil Procedure still applies to Iceland, which is not a party to the 1954 Hague Convention.

2. Parties to the European Convention on Establishment are: Belgium, Denmark, the Federal Republic of Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden and the United Kingdom.

5. As, however, the network of these conventions and agreements is not complete, it was held that measures should be taken for all nationals of a Council of Europe member state to be allowed to have the benefit of legal aid in the territory of another member state on the same basis as the nationals of those states, without any additional condition, including that of residence, being imposed upon them. Member states that impose special conditions on the granting of legal aid to their nationals who reside abroad may apply the same conditions to the nationals of other states who reside abroad.

6. It was also considered that special attention must be given to foreign nationals, whatever their nationality, who have their habitual residence in the territory of a member state and that they should be granted in that state the same treatment as nationals.

These foreign nationals take part in the economic, social and cultural life of their country of residence and equity demands that they be in a position to assert their legal rights and have the benefit of legal aid when they are in a difficult financial situation. If they are not granted the benefit of such aid, they might not be in a position to exercise their rights in the event of legal proceedings. In this connection, emphasis was laid on the fact that the competence of the defendant's forum, formally recognised in the Brussels Convention on Jurisdiction and the Enforcement of Civil and Commercial Judgments, as a fundamental principle of competence, is widely recognised and that it was consequently important to put the foreign national in a position to ensure his defence.

7. Under the terms of the resolution, a Council of Europe member state must grant to nationals of other Council of Europe member states, as well as to all persons having their habitual residence in its territory, the same treatment in respect of legal aid as that accorded to its nationals. It is the legislation of that state which determines the conditions to be fulfilled in order to receive the benefit of legal aid and the extent of that aid.

8. The expression "in civil, commercial and administrative matters" would be construed in a broad sense, including social and taxation matters; criminal matters are not covered by the resolution.

9. The resolution does not cover legal persons because the problem of granting legal aid to such persons is the subject of a study being carried out by the Council of Europe.

10. In order that the benefit of legal assistance may be granted to the nationals of each Council of Europe member state, it will be for these

states to take appropriate measures (reform of the law, conclusion of bilateral agreements or ratification of multilateral conventions in particular the 1954 Hague Convention and the 1955 European Convention on Establishment, etc.).

11. It should be noted that the granting by a state of legal aid to all persons habitually resident in its territory extends to stateless persons (see the 1954 New York Convention relating to the Status of Stateless Persons which has been ratified by the following Council of Europe member states: Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden, Switzerland and the United Kingdom).

12. As far as the concept of "habitual residence" is concerned, it should be recalled that it has been defined in Resolution (72) 1 and annex, which were adopted by the Council of Europe Committee of Ministers on 18 January 1972. Residence is there treated as a question of fact which must, in order to be considered as habitual, be accompanied by "a more stable territorial link. This stability may take the form of either a greater length of stay or a particularly close tie between the person and the place" (see the explanatory memorandum to Resolution (72) 1, paragraph 56). It should also be recalled that in accordance with the above resolution "the residence of a person may not depend upon granting or refusal of an official authorisation" (see the above-mentioned explanatory memorandum, paragraph 48). It therefore follows that the present resolution should not be interpreted as excluding from entitlement to legal aid those persons having their habitual residence in a state but not having been granted official authorisation to reside in that state.

13. It goes without saying that member states which already grant the benefit of legal aid to the persons referred to in sub-paragraphs *a* and *b*, either in pursuance of the law or in pursuance of international undertakings, will not be required to take any action on the resolution.

Similarly, any member state may go beyond the terms of the resolution by granting legal aid to all foreign nationals, without making residence a condition thereof.

Resolution (77) 31 on the protection of the individual in relation to the acts of administrative authorities

(Adopted by the Committee of Ministers on 28 September 1977 at the 275th meeting of the Ministers' Deputies)

The Committee of Ministers,

Considering that the aim of the Council of Europe is to achieve greater unity between its members;

Considering that, in spite of the differences between the administrative and legal systems of the member states, there is a broad consensus concerning the fundamental principles which should guide the administrative procedures and particularly the necessity to ensure fairness in the relations between the individual and administrative authorities;

Considering that it is desirable that acts of administrative authorities should be taken in ways conducive to the achievement of those aims;

Considering that, in view of the increasing co-operation and mutual assistance between member states in administrative matters and the increasing international movement of persons, it is desirable to promote a common standard of protection in all member states,

Recommends the governments of member states:

a. to be guided in their law and administrative practice by the principles annexed to this resolution,

b. to inform the Secretary General of the Council of Europe, in due course, of any significant developments in relation to the matters referred to in the present resolution;

Instructs the Secretary General of the Council of Europe to bring the contents of this resolution to the notice of the governments of Finland and Spain.

Annex

The following principles apply to the protection of persons, whether physical or legal, in administrative procedures with regard to any individual measures or decisions which are taken in the exercise of public authority and which are of such nature as directly to affect their rights, liberties or interests (administrative acts).

In the implementation of these principles the requirements of good and efficient administration, as well as the interests of third parties and major public interests should be duly taken into account. Where these requirements make it necessary to modify or exclude one or more of these principles, either in particular cases or in specific areas of public administration, every endeavour should nevertheless be made, in conformity with the fundamental aims of this resolution, to achieve the highest possible degree of fairness.

I – Right to be heard

1. In respect of any administrative act of such nature as is likely to affect adversely his rights, liberties or interests, the person concerned may put forward facts and arguments and, in appropriate cases, call evidence which will be taken into account by the administrative authority.

2. In appropriate cases the person concerned is informed, in due time and in a manner appropriate to the case, of the rights stated in the preceding paragraph.

II – Access to information

At his request, the person concerned is informed, before an administrative act is taken, by appropriate means, of all available factors relevant to the taking of that act.

III – Assistance and representation

The person concerned may be assisted or represented in the administrative procedure.

VI – Statement of reasons

Where an administrative act is of such nature as adversely to affect his rights, liberties or interests, the person concerned is informed of the reasons on which it is based. This is done either by stating the reasons in the act, or by communicating them, at his request, to the person concerned in writing within a reasonable time.

V – Indication of remedies

Where an administrative act which is given in written form adversely affects the rights, liberties or interests of the person concerned, it indicates the normal remedies against it, as well as the time-limits for their utilisation.

Explanatory memorandum

Introduction

1. One of the characteristic features of the development of the modern state is the ever-increasing importance of public administrative activities. Since the beginning of this century, public authorities, in addition to their traditional task of safeguarding law and order, have been increasingly engaged in a vast variety of actions aimed at ensuring the well-being of the citizens and promoting the social and physical conditions of society.

This development resulted in the individual being more frequently affected by administrative procedures. Consequently, efforts were undertaken in the various states to improve the individual's procedural position *vis-à-vis* the administration with a view to adopting rules which would ensure fairness in the relations between the citizen and the administrative authorities.

2. The protection of the citizen with regard to procedural aspects of administrative matters affecting him is part of the protection of the individual's fundamental rights and freedoms, which is one of the principal tasks conferred on the Council of Europe by its Statute. The Council of Europe has therefore taken an interest in this question, and in 1970 its Committee of Ministers decided to include the study of the protection of the individual in relation to acts of administrative authorities in the Work Programme of the organisation.

3. In 1971, a sub-committee of the European Committee on Legal Cooperation (CDCJ) was set up and entrusted with preparing a pilot study. The main purpose of this study was to determine whether general rules concerning the protection of the individual with regard to administrative acts could be discerned in the different legal systems in Europe, and to state any conclusions with regard to possible action at European level.

The sub-committee, which met on four occasions from 1971 to 1974, prepared an "Analytical survey of the rights of the individual in the administrative procedure and his remedies against administrative acts". This document, which was published in 1975, was compiled on the basis of replies to a questionnaire which the sub-committee had drawn up and sent to governments. It takes stock of the principles which are applied in the member states of the Council of Europe (with the exception of Iceland and Malta) as well as in Finland and Spain, and lists new tendencies in their administrative law and practice.

4. In its report to the CDCJ the sub-committee noted that in spite of the differences between the legal and administrative systems of the member states it was possible to discern a large measure of agreement concerning the fundamental principles which should guide the rules on administrative procedures established for the protection of the individual. The underlying idea of the rules applied, or the tendencies existing, in the different states was to ensure fairness in the relations between the individual and the administration.

The sub-committee concluded that in order to promote a common standard of protection in all member states it was desirable to draw up an instrument within the Council of Europe.

5. This conclusion having been approved by the CDCJ and subsequently by the Committee of Ministers, the sub-committee was then entrusted with drafting a recommendation covering the following aspects of the protection of the individual in relation to administrative acts:

- the right to be heard;
- access to information;
- legal assistance and free legal aid;
- the statement of reasons; and
- the indication of remedies.

6. A draft resolution on the protection of the individual in relation to the acts of administrative authorities was prepared by the sub-committee in the course of four meetings held from 1975 to 1976, and finalised by a Committee of Experts on Administrative Law at its meeting held from 13 to 15 April 1977. This draft was examined and revised by the CDCJ at its 27th meeting, and the text as submitted to it by the CDCJ was then adopted by the Committee of Ministers on 28 September 1977 at the 275th meeting of the Ministers' Deputies.

General considerations

7. In conformity with its terms of reference (cf. paragraph 5 above) the sub-committee drew up a resolution containing, in an annex, five general principles of administrative justice which the governments of member states are recommended to be guided by in their law and practice. The expression "to be guided by" included in the operative part of the resolution had been used in order to leave states as much freedom as possible in choosing the means for ensuring that administrative procedures will conform in substance with the principles set out in the

annex to the resolution. For that same reason, the term "principle" has been preferred to the term "rule": for the aim of the resolution is not to achieve, by adopting uniform rules, harmonisation of the different national laws on administrative procedure, but rather to promote general recognition, in the law and practice of the member states, of certain principles. This idea is also reflected in the wording of the principles: they do not define detailed obligations for the administration but describe the ways conducive to the achievement of fairness in the relations between the administration and the individual.

8. The set of principles is preceded by an introductory note which has a double purpose: it sets out the scope of application of the resolution, and it provides some guidance on the way in which the principles could be implemented.

9. The resolution applies to those administrative procedures which concern the taking of administrative acts.

10. To avoid difficulties of terminology in respect of the application of the term "administrative act", the resolution offers a definition of its own. It is contained in the first paragraph of the introductory note.

The act must be taken "in the exercise of public authority". The resolution does not therefore apply to acts of an administrative authority which are not taken in the exercise of public authority. It is, on the other hand, capable of applying to persons other than administrative authorities in whom a measure of public authority has been vested. Moreover, this part of the definition should be read in conjunction with the introductory phrase which states that the principles apply only "in administrative procedures". This is to indicate that judicial procedures, the investigation of criminal offences with a view to their prosecution before a court, and legislative procedures (i.e., under the present resolution the enactment of statutes and statutory instruments) are outside the resolution's scope of application.

The reference to "individual measures or decisions" includes those which apply to a number of specific persons, but is meant to exclude measures and decisions of general application.

Moreover, the resolution applies only to acts of such nature as "directly" to affect rights, liberties or interests and therefore has no application to persons who are only indirectly affected.

11. The introductory note makes it clear that the principles are applicable to the protection of both natural and legal persons. For that reason,

throughout the text of the annex, the term "person concerned" has been substituted for the term "individual" as used in the subcommittee's denomination and terms of reference.

12. The second paragraph of the introductory note contains a general proviso which is applicable to all principles. It is aimed at ensuring that the principles are implemented in a way compatible with the requirements of good and efficient administration and that their application does not conflict with the interests of third parties (e.g., confidentiality of information in the possession of the administrative authority), or major public interests (e.g., state security, keeping of public order, public health).

In specific cases also the major interests of the persons concerned may justify modifications in the implementation of the principles (e.g., in respect of the access to medical information, which would be detrimental to the person concerned).

13. In order to render the application of the principles more flexible the general proviso has been complemented by a clause allowing for the possibility of modification or non-application of certain principles in particular cases or in specific areas of public administration (e.g., certain public services or institutions having a particular disciplinary regime, or in the case of examinations), but emphasising the desirability of achieving nevertheless the highest possible degree of fairness.

14. In the course of preparing this resolution, the question arose whether provision should be made for the situation where any of the principles were not observed by the administrative authority.

Having found that the present diversity of the legal systems of the member states impedes the elaboration of common rules in this field, the sub-committee considered that it was for each state to implement the rules applicable in cases of non-observance by administrative authorities of the measures taken in the application of the principles set out in this resolution.

It is recalled that this resolution lays down those principles which all member states accept as common minimum standards of achievement. Nothing in this resolution will therefore prevent a state from going beyond this minimum and recognising additional or more extensive rights and safeguards for the protection of individuals in relation to acts of the administration.

Likewise, nothing in this resolution should be interpreted as implying the diminution of any right or safeguard in relation to administrative acts already recognised by a member state.

Comments on the annex

Principle I – Right to be heard

15. In conformity with the underlying idea of the resolution – to achieve a high degree of fairness in the relations between the administration and the individual – this principle provides that the person concerned is given an opportunity to be heard during the administrative procedure: he may put forward facts and arguments and, where appropriate, call evidence. The person concerned will thus be enabled to participate in the procedure concerning an administrative act and can defend his rights, liberties and legitimate interests.

The term "right to be heard" is not to be taken literally. The person concerned may present his case in writing or orally, whichever is more appropriate.

16. The principle applies only to administrative acts of such nature as is likely to affect adversely the rights, liberties or interests of the person concerned. Where the decision to be taken is the granting of an application by the person concerned and it is intended to give entire satisfaction to him, the right to be heard need not be granted.

17. It is not stipulated at what stage of the administrative procedure the person concerned ought to be granted the opportunity of putting forward facts, arguments or evidence. In fact, the sub-committee had originally intended to provide for that opportunity to be granted prior to the taking of the administrative act. However, in view of the great variety of administrative practices which often allow for the act to be reviewed during the administrative procedure, it was considered difficult to lay down a strict rule. The formula adopted is flexible as to the moment when the right to be heard is granted. However, to ensure the efficacy of the principle it is provided that the administrative authority will take into account any facts, arguments or evidence put forward by the person concerned in pursuance of his right to be heard.

18. The right to be heard is subject to the general proviso that it must be compatible with the requirements of good and efficient administration (cf. paragraph 12 above). If, for instance, the taking of the administrative act cannot be delayed, the person concerned need not be heard. The same applies whenever it is for other pertinent reasons impossible or impracticable to hear him. Hearing the person concerned might in certain cases unduly slow down the administrative procedure, and it is in the public interest that the administration proceed with appropriate expediency.

19. If the person concerned is to use this entitlement effectively he must be aware of it. The second paragraph therefore requires the administration to inform him – in appropriate cases and in due time, that is, in sufficient time to enable him to avail himself of his entitlement – of the possibility to put forward facts, arguments and evidence. This information may be given in any way suitable to the case in question, for example, by letter, public notices in the press or by posters displayed at an appropriate place.

Principle II – Access to information

20. This principle complements Principle I ; it is aimed at enabling the person concerned effectively to exercise his right to be heard by granting him access to the relevant factors on which the administrative act is intended to be based.

The term "factors" was adopted so as to include relevant facts together with indications of the legal basis of the administrative act. "Available factors" are those factors which are at the disposal of the administration at the time when the request is made and can be communicated to the person concerned in the same form in which they appear in the file, except for coded information, for example, information stored in a computer, which should be transcribed in readable form.

21. It was decided not to specify the means by which the person concerned is informed of the relevant factors (e.g., transmission of a summary, or granting access to the file). The formula adopted ("by appropriate means") enables the administrative authority to choose the means best suited in a given case and in accordance with the relevant administrative practices.

22. As regards the possibility of withholding certain information on the ground that major public interests are involved or for reasons of confidentiality, it was not considered necessary to provide for an express exception ; these cases are covered by the general proviso (cf. paragraph 12 above).

23. The information should be given when the person concerned expressly requests it. This does not prejudice the giving of information in all cases.

24. The scope of the principle has been limited to pending cases. There might, of course, be a need for the person concerned to have access to information also after an administrative act has been taken, for instance, for the purpose of having the act reviewed, and the principle does not exclude this (see paragraph 14).

Principle III – Assistance and representation

25. The purpose of this principle is to enable the person concerned to be assisted or represented in the administrative proceedings, it being understood that he is always free to conduct his case himself if he so desires. The principle does not deal with the question of any obligation for the person concerned to accomplish himself certain acts in the procedure or to take part himself in certain phases of the procedure.

26. It is to be noted that the principle does not deal with the nature of the assistance or representation, that is, qualifications or conditions of the assistant or the legal representative.

27. Nor does it deal with free legal aid, for example, the provision at public expense, to the person concerned of legal aid or advice in connection with procedures before an administrative authority.

Although the question of free legal aid was included in its terms of reference (cf. paragraph 5 above), the sub-committee decided not to deal with it in this resolution because another committee working under the authority of the CDCJ (the "Committee of Experts on Economic and Other Obstacles to Civil Proceedings *inter alia* Abroad") was already engaged in a comprehensive examination of the problems relating to legal aid, including legal aid in administrative matters. It is emphasised, however, that this decision was aimed at avoiding duplication of work by the two committees, but should not be understood to reflect a negative opinion as to the desirability of providing legal aid and advice to persons with limited means in connection with administrative procedures.

Principle IV – Statement of reasons

28. When an administrative act is of such a nature as adversely to affect the rights, liberties or interests of the person concerned, it is essential – particularly in view of a possible appeal – that it should be reasoned. Otherwise, the person concerned is not in an adequate position to decide if it is worthwhile challenging the act.

29. The question of how detailed the reasons should be and of how they should be presented is left to the administration which will determine the extent of reasoning according to the nature of the administrative act, bearing in mind the purpose of the statement of reasons, which is to enable the person concerned to evaluate the act.

30. One way of communicating the reasons is to state them in the act or in the document by which the act is conveyed to the person concerned.

Another way of meeting the needs of the person concerned is to grant him, on request, a statement of the reasons. To that end, the principle provides for the possibility of communicating the reasons later on to the person concerned at his request. Such a communication should be in writing, and it should be done within a reasonable time. What is to be considered a reasonable time will depend, *inter alia*, on the time-limit for lodging an appeal.

31. The principle is subject to the general proviso (cf. paragraph 12 above). Moreover, an indication of the reasons might be unnecessary because they are already known to the person concerned.

Principle V – Indication of remedies

32. This principle complements Principle IV. To ensure the effective protection of the rights of the person concerned, any administrative act which adversely affects his rights, liberties or interests should be accompanied by information on the remedies which are available against it.

33. The resolution has taken into account only those administrative acts which are given in written form. This is to avoid difficulties of application with regard to other acts (e.g., verbal acts and what are known in certain countries as "implicit acts").

34. The reference to "normal remedies" is intended to indicate that not all possible remedies are included in the principle. It is recognised that the national systems of remedies differ from each other in many respects and that it therefore should be left to each country to decide the precise scope of the principle within its administrative or judicial system. "Normal remedies" indicates that there may be more than one normal remedy in a given situation.

The principle does not include exceptional remedies, which might be available against administrative acts, for instance appeal to a constitutional court or recourse to bodies like parliamentary ombudsmen, who are not competent to change the decision.

35. The indication of the remedies should of course include all the information required for applying for the remedy, particularly the designation of the body competent to deal with the remedy, and the time-limit.

Resolution (78) 8 on legal aid and advice

(Adopted by the Committee of Ministers on 2 March 1978 at the 284th meeting of the Ministers' Deputies)

The Committee of Ministers,

Considering that the right of access to justice and to a fair hearing, as guaranteed under Article 6 of the European Convention on Human Rights, is an essential feature of any democratic society ;

Considering that it is therefore important to take all necessary steps with a view to eliminating economic obstacles to legal proceedings and that the existence of appropriate systems of legal aid will contribute to the achievement of this aim especially for those in an economically weak position ;

Considering that the provision of legal aid should no longer be regarded as a charity to indigent persons but as an obligation of the community as a whole ;

Considering that facilitating the availability of legal advice as a supplement to legal aid for persons in an economically weak position is of equal importance in the elimination of obstacles to access to justice,

Recommends the governments of member states to take or reinforce, as the case may be, all measures which they consider necessary with a view to the progressive implementation of the principles set out in the appendix to this resolution ;

Invites the governments of member states to inform the Secretary General of the Council of Europe periodically of the measures taken to follow up the recommendation contained in this resolution.

Appendix to Resolution (78) 8

Part I – Legal aid in court proceedings

1. No one should be prevented by economic obstacles from pursuing or defending his rights before any court determining civil, commercial, administrative, social or fiscal matters. To this end, all persons should have a right to necessary legal aid in court proceedings. When considering whether legal aid is necessary, account should be taken of :

a. personal financial resources and obligations ;

b. the anticipated cost of the proceedings.

2. Legal aid should be available even where a person is able to pay part of the costs of his proceedings. In that case, legal aid may be available with a financial contribution by the assisted person which shall not exceed what that person can pay without undue hardship.

3. Legal aid should provide for all the costs necessarily incurred by the assisted person in pursuing or defending his legal rights and in particular lawyers' fees, costs of experts, witnesses and translations.

It is desirable that, where legal aid is granted, there should be exemption from any requirement for security for costs.

4. It should be possible for legal aid to be obtained in the course of the proceedings if there is a change in the financial resources or obligations of the litigant or some other matter arises which requires the granting of legal aid.

5. Legal aid should always include the assistance of a person professionally qualified to practise law in accordance with the provisions of the state's regulations, not only where the national legal aid system always of itself so provides, but also :

a. when representation by such a person before a court of the state concerned is compulsory in accordance with the state's law ;

b. when the competent authority for the granting of legal aid finds that such assistance is necessary having regard to the circumstances of the particular case.

The assisted person should, so far as is practical, be free to choose the qualified person he wishes to assist him. The person so appointed should be adequately remunerated for the work he does on behalf of the assisted person.

6. When considering whether legal aid should be granted, the authorities may :

a. take into consideration, having regard to the circumstances of the particular case, whether or not it is reasonable for proceedings to be taken or defended ;

b. take account of the nature of the proceedings and, if need be, grant aid only for costs other than those relating to assistance by a qualified person as referred to in Principle 5.

7. The legal aid system should provide for a review of a decision to refuse a grant of legal aid.

8. The responsibility for financing the legal aid system should be assumed by the state.

9. The limits of financial eligibility for legal aid should be kept under review, especially having regard to rises in the cost of living.

10. The legal aid system should provide for the granting of legal aid, in accordance with the principles contained in the present resolution, in any proceedings for the recognition or enforcement of a decision in the state concerned of a decision given in another state.

11. The state should take the necessary steps to bring the provisions of the legal aid system to the attention of the public and other interested parties, particularly those agencies in the state to which potential applicants might turn for help.

Part II – Legal advice

12. The state should ensure that a person in an economically weak position should be able to obtain necessary legal advice on all questions arising out of the matters mentioned in Principle 1, which may affect his rights or interests.

13. Legal advice should be available either free or on payment of a contribution dependent on the resources of the person seeking the advice.

14. The state should ensure that information on the availability of legal advice is given to the public and to those to whom a person in need of legal advice may turn for help.

15. The state should take appropriate steps to see that such information on the legislation of the state as is necessary is available to advice-giving agencies.

16. The state should pay particular attention to the need for legal advice when proceedings may have to be taken in another state.

Explanatory memorandum

Introduction

1. The right of access to justice is an essential feature of any democratic society. The elimination of economic and other obstacles to civil proceedings was the subject of discussion at the 9th Conference of European Ministers of Justice held in Vienna in 1974. Particular attention was given to matters relating to legal aid and advice. In 1974, the Committee of Ministers, acting on the advice of the European Committee on Legal Co-operation (CDCJ), decided to set up a committee of experts on economic and other obstacles to civil proceedings, *inter alia* abroad, to consider the subjects dealt with in the reports and deliberations at the 9th Conference of Ministers of Justice.

2. In accordance with the CDCJ's instructions, the committee of experts gave priority to questions concerning legal aid and advice. It prepared Resolution (76) 5 on legal aid in civil, commercial and administrative matters which was adopted by the Committee of Ministers in February 1976. That resolution dealt with the granting of legal aid to nationals of member states of the Council of Europe and to all natural persons habitually resident in the territory of the state where the proceedings take place. The committee of experts also prepared the European Agreement on Transmission of Applications for Legal Aid, which was opened to signature of member states on 27 January 1977.

3. The committee of experts adopted, in October 1975, an extensive questionnaire on legal aid and advice to which member states were invited to reply. Replies were received in respect of eighteen member states as well as from Canada and Finland, which participated as observers in the committee's work. The Committee of Ministers authorised, in February 1977, the publication of the governments' replies to this questionnaire.

4. The replies contained comprehensive information on both the existing rules in this field and the reforms which were being planned in the various states and they provided a valuable basis for the committee's further work on the subject of legal aid and advice. The committee noted in particular that there were wide divergencies as regards the availability and extent of legal aid in court proceedings. The differences were even more apparent as regards legal advice outside such proceedings. In the committee's opinion, the replies showed clearly that it was desirable to lay down "minimum standards" for legal aid and advice on a European level. The committee considered that the most suitable way to achieve this would be a resolution adopted by the Committee of Ministers which recommended the governments of member states to take or reinforce, as the case might be, all necessary measures with a view to the progressive implementation of a set of principles prepared by the committee experts. It is of course understood that the implementation of these principles must be subject to the availability of the necessary financial resources in the state concerned.

5. The overriding principle behind the resolution is that the provision of legal aid and advice in civil and commercial matters should no longer, as often in the past, be regarded as a charity to indigent persons, but as an obligation of the community as a whole towards persons in an economically weak position.

6. The aim of the resolution is to contribute to the creation or furthering of systems of legal aid and advice in order to ensure that such aid

and advice is available in all appropriate cases. It should, however, be borne in mind that other measures, such as the simplification of procedures are also likely to contribute to the elimination of obstacles to justice. The committee of experts has also been instructed to study concurrently procedures facilitating access to justice.

7. The aim of legal aid and advice is essentially the same, namely to provide legal services for persons of limited means in order to enable them to assert or defend their legal rights. The link between these matters is also borne out by the legislation in several member states in which legal aid and advice form part of the same statutory scheme. Moreover, the existence of an effective legal advice scheme may often eliminate the need for actual court proceedings (see paragraph 30 below).

It has therefore seemed desirable to deal with matters relating to legal aid and advice in a single resolution.

Furthermore, it may be that where a comprehensive legal aid system, as envisaged in the resolution,is beyond the present resources of the state concerned, it could put the emphasis on ensuring that legal advice is available (see principle 12), and on providing court procedures which facilitate access to justice.

8. The resolution deals with legal aid and advice to natural persons and does not cover such aid and advice to legal persons.

Commentary on the specific provisions in the appendix to the resolution

Part I – Legal aid in court proceedings

Principle 1

9. This principle sets out one of the basic objectives of the resolution, namely that no one should be prevented by economic obstacles from pursuing or defending his rights before the courts, whether dealing with civil, commercial, administrative, social or fiscal matters. The term "court" should be understood as also including tribunals. This shows clearly that criminal matters fall outside the scope of the resolution. The principle stresses that necessary legal aid should be available as of right. As used in the context of this resolution, the meaning of the term legal aid is different in a number of member states, for example, in common law countries the term always includes the assistance of a lawyer, whereas in others it does not and may include only other costs or both. It is a matter for each member state to lay down in its own laws and regulations the circumstances under which legal aid should be regarded as necessary.

For example, some procedures may be made so simple and inexpensive as to make any legal aid unnecessary, whether in the form of legal representation or by way of exemption or payment of other procedural administrative matters. However, the principle expressly refers to two factors which, subject to the provisions of Principle 6, ought to be taken into account when considering whether legal aid is necessary in a particular case.

10. These factors relate the granting of legal aid to the individual applicant's situation : his financial position and the cost of the contemplated proceedings.

11. The resolution does not attempt to provide a method of determining the financial limits for legal aid or for assessing an individual applicant's financial position. There is a wide divergency in existing schemes both as to limits and as to assessment. Some states operate a system of predetermined fixed financial limits whereas others define in general terms the conditions for eligibility, and it is for the authority granting legal aid to determine whether or not the requirements are satisfied. Although the financial requirements are to a large degree decisive in determining whether or not a legal aid system achieves its purpose of eliminating the economic obstacles which may obstruct access to justice, the financial conditions for eligibility are to a large extent dictated by the economic conditions and budgetary resources of the country, and this is recognised in this principle. However, it is essential that the financial conditions for eligibility for legal aid should be such as to ensure that it is available to those in need of it and that a reasonable proportion of the population can benefit from it. The financial conditions should not be so rigorous as to require an applicant to sell his home or mortgage his income for years ahead, and so have to live in poverty simply so as to obtain access to the courts. This does not mean that it is unreasonable to require some applicants to borrow the sum required or part of it on reasonable security, if to do so would not cause undue hardship.

12. Some types of proceedings are considerably more expensive than others, and factor *b* recognises that and, where as it may be reasonable to refuse legal aid to a person of modest means where the proceedings are simple and inexpensive, the same person should be eligible where the cost of the proceedings would be considerable.

Principle 2

13. This principle emphasises that legal aid should not be limited only to persons who fall below the poverty line. It should also be available

to persons able to pay only part of the costs of their proceedings. In those cases, the assisted person may be required to pay a financial contribution which should not cause undue hardship. This may, for example, take the form of paying a specific contribution towards the total costs of the proceedings or waiving the obligation to pay certain fees or paying certain incidental expenses (see Principle 4).

Principle 3

14. The object of this principle is to ensure that legal aid covers all the costs necessarily incurred by the assisted person in pursuing and defending his legal rights. In addition to the remuneration of the lawyer (see Principle 5) legal aid should cover, or provide exemption from, the payment of all court costs and other costs connected with court proceedings (fees, taxes, "bailiffs'" costs, costs relating to witnesses and experts, translations, etc.). It is also desirable that legal aid should include payment of the assisted person's costs in attending a hearing in person (travelling expenses and possibly loss of earnings) whenever his presence at the hearing is deemed necessary.

The principle also deals with security for costs because such a requirement may be a serious obstacle to access to justice.[1] The principle therefore recommends states to provide that security should not be taken in those cases where the plaintiff has legal aid. As an alternative solution, the legal aid may, of course, provide the amount of the security.

Special problems may arise with regard to expert evidence and there may be cases in which it is justifiable not to allow the expense to fall upon legal aid funds.

Principle 4

15. This principle recognises the fact that circumstances may change after the proceedings have been instituted, even if the litigant at the outset of the proceedings was not eligible for legal aid. Legal aid may, however, be required at a later stage, for example, if the litigant is obliged to furnish costly expert evidence, or if his own financial conditions deteriorate.

Principle 5

16. This principle is of fundamental importance. It provides that legal aid should always include the assistance of a person professionally

1. The kind of security referred to in the text is known in many legal systems as *cautio judicatum solvi*.

qualified to practise law in the cases where it is considered necessary that such assistance should be provided: first, where the regulations of the state in which the proceedings take place impose on the parties representation by such a qualified person before its courts; and, secondly, and this may be an innovation, where the authority responsible for granting legal aid finds that, even where such representation is not compulsory under the law, such assistance is necessary having regard to the circumstances of the particular case or the applicant's own situation, especially where this is necessary to establish a balance in relation to the other party if he is represented. It should be noted that the text of the principle takes account in the opening sentence of the situation where national legal aid legislation includes the assistance of a qualified person in every case where legal aid is granted.

It is observed that the regulations of some states provide that legal aid services may be given by both lawyers in private practice and salaried lawyers, for example, in public law offices, while in other states such services are only rendered by lawyers in private practice. The aim of this provision is to make sure that the legally aided person should be assisted by a person who is fully qualified and that he should not have to content himself with, for instance, law students. The fundamental principle is that the legally aided person should be entitled to the assistance of a person having the same qualification as the person normally chosen in the same circumstances by a party not in need of legal aid. This should not be taken generally to exclude an *avocat stagiaire*, where he might otherwise be chosen. It is implicit that, if the applicant has difficulties in finding a lawyer to represent him, there should be a body to whom he could apply for designation of a lawyer.

17. This principle also lays down that the assisted person should, so far as is practical, be free to choose the lawyer he wishes to assist him. This does not in itself imply that the lawyer chosen by the assisted person should be obliged to represent him. Moreover, it is clear that the assisted person's request for a particular lawyer may be refused, if he for example, without valid reason, wishes to be represented by a lawyer practising in another part of the country and this would give rise to unreasonable costs. Furthermore, the lawyer chosen by the assisted person must be authorised in accordance with the national laws and regulations to appear before the court concerned.

18. Under the principle, the lawyer appointed should receive adequate remuneration for the work done on behalf of the assisted person. This provision is of primary importance for the proper functioning of an effective legal aid system. The services rendered by a lawyer merit remuneration,

even if lawyers traditionally have regarded the undertaking of legal aid work as a natural duty for the legal profession. It may also be desirable that, in order to safeguard the interests of the assisted person, and the equality of arms between the parties, the lawyer should receive an adequate remuneration. The reference to adequate remuneration should not be taken absolutely to exclude a system under which the remuneration is paid either as a salary or not directly to the lawyer but to a professional organisation of lawyers, for instance, as a contribution towards a pension fund. The purpose of the provision, however, is not to lay down any rules as to the manner in which the remuneration is to be paid. States should thus be free to provide how the remuneration is paid.

Principle 6

19. This principle modifies the basic provisions set out in Principle 1 and is meant to balance, for practical reasons, the right of every person in an economically weak position to obtain legal aid. It leaves to the competent authorities the right not to grant legal aid in two types of situation :

– When it is considered, having regard to the particular circumstances, that it is not reasonable for proceedings to be taken or defended. Such a condition for granting legal aid is provided for in many existing legal aid systems and, in particular, in those where the financial requirements for granting legal aid are comparatively generous and therefore a large proportion of the population is eligible for legal aid, with or without a financial contribution by the assisted person. It should be observed, however, that no such condition exists under the legal aid legislation of other states where the only condition as to the substance of the case is that it is not regarded as manifestly unfounded. Under this principle, states are not called upon to introduce such a test as to reasonableness where it does not exist. Moreover, it should also be emphasised that, where an examination of the prospects of success of the intended proceedings is a condition for the granting of legal aid, this examination should not prevent a party from bringing proceedings in a matter which reasonably could be submitted to the courts even if the outcome of the case is uncertain.

– Where the nature of the proceedings, because of the small costs involved or their simplicity or the help available from the court would not justify the granting of aid, especially where it would include a lawyer. This may be particularly applicable in

states where the legal aid system would always include the assistance of a lawyer. However, in this case, if other substantial costs are involved, the emphasis is put on the possibility of granting aid for such other costs.

20. In any event, this provision should not be interpreted as giving total discretion to the authorities to refuse to grant legal aid on the basis of the nature of the proceedings; it provides that, for common sense reasons, the granting of legal aid is not required where it would be of no real advantage to the parties while being a burden on the competent authorities. This may particularly apply to certain administrative proceedings.

Principle 7

21. A decision refusing legal aid for specific proceedings implies in many cases that the applicant is debarred from access to justice – in that particular case – as he is not able to bring or defend the proceedings without assistance. In view of the importance of this decision, it is therefore reasonable that there should be a possibility of reviewing the decision. This does not necessarily mean that there has to be an appeal to another body, but the decision may be reconsidered by the same body.

Principle 8

22. This principle requires that the responsibility for financing the legal aid system is assumed by the "state". The word "state" does not indicate, however, how the system is financed inside the state concerned, for example, from state or local government funds. The essential is that the community assumes the cost of the legal services and that these are not rendered mainly on a charitable basis by individual or private bodies. If legal aid is provided by bodies or organisations such as trade unions, consumer associations, it could continue to be given without financial contribution from the state. Such contribution is only required in respect of those who would otherwise not be in a position to assert or defend their rights.

Principle 9

23. Rises in the cost of living and inflation within the state concerned are generally particularly detrimental to those in an economically weak position. An increase in the cost of court proceedings may also cause

difficulties. It is therefore necessary to keep the limits of financial eligibility for legal aid (see Principle 1.*a* above) constantly under review in order to ensure that the financial eligibility is not eroded and that the proportion of the population who may benefit from legal aid is not reduced for this reason. It should be observed that the last part of the sentence in Principle 9 applies primarily to legal aid systems operating with fixed income limits.

Principle 10

24. This principle is based on the fact that there is an increasing possibility in recent years for recognition and enforcement abroad of decisions made by a court or tribunal. It is therefore desirable that a person in an economically weak position can also obtain necessary legal aid for such proceedings. It should be pointed out that provisions, under which a person who has been granted legal aid to obtain a decision can also be granted such aid for the recognition or enforcement of the decision, are included in many bilateral and multilateral agreements, for example, the 1958 Hague Convention on the Recognition and Enforcement of Maintenance Obligations in respect of Children and the 1968 Brussels Convention on the Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters, as well as the draft European conventions on recognition and enforcement of decisions relating to the custody of children and on an international tribunal in matters of custody of children.

25. It is understood that the granting of legal aid for the recognition or enforcement of a foreign decision in the circumstances referred to in this principle is independent of any question of reciprocity.

Principle 11

26. This principle recognises the fact that it is not sufficient merely to establish a system of legal aid, but that it is absolutely necessary that persons who are eligible for such aid are also informed of their rights in this regard. It should be noted, in particular, that many of those who are in the greatest need of the services available under the scheme are not only economically in a weak position but also socially and culturally handicapped. It is therefore important to disseminate information in such a way that it reaches as many potential beneficiaries as possible.

27. Although important that the public should know of the legal aid system, it is equally important that those who are called upon to render services under the legal aid system should be properly informed and trained in its operation. This information should be kept up to date.

28. Perhaps even more important than the matters referred to in paragraphs 26 and 27, is that intermediary bodies or persons whom potential applicants may first approach (e.g., social services, citizens advice bureaux, local administration, consumer associations, trade unions and religious bodies) should be able to give details as to the requirements to obtain legal aid and how to apply for legal aid.

Part II – Legal advice

General considerations

29. The principles concerning legal advice call for special consideration. It has emerged from the answers to the questionnaire that there are few common denominators between member states on this point. Although nearly all states have a more or less formalised system of legal aid, the ways in which legal advice is offered, and whether there is any provision to make it available to persons in an economically weak position, differ widely from state to state. Some principles about minimum standards of legal advice are, however, included in the resolution.

30. Legal advice is normally defined as assistance in legal matters outside or prior to court proceedings. A satisfactory system of legal advice, however, should not be limited to cases where court proceedings are actually envisaged. A large number of legal problems coming within the scope of the resolution, for example, concerning family problems, contracts, inheritance, taxes, etc, can easily be settled if the person involved is able to get the necessary legal information from a qualified person. Also, where the legal problem is of such a nature that it would normally involve a reference to a court in order to have it settled, legal advice at an early stage might eliminate the need for actual court proceedings.

31. It is important to emphasise that legal advice, particularly where it may avoid or be an alternative to court proceedings, is a much less expensive prospect for states desiring to improve the legal position of persons in economically weak circumstances. This factor might be of special interest to states who are in the process of introducing new systems of legal aid and advice.

32. Legal advice, as opposed to legal aid, needs not necessarily be given by professional lawyers but might, in a number of cases, be given satisfactorily by persons who are not professional lawyers but who are familiar with the problems on which they are giving advice.

33. The diversity of arrangements under which legal advice is given in member states makes it difficult to require that these schemes should

necessarily be financed from public funds. It is, however, of fundamental importance that the state assume the responsibility of ensuring that the provision of legal advice within the state functions satisfactorily, and that such advice actually reaches those who are in need of it.

Principle 12

34. As noted in the introduction, it seems reasonable to put an obligation on the state to see to it that legal advice can be obtained when there seems to be a real need for it.

It is a fact that, in many member states, in contrast to a formal legal aid system, certain aspects of legal advice are undertaken by private organisations, for example, consumer bodies, trade unions or organisations of students working on a voluntary basis. Where the provision of legal advice by such organisations is sufficient in quantity and quality to meet the needs of the public, the principle requires nothing further from the state as to the establishment of a legal advice system.

Like legal aid, legal advice is especially necessary for persons who cannot afford to pay the full cost of a lawyer's assistance, and though legal advice may well be available to all persons irrespective of their financial situation, it seems reasonable only to put an obligation on the state in respect of persons in an economically weak position, but no distinction should be made between nationals and foreigners.

Principle 13

35. The giving of legal advice to persons in an economically weak position will normally involve less expense than legal aid for court proceedings. Whether the advice is given as part of a comprehensive legal aid and advice scheme or on a voluntary basis, the principal consideration should be that all individuals are able to obtain advice, preferably as soon as is possible after the problem arises. They should not be inhibited from obtaining this advice because of the cost of obtaining such advice, which may well avoid further difficulties for them. The principle recognises, however, that in the field of legal advice it may be reasonable to require a contribution appropriate to the means of the person seeking the advice. The assessment of this contribution, if any, and the consent to give legal advice should be with a minimum of formalities. However, if the individual is to be encouraged to seek advice it is of importance that he should, wherever possible, know in advance of seeking the advice what the maximum cost should be and, consequently, this principle should be read in conjunction with Principle 14.

36. The principle does not seek to lay down any provision as to payment of the person giving the advice. It may be without remuneration; it may be remunerated only by the payment made by the person seeking advice where such a payment would not cause undue hardship, or it may be, as is the case where the advice is given as part of a comprehensive legal aid scheme, some payment by the state.

Principle 14

37. This principle invites states to ensure that the provisions for legal advice are made known to the public and perhaps more urgently to those who may act as intermediaries in referring the person in need of advice to those persons able to give it. It is plainly linked to the provisions of Principle 11 which relate to information on legal aid. For many people in an economically weak position, the major difficulty with any legal problem is in knowing how to obtain help. In some cases, they may not even realise that the problem is one which requires legal assistance. For this reason, it is desirable that states should ensure that those to whom deprived persons may turn for help in the first instance should be aware of the provisions within the states for legal advice. Even where such advice is to be given on a voluntary basis by lawyers or other organisations and is not organised by the state, only the state has the resources and organisation to bring the provisions for legal advice to the attention of the public.

Principle 15

38. This principle recognises that, where legal advice is provided, the state has a responsibility to those bodies giving aid and advice and to the public to see that information is available which will, so far as possible, enable up-to-date and accurate advice to be given. Such information is particularly desirable as regards all changes in the current legislation. It is not intended that this should be an onerous burden as in many cases where the advice is given, for example, by lawyers or trade unions, they will themselves take all the steps necessary to ensure that the advice they give is accurate and up to date. However, there will in some states be organisations which perform a useful function in giving legal advice and which do not have the facilities or financial resources to ensure that they keep abreast of changes in the law. Where this is the case, this principle invites states to take steps to see that information is available to these bodies. This may take the form of copies of legislation, official reports, explanatory notes and memoranda produced

by the state authorities or other bodies where these are produced for the information of the public. It is evident that, in many cases, it will not be sufficient simply to publish the law in an official gazette. If a person in an economically weak position is to be able to assert or defend his legal rights, especially under new legislation in the state, and is to be put on the same footing as those who might be able to afford to pay to obtain the relevant information, it is clear that the agencies which give advice to such economically weak persons should be in possession of the most up-to-date and accurate information. As the basis of the resolution (see paragraph 4) is that legal advice is to be an obligation of the community to those in an economically weak position, it must be for the state to take such steps as appear to it appropriate to satisfy this principle. In states where public funds are available to enable persons of limited means to consult a lawyer, the information given in accordance with this principle may be limited to providing those concerned with a general reference to legislative texts and documents which are accessible to the public together with an indication where they may be obtained.

Principle 16

39. This principle invites the state to pay particular attention to the need for legal advice when the person seeking advice may envisage proceedings in another state. The fact of a possible need to take proceedings abroad implies exceptional difficulties, and therefore puts the individual concerned in a particularly weak position, and requires special help. This international aspect of the legal advice problem is likely to have increasing importance because of progressing international communication. The obligation of the state will depend on the efficiency of the existing legal advice machinery. However, where no such machinery exists, the state should pay particular attention to these problems in order that reasonable assistance may be provided. Such advice may lead to seeking legal aid in the state where the proceedings are to be taken in accordance with the European Agreement on the Transmission of Applications for Legal Aid.

Resolution (85) 8 on co-operation between the ombudsmen of member states and between them and the Council of Europe[1]

(Adopted by the Committee of Ministers on 23 September 1985 at the 388th meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of Article 15.*a* of the Statute of the Council of Europe,

Recalling that the maintenance and further realisation of human rights and fundamental freedoms is one of the principal tasks assigned to the Council of Europe under its Statute;

Considering that the work and opinions of the ombudsmen of member states contribute significantly to the protection of individuals in relation to acts of the administrative authorities and thereby serve to strengthen the protection of human rights and fundamental freedoms;

Believing that the organisation of regular conferences with the ombudsmen of member states, with the participation of members of the relevant national and Council of Europe bodies dealing with human rights, would give impetus to the further realisation of human rights;

Bearing in mind the desirability of improved information of the ombudsmen on the relevant activities of the Council of Europe in the field of human rights,

Decides:

a. to institute in the framework of the Council of Europe, regular conferences with the ombudsmen of member states to consider and exchange views and experiences on the protection of human rights in relation to acts of the administrative authorities;
b. to instruct the Secretary General to invite representatives of the relevant national and Council of Europe bodies dealing with human rights to attend such conferences with a view to facilitating exchanges of views on questions of mutual interest;
c. to invite the Secretary General to ensure, by all appropriate means, that the ombudsmen are informed on a regular basis of the case-law of the organs of the European Convention on Human Rights and of other relevant material concerning the protection and promotion of human rights.

1. The term ombudsmen in this resolution relates to ombudsmen, parliamentary commissioners, mediators and persons discharging similar functions.

Recommendation No. R (80) 2 concerning the exercise of discretionary powers by administrative authorities

(Adopted by the Committee of Ministers on 11 March 1980 at the 316th meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of Article 15.*b* of the Statute of the Council of Europe,

Considering that the aim of the Council of Europe is to achieve greater unity between its members;

Considering that administrative authorities are acting in an increasing number of fields, and, in the process, are frequently called upon to exercise discretionary powers;

Considering it is desirable that common principles be laid down in all member states to promote the protection of the rights, liberties and interests of persons whether physical or legal, against arbitrariness or any other improper use of a discretionary power, without at the same time impeding achievement by the administrative authorities of the purpose for which the power has been conferred;

Recalling the general principles governing the protection of the individual in relation to the acts of administrative authorities as set out in Resolution (77) 31;

Considering that it is desirable that the said resolution be supplemented when applied to acts taken in the exercise of discretionary powers,

Recommends the governments of member states:

a. to be guided in their law and administrative practice by the principles annexed to this recommendation,

b. to inform the Secretary General of the Council of Europe, in due course, of any significant developments relating to the matters referred to in the present recommendation;

Instructs the Secretary General of the Council of Europe to bring the contents of this recommendation to the notice of the Government of Finland.

Appendix to the recommendation

Principles applicable to the exercise of discretionary powers by administrative authorities

I – Scope and definitions

The following principles apply to the protection of the rights, liberties and interests of persons with regard to administrative acts taken in the exercise of discretionary powers.

The term "administrative act" means, in accordance with Resolution (77) 31, any individual measure or decision which is taken in the exercise of public authority and which is of such nature as directly to affect the rights, liberties or interests of persons whether physical or legal.

The term "discretionary power" means a power which leaves an administrative authority some degree of latitude as regards the decision to be taken, enabling it to choose from among several legally admissible decisions the one which it finds to be the most appropriate.

In the implementation of these principles the requirements of good and efficient administration, as well as the interests of third parties and major public interests, should be duly taken into account. Where these requirements or interests make it necessary to modify or exclude one or more of these principles, either in particular cases or in specific areas of public administration, every endeavour should nevertheless be made to observe the spirit of this recommendation.

II – Basic principles

An administrative authority, when exercising a discretionary power:

1. does not pursue a purpose other than that for which the power has been conferred;

2. observes objectivity and impartiality, taking into account only the factors relevant to the particular case;

3. observes the principle of equality before the law by avoiding unfair discrimination;

4. maintains a proper balance between any adverse effects which its decision may have on the rights, liberties or interests of persons and the purpose which it pursues;

5. takes its decision within a time which is reasonable having regard to the matter at stake;

6. applies any general administrative guidelines in a consistent manner while at the same time taking account of the particular circumstances of each case.

III – Procedure

In addition to the principles of fair administrative procedure governing administrative acts in general as set out in Resolution (77) 31, the following principles apply specifically to the taking of administrative acts in the exercise of a discretionary power.

7. Any general administrative guidelines which govern the exercise of a discretionary power are :

a. made public ; or

b. communicated in an appropriate manner and to the extent that is necessary to the person concerned, at his request, be it before or after the taking of the act concerning him.

8. Where an administrative authority, in exercising a discretionary power, departs from a general administrative guideline in such a manner as to affect adversely the rights, liberties or interests of a person concerned, the latter is informed of the reasons for this decision.

This is done either by stating the reasons in the act or by communicating them, at his request, to the person concerned in writing within a reasonable time.

IV – Control

9. An act taken in the exercise of a discretionary power is subject to control of legality by a court or other independent body.

This control does not exclude the possibility of a preliminary control by an administrative authority empowered to decide both on legality and on the merits.

10. Where no time-limit for the taking of a decision in the exercise of a discretionary power has been set by law and the administrative authority does not take its decision within a reasonable time, its failure to do so may be submitted to control by an authority competent for the purpose.

11. A court or other independent body which controls the exercise of a discretionary power has such powers of obtaining information as are necessary for the exercise of its function.

Explanatory memorandum

Introduction

1. The basis for the joint initiative of all member states to prepare a recommendation concerning the exercise of discretionary powers can be

found in Article 1 of the Statute of the Council of Europe, which entrusts to the organisation a task, *inter alia*, in the field of law, administration and human rights.

2. In modern society, administrative action is exerting an ever-increasing influence on the lives of the citizens, who are all, one way or another, affected by decisions of administrative authorities.

In some matters, the outcome of administrative decisions is precisely determined in advance by laws and regulations. In others, the law allows administrative authorities some degree of latitude and sets only the limits to that latitude, that is, the administration is given a discretionary power.

An administrative authority which exercises a discretionary power must not only comply with the applicable laws and regulations but also act in a manner that is fair and just.

Efforts to this end are continuously under way in many member states. In order to provide these efforts with a common European background, the Committee of Ministers of the Council of Europe decided in February 1977 to include the present subject in the work programme of the organ

3. In September 1978, the Committee of Experts on Administrative Law (CJ-DA) was instructed by the Committee of Ministers to prepare a draft resolution on the exercise of discretionary powers.

The committee, chaired by Mr M. Morisot (France) held three plenary meetings, from 4 to 8 December 1978, from 27 to 30 March 1979 and from 26 to 29 June 1979. Moreover, a Working Party, chaired by Mr B. Wennergren (Sweden) held two meetings, from 10 to 12 January 1979 and from 8 to 10 May 1979, in order to work out the details of the text.

4. The committee based its discussion, findings and recommendations on a comparative survey of the laws, administrative practice and case-law of the member states. In spite of the diversity of legal systems and concepts, there was a large degree of consensus on the aims to be achieved, which made it possible for the committee to reach common solutions.

5. The draft recommendation was examined by the CDCJ at its 32nd meeting in November 1979 and the text submitted by the CDCJ to the Committee of Ministers was adopted by the latter on 11 March 1980 at the 316th meeting of the Ministers' Deputies.

General considerations

6. The recommendation concerning the exercise of discretionary powers invites the governments of member states to be guided in their law and practice by the principles contained in the appendix to this recommendation. These principles focus on three central aspects :

- basic principles governing the exercise of discretionary powers (Appendix, section II) ;
- procedure applicable to the exercise of discretionary powers (Appendix, section III) ;
- control of the exercise of discretionary powers (Appendix, section IV).

7. The expression "to be guided by" included in the operative part of the recommendation has been used in order to leave states as much freedom as possible in choosing the means for ensuring that the exercise of discretionary powers will conform in substance to the principles contained in the recommendation. For the same reason, the term "principle" has been preferred to the term "rule" : for the aim of the recommendation is not to achieve, by adopting uniform detailed rules, harmonisation of the different national laws in the matter, but rather to promote general recognition in the law and practice of the member states of certain common principles.

8. Some of the principles contained in this recommendation have a general bearing and apply to all administrative acts but have a specific importance for acts taken in the exercise of discretionary powers.

9. The set of principles is preceded by an introductory note the purpose of which is to set out the scope of application of the recommendation, give definitions of the concepts which constitute the subject matter, and provide some guidance on the way in which the principles could be implemented.

10. The recommendation applies to administrative acts taken in the exercise of discretionary powers.

The term "administrative act" is given exactly the same meaning as under Resolution (77) 31. The act must be taken in the exercise of public authority ; as in the case of that resolution, judicial procedures, the investigation of criminal offences with a view to their prosecution before a court, legislative procedures (i.e., the enactment of statutes and statutory instruments) are outside the recommendation's scope of application.

Moreover, matters relating to the internal management and organisation of the administration fall outside the ambit of the recommendation.

11. It is useful to point out that the exercise of discretionary powers may, in some cases, involve a choice between taking some action and not acting at all.

12. The recommendation does not apply to administrative decisions in those cases where the legislator uses a so-called "undetermined legal concept" (*unbestimmter Rechtsbegriff*). Legal concepts within this category are not defined in detail by the legislator himself but have nevertheless an objective meaning which the administrative authority should identify in individual cases.

13. The last paragraph of the introductory note contains a general proviso which is applicable to all the principles. It is aimed at ensuring that the principles are implemented in a way compatible with the requirements of good and efficient administration and that their application does not conflict with the interests of third parties (e.g., confidentiality of information in the possession of the administrative authority), or major public interests (e.g., state security, keeping of public order, public health).

In specific cases also the major interests of the person concerned may justify modifications in the implementation of the principles.

14. In order to render the implementation of the principles more flexible, the general proviso has been complemented by a clause recognising the possibility of modification or non-application of certain principles in particular cases or in specific areas of public administration (e.g., certain public services or institutions having a particular disciplinary regime, or in the case of examinations) but emphasising the desirability of achieving the fundamental aims of this recommendation.

In the case, however, of certain of the basic principles, the committee found it difficult to see how modification or non-application should be possible at all.

15. It is recalled that this recommendation lays down those principles which all member states accept as common minimum standards of achievement. Nothing in the recommendation will therefore prevent a state from going beyond this minimum, nor should it be interpreted as implying the diminution of any safeguard already recognised by a member state.

Comments on the appendix

A – Basic principles

16. These are obligations placed on administrative authorities when they are exercising discretionary powers. Their purpose is to ensure that

the latitude conferred by legislation is exercised in a just and fair manner and not abused or used in an arbitrary way.

Principle 1 – Purpose of the discretionary power

17. This principle underlines that an administrative authority on which a discretionary power has been conferred should observe as a principal purpose the only purpose or one of the purposes for which this power was created.

If, however, the administrative act is such as to produce secondary effects that are not in conformity with the purposes for which the discretionary power has been conferred, these secondary effects should not enter into consideration when the lawfulness of the administrative act is assessed.

18. In the application of this principle it is desirable that the purpose to be pursued and the nature of the criteria to be taken into account in exercising a discretionary power should appear clearly. In some cases, the intention of the legislator is evident from the legislative instrument itself but in others the purpose of the power conferred may not be apparent. It is advisable, when creating a discretionary power, that the purpose to be pursued should, depending upon the practice in the legal system concerned, be indicated as clearly as possible in the body of the text of the law conferring that power or, alternatively, in its title or preamble, or in the accompanying explanatory memorandum. Where the legislation does not explicitly indicate it, this power should in any case be exercised in the public interest.

Principle 2 – Objectivity and impartiality

19. Objectivity and impartiality in the exercise of a discretionary power include the obligation placed on an administrative authority to consider all the factors relevant to the particular case and only those factors, giving to each of them its due weight; no factor should be unduly taken into account or disregarded and any improper consideration which has no relation to the decision to be taken should be avoided.

20. The term "factors" was adopted so as to include both the facts and the legal basis for the administrative act. "Relevant factors" comprise the facts, considerations and legal basis which it is incumbent upon the administrative authority to take into account in the specific case.

21. The administrative authority should endeavour to acquaint itself, if necessary of its own accord, with the factors which it deems relevant

in the particular case, for example, with the aid of pertinent documents, information from the parties concerned or third parties, and expert opinions. It is then for the administrative authority in accordance with Principle II of Resolution (77) 31 to enable the person concerned to be informed of the factors thus made available.

Principle 3 – Equality before the law

22. The purpose of this principle is to prevent unfair discrimination by ensuring that persons in the same *de facto* or *de jure* situations enjoy similar treatment where the exercise of a given discretionary power is concerned.

23. If a distinction in treatment is based on reasonable grounds whereby it can be objectively justified having regard to the purpose to be pursued, there is no infringement of the principle of equality before the law. There is unfair discrimination only where the distinctive treatment has no reasonable justification having regard to the purpose and consequences of the measure envisaged.

This principle does not exclude the possibility that an administrative authority will change its course of conduct for reasons of general interest or because former practice has been found illegal or inappropriate.

Principle 4 – Proportionality

24. This principle applies specifically where an administrative act taken in the exercise of a discretionary power adversely affects the rights, liberties or interests of an individual ; its aim is to ensure a reasonable balance between the interests at stake, for example the public interest on the one hand and the private interests of individuals on the other. It underlines that an administrative authority on which a discretion is conferred should not place on the individual any burdens which would be excessive with regard to the purpose to be pursued.

At its extreme, this principle invites administrative authorities to refrain from acting in cases where any action at all might lead to a prejudice to the individual which is out of proportion to the purpose to be achieved.

25. Most European administrative law systems recognise the principle of a reasonable balance between the purpose to be achieved and the means used to achieve it. In some countries, this is known as the "principle of proportionality" ; in others, the concept of proportionality is not known as such, though its substance is acknowledged.

Principle 5 – Reasonable time

26. This principle is of particular significance in those cases where before an activity may lawfully be carried out, a licence or other form of authorisation must be granted by the administration. In such cases it is essential for the applicant for such a licence or other authorisation to learn for certain, as soon as practicable, the decision of the authorising body. Whenever no time-limit for the making of such a decision is laid down by law, the applicant may be placed in a state of uncertainty for an indefinite period. This may cause him considerable practical difficulty and may constitute a hidden form of arbitrariness.

The same holds true when, by taking steps in an individual case, an administrative authority creates an uncertainty as regards the scope of the rights, liberties or interests of the individual.

27. What constitutes in a given case a reasonable time depends on several factors, particularly the complexity of the matter at stake, the urgency of the decision to be taken and the number of persons involved in the case. At the European level, an important body of case-law developed by the organs of the European Convention on Human Rights indicates the way in which the concept of a reasonable time should be assessed, *inter alia*, in administrative matters (e.g., the Koenig case).

28. The application of the present principle is supplemented by Principle 10 under which the failure of an administrative authority to take a decision within a reasonable time may be submitted to the control of an authority empowered for this purpose.

29. However, as the effects of the expiry and the duration of a reasonable time vary according to the legal system, it is for each member state to ensure the application of the principle according to its own law.

Principle 6 – Application of guidelines

30. This principle highlights the importance of consistency in administrative practice. It lies within the scope of the general principle of equality and is intended to promote predictability and certainty, but it underlines also the need for an individual examination of the particular circumstances of each case.

31. The term "general administrative guidelines" includes the instructions which an administrative authority addresses to officials of the administration, concerned for the purpose of shaping the administration's course of conduct and ensuring consistency in administrative action,

by indicating the practice to be followed in cases affecting members of the public which are of a comparable nature. It includes circulars, office memoranda and other administrative measures of an internal nature.

32. As a general rule, the administrative authority which is making the decision applies any general administrative guidelines in a consistent way where they are mandatory within the administration.

In many countries, general administrative guidelines do not have the force of law and usually the non-observance of such guidelines is not itself alone a ground for rendering the relevant measure void.

In some other countries, by contrast, citizens may invoke a general administrative guideline to challenge a decision taken in their regard.

33. It is for each national system to determine the consequences of the non-observance of general administrative guidelines.

B – Procedure

34. As this is a field in which the individual may feel particularly defenceless and may experience difficulties in asserting his rights and interests, it appeared desirable to the committee of experts to supplement the principles on the protection of the individual in relation to the acts of administrative authorities set out in Resolution (77) 31, which are also applicable to the exercise of discretionary powers, with rules of procedure which are of specific relevance to this matter.

35. In the course of preparing this part of the recommendation the committee of experts has sought to avoid laying down principles which are in substance already contained in Resolution (77) 31 and which would actually add nothing to the guarantees already provided for under the said resolution.

Thus the committee of experts did not, for instance, find it necessary to lay down a principle stressing the necessity of giving a clear and sufficient statement of reasons for administrative acts taken in the exercise of discretionary powers, as the content of such a principle was considered to be fully covered by Principle IV of Resolution (77) 31.

Principle 7 – Publicity of guidelines

36. This principle complements Principle 6.

It is not sufficient that general administrative guidelines be observed by the authority concerned (see Principle 6). It is very desirable that a person concerned should have access to the guidelines so that he can act in full knowledge of the pertinent criteria.

37. The application of Principle II of Resolution (77) 31, which enables a person concerned to have access to information, already meets this need partially in as much as general administrative guidelines are relevant factors within the meaning of the said resolution.

Nevertheless, the present principle usefully supplements Principle II of Resolution (77) 31 : on the one hand, it has a preventive effect, particularly by enabling the individual to assess to some extent, in advance, the likelihood of his application succeeding, by knowing the criteria applied in similar cases ; on the other hand, it provides explicitly for guidelines to be communicated at the individual's request, be it before an act is taken or after. This might be of interest to the person concerned in so far as the information may enable him to ascertain whether the principle of equality has been observed in the decision affecting him.

38. The formula adopted enables administrative authorities in member states to apply this principle either by making any general administrative guidelines public or by communicating them to the person concerned at his request to the extent that is necessary. The latter formula may be appropriate when a guideline, although consistently applied by an authority, has not been laid down in writing.

39. Further, it has been decided in the case where guidelines are communicated at the request of the person concerned, not to specify the means whereby it is to be done. The expression used has been adopted so that an administrative authority is left free to communicate only those parts of the guideline which concern directly the specific case or, without communicating the text of the guideline itself, to indicate to a person concerned the criteria set out therein as to govern similar cases.

Principle 8 – Departure from a guideline

40. The purpose of the principle is to enable a person concerned to be informed of the reasons for any departure by an administrative authority from a general administrative guideline in such a manner as affects adversely his rights, liberties or interests. From this he may detect whether one of the other principles referred to in the recommendation (e.g., the principle of equality) has been infringed.

The departure from the guideline should be explained as a part of the statement of reasons to be given under Principle IV of Resolution (77) 31.

The application of this principle also implies the possibility for an individual to learn from the statement of reasons why such a departure

has been made in a given case, whether this was made necessary by the circumstances of the case and is justified objectively or whether it constitutes an arbitrary departure.

41. The application of this principle is closely connected with that of Principles 6 and 7.

C – Control

42. Owing to the diversity of the control systems in member states the committee of experts confined itself to drafting very general principles in this field. It considered that it was for each state to select the measures to be taken for the application of these principles, according to its own legal system.

Principle 9 – Nature of control

43. The purpose of this principle is to ensure that the legality of any administrative act taken in the exercise of a discretionary power is subject to control by a court or other independent body.

44. The principle does not exclude the possibility that the courts and other independent bodies (for example, ombudsmen), which control the legality of a discretionary administrative act, also control the merits of such acts.

Also the terms of paragraph 2, which provide expressly for control of both legality and merits by the competent administrative authority, are not to be construed as precluding this twofold control by a court or another independent body.

45. On account of the diversity in the European legal systems between the definition of legality and that of the merits, it was agreed that it was for each member state to determine the content, in the present context, of the two concepts of "legality" and "merits", the limits of which are not always precise and clear.

It is also relevant to the question of whether any of the principles in this recommendation is to be looked upon as raising a question of legality or of merits.

Principle 10 – Abstention on the part of an administrative authority

46. This principle is closely connected with Principle 5. Its application aims at enabling a person concerned who has been placed in a position

of having to wait for a period exceeding a reasonable time, to submit the abstention on the part of an administrative authority to control by an authority competent for the purpose.

47. The preconditions for control, the nature and type of that control as well as the control bodies competent to exercise that control, are matters to be determined according to the legal systems of individual member states.

Principle 11 – Powers of the control body to obtain information

48. The purpose of this principle is to guarantee that the court or independent body which controls the exercise of a discretionary power by an administrative authority has the means necessary to achieve this objective.

It implies in particular that the court or other independent body should have access to the information on the basis of which the decision was taken and that administrative bodies should communicate such information.

The principle does not, however, exclude those systems where only the parties to a case and notably the administrative authority are allowed to produce the relevant elements, provided always that the control body may order certain elements to be produced.

49. Under this recommendation the powers of independent control bodies to obtain information from administrative authorities are meant to be such as are necessary for the exercise of their functions; depending upon the legal system, the information referred to may take the form of, for example, official reports on the facts and considerations taken into account by the administrative authority when taking the decision.

50. The extent of such powers is left to be determined by each member state according to its legal system.

Recommendation No. R (81) 7 on measures facilitating access to justice

(Adopted by the Committee of Ministers on 14 May 1981 at its 68th Session)

The Committee of Ministers,

Considering that the right of access to justice and to a fair hearing as guaranteed under Article 6 of the European Convention on Human Rights, is an essential feature of any democratic society,

Considering that court procedure is often so complex, time-consuming and costly that private individuals, especially those in an economically or socially weak position, encounter serious difficulties in the exercise of their rights in member states;

Bearing in mind that an effective system of legal aid and legal advice, as provided for under Resolution (78) 8 of the Committee of Ministers, may greatly contribute to the elimination of such obstacles;

Considering that it is nevertheless desirable also to take all necessary measures in order to simplify the procedure in all appropriate cases, with a view to facilitating access to justice of the individual whilst ensuring at the same time that justice is done;

Considering that, with a view to facilitating access to justice, it is desirable to simplify documents used in such procedures,

Recommends the governments of member states to take or reinforce, as the case may be, all measures which they consider necessary with a view to the progressive implementation of the principles set out in the appendix to this recommendation;

Invites the governments of member states to inform the Secretary General of the Council of Europe every five years of the measures taken or envisaged to follow up this recommendation, with a view to the circulation of this information to the governments of member states.

Appendix to the recommendation

Principles

Member states should take all necessary steps to inform the public on the means open to an individual to assert his rights before courts

and to make judicial proceedings, relating to civil, commercial, administrative, social or fiscal matters, simple, speedy and inexpensive. To this end member states should have particular regard to the matters enumerated in the following principles.

A – Information to the public

1. Appropriate measures should be taken to inform the public of the location and competence of the courts and the way in which proceedings are commenced or defended before those courts.

2. General information should be available from the court or a competent body or service on the following items :

- procedural requirements, provided that this information does not involve giving legal advice concerning the substance of the case ;
- the way in which, and the time within which a decision can be challenged, the rules of procedure and any required documents to this effect ;
- methods by which a decision might be enforced, and if possible, the costs involved.

B – Simplification

3. Measures should be taken to facilitate or encourage, where appropriate, the conciliation of the parties and the amicable settlement of disputes before any court proceedings have been instituted or in the course of proceedings.

4. No litigant should be prevented from being assisted by a lawyer. The compulsory recourse of a party to the services of an unnecessary plurality of lawyers for the need of a particular case is to be avoided. Where, having regard to the nature of the matter involved, it would be desirable, in order to facilitate access to justice, for an individual to put his own case before the courts, then representation by a lawyer should not be compulsory.

5. States should take measures to ensure that all procedural documents are in a simple form and that the language used is comprehensible to the public and any judicial decision is comprehensible to the parties.

6. Where one of the parties to the proceedings does not have sufficient knowledge of the language of the court, states should pay particular

attention to the problems of interpretation and translation and ensure that persons in an economically weak position are not disadvantaged in relation to access to the court or in the course of any proceedings by their inability to speak or understand the language of the court.

7. Measures should be taken in order that the number of experts appointed by the court for the same proceedings, either on its initiative or at the request of the parties, should be as limited as possible.

C – Acceleration

8. All measures should be taken to minimise the time to reach a determination of the issues. To this end steps should be taken to eliminate archaic procedures which fulfil no useful purpose, to ensure that the courts are adequately staffed and they operate efficiently, and to adopt procedures which will enable the court to follow the action from an early stage.

9. Provisions should be made for undisputed or established liquidated claims to ensure that in these matters a final decision is obtained quickly without unnecessary formality, appearances before the court or cost.

10. So that the right of appeal should not be exercised improperly or in order to delay proceedings, particular attention should be given to the possibility of provisional execution of court decisions which might lead to an appeal and to the rate of interest on the judgment sum pending execution.

D – Cost of justice

11. No sum of money should be required of a party on behalf of the state as a condition of commencing proceedings which would be unreasonable having regard to the matters in issue.

12. In so far as the court fees constitute a manifest impediment to justice they should be, if possible, reduced or abolished. The system of court fees should be examined in view of its simplification.

13. Particular attention should be given to the question of lawyers' and experts' fees in so far as they constitute an obstacle to access to justice. Some form of control of the amount of these fees should be ensured.

14. Except in special circumstances a winning party should in principle obtain from the losing party recovery of his costs including lawyers' fees, reasonably incurred in the proceedings.

E – Special procedures

15. Where there is a dispute about a small amount of money or money's worth, a procedure should be provided that enables the parties to put their case before the court without incurring expense that is out of proportion to the amount at issue. To this end, consideration could be given to the provision of simple forms, the avoidance of unnecessary hearings and the limitation of the right of appeal.

16. States should ensure that the procedures concerning family law are simple, speedy, inexpensive and respect the personal nature of the matters in issue. These matters should, as far as possible, be dealt with in private.

Explanatory memorandum

Introduction

1. The problems connected with access to justice have been a cause of concern to many governments for some time. They were one of the main themes of the 9th Conference of European Ministers of Justice which was held in Vienna on 30 and 31 May 1974.

Following a report by the Ministers of Italy and Austria, that conference recommended the Committee of Ministers of the Council of Europe "to instruct the European Committee on Legal Co-operation to study the problem of the economic and other obstacles to civil proceedings at home and abroad, in the light of the discussions at the 9th Conference, the examination of which might be entrusted to a committee of experts". This committee of experts was set up in 1974. Because the subject is of such topical importance the same matter was the subject of a report by the French Minister at the 11th Conference of European Ministers of Justice which met in Copenhagen on 21 and 22 June 1978. At this conference, the Ministers of Justice considered that it might also be desirable to undertake a study on expenses incurred in court proceedings and the suitable measures to reduce them.

2. The committee of experts set up in 1974, gave its main attention to legal aid and advice. It was at its initiative that the following instruments, recently adopted by the Committee of Ministers at the proposal of the European Committee on Legal Co-operation (CDCJ), were prepared:

I. Resolution (76) 5 on legal aid in civil, commercial and administrative matters, adopted by the Committee of Ministers on 18 February 1976, together with the accompanying explanatory memorandum.

This resolution sets out to establish minimum standards for the granting of legal aid to foreign nationals.

II. Resolution (78) 8 on legal aid and advice, adopted by the Committee of Ministers on 2 March 1978, together with the accompanying explanatory memorandum.

This resolution sets out minimum standards for legal aid and advice.

III. European Agreement of 27 January 1977 on the Transmission of Applications for Legal Aid.

IV. Additional Protocol to the European Convention on Information on Foreign Law, of 15 March 1978, in so far as it concerns requests made in the framework of legal aid and advice.

V. Legal aid and advice was also the subject of a questionnaire sent out to member states which was published, with the replies that were received, in 1978.

3. Furthermore, it was pointed out that at the 12th Conference of European Ministers of Justice, in Luxembourg (May 1980), the Austrian Minister of Justice presented a report on "A more effective justice". After a stocktaking of the activity "Access to justice" carried out within the Council of Europe, the report concluded that the time had now come to examine another aspect of the same problem, namely the functioning of the judicial system. The judicial machinery itself has to be examined by those responsible for devising and administering it, in order to improve the functioning and increase the efficacy of the courts. Resolution No. 2, adopted by the conference, recommends the Committee of Ministers to give priority to the study of ways of improving the functioning of justice.

This question will be considered by the CDCJ with a view to including it in the Work Programme of the Council of Europe.

General considerations

4. The committee could not have limited its work to legal aid and advice, as in the first place, there will always be a number of people for whom legal aid is not available; for some of these people obtaining justice involves a very considerable financial burden. In addition expense is not the only obstacle to access to justice. When procedure is so slow that it keeps some people waiting years for their cases to be decided, and so complex as to be unintelligible to the parties, it needs to be reviewed.

In all countries, the major obstacles to justice are in fact the same : complexity, duration and cost. Each of these aspects influences the other. The complexity of proceedings and the slowness which often is the consequence thereof may indeed entail an increase of cost.

5. In 1976, a detailed questionnaire on procedures facilitating access to justice was sent out to all member states. The replies, published in 1978, provide an extremely important source of information. They show that many countries have taken, or are planning to take, measures to bring justice closer to their citizens. Although these measures are of various kinds, one can see that, in most states, special procedures have been instituted to facilitate access to justice. Procedures of this kind have, for example, been introduced for the recovery of small debts and undisputed claims, as well as for cases relating to consumer protection, or family law.

6. However, the committee considered, firstly, that the publication of the questionnaire and of the replies was not enough ; the member states of the Council of Europe should be urged to take steps to ensure that everybody can more easily have access to the courts, irrespective of means, education or position.

In the committee's view, the best way to proceed would be the adoption of a recommendation inviting the governments of member states gradually to implement the principles set out in the appendix to the recommendation, in so far as their budgetary resources would allow.

7. In addition, the committee felt that the use of special procedures for particular matters was not the only method to consider, but that a number of improvements, based on measures already taken in certain states, should be made in all types of judicial proceedings, whether of general application or specially designed for disputes of a particular category.

8. The principles set out have been grouped according to their subject : information to the public ; simplification ; acceleration ; cost of justice ; special procedure.

The committee considered it appropriate to take as the first item of the recommendation, information to the public. It is clear that satisfactory information can in itself help access to justice ; on the one hand, by instructing interested persons on the extent of their rights and, on the other hand, by making it possible to avoid unnecessary proceedings.

Commentary on the principles in the appendix to the recommendation

9. The recommendation applies to civil, commercial, administrative, social and fiscal matters, excluding criminal matters, which because of their peculiarities require specific treatment. The committee did not consider it necessary to mention labour matters in the recommendation since they are wholly or partially covered by civil, administrative or social law of the different member states. The principles relating to information to the public (1 and 2), simplification (3 to 7), acceleration (8 to 10) and cost of justice (11 to 14) are general in scope, while those relating to special procedures (15 and 16) concern certain types of cases which frequently arise and may call for specific solutions : small claims and family law disputes.

10. The general statement which appears at the head of the appendix in the French version uses the expression "*faire valoir ses droits en justice*" while the English version employs the terms "to assert his rights before courts". The committee agreed to consider these expressions to be equivalent. Furthermore the term "court" means any authority or body exercising independent judicial functions in the above-mentioned matters ; it is the same for the term "tribunal" which appears in the French version of the principles.

11. The general statement mentioned above invites states to take all the necessary steps to remedy the three main obstacles to access to justice : complexity, duration and cost.

By "all necessary steps" the statement implicitly recognises that not only have some states already carried out reforms in the areas mentioned, but also that solutions may vary according to the nature of the subject matter.

A – Information to the public

Principles 1 and 2

12. An individual's lack of knowledge of the various ways in which he may have his claims dealt with by the court is undoubtedly a serious obstacle to access to justice.

The mass media take little interest in civil cases. A large section of the public knows nothing about court cases, except that they are expensive. Most citizens are not aware of the jurisdiction of courts in relation to their territorial competence or the subject matter of the case.

Steps should be taken to ensure that every member of the public may know which court is competent to deal with his case and what are the requirements for bringing an action before that court.

The need for information applies to defendants as well, as they must know where and to whom to reply. It would therefore be helpful if court documents could state clearly the competent courts, their address and the authorities from whom information can be obtained.

13. Although Principle 1 mainly applies to questions relating to domestic law, the committee considered that the state ought to ensure that information on the competence of a foreign court be provided when such a competence is determined by virtue of an international convention to which the state concerned is a contracting party. Furthermore it would also be desirable in the long term that states try to ensure that a system of information be set up on means to bring an action before a foreign court.

14. It is not sufficient for persons to know which courts to go to or how to bring their cases. They should be able to obtain additional information to enable them to take action. This information is referred to in Principle 2. In this respect, states have a specific duty and cannot rely entirely on lawyers. Litigants may quite legitimately wish to know in advance what steps have to be taken, especially if they conduct their cases themselves as they may be entitled to do under Principle 4. There are also cases where costs are needlessly increased by compulsory recourse to a lawyer.[1]

The need for information would not be met simply by providing the litigant with a copy of the Civil Code or the Code of Civil Procedure.

15. The way in which information is to be obtained is of course exclusively a matter for member states to decide. It could, for example, be supplied to the parties through the courts.[2] It could also be obtained from services attached to the courts; this is the case in Sweden and in Switzerland where the parties have the possibility of obtaining information from the court services on all procedural formalities which concern them, or in France and Luxembourg where court advice bureaux attached to the courts have been set up to inform the parties of the

1. The case of Cox versus De Wolf, which gave rise to Judgment 42/76 of 30 November 1976 of the Court of Justice of the European Communities, is significant in this respect. This was a case where a Belgian national wished to secure enforcement of a Belgian court decision in the Netherlands. The cost of proceedings and the lawyer's fees were far in excess of the amount at issue. As a result of this case, the Netherlands amended its law.

2. While in some countries the procedure may be adversarial in form, with the judge merely arbitrating the debates, in others it is inquisitorial. In some countries, the judge may lead the discussion and advise parties who are present but not represented (Austria, Federal Republic of Germany, Iceland, Norway and Switzerland).

nature and scope of their rights and of the procedural means of exercising them. Experience of countries where such systems operate shows no reason to believe that it will prove to be overburdensome.

This information may also be given by agencies outside the court which have been established or approved by the state and operate in connection with the court authorities, by the administrative services or publicised by means of the mass media.

Information of a general nature may be given in forms, or in brochures,[1] or folders, or on notices posted in the court office and, in some cases, orally.

16. This information should relate only to questions of procedure and should not constitute advice on the merits of the case.

17. Where failure to observe a procedural requirement would have serious consequences, member states must specially ensure that information to that effect is available. The first example that comes to mind is that of failure to observe a time-limit.

In most states if the party concerned does not take certain steps within a given time, this may lead to consequences prejudicial to his interests, in particular a judgment by default. Although remedies are usually available, this is an inadequate solution, particularly owing to the duration and costs of legal proceedings. Therefore, when a party is not represented by a lawyer, it is desirable that he should be informed about the consequences of failing to comply with certain time-limits. This information could be supplied, for example, in a document given to the parties. Where it is possible to appeal against a judgment, information could be given in this judgment or set out in a document notifying the party of such a judgment. When this information is not given, the party should, on request, be informed either by the court or by any competent service working with the judicial organisation. Where the judgment in disputed proceedings is oral, the judge or someone connected with the court should inform the losing party, either as a matter of course or if requested, of the possibilities of appeal.

18. In those states where judgments by default can be enforced without prior notification of the judgment to the losing party, particular care should be taken that if the losing party should wish at a later stage to

1. Examples of this method can be found in Austria, where a brochure has been made containing complete information on court organisation and functioning and ways to protect citizens' rights in the field, or in the Federal Republic of Germany where brochures have been published giving useful information for the parties on procedural formalities. In Sweden, as a part of a book with general information to the public, wide indications are provided on judicial matters.

challenge the judgment, information on how this is done should be readily available. Where appropriate this information could be given by the officer responsible for enforcing the judgment.

19. Furthermore, attention was drawn to certain circumstances in international relations which can lead to judgment by default or again deprive the interested party of the necessary information as to the means to assert his rights. In particular, where court documents are sent through the post, the defendant could fail to receive them, for instance if the address is written wrongly, or if he has changed his address. Where in an international context other means are used, for example diplomatic or consular channels, it is not unusual for legal documents to arrive too late for the interested person to arrange for his defence or introduce an appeal.

One remedy for this is contained in the Hague Convention of 15 November 1965 on the service abroad of judicial and extrajudicial documents in civil and commercial matters; it institutes a more efficient system for the transmission of instruments and besides lays down in Articles 15 and 16 guarantees for the rights of the defendant when the defendant, served with a writ outside the country of the issuing court, does not appear before this court.

20. The case does not end with the judgment, since the successful party may still have to enforce the decision. Enforcement of a decision may give rise to new difficulties and entail further expenditure. For this reason, information on the methods of enforcement and their cost should be available, preferably before proceedings are commenced. In this way every litigant would know what it would cost for a judgment in his favour to be enforced, and every party would know what steps may be taken against him.

21. In the case of a judgment which may have to be recognised or enforced abroad, the party concerned should be able to obtain information about the procedure to be followed and its cost. Information about this is given in the *Practical guide to the recognition and enforcement of foreign judicial decisions in civil and commercial law* prepared under the auspices of the European Committee on Legal Co-operation of the Council of Europe and published by Morgan-Grampian Limited, London.

22. Furthermore, mention was made of Resolution (77) 31 on the protection of the individual in relation to the acts of administrative authorities adopted by the Committee of Ministers on 28 September 1977 as

a pattern to be followed ; Principle V of this resolution recommends that administrative acts should indicate the normal remedies against them as well as the time-limits for their utilisation.

B – Simplification

Principle 3

23. An effective way of facilitating access to justice is to encourage the amicable settlement of disputes and conciliation. There is a distinction between means of preventing legal proceedings from taking place and means of bringing proceedings, once started, to a conclusion before judgment is passed, but it should nevertheless be possible for friendly settlements to take place at any time and for judges to be able to take any appropriate steps to reconcile the parties at all stages of the proceedings. For the sake of efficiency, purely formal and dilatory conciliation proceedings should be avoided.

Conciliation procedures, with different characteristics, exist in most member states.

24. One way of improving the course of justice would be to entrust the task of conciliation to people other than judges. In France, for instance, there are *conciliateurs* (conciliators) whose task is to attempt to bring about an amicable settlement of disputes between parties who do not wish to go to court. The role of these people is also to try to appease opposing parties and help them to find some common ground for an agreement.

Consumer protection bodies responsible for investigating consumers' complaints and reconciling the parties involved have also been set up.

25. States should examine in which cases a settlement reached before a recognised body of conciliation should become enforceable.

Principle 4

26. This principle preserves the right to consult a lawyer and be legally advised in all court proceedings. There are many disputes in which professional assistance is indispensable. The assistance of a lawyer before proceedings are commenced can lead to an amicable settlement or the abandonment of an unnecessary claim, so saving money, time and effort of the potential litigant. The principle does not, however, prevent those states, who have provided as a means of reducing costs of procedure that in certain cases the costs of a lawyer cannot be recovered, from continuing with these provisions.

27. While it is useful, not to say indispensable in many cases, for each of the parties to be represented by a lawyer throughout the proceedings, the principle recognises that there are cases where a litigant should be entitled to put his own case before the courts.

The compulsory recourse to a lawyer in all cases could lead to the impression that access to justice is obstructed.

Even if there is a comprehensive legal aid scheme, the services of a lawyer have to be paid for, and this may be expensive. There are, however, cases where a lawyer's services do not seem absolutely necessary.[1] The judge might well take a more active part in such proceedings, and the procedure could be simplified. Where the litigants are not sufficiently experienced to conduct their own cases, the judge could invite them to obtain the assistance of a competent person.

28. In some states the parties must have recourse to the services of several members of the legal profession for the same case. When this requirement is simply and solely for the purpose of keeping to traditional rules of procedure and is not based on an objective need, there is every reason to change these rules in order both to simplify cases and to reduce costs.[2]

Principle 5

29. This principle is concerned with the form and language of the documents used in court proceedings; the form also includes the contents of the document. The recommendation would be incomplete if states were not encouraged to make progress in this respect.

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1. In several countries, the parties are entitled to conduct their own cases. This is the situation in Belgium (with certain exceptions), Cyprus, Denmark, Iceland, Ireland, Norway, Sweden, Switzerland, Turkey and the United Kingdom. This is also the situation in Austria before the local (district) courts in all matters and before the regional (provincial, circuit) courts in matrimonial cases at the first instance. In France it is possible, in particular before the commercial courts. The same possibility exists in the Federal Republic of Germany before the local courts with the exception of matrimonial cases and certain other related cases – lower and higher state administrative and labour courts, lower state social courts, and higher state social courts. In Belgium and Iceland, the parties may be represented by close relatives before certain courts. In Sweden a party may be represented by whomever he chooses, provided that the court finds him suitable. In some countries (Belgium, Federal Republic of Germany, France, Luxembourg, Norway and Switzerland) parties may be represented and assisted by trade union officers in cases involving labour law. In Luxembourg the assistance of a lawyer is required in all matters before the court of first instance, the court of appeal and the Supreme Court. However, such assistance is optional before the *juge de paix* which is the competent instance for some special matters such as leases and generally for any civil or commercial dispute where the amount of the claim does not exceed 30 000 Luxembourg francs. This is also the situation before the district court (*tribunal d'arrondissement*) dealing with commercial matters and also before courts dealing with social and labour law, in which cases parties may be assisted by trade union officers in Switzerland, where there is no obligation to use a lawyer's services; the assistance of a lawyer is not permitted in the labour court in certain cantons. In the Netherlands the parties may act for themselves before the district courts and before all administrative, social and fiscal bodies; however, in fiscal matters the assistance of a lawyer is necessary if an oral statement is to be made before the highest court (*Hoge Raad*).

2. In this respect, Belgium abolished the office of the *avoués*, as well as France, except for cases brought to the court of appeal.

The archaic and formalised nature of many court documents clearly constitutes an obstacle for the ordinary citizen. It is therefore preferable to avoid the use of obsolete, foreign or unnecessarily complicated or technical terms. There is no reason why comprehensible language should not be used.[1] This would apply particularly to any document informing the defendant of the steps he must take in particular to ensure that judgment is not granted by default. The document should state clearly the facts alleged by the opposing party and the specific procedures which allow the recipient to protect his interests.

30. It is of considerable importance that the parties to a dispute should fully understand any judgment and reasons given by the court for its decision. For the majority of people appearing as parties in a case, it may be their first and only contact with the court system.

To comply with this principle it would be desirable that states encourage the law professionals at all levels of the court system to use a simple language in their relations with the public. The education and training of the lawyers should take this need into account.

Principle 6

31. A failure to understand the language used by the court is a serious obstacle to access to justice. The states should therefore take measures to remedy this situation.

Provisions should be made not only for assistance by interpreters at the hearings but also for information to be given to the persons concerned on how to obtain translations of documents.

Officials responsible for giving information should, so far as possible, be assisted by interpreters when dealing with persons who do not have a sufficient understanding of the language of the court and who are not accompanied by another person who knows both languages.

It would also be helpful to prepare foreign-language translations of documents giving procedural information.

32. The principle does not stipulate who shall ultimately bear the cost of interpretation or translation. Even so, any risk of incurring such costs and so deterring anyone from asserting or defending his rights before

1. A questionnaire on measures to simplify the form and language used in judicial and extrajudicial documents was sent out to member states in 1977. It appears from the answers that several states, such as Austria, Cyprus, Denmark, France, Federal Republic of Germany, Norway, Portugal, Sweden and the United Kingdom, have undertaken activities in this field.

the courts should be avoided as far as possible. In this context, it should be recalled that Resolution (78) 8 on legal aid and advice, adopted by the Committee of Ministers on 2 March 1978, recommends in particular that legal aid should provide for the cost of translation.

Principle 7

33. This principle, which recommends limiting the number of experts in the proceedings, meets several needs. Firstly, those of simplifying proceedings and reducing their cost. Secondly, the Committee wished to maintain a certain balance between the parties, for instance in cases opposing a private individual to a large company able to bring a large number of experts into the proceedings.

However, it should be made clear that the recommendation applies directly only to experts appointed by the judge or the court, whether as a matter of course or at the request of the parties, and not those appointed by the parties themselves.

There are various ways of reducing the number of experts called in for any one case. The court may, for example, appoint an expert from an approved professional body ; the parties can be encouraged to accept the assistance of a single expert or a limited number of experts, or the court can be allowed to advise the parties for the purposes of deciding on the number of experts required.

C – Acceleration

Principle 8

34. This principle, which complies with Article 6, paragraph 1, of the European Convention on Human Rights, is concerned with the speed at which a decision is reached. This is especially important in certain types of proceedings, for instance in custody of children cases. It is also important that in personal injury cases the question of liability should be settled quickly, even though the assessment of damage must await the medical experts' final conclusions. Delays in some of these cases can be very serious, as the parties and the witnesses may forget the essential details. In addition the longer the proceedings take, the greater may be the costs.

35. A number of ways are indicated in the principle for shortening proceedings. It is suggested that the usefulness of procedural rules of a purely formalistic nature be reviewed and that those which no longer measure up to the present-day concepts of proper administrative efficiency be revoked.

But procedural alterations are not enough unless combined with improvements in the judicial machinery itself. There is little point in having procedural rules which solve the problems of cost, complexity and time, if cases take years to reach the courts because of a shortage of judges and staff, or because courtrooms are not available. The states are therefore invited to ensure that the courts are adequately staffed and equipped. Rational organisation of work could also bring improvements at little extra cost. For example, on the basis of realistic listing, a balanced timetable for hearings could be drawn up to enable all court officials to use their time efficiently.

36. Further to this, with the aim of accelerating the procedures by alleviating the burden on the legal apparatus, it has been suggested that slates study the possibility of relieving the courts in appropriate cases of certain tasks which have been traditionally assigned to them. For example, in some countries (Iceland, Norway) competence in matters of divorce has been assigned to the administrative authorities.

37. Lastly, as cases frequently drag on as a result of obstruction or inertia by parties, it was pointed out that an effective remedy which would speed up proceedings might be to give the judge a role other than that of passive arbiter and to make him responsible for directing proceedings, giving him the power to control the progress of the case from its commencement, and enabling him to lay down time-limits for the completion of various steps in the proceedings. Such a system would appear to have produced worthwhile results, for example in France where a particular judge, now known as *juge de la mise en état*, has been made responsible for controlling the progress of proceedings. In many member states, for instance Austria, France, Federal Republic of Germany and Switzerland, judges have wide powers as regards the handling of the proceedings. It would be desirable if judges had the possibility to limit the number of expert witnesses proposed purely for dilatory purposes by one of the parties (see Principle 7).

Principle 9

38. When a debtor falls to meet his obligation, it is often because he is not solvent or because he is trying to obtain credit and not because he disputes the claim as such.

When the claim is undisputed or seems to be established, by the proofs submitted to the judge, there should be provisions enabling the creditor to obtain an enforceable decision with a minimum of formalities

and costs. The principle is also to the debtor's advantage in so far as he runs the risk of having to refund the costs of the recovery procedure to the creditor. In fact, in most member states, the law already makes provision for simple procedures whereby creditors, once their claim is established, may obtain an enforceable decision without the personal appearance of the parties in court. The arrangement by which the sum claimed may be recovered varies considerably from one country to another. The arrangements normally depend on the court which has jurisdiction, whether the amount of the claim is limited, and whether or not a lawyer's services are required.

In these proceedings, the use of forms seems particularly appropriate, and in at least one member state (Federal Republic of Germany) computers are used to expedite such proceedings.

39. Nevertheless, the debtor's rights must be safeguarded, and he should therefore be given an opportunity to dispute the claim by bringing the case before the court.

Principle 10

40. Although the right of appeal is generally regarded as a fundamental right, nevertheless in most states some restrictions are imposed on this right. The justification for such restrictions may be found in the desirability of finality in litigation and in limiting the cost of litigation, especially where only a moderate sum may be at stake.

The number of appeals made merely to gain further time could be reduced if judgments were enforceable notwithstanding any pending appeal, provided that the court had a discretion to order a stay of the execution of the judgment in appropriate cases.

41. One of the reasons why the right of appeal is sometimes exercised for purely dilatory purposes is the low interest rate used in legal decisions. Accordingly, it would probably be possible to limit abuse of this right on one hand by setting this interest rate at a reasonable level in the light of circumstances, and on the other hand by establishing a flexible system able to adapt easily in relation to some objective indicators of economic activity, as, for instance, the official rate of discount. This is the case in Denmark, in the Netherlands and in Sweden where, the judicial interest rate is linked to the discount rate of the respective central banks. This adjustment operates *ipso facto* in Denmark and Sweden while in the Netherlands it requires a governmental decision.

D – Cost of Justice

Principle 11

42. The costs which a person may face in taking or defending court proceedings may be divided into two major categories: the amounts payable to the state and the fees of lawyers and other persons called to participate, such as in France the *auxiliaires de justice* as well as experts, witnesses, etc.

43. A litigant's knowledge that he might be required to pay sums to the state in advance could constitute a serious obstacle to access to justice. Consequently, it is desirable that, where states consider that they should not abolish such duties altogether the competent authorities should have the power to reduce or waive the amount taking into consideration such factors as the nature of the case, the importance of the interests involved, the personal circumstances of the parties, etc.

44. Frivolous litigation must be discouraged. If this is to be achieved by requiring the payment of a sum in advance that sum should not be unreasonable. On the other hand the same aim may be achieved by the method introduced in France, for example by fines and damages. In Portugal, a party which entered into frivolous litigation can be sentenced to a fine and also, on the request of the other party, to the payment of damages including lawyer's fees as fixed by the judge. In other words, the states should protect the defendant without obstructing access to justice.

Principle 12

45. The court fees payable to the state should be as low as possible. As the French delegation to the 11th Conference of European Ministers of Justice pointed out in a memorandum, the resultant loss of state revenue could be offset from other resources. In the case of France, for instance, an Act of 30 December 1977 provides that no court fees are payable, but at the same time provision is made for a considerable increase of certain fines in criminal cases. However, this recommendation is not concerned with any tax payable on a judgment, since the type and amount of such a tax is too closely linked with the general taxation schemes of the states concerned.

46. A number of other countries have systems, whereby no court fees are payable in certain cases, for instance, in disputes between employers and employees, in landlord and tenant cases, in different types of

family cases and in social insurance cases, small claims, etc. States which deem that they cannot abolish such fees altogether, might reduce them as much as possible.

47 Furthermore, some states have a complex system of legal costs which increases the number of administrative procedures and measures. Any simplification in this area is to be recommended, with the twofold aim of reducing costs and removing the obstacles to access to justice. This has been done in Sweden, where only one court fee of a reduced amount still remains.

Principle 13

48. The fees paid to lawyers and experts are by far the largest item in the cost of legal proceedings. The burden of such fees often bears particularly hard on persons of moderate means to whom legal aid is not available and sometimes deters them from instituting proceedings and defending their rights. It is therefore in the public interest that these fees should be kept at a reasonable level.

49. In many states some degree of control is, or can be, exercised over lawyers' fees. There are set scales in Austria, Federal Republic of Germany and Switzerland, while recommended scales or guidelines exist in Denmark, the Netherlands and Norway. Sometimes these fees can be reviewed, by the Ministry of Justice, as in Norway, or by a court or administrative official, either automatically or at the request of one of the parties, as is the case in Austria or Switzerland, or by the *Conseil de l'Ordre des Avocats* in Luxembourg. This is particularly important when the losing party is ordered to pay his opponent's costs (see Principle 14). In the United Kingdom the courts are allowed considerable discretion in such matters. In France, when it seems unfair that one party should have to bear the burden of sums laid out but not included in costs (e.g., lawyers' fees), the judge may fix an amount which the other party is ordered to pay. In Sweden there are, besides the private lawyers, public lawyers' offices, which are supposed to cover their own costs but not to make any profit. The client is free to choose a private or a public lawyer; their qualifications are the same and they are both entitled to act within the legal aid scheme. This system makes for a certain competition between private and public lawyers, which is intended to serve as a control of the fees. Minimum scales for lawyers' fees are set up in Turkey. The fees in these scales are taken as a basis for determining the lawyers' fees to be paid by the losing party to the other party and where is no agreement between the lawyer and the client.

50. It is important that, as far as possible, the client should always be advised in advance of the likely cost of proceedings and in particular of the lawyers' fees, for instance by bringing to his attention the professional scales. Often the sums demanded by lawyers cover both their own fees and the legal costs payable to the state. For the sake of clarity it is desirable that in future these different sums should be stated separately.

51. It is difficult to lay down general rules governing experts' fees on account of the wide variety of situations likely to arise in practice, since expert opinions may prove necessary in virtually any sphere of social life. Furthermore, the level of qualifications required and the manner in which experts are paid can vary considerably. The recommendation therefore merely advocates that states should exercise some form of control over such fees, along the lines, for instance, of the supervision of lawyers' fees : statutory or recommended scales or rates, guidelines provided by professional bodies, review by the court or a court official, etc. In Austria and the Federal Republic of Germany, experts' fees as well as lawyers' fees are fixed by the law.

Principle 14

52. Not all member states allow the successful party to recover costs incurred during the proceedings, particularly his own lawyer's fees, from the other party, and in those which do, the rules applied differ. Thus in Belgium, France, Luxembourg and Portugal, lawyers' fees are in principle borne by the party who calls on the lawyer's services. It is the same in Switzerland as far as the assistance of a lawyer is not admitted before courts judging labour law disputes. By contrast, these same fees are included among the costs recoverable from the losing party in Austria, Cyprus, Denmark, the Federal Republic of Germany, Iceland, Ireland, Italy, Norway, Spain, Sweden, Switzerland, Turkey and the United Kingdom and, in part, in the Netherlands.

53. In any event, a party in a civil case will find that the economic risks involved are less if he can be sure that if he wins he will be able to recover his costs from the losing party. Moreover, a system whereby the losing party is normally ordered to pay the costs of the successful party serves as a deterrent against frivolous litigation.

54. For these reasons the recommendation advocates the principle whereby the costs incurred by the successful party are to be recovered from the losing party. This principle, however, cannot be considered

absolute. On the one hand, it must be applied "except in special circumstances", these being either objective (type or subject of dispute, economic interests at stake, amount of costs incurred) or subjective (cases that have no real merit). Obviously, it is up to the states to decide in what types of circumstances the general principle should not be applied, but it is likely that the courts will have discretion to assess whether such circumstances exist and what effect they have. On the other hand, only sums which the successful party has "reasonably incurred in the proceedings" are recoverable. This means that expenditure which is excessive or unessential, having regard to the nature and seriousness of the dispute, is not recoverable. Here again, the decision will rest with the courts in individual cases.

E – Special procedures

Principle 15

55. Those states which have investigated the problem of very small claims have found that the ordinary procedure of their courts can be an obstacle, as its complexity is daunting for the man in the street. The problem arises particularly for such claims involving sale and hire contracts, road accidents, accidents at work, disputes between neighbours, consumer problems, etc.

56. This principle calls upon member states to provide a procedure which is as inexpensive as possible. Many member states have found that the only way to solve the problem of the small claim is to devise a procedure which is so simple that a plaintiff can pursue his remedy without a lawyer and defend his own case in court. This is done in various ways. In the Scandinavian countries special consumer complaints boards have been set up which receive written evidence but seldom hold oral hearings. In England and Wales and in Sweden, there is a simplified procedure before the lower courts which encourages a litigant to argue the case himself before courts. Other states have simplified the formalities or the way in which cases are heard, or have thus dispensed with the necessity for the parties to be represented by a lawyer in the lower courts or in some specialised courts (Belgium, France, Luxembourg, Netherlands, Switzerland). In Austria summary proceedings (*Bagatellverfahren*) are characterised by simplification, reduced cost and limitation of the possibilities of appeal.

57. No pattern is suggested for states to follow, although it is recommended that forms could be placed at the disposal of litigants, the

number of hearings reduced, which would lower costs, and the right to appeal restricted, which would prevent proceedings becoming too long.

Principle 16

58. Access to justice is indispensable in family cases. The states are therefore specially requested to ensure that their courts are able to deal with family disputes in accordance with a procedure that complies with the principles included in this recommendation, taking into account the serious consequences that the decisions in these cases have on persons' private life and economy. Particular attention should be paid to ensure that these judgments are given expeditiously.

59. In view of the sensitive nature of these cases, the parties often find it difficult to discuss all aspects of their family problems in public. The rules of procedure should therefore be designed so as to take this into account.

In some states (Austria, Denmark, France, Federal Republic of Germany, Iceland, Ireland, the Netherlands and Norway) all such hearings are now held in private and this has served as an encouragement to people to bring their cases to court. These cases clearly concern people who, prior to the general introduction of private hearings, would not have been able to face the ordeal of exposing these strictly personal matters in public.

The desirability of holding proceedings in private in the interests of individual privacy must, however, be reconciled with the principle to be found in the constitutions of certain countries that justice shall be done in public.

Recommendation No. R (81) 19 on the access to information held by public authorities[1]

(Adopted by the Committee of Ministers on 25 November 1981 at the 340th meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of Article 15.*b* of the Statute of the Council of Europe

Considering that the aim of the Council of Europe is to achieve greater unity between its members;

Having regard to Assembly Recommendation 854 on access by the public to government records and freedom of information;

Considering the importance for the public in a democratic society of adequate information on public issues;

Considering that access to information by the public is likely to strengthen confidence of the public in the administration;

Considering therefore that the utmost endeavour should be made to ensure the fullest possible availability to the public of information held by public authorities,

Recommends the governments of member states to be guided in their law and practice by the principles appended to this recommendation.

Appendix to Recommendation No. R (81) 19

The following principles apply to natural and legal persons. In the implementation of these principles, regard shall duly be had to the requirements of good and efficient administration. Where such requirements make it necessary to modify or exclude one or more of these principles, either in particular cases or in specific areas of public administration, every endeavour should nevertheless be made to achieve the highest possible degree of access to information.

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1. When this recommendation was adopted, and in application of Article 10.2.*c* of the Rules of Procedure for the meetings of the Ministers' Deputies, the Representatives of Italy and Luxembourg reserved the right of their governments to comply with it or not.

I Everyone within the jurisdiction of a member state shall have the right to obtain, on request, information held by the public authorities other than legislative bodies and judicial authorities.

II Effective and appropriate means shall be provided to ensure access to information.

III Access to information shall not be refused on the ground that the requesting person has not a specific interest in the matter.

IV Access to information shall be provided on the basis of equality.

V The foregoing principles shall apply subject only to such limitations and restrictions as are necessary in a democratic society for the protection of legitimate public interests (such as national security, public safety, public order, the economic well-being of the country, the prevention of crime, or for preventing the disclosure of information received in confidence), and for the protection of privacy and other legitimate private interests, having, however, due regard to the specific interest of an individual in information held by the public authorities which concerns him personally.

VI Any request for information shall be decided upon within a reasonable time.

VII A public authority refusing access to information shall give the reasons on which the refusal is based, according to law or practice.

VIII Any refusal of information shall be subject to review on request.

Explanatory report

Introduction

1. It is generally recognised that a democratic system can best function effectively when the public is fully informed. Moreover, because of social and technological developments, modern life has become so complex that public authorities often possess large quantities of records and information of general interest and importance. To ensure adequate participation of all in public life, it is necessary that the public should, subject to unavoidable exceptions and limitations, have access to information held by public authorities at all levels.

2. The everyday life of the individual is profoundly affected by the activities of public authorities. In order to protect the rights of the individual it is most important that he should be aware of the information held by public authorities – in particular information concerning himself or his interests – and that access to information should be on the basis of equality.

3. It should be mentioned that access to information by the public is also in the interest of the public authorities themselves, because it can help to establish a closer relationship between the administration and the individual, and is thus likely to strengthen the confidence of the public in the administration.

4. Having regard to the importance of these general considerations, a colloquy was held on "Freedom of information and the duty for the public authorities to make available information". This colloquy was organised by the Council of Europe in Graz, from 21-23 September 1976, in collaboration with the Faculty of Law of the University of Graz. The conclusions of this colloquy were considered by the Steering Committee for Human Rights at its 3rd meeting (8-12 May 1978) and it was decided to set up a committee of experts to study the suggestions put forward at the colloquy. That committee proposed to undertake the drafting of a recommendation to member states on the matter. Before a decision was taken on that proposal, the Parliamentary Assembly of the Council of Europe adopted, on 1 February 1979, Recommendation 854 (1979) on access by the public to government records and freedom of information, recommending that the Committee of Ministers should :

> "invite member states which have not yet done so to introduce a system of freedom of information, that is, access to government files, comprising the right to seek and receive information from government agencies and departments, the right to inspect and correct personal files, the right to privacy, and the right to rapid action before the courts in these matters".

5. Recommendation 854 (1979) was forwarded by the Committee of Ministers to the Steering Committee for Human Rights for consideration in May 1979.

6. By Decision No. CDDH/9/161179 of 16 November 1979, the Steering Committee for Human Rights instructed the Committee of Experts on public authorities and access to information "to continue its study of the question of access to government files, including the rights to seek and receive information from government agencies and departments and taking into account the right to privacy and the right to rapid action before the courts in these matters, with a view to drafting an appropriate recommendation to governments of member states".

The Committee of Experts on public authorities and access to information was instructed not to deal with the question of "the right to inspect and correct personal files" as mentioned in paragraph 13 (a) of Recommendation 854 (1979) of the Parliamentary Assembly of the Council of Europe. It was the opinion of the Steering Committee that

this right raised important problems concerning the protection of the individual against the acts of the administration and should be dealt with separately.

7. A draft recommendation on access to information held by public authorities was prepared by the Committee of Experts on public authorities and access to information in the course of two meetings held in 1980 and examined by the Steering Committee for Human Rights at its 9th meeting (4-8 May 1981). The text was submitted to the Committee of Ministers and adopted on 25 November 1981 [at the 340th meeting of the Ministers' Deputies].

General considerations

8. The committee of experts has drawn up a recommendation containing, in an appendix, eight general principles on access to information held by public authorities by which the governments of member states are recommended to be guided in their law and practice. The term "principles" has been used in order to leave member states as much freedom as possible in choosing the means for ensuring that administrations will conform in substance with the principles set out in the appendix to the recommendation.

These principles should be understood as indicating a general standard and not as preventing a member state from recognising additional or more extensive rights and safeguards for the provision of access to information or from extending the scope of their application. Likewise, nothing in the recommendation should be interpreted as implying the limitations of any rights or safeguards in relation to provisions on access to information which may already be recognised by a member state.

9. An introductory note to the principles makes it clear that they are applicable to both natural and legal persons, since both categories have a similar interest in having access to information.

10. Furthermore, the introductory note contains a general provision which applies to all of the principles. It aims to ensure that the principles are implemented in a way which is compatible with the requirements of good and efficient administration. In order to render the application of the principles more flexible, a clause has been inserted allowing for the possibility of modification or non-application of certain principles in particular cases or in specific areas of public administration whilst emphasising the desirability nevertheless of achieving the highest possible degree of access to information.

Comments on the appendix

Principle I

11. Principle I sets out the main object of the recommendation, that is, the right to obtain information, even where the interested person is not a party in an administrative procedure. The protection of the citizen in such a procedure is the object of Resolution (77) 31 on the protection of the individual in relation to the acts of the administration, adopted by the Committee of Ministers of the Council of Europe on 28 September 1977. This general principle applies to persons having a direct relationship with the public authorities, as indicated by the concept of jurisdiction.

12. The term "public authority" is understood to cover all administrative authorities at whatever level. The scope of application of the recommendation will not extend however to legislative bodies and judicial authorities.

Principle II

13. There can be different systems for ensuring access to information. These systems depend on the structure and practice of each administration. Principle II, therefore, does not intend to recommend any particular system for providing access to information. The important point is that appropriate and effective means shall be provided for obtaining the information required.

14. Accordingly, the choice between existing possibilities for making information available is left to each member state. It is a matter of decision whether the means adopted should be a law, a formal code of practice, special rules, or some other means.

15. The means of obtaining information may include the inspection of records, the provision of written or oral answers or the supply of copies. No preference need be given to any particular means but it should be appropriate and effective, having regard to the given circumstances and the nature of the information.

Principle III

16. The right of access to information is aimed at helping the public to be fully informed about the issues of public life. For this purpose the supply of information should not depend on the establishment of a specific interest in the information.

Principle IV

17. This principle is essentially a non-discrimination clause. It is intended to ensure that, subject to the provisions of Principle V, information will be given on the same basis and to the same extent to everyone who seeks it.

Recommendation No. R (84) 15 relating to public liability[1]

(Adopted by the Committee of Ministers on 18 September 1984 at the 375th meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of Article 15.*b* of the Statute of the Council of Europe,

Considering that the aim of the Council of Europe is to achieve a greater unity between its members ;

Considering that public authorities intervene in an increasing number of fields, that their activities may affect the rights, liberties and interests of persons and may, sometimes, cause damage ;

Considering that, since public authorities are serving the community, the latter should ensure reparation for such damage when it would be inappropriate for the persons concerned to bear it ;

Recalling the general principles governing the protection of the individual in relation to the acts of administrative authorities as set out in Resolution (77) 31 and the principles concerning the exercise of discretionary powers by administrative authorities set out in Recommendation No. R (80) 2 ;

Considering that it is desirable to protect persons in the field of public liability,

Recommends the governments of member states :

a. to be guided in their law and practice by the principles annexed to this recommendation ;

b. to examine the advisability of setting up in their internal order, where necessary, appropriate machinery for preventing obligations of public authorities in the field of public liability from being unsatisfied through lack of funds.

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1. When this recommendation was adopted, and in application of Article 10.2.*c* of the Rules of Procedure for the meetings of the Ministers' Deputies, the Representative of Sweden reserved the right of his government to comply with it or not and the Representatives of Denmark and Norway reserved the right of their governments to comply or not with Principle II thereof.

Appendix

Scope and definitions

1. This recommendation applies to public liability, that is to say, the obligation of public authorities to make good the damage caused by their acts, either by compensation or by any other appropriate means (hereinafter referred to as "reparation").

2. The term "public authority" means:

a. any entity of public law of any kind or at any level (including state, region, province, municipality, independent public entity); and

b. any private person, when exercising prerogatives of official authority.

3. The term "act" means any action or omission which is of such a nature as to affect directly the rights, liberties or interests of persons.

4. The acts covered by this recommendation are the following:

a. normative acts in the exercise of regulatory authority;

b. administrative acts which are not regulatory;

c. physical acts.

5. Amongst the acts covered by paragraph 4 are included those acts carried out in the administration of justice which are not performed in the exercise of a judicial function.

6. The term "victim" means the injured person or any other person entitled to claim reparation.

Principles

I Reparation should be ensured for damage caused by an act due to a failure of a public authority to conduct itself in a way which can reasonably be expected from it in law in relation to the injured person. Such a failure is presumed in case of transgression of an established legal rule.

II 1. Even if the conditions stated in Principle I are not met, reparation should be ensured if it would be manifestly unjust to allow the injured person alone to bear the damage, having regard to the following circumstances: the act is in the general interest, only one person or a limited number of persons have suffered the damage and the act was exceptional or the damage was an exceptional result of the act.

2. The application of this principle may be limited to certain categories of acts only.

III If the victim has, by his own fault or by his failure to use legal remedies, contributed to the damage, the reparation of the damage may be reduced accordingly or disallowed.

The same should apply if a person, for whom the victim is responsible under national law, has contributed to the damage.

IV The right to bring an action against a public authority should not be subject to the obligation to act first against its agent.

If there is an administrative conciliation system prior to judicial proceedings, recourse to such system should not jeopardise access to judicial proceedings.

V Reparation under Principle I should be made in full, it being understood that the determination of the heads of damage, of the nature and of the form of reparation falls within the competence of national law.

Reparation under Principle II may be made only in part, on the basis of equitable principles.

VI Decisions granting reparation should be implemented as quickly as possible. This should be ensured by appropriate budgetary or other measures.

If, under domestic law, a system for a special implementation procedure is provided for, it should be easily accessible and expeditious.

VII Rules concerning time-limits relating to public liability actions and their starting points should not jeopardise the effective exercise of the right of action.

VIII The nationality of the victim should not give rise to any discrimination in the field of public liability.

Final provisions

This recommendation should not be interpreted as:

a. limiting the possibility for a member state to apply the principles above to categories of acts other than those covered by the recommendation or to adopt provisions granting a wider measure of protection to victims;

b. affecting any special system of liability laid down by international treaties;

c. affecting special national systems of liability in the fields of postal and telecommunications services and of transportation as well as special systems of liability which are internal to the armed forces, provided that adequate reparation is granted to victims having regard to all the circumstances;

d. affecting special national systems of liability which apply equally to public authorities and private persons.

Explanatory memorandum

Introduction

1. Recommendation No. R (84) 15 relating to public liability is a logical sequel to the Council of Europe's work in the field of administrative law, aimed at protecting persons in their dealings with public authorities. Public authorities in all states are acting in an increasing number of fields; since their actions have a continuous and determining influence on the public's activities, rights and interests, many occasions of conflict and damage inevitably arise and the problem is to determine how far the injured persons can be required to bear the damage.

2. The Council of Europe's work in this field began at the 9th Colloquy on European Law (Madrid, 2-4 October 1979) on the liability of the state and regional and local authorities for damage caused by their agents and administrative services, when the situation in member states was reviewed. The colloquy identified the differences that exist with regard both to the basis of public liability and to the rules for establishing the right to reparation and its scale.

3. There was seen to be a case for harmonisation at European level and, in 1980, the European Committee on Legal Co-operation (CDCJ) accordingly instructed the Committee of Experts on Administrative Law (CJ-DA) to draw up appropriate instruments dealing with specific aspects of state liability.

4. It was concluded that, besides the need of establishing a general rule according to which public authorities must be liable for their acts, specific principles are necessary in this field which would be appropriate to the particular nature of the activities of public authorities. Such principles are justified regardless of the question of whether public authorities are answerable before the same courts or whether, by statutory or case-law, they come under a separate system of liability.

5. Damage caused to persons may be the result either of "unlawful" or of "lawful" action by public servants or administrative bodies. The

instrument accordingly contains principles providing for reparation in both cases. Nevertheless, since rules concerning reparation for damage caused by lawful acts may necessitate important changes in certain states' legislation and practice, the instrument provides for the possibility of limited application of Principle II in national systems with the possibility of a gradual extension.

6. The existence of a system of public liability constitutes an essential safeguard for persons, but it is equally important that the system should be so implemented as to allow those injured to obtain just and expeditious reparation. Thus the recommendation, as well as laying down principles to govern the right to reparation, sets out ways of making such reparation effective and advocates that consideration be given to the desirability of setting up, where necessary, ways and means to prevent obligations in this field being unsatisfied through lack of funds.

Scope and definitions

Paragraph 1

7. This paragraph states the scope of the recommendation and, for this purpose, indicates that it applies to public liability ; the latter is defined as the obligation of public authorities to make good the damage caused by their acts. Such liability of public authorities is traditionally known in several legal systems as "state liability". However, this notion was rejected because the word "state" does not always denote the same political and institutional realities. In some systems, for instance, the notion of state applies to all institutions which govern or regulate the public life of the nation whereas in others it refers only to central government. The expression public liability" is therefore preferable because it can apply in all legal systems to the type of liability covered by this instrument.

Paragraph 2

8. Public liability is characterised by the fact that its scope is limited to acts of public authorities.

The notion of "public authority" is defined by using a functional criterion, that is the exercise of powers or prerogatives exceeding the rights or powers of ordinary persons. The indication of the specific cases where this condition is met falls within the sphere of domestic law. In some legal systems, prerogatives of official authority are exercised in the performance both of activities traditionally viewed as falling within the sphere of public entities, such as the maintenance of public order,

and of activities which can also be carried out by private persons, such as education or transport. Conversely, other systems consider that the prerogatives of official authority cannot be exercised in respect of the last-mentioned activities – which would consequently be subject to the liability system under ordinary law.

9. In some states, "public service" (*service public*) activities are also subject to a particular liability system.

The performance of tasks or activities which have special characteristics, or are of special interest to the community, is sometimes viewed as a public service. However, the notion of public service does not exist in all legal systems or does not always cover the same situations.

For this reason the recommendation does not specifically provide for the system of public liability to be applied to such activities, but nothing should prevent its application to those states which recognise the notion of public service and consider that activities relating to it must be subject to a liability system different from that existing under ordinary law.

10. Public authorities within the meaning of this recommendation may be both public law persons or entities and private law persons or entities, provided they come within the situation described above. Consequently, the enumeration in sub-paragraph *a* in paragraph 2 serves merely as an example. The public or private quality of an entity or person is therefore not decisive in giving rise to public liability. What matters is the nature of the powers it exercises.

Paragraph 3

11. The definition of the term "act", based on similar definitions in Resolution (77) 31 on the protection of the individual in relation to the acts of administrative authorities and Recommendation No. R (80) 2 concerning the exercise of discretionary powers by administrative authorities, states that "the term 'act' of public authorities means any action or omission which is of such a nature as to directly affect the rights, liberties or interests of persons". This text innovates, by comparison with the definitions in the above-mentioned instruments, by providing expressly that an act may be an action or an omission.

Paragraph 4

12. This provision defines the scope of the instrument. It covers specifically some acts of public authorities, but states may extend the application of the system of public liability to other categories of acts.

It follows from paragraph 4 that the legislative acts adopted by parliament, and, in some states, by similar bodies of the entities forming the state which possess legislative power (regions, states in a federal state) are excluded from the scope of the recommendation.

In many states, the executive authorities (government, ministers, other administrative authorities) can adopt normative acts of general application. Those acts are adopted either on the basis of a delegation of power by the body which possesses the legislative power or by virtue of a power which is derived from the constitution.

According to paragraph 4, only acts of the executive bodies falling within "the regulatory authority" are covered by the recommendation. The acts which fall within such a "regulatory authority" shall be determined in accordance with the law of each state.

Paragraph 5

13. Paragraph 5 draws a fundamental distinction between acts performed in the exercise of a judicial function and solely administrative acts carried out in the administration of justice. The former acts do not fall within the scope of this recommendation. The latter acts, whether performed by the judge himself or by his ancillary staff, may be equated with one of the types of acts set out in paragraph 4. These acts are covered by the recommendation.

Paragraph 6

14. The protection granted by the system of public liability can cover not only the injured person but also other persons, namely his or her heirs. For the purpose of this instrument all those who are entitled to claim reparation are called "victim".

Principles

Principle I

15. This provision defines the factors which must be present for public liability to arise. With regard to the basis of liability, the instrument follows precedents already established in the area of civil liability by the work of the Council of Europe's European Committee on Legal Co-operation (CDCJ), precedents which are in line with recent developments, especially recent court decisions, in a number of member states. This principle does not make use of the two criteria of unlawfulness and

fault. Public liability should arise whenever damage is caused by a failure of public authorities to comply with the standards of conduct which can reasonably be expected from them in law in relation to the injured person. This makes it possible, *inter alia*, to protect victims having suffered damage caused by agents unknown or by a department acting collectively.

16. The standards of conduct which public authorities might reasonably be expected in law to observe depend on their tasks and the means at their disposal. The public administration in particular, and public authorities in general, are instruments to which the nation, through its representatives, entrusts functions for which they are assigned the means. Public authorities must consequently be in a position to perform a series of tasks and provide a number of services to the community, the definition, scope and nature of these activities being established by legal rules. When a public authority fails to comply with a duty required by the legal rules and damage to citizens ensues, it should be possible for the latter to obtain reparation from the public authority in question, regardless of any personal liability of the agents or officials who caused the damage.

17. The term "in law" means that the state's legal system must be considered as a whole. It refers to all applicable legal rules.

The scope of the notion of "legal rule" varies: in some systems, customary rules fulfilling certain conditions or possessing certain characteristics have the same binding force as written laws. It is therefore a matter for domestic systems to decide which rules may be considered as legal rules.

18. The definition of the term "act" in paragraph 3, considered in conjunction with the expression "reasonably in relation to the injured person" in Principle I, makes it clear that public liability does not arise in every instance of transgression of a legal principle or legal rule, since such principle or rule must be one that affects a right, freedom or interest of the injured person. Only such a transgression can give rise to reasonable expectation within the meaning of Principle I. Transgression of a rule which is concerned with an administration's internal organisation and does not directly or indirectly create an individual right or interest, does not give rise to liability under Principle I.

19. The presumption raised in this principle is confined, for reasons of legal certainty, to established legal rules. These are rules known at the time when the act was carried out. This excludes those rules defined

by the courts by means of an overall interpretation of legal provisions after the carrying out of the act that caused the damage.

20. This presumption is rebuttable, and the public authority in question will not be liable if it can show that violation of the rule does not amount to non-compliance with the standard of conduct which it was bound to observe. This presumption helps to protect the victim, who is not obliged to investigate the conduct of the agent or administrative department responsible for the act causing the damage but has merely to prove that the public authority has failed to observe conduct prescribed by a legal rule.

21. One application of the principle stated above in many countries is that there is presumption of liability in the case of technical failure of equipment used by the public authorities. As an example, it can be mentioned the case in which there is a technical failure of the traffic lights. A claimant should be able to get reparation even if it is not possible to establish any fault on the part of any particular official.

22. It appears from the text of the provision that public liability arises only where damage is caused, which conversely means that the breach of a legal rule by itself is not sufficient to give rise to this category of liability. This should not prevent the possibility of liability of a different kind, for instance, criminal or disciplinary liability. The affirmation that the damage must be "caused" by an act establishes the need for a causal relation between the act of the public authorities and the damage. Generally the instrument does not regulate questions of causation but specific questions in relation thereto are dealt with in Principle III (contribution by the victim to the damage).

23. A special problem may arise where damage is caused by an official ostensibly acting in the public service, but in fact acting in his own interest; one must determine the criteria for defining what is referred to in some systems as separate personal fault (*faute personnelle détachable*) and administrative error (*faute de service*). Where the appearance of normal activity of a public authority is sufficient to mislead reasonable and careful people, public liability must arise even if such an appearance subsequently proves to be untrue. This consequence is based on the fact that appearance is constituted by factors that are objectively linked to public administration or a public service. Thus, liability may arise if, in the particular case, the capacity of an administrative official and the circumstances of his action are of such a nature as to mislead the injured person.

Principle II

24. A person's rights and legitimate interests may be infringed and damage caused not only when a public authority fails to conduct itself in the way required of it but also, in certain instances, when it acts in a proper manner and cannot be accused of breach of duty. Such damage is the consequence of a risk inherent in all social activity, and criteria must be established for determining those instances in which the damage should be borne by the injured person and those in which, on the other hand, it should be the responsibility of the community.

25. A generally accepted principle of social solidarity requires persons to accept a whole range of inconveniences and damage as a normal consequence of life in society, when they are not excessively important or serious and they affect the population as a whole. Conversely, it seems unjust to require the injured person to bear damage to which the aforementioned qualifications do not apply and which constitutes an excessive burden for a specific person in relation to the principle of equality in sharing the consequences of public obligations.

26. For these reasons, even if the conditions stated in Principle I are not met, in other words even if there has not been any failure by a public authority to conduct itself in a way which could reasonably be expected of it, in law, the recommendation invites states to provide in their internal law for rules granting reparation to the victim whenever it would be manifestly unjust for the injured person to bear the damage alone. In order to help to qualify the unjust character of the damage, this principle enumerates three cumulative conditions.

27. To facilitate implementation of the recommendation, particularly by states with no objectively defined general system of liability, paragraph 2 provides that states may restrict the application of Principle II to specified categories of acts. This will also enable those states, if they so wish, to apply Principle II in stages to ever-wider categories of acts.

Principle III

28. The provisions of Principle III are based upon those relating to the same subject in the European Convention on Products Liability in regard to Personal Injury and Death. The principle covers cases in which the injured person has himself contributed to the damage. The fault of the victim is the main cause that modifies the liability. However, the case of the failure of the victim to use the legal remedies available to him, which might have prevented or reduced the damage, has been expressly

mentioned. It will be for the court to determine in a specific case the contribution to the damage by the victim with a view to assessing the reparation or, if appropriate, disallow it.

29. The second paragraph states that reparation may also be reduced where the damage is the result of an act committed by a person for whom the victim is responsible under national law (for example, depending on the system : agent, minor).

30. Although the recommendation does not expressly mention this matter, public authorities will, as a general rule, be exonerated from liability in the case of *force majeure*. *Force majeure*, an example of which arises out of atmospheric phenomena, is characterised by the fact that, since the cause of the damage cannot be attributed to the public authorities, the actual occurrence of the act causing damage is normally unpredictable and its consequences are unavoidable. It is not possible, in such cases, to speak of acts of the public authorities or of causation which would justify attributing liability to the public authorities for the damage caused. The causal link may, in certain cases, be broken by the intervention of a third person which would, for example, by preventing the action of an administrative body, consequently free the public authorities from liability.

Principle IV

31. This principle departs from the approach, now discarded by many states, whereby a person having suffered damage caused by a public activity or service had to bring a claim against the official or civil servant allegedly liable. This solution did not provide the victim with satisfactory protection because it was sometimes impossible to find the person who had actually caused the damage, or very often, that person was insolvent.

32. The liability of public authorities is at present the victim's basic guarantee that he will obtain proper compensation, but there are two different means whereby action can be taken. In cases where the official or person who has caused the injury can be identified, some legal systems allow the victim to claim either against the public authority for which the official was working at the time or against the official himself, or against both simultaneously. Under other systems, claims must always be brought against the public authority, which can then take action against the official or civil servant who has caused the damage. The instrument adopts a compromise solution, establishing that states should not hinder the victim in the exercise of his right to proceed directly

against the public authority liable or bound to make good the damage, thus leaving it to the victim to choose in countries where direct action can be taken against the official in question. If the damage was the result of a lawful act, there would be no basis for recourse action of the public authority against the agent having caused the damage.

33. The recommendation does not pronounce on the desirability of establishing administrative conciliation systems prior to judicial proceedings. Their main advantage could be said to be to facilitate friendly settlements in certain cases, although they might also have the disadvantage of making procedures unwieldy or of discouraging ill-informed persons from exercising their legitimate rights. Work has already been carried out on this question in the Council of Europe and attention may be drawn to Principle 3 of Recommendation No. R (81) 7 of the Committee of Ministers on measures facilitating access to justice, which states that "Measures should be taken to facilitate or encourage, where appropriate, the conciliation of the parties and the amicable settlement of disputes before any court proceedings have been instituted or in the course of proceedings". This principle is explained in greater detail in the explanatory memorandum to the recommendation, which states, *inter alia*, that "for the sake of efficiency, purely formal and dilatory conciliation proceedings should be avoided".

This recommendation merely introduces therefore a principle according to which, where conciliation procedures are provided for in law, they should be conceived and implemented in a manner which does not jeopardise the taking of legal action, since that is the principal means whereby a victim may obtain compensation.

Principle V

34. This provision establishes the principle that reparation must be made in full, meaning that the victim must be compensated for all the damage resulting from the wrongful act which can be assessed in terms of money, and be appropriately compensated for other damage. However, it leaves it to domestic law to determine the heads of damage, the nature and the form of the reparation. In most legal systems, however, reparation covers both immediate material damage (*damnum emergens*) and the loss incurred (*lucrum cessans*).

35. In the circumstances referred to in Principle II, in view of the characteristics of acts by public authorities which cause damage, and having regard to the basis of the duty to make reparation, it may be appropriate for the injured person to bear a part of the damage. Indeed, since this

provision specifically mentions cases in which it would be manifestly unjust for the injured person to bear the damage "alone", it follows that it may be just to make fair rather than full reparation. The amount of such reparation is to be fixed in the light of all the factors used in such cases to establish the degree of liability of public authorities and the consequent entitlement of the injured person.

Principle VI

36. The final decision recognising the right of the victim to receive reparation does not always result in effective reparation being received without delay. Procedurally speaking, the enforcement of decisions in this field is made according to one of the following systems:

a. The decision can be immediately enforced and constitutes sufficient title to obtain reparation;

b. The decision cannot be immediately enforced and a special procedure is provided for in order to obtain effective reparation.

37. In principle, the first system permits fast reparation. Nevertheless, it was thought useful to lay down the general principle according to which enforcement of decisions in this field should be made as quickly as possible. If the second system is followed, the recommendation emphasises that the enforcement procedure should be easily accessible and fast. These two rules comply with the principles contained in Recommendation No. R (81) 7 of the Committee of Ministers on measures facilitating access to justice.

38. However, practical or legal obstacles to obtaining an effective reparation may exist. One is represented by strict budgetary rules of the state or other public entities which might prevent the disposal of the funds necessary to comply with the decision. Another possible obstacle is the inertia of the officials of the administration. A third obstacle lies in the prohibition, in some states, of enforcement in respect of the public authorities.

39. The instrument does not describe specific measures to overcome such obstacles, and recommends that states adopt budgetary or other appropriate measures. In some states, for example, budgetary rules provide for orders to pay and, if necessary, the automatic entry in the following year's budget of the sums which are due to the victim. To remedy the inertia or malicious conduct of officials of the administration, some systems provide for the possibility of the personal liability of the agents concerned.

Principle VII

40. Procedural time-limits and rules relating to their calculation have the double aim of fixing the period within which a right of action must be exercised and of instituting a measure of legal certainty by reasonably limiting the possibility of affecting legal rights. In the sector of private law, the first factor prevails and, consequently, time-limits are usually long. Long periods may sometimes constitute an obstacle to the smooth operation and effectiveness of administration action and, at the same time, would not seem indispensable for the protection of individual rights. For this reason, states lay down shorter periods. The recommendation recognises the need for this but it also underlines that such rules must not jeopardise the effective exercise of the right of action.

Principle VIII

41. The principles on public liability should be applied according to the same criteria and in a uniform way to all persons, regardless of their nationality, even if other states have a different legal provision. Progress in the protection of rights and legitimate interests of persons, in the spirit of the constant action of the Council of Europe, implies rejection of any discrimination in this field.

Final provisions

42. While not indispensable, these provisions are intended to underline the limits of the recommendation's scope.

Although the recommendation is concerned only with the acts indicated in the chapter "Scope and definitions", states may also apply it to other categories of acts. States may also, in the domestic application of the recommendation, modify certain of its provisions so as to afford fuller protection to the injured person while remaining within its general scope. Since most states recognise the principle of the pre-eminence of international law, it follows that any system of liability set up under the recommendation will not take precedence over special systems set up as a result of an international treaty.

43. Sub-paragraph *d* concerns states where private persons and public authorities are subject to the same liability system. It is evident that, if in such states special systems of liability which are different from that provided for in this instrument exist, they prevail over the recommendation, provided that such systems are of general application and no more favourable position is accorded to public authorities.

Recommendation No. R (85) 13 on the institution of the ombudsman[1, 2]

(Adopted by the Committee of Ministers on 23 September 1985 at the 388th meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of Article 15.*b* of the Statute of the Council of Europe,

Considering that the aim of the Council of Europe is to achieve greater unity between its members, in particular through the maintenance and further realisation of human rights and fundamental freedoms;

Bearing in mind Assembly Recommendation 757 (1975) on the conclusions of the meeting of the Assembly's Legal Affairs Committee with the ombudsmen and parliamentary commissioners in Council of Europe member states, held in April 1974;

Having regard to Resolution No. 2 of the European Ministerial Conference on Human Rights on the role of the Council of Europe in the further realisation of human rights (Vienna, 19-20 March 1985);

Welcoming the remarkable development of the institution of the ombudsman in recent years at national, regional and local level in Council of Europe member states;

Considering that, having regard to the complexities of modern administration, it is desirable to supplement the usual procedures of judicial control;

Recalling the functions of the ombudsman involving, *inter alia*, consideration of individual complaints concerning contended errors or other shortcomings on the part of the administrative authorities with a view to enhancing the protection of the individual in his dealings with those authorities;

Considering that through these functions the institution of the ombudsman can, bearing in mind the specific situation in each country, contribute towards the strengthening of parliamentary control;

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1. The term ombudsman in this recommendation relates to ombudsmen, parliamentary commissioners, mediators and persons discharging similar functions.

2. When this recommendation was adopted, the Representative of the Federal Republic of Germany, in application of Article 10.2.*c* of the Rules of Procedure for the meetings of the Ministers' Deputies, reserved the right of his government to comply with it or not.

Considering, furthermore, that the opinions of the ombudsman may constitute a major factor in the evolution of general principles and rules governing the functioning of the administration and the conduct of public employees,

Recommends the governments of member states :

a. to consider the possibility of appointing an ombudsman at national, regional or local level or for specific areas of public administration ;

b. to consider empowering the ombudsman, where this is not already the case, to give particular consideration, within his general competence, to the human rights matters under his scrutiny and, if not incompatible with national legislation, to initiate investigations and to give opinions when questions of human rights are involved ;

c. to consider extending and strengthening the powers of the ombudsman in other ways so as to encourage the effective observance of human rights and fundamental freedoms in the functioning of the administration.

Recommendation No. R (86) 12 concerning measures to prevent and reduce the excessive workload in the courts

(Adopted by the Committee of Ministers on 16 September 1986 at the 399th meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of Article 15.*b* of the Statute of the Council of Europe,

Having regard to the increasing number of cases brought before the courts, which is liable to interfere with everyone's right to a hearing within a reasonable time under Article 6.1 of the European Convention on Human Rights ;

Considering, moreover, the high number of non-judicial tasks to be performed by judges which, in some countries, has a tendency to increase ;

Convinced of the interest of limiting the number of non-judicial tasks performed by judges as well as of reducing any excessive workload of the courts in order to improve the administration of justice ;

Further convinced of the interest of permanently ensuring a balanced distribution of cases among the courts and of making the best possible use of their human resources,

Invites the governments of member states, apart from allocating to the judiciary the necessary means to deal effectively with the increasing number of court proceedings and non-judicial tasks, to consider the advisability of pursuing one or more of the following objectives as part of their judicial policy :

I. Encouraging, where appropriate, a friendly settlement of disputes, either outside the judicial system, or before or during judicial proceedings.

To that effect, the following measures could be taken into consideration :

a. providing for, together with appropriate inducements, conciliation procedures for the settlement of disputes prior to or otherwise outside judicial proceedings ;

b. entrusting the judge, as one of his principal tasks, with responsibility for seeking to achieve a friendly settlement of the dispute in all appropriate matters at the commencement or at any appropriate stage of legal proceedings;

c. making it an ethical duty of lawyers, or inviting the competent bodies to recognise as such, that lawyers should seek conciliation with the other party before resorting to legal proceedings and at any appropriate stage of such proceedings.

II. Not increasing but gradually reducing the non-judicial tasks entrusted to judges by assigning such tasks to other persons or bodies.

The appendix to this recommendation contains examples of non-judicial tasks which in some states are at present performed by judges and of which they could be relieved, taking into account the particular circumstances of each country.

III. Providing for bodies which, outside the judicial system, shall be at the disposal of the parties to solve disputes on small claims and in some specific areas of law.

IV. Taking steps, by suitable means and in appropriate cases, to make arbitration more easily accessible and more effective as a substitute measure to judicial proceedings.

V. Generalising, if not yet so, trial by a single judge at first instance in all appropriate matters.

VI. Reviewing at regular intervals the competence of the various courts as to the amount and nature of the claims, in order to ensure a balanced distribution of the workload.

VII. Evaluating the possible impact of legal insurance on the increasing number of cases brought to court and taking appropriate measures, should it be established that legal insurance encourages the filing of ill-founded claims.

Appendix to Recommendation No. R (86) 12

Examples of non-judicial tasks of which judges in some states could be relieved according to the particular circumstances of each country

Celebration of marriage;

Establishment of family property agreements;

Dispensing with the publication of marriage bans;

Authorising one spouse to represent the other : replacing the consent of the spouse prevented from giving consent ;

Change of family name – change of first name ;

Recognition of paternity ;

Administration of the property of those lacking legal capacity ;

Appointment of a legal representative for the legally incapacitated adults and for absent persons ;

Approval of acquisition of property by legal persons ;

Supervision of traders' account books ;

Commercial registers :

traders,
companies,
trademarks,
motor vehicles,
ships, boats and aircraft ;

Granting of licences for the exercise of commercial activities ;

Judicial intervention in elections and referenda other than provided for in the constitution ;

Appointment of a judge as chairman or member of committees in which his presence is merely required to strengthen the committee's impartiality ;

Collection of taxes and customs duties ;

Collection of judicial fees ;

Acting as a notary public ;

Measures relating to estates of deceased persons ;

Civil status documents and registers ;

Land registry (control over registration of transfer of property, of charges over immovable property) ;

Appointment of arbitrators when such appointment is required by law.

Explanatory memorandum

Introduction

1. The concern to improve the efficiency of the judicial system is shared by many governments. It is nothing new : congestion and slowness have long been deplored as characteristics of the judicial process. But the problem is particularly acute today because Europeans are in a position to avail themselves more freely of the judicial system, probably because the continual changes in society give rise to a growing number of conflicts which need to be settled and situations which have to be resolved. For budgetary reasons, however, states might find it difficult to meet the increasing number of cases with a corresponding increase of the various resources made available to the judicial system.

2. Improving the functioning of the judicial system was one of the major themes of the 12th Conference of European Ministers of Justice, held in Luxembourg in May 1980.

Previously the Council of Europe's member states had co-operated mainly on access to the courts : informing the public, legal aid, linguistic assistance, etc. On the initiative of the Ministers of Justice, a Committee of experts on the working of the judicial system was set up in 1981.

3. If the judicial system is to be able to meet an increasing demand rapidly and without any drop in standards, a whole range of possible reforms must be explored, covering, *inter alia*, education and further training of judges and judicial staff, courts' working conditions, simplification of procedures, and alternative methods of solving disputes, etc.

4. The committee looked first of all at measures likely to make civil procedure simpler, swifter and more flexible.

Recommendation No. R (84) 5 on the principles of civil procedure designed to improve the functioning of justice was drawn up on the committee's initiative and adopted by the Committee of Ministers on 28 February 1984 on a proposal by the European Committee on Legal Co-operation (CDCJ).

5. The committee went on to study ways of reducing the number of cases brought before the courts and the volume of the courts' work. The outcome of these discussions forms the principal part of this recommendation.

6. On the invitation of the 14th Conference of European Ministers of Justice, held in Madrid in May 1984, the Committee of Ministers decided that the work undertaken should be extended to include a study of

the following: the means of lessening the burden on the judicial system by encouraging the development of non-judicial forms of enforcement, modern enforcement techniques, and the situation relating to the recognition of the means of enforcement in European states.

7. The committee will further study how far it is possible, at an international level, to improve the training of judges and judicial staff, and to establish a better correspondence between the requirements of justice and the availability of the necessary resources to satisfy these requirements.

General considerations

8. An increasing number of cases and the excessive workload of judges are the main causes of delay in dealing with cases. The right of the individual – secured by Article 6, paragraph 1, of the European Convention on Human Rights – to a hearing within a reasonable time might be jeopardised. In some cases, delay may give rise to despair or to irreparable damage; it may amount to a denial of justice. A democratic state cannot plead budgetary difficulties to excuse infringement of this basic right.

9. In search of means to ameliorate this situation, the committee focused its work on the following questions:

a. Would it be advisable to devise further solutions other than judicial trials to the inevitable conflicts of life in society?

b. Is it not the case that, in the course of time, judges have been increasingly burdened with a whole range of duties not incumbent upon them in virtue of any higher principle?

c. Cannot adjustments be made to the rules on jurisdiction and the composition of courts so as to make the best possible use of the judges, provided it remains compatible with the requirements of good justice?

The committee was also led to study the possible impact of legal insurance on the workload of courts.

10. In October 1981 a detailed questionnaire on matters relating to the functioning of the judicial system was sent to member states' governments. Study of the replies prompted the committee in 1983 to seek further details about freeing judges from duties often regarded as non-judicial. The information thus obtained showed up substantial differences in practice and experience.

11. Aware of the difficulty of transferring innovations or transplanting institutions from one legal system to another, the committee felt it was appropriate to request Council of Europe member states to consider whether it might be advisable to pursue one or more of the following main objectives in their judicial policy, in the light of experience already acquired in various places: to promote the friendly settlement of disputes and the use of informal procedures for resolving conflicts; to free the judges from non-judicial duties; to adjust the rules on jurisdiction and the composition of courts with a view to making better use of the judicial system's human resources; and/or to forestall any exaggerated demand for judicial services which might arise as a result of extending legal-expenses insurance.

12. During the course of its work, the committee encountered two main difficulties: defining the area of non-judicial activity; and reconciling the use of alternative methods of resolving conflicts with the right of every individual to bring or defend his case before a court, as secured notably by Article 6, paragraph 1, of the European Convention on Human Rights.

Comments on the proposed objectives

Friendly settlement of disputes

13. An appreciable number of disputes lead to litigation because there has been no real contact between the parties nor any attempt to narrow the gap between their positions. Sometimes, even, condemning the other party seems to be a more pressing concern than trying to find a solution.

In a society in which everyone daily carries out a variety of acts whose legal dimension is not immediately perceived and everyone faces legal situations which change rapidly, there is ample room for conflict. Before judicial proceedings or any other procedures for settling a dispute are embarked upon, the parties should have had an opportunity to make an accurate assessment of the dispute and to try to iron out the problem. Moreover, even where attempted conciliation prior to judicial proceedings proves ineffectual, the judge could usefully take on the role of an intermediary in such a way as to enable the parties to find a solution to the conflict themselves. This matter was raised in a different context in Recommendation No. R (81) 7 of 17 May 1981 on measures facilitating access to justice.

14. With the exception of disputes about rights whose exercise is not entirely at the parties' own discretion because they are a matter of public policy, the scope for conciliation is enormous.

Since it is likely to result in savings of time and money as well as to encourage a constructive attitude, conciliation should be specially encouraged where the parties will have to maintain close relations in the future (family, neighbours, colleagues, etc.) and in all cases in which the balance of power between the parties or the importance of the interests at stake is not such as to justify the fear that the weaker party will accept a solution that is manifestly contrary to his own interests (for instance, everyday consumer disputes).

15. As it presupposes a minimum of goodwill, conciliation has greater chances of succeeding if it is resorted to early – before the parties to the dispute adopt entrenched positions – and if it is optional. There are signs of a decline in compulsory conciliation, which has in practice often become an ineffective formality.

As a general rule, an application from one of the parties should be sufficient for the conciliation procedure to be put into motion. Such procedure will necessarily depend on the circumstances of the judicial set-up in each state. It could first take place before an auxiliary judge or any independent body with conciliatory competence in a particular field (labour law, consumer law, building law). In the event of failure, a new attempt at conciliation could be made by the judge dealing with the case, either at the request of one of the parties or on the judge's own initiative.

The conciliator should be seen as manifestly independent of the parties, have recognised human qualities and have wide discretion to make equitable conciliation proposals. In certain cases, notably family law disputes, the parties may be invited to appear in person, without counsel. In other instances, the conciliation process may properly continue with the lawyers only, if the absence of the parties becomes a condition for the success of the attempted conciliation.

There should be certain advantages attached to conciliation : the record of a successful conciliation could be enforceable ; court costs might be waived in cases of successful conciliation before the judge. Furthermore, the judge might take into consideration the attitude of each party during conciliation proceedings in distributing the procedural costs among them.

16. Although lawyers are bound to comply with their clients' instructions, they should nonetheless, in all cases that seem appropriate, advise those instructing them to seek a settlement with the opposing side. Moreover, fees should not be an impediment to this.

In order to develop the practice of conciliation, seeking conciliation should be recognised as an ethical duty of lawyers. According to the particular features of the legal system of each state, public authorities may be able to exercise a greater or lesser role in this respect. They may either amend any provisions applicable to the legal profession or invite the Bar and lawyers' associations to take steps to that end. It would further be appropriate to examine any obstacles – possibly in the determination of fees – to securing friendly settlements of disputes.

Freeing the judges from non-judicial tasks

17. The essential function of judges is to determine disputes regarding legal claims according to law.

It is nonetheless apparent that a considerable part of their working time is taken up with activities that do not relate to litigation and are administrative rather than judicial in nature. In the course of time, their training and impartiality, the knowledge they may have of certain legal matters when disputes are involved, have resulted in their taking on supervisory functions, an increasing role in family matters and a number of registering and certifying roles, as well as their exercising control in the economic sphere.

Obviously there is no question of making a universal recommendation that judges should be freed from all these tasks; it is a matter of encouraging a review of the many circumstances in which the courts are called upon in which there is no existing dispute, with a view to eliminating all those in which intervention by the court is not absolutely necessary.

18. As was pointed out above, the notion of "non-judicial tasks" cannot be easily defined. One has only to think of the controversies in the legal literature of several member states concerning the administrative, judicial or hybrid nature of decisions taken in the exercise of the courts' non-contentious jurisdiction.

Following a pragmatic approach, the committee considered all the tasks or activities which have no contentious element and examined to what extent responsibility for them was given to the courts in member states and what were the grounds for such decisions. At the end of

this survey the committee has drawn up a list – which is not exhaustive – of examples of non-judicial duties which the judges could be relieved of in some states, taking into account the particular circumstances of each country.

19. The courts generally have a supervisory role to play where members of a family propose by common consent to change the legal relations binding them. The justification usually put forward for this is the need to safeguard public policy and essential private rights and interests. The most common examples are divorce by consent, approval of agreements relating to the custody of children, and adoption order. Such areas of activity are not being called into question.

On the other hand, and to mention only one or two examples, it may be asked whether there is a cogent justification for entrusting the judge with the task of approving all agreements with which spouses intend to settle conflicts of their marital life. The same applies to the role of the judge in the matter of changing names and first names where such changes are permitted by law. The answers to this type of question will vary depending upon the judicial tradition, the procedural system and any other particular circumstance of each country.

20. The growing role of the courts in preventing and administering bankruptcies is undoubtedly attributable to the concern to uphold public policy and private interests. It is less obvious that this concern lies behind the judges' other activities in some states in the field of commercial law, such as monitoring various accounts and registers or granting licences.

21. Other than in certain special circumstances, is it appropriate to make the judges responsible for the organisation and administrative supervision of elections – except in disputed cases?

Judges are often appointed as chairmen or members of all sorts of committees with the sole aim of strengthening the committees' impartiality (real estate planning inquiries, political honours scrutiny committees, prisoners' welfare committees, etc.). Such a practice should normally be discouraged.

22. The appendix contains a series of examples of tasks which the judges could be relieved of according to the particular circumstances of each state.

In general, the carrying out of non-judicial functions should be provided for by law and restricted to a small number of eventualities in which intervention by the judges appears essential to safeguard a right or uphold public policy.

23. The tasks that would thus be withdrawn from the judges could be given to the civil service in some cases or to judicial staff in others. The *Rechtspfleger* may be mentioned as an example of a judicial officer who has been made responsible, in the Federal Republic of Germany and in Austria, for a large part of the non-contentious jurisdiction as well as for some duties in civil litigation procedure.

Settlement of disputes by other bodies

24. Mention was made above that it was advisable to encourage conciliation as a means of settling disputes, primarily with a view to relieving the courts (extra-judicial conciliation) or at least reducing the amount of time spent by judges on finding suitable solutions and writing records (judicial conciliation).

Would it be possible to go further and give certain extra-judicial bodies or authorities the task of settling some disputes?

Apart from arbitration, very little has been done in this direction in Europe.

25. One of the foundations of a state based on the rule of law, as expressed in national constitutions and in Article 6, paragraph 1, of the European Convention on Human Rights, is a citizen's basic right of access to the courts to establish or defend his rights. Access to the courts cannot be refused.

This should not, however, preclude the possibility of making alternative means of settling disputes by other procedures available to the public in certain circumstances, provided that such alternatives are optional or, failing that, do not exclude subsequent appeal to the ordinary courts.

26. Arbitration, which originates in a private agreement and ends with a final, binding decision, is the only longstanding alternative arrangement which is, in principle, of general application. It lends itself to the settlement of all disputes involving rights which the parties are free to dispose of.

It is unlikely that arbitration will come to be used much outside the business sphere. It seems desirable, though, that this institution should be both better known and more efficient in those fields to which it is particularly suited. Despite the relatively high cost, its speed, professionalism and relative informality are undoubted advantages. The institution would be more efficient if arbitration awards were not appealable

to the courts and could be set aside only on grounds such as public policy, incompatibility of reasons, *ultra vires* or infringement of the rights of the defence. Arbitrators should be empowered to rule in respect of their own jurisdiction and arbitration awards should be as easily enforceable as possible.

27. Apart from arbitration, other extra-judicial procedures could be set up, as they have indeed already been experienced in some member states. In the case of small claims and in certain special areas such as consumer law, rent disputes and road traffic, parties should be able – or even be obliged, subject to appeal to the courts – to seek rapid, inexpensive settlements from ad hoc bodies.

Use of single judges at first instance

28. Whatever measures are taken to reduce the courts' workload, the overall volume of work will remain substantial. It is therefore appropriate to encourage more judicious use of the human resources of the ordinary courts by making the practice of having single judges hear cases at first instance, more widespread in all areas of the law which lend themselves to it.

29. The recommendation particularly refers to courts of first instance with general jurisdiction.

Consideration should be given to how far, and on what conditions, cases brought before these courts could be assigned to a single judge rather than to a panel of judges.

30. In each national legal system there may be a small number of cases which by their very nature should be heard by more than one judge.

The distribution of other cases to single judges or to panels of more than one judge, where the two systems exist, should rely on objective criteria and be conducted under such safeguards as to avoid any form of arbitrariness.

31. Obviously, wider use of single-judge courts is not in itself a panacea. The courts' output will be increased though not multiplied. In some cases, registrars' departments and court secretariats will have to be given extra staff. Nonetheless, if it is implemented judiciously and if a simpler, more flexible procedure is simultaneously introduced in accordance with the principles set out in Recommendation No. R (84) 5, this measure should help relieve congestion in the courts without impairing the standard of justice.

The jurisdiction of the courts

32. If there are no regular adjustments in the monetary ceilings which determine the general jurisdiction of the courts, monetary depreciation results in a substantial number of cases being removed from courts of limited jurisdiction, which were perfectly equipped to deal with them, and being transferred to overload even more those courts which have jurisdiction to try cases without any monetary limit.

Similarly, a high level of inflation may limit the effectiveness of a number of alternative methods of settling disputes established in order to settle cases whose value does not exceed a statutory amount, notably disputes between consumers and suppliers.

33. The law establishing the jurisdiction of the various courts must be amended at suitable intervals in order to prevent or correct such shifts in jurisdiction. Minimum amounts for the admissibility of some appeals should also be regularly adjusted.

Similar attention needs to be paid to the distribution of special jurisdictions among the courts. Courts of limited jurisdiction, for instance, could have monetarily unlimited jurisdiction in a larger number of cases (maintenance, tenancies, etc.).

Legal-expenses insurance

34. Apart from a number of specific contracts in which it appears as an accessory clause (e.g., driver's third-party liability), legal-expenses insurance is, in many member states, an innovation which is rapidly becoming widespread and whose impact on the functioning of the judicial system is not yet easy to assess.

This type of insurance, which covers the insured person's court costs and attorneys' fees and, usually, those of the other party in the event of the insured person's losing his case, eliminates the limited financial risk incurred by anyone eligible for legal aid and the whole financial risk of anyone ineligible for legal aid. One can readily imagine, therefore, that such insurance, covering as it does a whole range of litigation (landlord and tenant, private nuisance, consumer problems, road accidents, individual labour disputes, etc.) may, if care is not taken, encourage excessive recourse to courts. Such a relationship of cause and effect has not been established in a clear-cut way, however. It accordingly seems desirable that states should make arrangements for studies and monitoring, if necessary in liaison with bodies representing insurers.

Recommendation No. R (87) 16 on administrative procedures affecting a large number of persons

(Adopted by the Committee of Ministers on 17 September 1987 at the 410th meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of Article 15.*b* of the Statute of the Council of Europe,

Considering that the aim of the Council of Europe is to achieve a greater unity between its members;

Considering that, in an increasing number of fields, administrative authorities are called upon to take decisions which affect in varying ways a large number of persons, especially in the fields of major installations, industrial plant and spatial planning;

Considering that it is desirable that common principles be laid down in respect of such decisions in all member states so as to ensure compatibility between the protection of a large number of persons and the requirements of efficient administration;

Considering, in addition, that some of these administrative decisions may also affect persons residing or having interests in the territories of neighbouring states;

Bearing in mind in this respect recent trends in international environmental law concerning the transborder effects of activities carried out within the jurisdiction or under the control of a state;

Considering that it is desirable that administrative authorities also take into consideration observations from such persons concerned relating to potential effects of proposed decisions in the territory of neighbouring states;

Having regard to the general principles laid down in Resolution (77) 31 on the protection of the individual in relation to the acts of administrative authorities as well as to the relevant principles included in Recommendation No. R (80) 2 concerning the exercise of discretionary powers by administrative authorities;

Considering that these principles should be adapted and supplemented in order to ensure in a fair and effective manner the protection of a large number of persons, including, where appropriate, persons concerned by international effects of decisions,

Recommends the governments of member states to be guided in their law and administrative practice as well as in their mutual relations by the principles set out in the appendix to this recommendation ;

Instructs the Secretary General of the Council of Europe to bring the terms of this recommendation to the notice of the Government of Finland.

Appendix to Recommendation No. R (87) 16

Scope and definitions

The present Recommendation applies to the protection of the rights, liberties and interests of persons in relation to non-normative administrative decisions (administrative acts) which concern a large number of persons, more specifically :

a. a large number of persons to whom the administrative act is addressed, hereafter referred to as persons of the first category ;

b. a large number of persons whose individual rights, liberties or interests are liable to be affected by the administrative act even though it is not addressed to them, hereafter referred to as persons of the second category ;

c. a large number of persons who, according to national law, have the right to claim a specific collective interest that is liable to be affected by the administrative act, hereafter referred to as persons of the third category.

Persons of the three categories are hereafter referred to as persons concerned.

Section I below sets out the principles applicable to the making of the above-mentioned administrative acts and to the control thereof.

Section II states additional principles designed to protect the persons concerned when an administrative act is liable to have effects in the territory of a neighbouring state.

In the implementation of these principles, due regard should be had to the requirements of sound, efficient administration as well as to

major public interests and the interests of third parties, in particular with respect to the protection of personal data and of industrial or commercial secrecy. When the above requirements or interests make it necessary, one or more of these principles may be derogated from or excluded in specific areas of public administration or in duly justified circumstances.

The aims of this recommendation can be achieved:

– either through a single set of rules covering the whole subject,

– or through rules or practices specific to particular categories of decisions or particular fields.

Section I

Administrative procedure and control

The administrative act which concerns a large number of persons should be taken on completion of a participation procedure conforming to the principles set forth below.

I When a competent authority proposes to take such an administrative act, the persons concerned should be informed in such manner as may be appropriate and be provided with such factors as will enable them to judge its possible effects on their rights, liberties and interests.

II Having regard to the object and effects of the proposed administrative act, the interests at stake, the status or number of the persons concerned or the need to ensure efficient administration, the competent authority may decide that at all or some stages of the procedure:

a. persons of the second category with common interests shall nominate one or more common representatives;

b. persons of the third category shall be represented by associations or organisations.

III At their request, persons of the first category and, subject to such representation arrangements as may be imposed on them in conformity with Principle II, persons of the other categories, should have access in such manner as may be appropriate to all the available factors relevant to the taking of the act.

IV Having regard to the object and effects of the proposed administrative act, the interests at stake, the status or number of the persons concerned or the need to ensure efficient administration, the competent

authority should decide that the participation procedure continue under one or more of the following forms:

a. written observations;

b. private or public hearing;

c. representation in an advisory body of the competent authority.

Where the procedure chosen is that of representation of the persons concerned in an advisory body, persons of the first category and, subject to such representation arrangements as may be imposed on them in conformity with Principle II, persons of the second category, should also have the right to put forward facts and arguments and, in appropriate cases, present evidence.

V The competent authority should take into account facts, arguments and evidence submitted by the persons concerned during the participation procedure.

VI The administrative act should be notified to the public.

Without prejudice to any other way of communication, a public notification should specify, to the extent that it does not itself contain the information, how the persons concerned may gain access to the following:

– the main conclusions emerging from the procedure;

– the reasons on which the administrative act is based;

– information on normal remedies against the administrative act and the time-limit within which they must be utilised.

Persons of the first category should be personally informed of the administrative act and of the reasons on which it is based. The reasons may be included in the act itself or be communicated to these persons in writing, at their request, within a reasonable time. An indication of the normal remedies against the act, as well as of the time-limit for their utilisation should also be given to the said persons.

VII The administrative act should be subject to control by a court or other independent body. Such control does not exclude the possibility of a preliminary control by an administrative authority.

When the control procedure involves a large number of individuals, the court or other control body may, in accordance with fundamental principles and having due regard to the rights and interests of the parties, take various steps to rationalise the procedure, such as requiring

participants with common interests to choose one or more common representatives, hearing and deciding test appeals and making notification by public announcement.

Section II

International aspects

VIII When the administrative act is likely to affect rights, liberties or interests in the territory of a neighbouring state, the administrative participation procedure referred to in Section I should be accessible to the persons concerned in that state, on a non-discriminatory basis, according to the following indications:

a. The competent authority should provide these persons with the information mentioned in Principle I, at the same time as it informs the persons concerned on its territory. Such notification may be made either directly, by any appropriate means, provided the rules or practices governing relations between the states concerned so allow, or through the authorities of the neighbouring state.

b. Such representation arrangements as may be laid down by the competent authority should apply to the representation of these persons.

c. These persons may submit their observations either directly, in accordance with the procedure in the territory of the state where the act is being proposed, or through the authorities of the neighbouring state when these authorities have declared their readiness to perform such functions in their residents' interest.

d. The competent authority should inform these persons of the administrative act following the methods of communication mentioned in paragraph *a*.

e. The competent authority can provide the information mentioned in paragraphs *a* and *d* in its own language. It shall not be bound to take into account observations submitted in other languages.

IX Access to the control procedure should be secured without discrimination on grounds of nationality or residence.

X Access to the administrative participation procedure and to the control procedure may be subject to reciprocity.

XI The application of the principles contained in this section may be subordinated to conventions concluded between the states concerned.

With due regard to the jurisdictions provided for by the internal law of each state as well as to the existing international agreements, the states and territorial communities or authorities concerned should further maintain liaison with one another with a view to ensuring an effective participation by all persons concerned. They should endeavour to facilitate exchanges of information between the competent authority and the persons concerned. They may conclude either general or specific agreements or arrangements on a basis of reciprocity and equivalence for such purposes as :

a. designating the authorities of the neighbouring state which should be approached according to the kind of administrative act proposed ;

b. enabling the factors relevant to the taking of the administrative act to be made available to the persons concerned in the neighbouring state ;

c. enabling an authority of the neighbouring state to obtain the observations of the persons concerned residing in its territory and to forward them to the competent authority ;

d. stating the languages to be used.

Explanatory memorandum

Introduction

1. Improving relations between the individual and the administrative authorities, in particular with regard to his protection when administrative acts are being taken, constitutes a characteristic feature of the legal policy recently followed in European states. The aim is to ensure the highest possible degree of fairness in relations between the citizen and administrative authorities which are engaged in an ever-increasing number and variety of actions.

For several years the Council of Europe has provided the studies and initiatives in this field with a common European background. The work undertaken has notably led to the adoption of several recommendations addressed by the Committee of Ministers to governments of member states with a view to having their laws and practices based on common principles. These recommendations concern the administrative procedure relating to the taking of individual measures or decisions of such a nature as directly to affect the rights, liberties or interests of persons, the exercise of discretionary powers, public liability.

2. Recommendation No. R (87) 16 is a logical sequel to that work. It has been found that an increasing number of actions by public authorities are of such complexity or scale as simultaneously to affect, with varying intensity, a large number of persons. Their impact may even be felt in the territory of a neighbouring state. Such actions of public authorities may not only affect in a concrete manner the rights, liberties and interests of a large number of persons, but they may also attract the attention and anxiety of a large number of other persons whose interests could be affected and cause them to want to influence the proposed action. In some circumstances, the interests of the latter persons are so important that they ought to be given protection in the administrative procedure.

The factors now mentioned have a special bearing on the organisation of the administrative procedure and call for adequate solutions.

Two basic questions arise.

How should the protection of a large number of persons be organised so as to remain compatible with the requirements of efficient administration ? To what extent, under which conditions, and how should persons, whose rights, liberties or interests are liable to be affected by an administrative act in the territory of a neighbouring state, have the possibility of taking part in its making and of having it reviewed by a control organ ?

3. The European Committee on Legal Co-operation (CDCJ) referred the matter for consideration to the Committee of Experts on Administrative Law (CJ-DA) and instructed the latter to draw up an appropriate instrument.

4. In spite of the differences between the legal and administrative systems of the member states, it was possible to discover a large measure of agreement concerning the fundamental principles which should guide the rules on administrative procedures concerning a large number of persons and to recommend their extension. The task was basically one of developing and adapting the principles set out in Resolution (77) 31 on the protection of the individual in relation to the acts of administrative authorities and, subsidiarily, in Recommendation No. R (80) 2 concerning the exercise of discretionary powers by administrative authorities.

5. The protection of rights, freedoms and interests liable to be affected in the territory of a neighbouring state raised more delicate issues. States admittedly have a duty to see to it that activities carried on within their jurisdiction cause no damage in the territory of another state. In

conformity with recent trends in international environmental law, states do increasingly consult together and exchange such information as will enable them to assess any effects of proposed decisions on the environment (in the widest sense) in neighbouring states. On the lines of certain initiatives already taken at international level, notably in the framework of OECD, it appeared desirable to encourage national authorities called upon, to make decisions of such scope to take into consideration not only observations from authorities of the neighbouring state but also observations from persons liable to be affected by the said decisions in their rights, liberties or interests, in the territory of the latter state. The fullest possible participation by these persons in the administrative procedure and in the control procedure should accordingly be permitted. This includes participation, in appropriate ways, of persons having a legitimate concern or anxiety with respect to major projects of environmental importance.

6. Drafting a convention to cover the whole problem area was considered a premature move. Instead, the more cautious way of drafting a recommendation was chosen. Such an instrument had already been selected in the past to lay down the basic principles for the protection of the individual in relation to the acts of administrative authorities ; there was no sound reason to depart from that course in the special field of proceedings concerning a large number of persons. The recommendation aims both at basing the internal law of member states on certain fundamental principles, to which proposals for implementation are attached, and at suggesting lines along which international agreements or arrangements may usefully be concluded in this field, in order better to take account of its international dimensions.

General considerations

7. The recommendation invites the governments of member states to subject to a participation procedure, the taking of administrative acts affecting a large number of persons and to organise an appropriate control of such acts by a court or other independent body. To that end, it sets out, in an appendix, two series of principles by which the governments are recommended to be guided in their law and practice.

The expression "to be guided" included in the operative part of the recommendation has been used in order to leave states as much freedom as possible in choosing the means for ensuring that administrative procedures and control procedures will conform in substance with the principles set out in the appendix. For that same reason, the

term "principle" has been preferred to the term "rule" : for the aim of the recommendation is not to achieve, by adopting uniform rules, the harmonisation of the different laws on this kind of procedures, but rather to promote general recognition, in the law and practice of member states, of certain principles.

8. The appendix begins with an introductory part, the purpose of which is to set out the scope of application of the recommendation, give definitions of concepts which constitute the subject matter and provide some guidance on the way in which the principles could be implemented. The principles themselves are then set out in two sections.

9. The acts covered may be singled out by two characteristics. They are non-normative administrative decisions and they share the additional distinctive element of concerning a large number of persons. The recommendation offers no definition of the term "a large number" : it is left to each national legal system to specify, where appropriate, the levels that determine at what stage a participation procedure becomes applicable. The proposed administrative act must concern a project of substantial importance, the carrying out of which is likely to affect many persons.

These persons may be divided into three categories, of variable size according to the area involved and the particulars of each national administrative system, namely :

- persons to whom the act is addressed (first category) ;
- persons who, though not addressees of the act, will personally feel its impact as their individual rights, liberties or interests will probably be affected (second category) ;
- persons who claim to share a specific collective interest that is liable to be affected by the act (third category).

Whether a collective interest is deemed specific will depend upon the nature of the objectives sought by the association uniting the persons concerned as well as, where appropriate, upon the geographic area in respect of which the association, as constituted, may reasonably claim to express its concern.

When, for instance, the proposed administrative act concerns an industrial plant, the first category will generally include the persons requesting a permit ; the second category will include persons living on or close to the site who will be personally affected ; the fact that the act is notified to them does not necessarily mean that these persons

are of the first category. The third category will include persons involved in the defence of such interests as environment protection, health and security, protection of the cultural heritage and so on. Many other examples may be found. Persons of the three categories are referred to as "persons concerned".

In some member states, persons of the third category are not generally allowed to take part in administrative and control proceedings. This instrument allows those states to determine the fields where the collective interests of these persons are protected, that is to say, where the law grants them a right to take part in the proceedings in order to defend such interests.

10. The recommendation's scope is not limited to certain areas of administrative activity. It is neither desirable nor feasible to specify in such international instruments, as is often the case under national law, the fields in which participation procedures must be set up as well as any levels and criteria of magnitude determining at what stage those procedures must be used. It is true that spatial planning, the execution of major installations and the protection of the environment constitute the most obvious fields of application. The recommendation is however designed to encompass various other fields and to be applicable to future areas of administrative action which are not foreseeable yet.

11. Taking into account the diversity of legal techniques used by administrative authorities in member states as well as the fact that, in some of those states, the term "administrative act" is indeed not an established legal concept, the principles were designed to be reasonably flexible, leaving to states a certain margin of discretion. The principles should accordingly be implemented in a way compatible with the requirements of sound and efficient administration, and their application should not conflict with the interest of third parties (for example, industrial security) or major public interests (for example, state security, the keeping of public order). The possibility was further reserved to derogate from/or not to apply them in specific areas of public administration or in duly justified circumstances. A participation procedure may for instance be dispensed with, as being superfluous, where the sole purpose of the proposed administrative act is strictly to implement a regulatory act taken after consultation with all the interested persons.

12. Having regard to the fact that public consultation has often been introduced in member states through specific provisions limited to certain areas, it was decided to allow for a progressive implementation of the recommendation. Another clause therefore provides that the aims

of the instrument can be fulfilled not only through a single set of rules covering the whole subject but also through rules or practices specific to particular categories of decisions or particular fields.

13. It is recalled that this recommendation lays down principles which member states should accept as common minimum standards of achievement. Nothing in the recommendation will therefore prevent a state from going beyond this minimum – indeed the last principle in Section II is a direct incentive to go beyond it – nor should it be interpreted as implying the diminution of any safeguard already recognised by a member state.

Comments on the principles

14. The appendix contains two sections. One lays down those principles applicable to the taking and the control of administrative acts which concern a large number of persons on the national territory.

The other states various additional principles for the protection of rights, liberties and interests affected outside the national territory.

Section I

15. Administrative acts falling within the scope of application of the recommendation should be taken on completion of a procedure permitting an effective consultation with all the persons concerned. This "participation" procedure conforms to several principles which are presented hereunder.

Principle I

16. Under the terms of Principle I, the persons concerned must be informed of the main features of the proposed action. Such information should enable them to determine whether and in what way they are or may be affected by the project. Depending on the scale of the project and the number of persons potentially affected, the information methods used, either individually or in combination, could include the following : circular letter, notice in the town hall, notice at the future site of the project, public announcement in the local or regional press, exhibition with plans and scale models, etc.

Principle II

17. The participation procedure is intended to be a very open one. Not only should it guarantee protection of individual or collective rights,

liberties or interests; it should also ensure that the administration is fully informed, so that it may reach a judicious decision consistent with the general interest. However, in order to keep the consultation exercise within reasonable limits and avoid extensive repetition of virtually identical arguments, Principle II allows the competent authority to channel participation requests. Persons with identical or analogous individual interests (persons living close to a plant, users of a public transport service, shopkeepers with premises in a thoroughfare where alterations are planned, etc.) may thus be obliged to choose one or more common representatives. Those who share the same specific collective interest (for example, preservation of a landscape) may be obliged to present their arguments through associations or organisations. The national legislation may lay down criteria, such as the requirement of being representative, for the participation of associations or organisations in the administrative procedure.

Principle III

18. The participation procedure covers individuals likely to be affected to very different degrees and in different ways by the administrative act. Since it is not just a matter of protecting the persons concerned but also of ensuring that the administration is informed as fully as possible, it was felt that everyone should be guaranteed equal access to information. Principle III does not specify the means by which the persons are informed (for example, transmission of a summary or granting access to the relevant documents). The formula adopted ("in such manner as may be appropriate") enables the administrative authority to choose the means best suited to a given case and in accordance with the relevant administrative practices.

The guarantee contained in Principle III is qualified in two ways: firstly, persons in the second and third categories may have access to the information only through their representatives; secondly, the protection of important public interests (national defence, etc.) or of third parties' interests (industrial secrets, etc.) may in certain cases justify the exclusion of certain matters from the information accessible to all.

Principle IV

19. The participation of interested persons may take several forms which are, at present, integrated to varying degrees into national administrative traditions. Principle IV lists these in no particular order of priority: observations sent by post or entered in a register, an interview with a

representative of the authority which is to take the decision or with a person delegated to report back to it, a public hearing, and the creation of advisory committees composed of representatives of the various interests concerned. These consultation processes do not exclude other forms of participation of a more political nature, such as the referendum, or more management-oriented, such as the direct involvement of representatives of the interested parties in decision-taking by joint management bodies.

Unlike the preceding principle, Principle IV draws a distinction between the different groups of persons concerned : a more extensive right of intervention is accorded to persons in the first two categories, whose rights, liberties and interests should not be defended solely through a consultative body.

Principle V

20. To be meaningful, a participation procedure should produce some useful effects. The administration should take into account the observations and arguments submitted during the procedure. In view of the great diversity of national laws in this respect, it was not possible to be any more explicit in the recommendation about the scope of this obligation. Suffice it to suggest here that the obligation to take account of the observations submitted should have both a procedural dimension (the authority should assess the relevance and the merits of the observations and objections submitted) and a material aspect (the authority should not subsequently deviate radically from the gist of the project as communicated to the persons concerned). Final responsibility for deciding how and by what legal technique the effectiveness of the consultation procedure is to be guaranteed lies with each state's legislation.

Principle VI

21. All persons concerned must be informed of the outcome of the procedure. However, this information process does not necessarily have to take the form of individual notification of the decision. In certain circumstances such a solution would scarcely be practicable, owing to the number of persons concerned, the length of the decision or some other reason.

Principle VI advocates a public notification. This notification may reproduce the decision, if it is brief and complete, that is to say, if it

includes the reasons for the decision, a conclusion on the results of the inquiry and an indication of appeal procedures. Failing that, the notice will indicate the substance of the decision taken as well as the places and times at which and the dates by which the persons concerned may inform themselves of the various elements mentioned above. The notice could also merely inform the persons concerned about how to gain access to the complete decision. In addition, persons to whom the decision is addressed are afforded special protection, in conformity with Resolution (77) 31.

Some wide-ranging acts, presented almost in the same way as regulatory acts, may not easily include information on remedies. In such instances, some information on remedies should as far as possible be given, for instance by placing an information note or booklet at the disposal of the persons concerned.

Principle VII

22. In the matter of control, there is a great diversity between national laws in every respect : locus standi, scope of the control, whether or not an appeal has a suspensive effect, power of the courts to give instructions to the administration. In spite of a general trend towards fuller supervision by the courts, harmonisation of the law on this point is particularly difficult. Principle VII reflects this state of affairs.

Firstly, it guarantees the existence of a system of control by a court or other independent body but without indicating either its scope or its accessibility, which are both matters regulated exclusively by domestic law.

Secondly, it is designed to facilitate the efficient conduct of proceedings within a reasonable time by suggesting certain procedural changes made desirable by the large number of participants. The changes suggested are intended only as examples, as any procedural reform should take account of the particular features of each state's judicial system and traditions. Such changes should be introduced in conformity with the fundamental principles of procedure deriving from the constitution or from texts ranking above the law.

23. In this respect, it is recalled that the principles set out in the appendix to the recommendation, and in particular Principle VII, are addressed to governments – with a view to their proposing any necessary legislative reforms – rather than to courts. It may be noted in this regard that, in some states, courts already have extensive powers to

rationalise proceedings along the lines suggested, while such rationalisation is limited in scale or even non-existent in other states and would need a legislative basis.

Section II

24. Envisaged in Section II are situations where a project which gives rise to a participation procedure in the territory of one state is liable to affect rights, liberties or interests in the territory of a neighbouring state, including a state separated from the state in which the act is being proposed by international waters. However, the instrument does not cover environmental effects which could occur a long way from the project launched or approved by administrative authorities (long-range transboundary air or water pollution). In the above situations, consultations between public authorities in each neighbouring state, in particular on the basis of model agreements set out in the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities, will undoubtedly constitute a positive step forward. However, it was felt that the persons concerned themselves should be able to take part in the defence of their interests. Keeping in mind the declared aim of an ever-greater unity between member states, it appears justified to associate the said persons with the preparation of the act, in spite of the border's existence.

Principle VIII

25. Under the terms of Principle VIII, persons whose rights, liberties or interests are liable to be affected in a neighbouring state should have non-discriminatory access to the administrative participation procedure, according to indications which the principle sets out. This guarantee of access may however be subject to reciprocity, in accordance with Principle X.

26. The principle of non-discriminatory access does not rule out any adjustment to the procedure. Moreover, if it is to be effective, further measures will also be necessary, especially the provision of relevant information to the persons concerned in a neighbouring state. These issues are addressed under sub-paragraphs *a* to *e*.

27. Any information provided by the competent authority on the project or the administrative act itself should at the same time be brought to the attention of the persons concerned by possible effects of the proposed decision in a neighbouring state, either through the authorities

of the latter state or directly, in particular, by announcement in the press (sub-paragraphs *a* to *d*). Favouring one or the other method of communication in a given case may be a matter of convenience. Due account should, however, be taken of the overall context of relations between the states concerned, as resulting from the texts or practices governing such relations, and care should be taken to check that direct communications are admissible in the circumstances.

28. Furthermore, what is envisaged for the persons concerned in a neighbouring state is an extension of the proceedings set up in the territory of the state where the act is to be taken. Such representation arrangements, as may be laid down by the competent authority, will therefore apply to the representation of the said persons. It also follows that in its dealings with these persons, the competent authority shall not be bound to receive or impart documents in languages other than its own (sub-paragraphs *b* and *e*).

29. Once they have been informed of the proposed administrative act and of the procedure for its adoption, the persons concerned in a neighbouring state may submit their observations either directly, in accordance with the procedure in the territory of the state where the act is being proposed, or through the authorities of the neighbouring state when these authorities have declared their readiness to perform such functions. The latter instance illustrates a new development in mutual administrative assistance, under which the authorities of one state spontaneously afford assistance in the conduct of administrative proceedings in another state, in the interest of their own residents (sub-paragraph *c*).

Principle IX

30. According to Principle VII the administrative act must be liable to a control by a court or some other independent body, in conformity with procedures which, it has been noted, are widely left to the national law of each state. Where the act affects rights, liberties or interests in a neighbouring state, the persons concerned should have access to the control procedure. Access should not be denied on grounds of nationality or residence nor should a difference in treatment be imposed on such grounds (Principle IX), subject to the limitation envisaged in Principle X.

Principle X

31. Under Principle X, access to the administrative participation procedure and to the control procedure may be subject to reciprocity. The

introduction of an optional clause of reciprocity is largely due to the fact that, in certain member states, it is a citizen's privilege to participate in the making of administrative decisions, unless a special law or international convention applies. Account has also been taken of the possibility of international effects occurring in the territories of neighbouring states which are not members of the Council of Europe and have fairly different legal and administrative systems.

Principle XI

32. The extension of participation procedures to persons concerned by the effects of administrative acts in a neighbouring state may, in same instances, be dealt with in international conventions or agreements.

The first paragraph of Principle XI specifies that states may subordinate the application of all principles contained in Section II to the conclusion of interstate conventions. Concluding such conventions may, in particular, be deemed necessary by those states which want to rely on reciprocity or wish to stipulate more precisely the framework, forms and limits of the minimum administrative assistance referred to in Principle VIII.

33. The second paragraph is aimed at encouraging a wider measure of mutual assistance extending beyond the minimum prescribed in Principle VIII, via consultations between authorities, the simplification of exchanges between the competent authority and the persons concerned and, where appropriate, the conclusion of general or specific agreements or arrangements on a basis of reciprocity and equivalence. It contains various suggestions as to the measures of assistance which might be agreed upon. Here, a vast procedural field is open to cooperation, ranging from placing the relevant information at the disposal of the persons concerned in the town halls of the neighbouring state to the holding of hearings with representatives of the authority which is to take the act.

Recommendation No. R (89) 8 on provisional court protection in administrative matters[1]

(Adopted by the Committee of Ministers on 13 September 1989 at the 428th meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of Article 15.*b* of the Statute of the Council of Europe,

Considering that the aim of the Council of Europe is to achieve a greater unity between its members;

Considering that administrative authorities are active in numerous fields and that their activities are likely to affect individual rights, liberties and interests;

Considering that the immediate execution in full of administrative acts which have been challenged or are about to be challenged may, in certain circumstances, prejudice the interests of persons irreparably in a way which, for the sake of fairness, should be avoided as far as possible;

Considering that it is desirable to guarantee individuals, where necessary, provisional protection by the courts, without disregarding the need for effective administrative action;

Recalling the general principles on the protection of the individual in relation to acts of administrative authorities set out in its Resolution (77) 31 and the principles concerning the exercise of discretionary powers by administrative authorities contained in its Recommendation No. R (80) 2,

Recommends the governments of member states to be guided in their law and practice by the principles set out in this recommendation.

Introduction

The following principles apply to provisional court protection against administrative acts.

Without prejudice to the next sub-paragraph, the term "administrative act" means, in accordance with Resolution (77) 31 on the protection of the individual in relation to the acts of administrative authorities, any

1. When this recommendation was adopted, the Representative of Denmark, in application of Article 10.2.*c* of the Rules of Procedure for the meetings of the Ministers' Deputies, reserved the right of her government to comply with it or not.

individual measure or decision which is taken in the exercise of public authority and which is of such a nature as directly to affect the rights, liberties or interests of persons.

In those legal systems where administrative regulatory acts can be challenged before a court, the following principles also apply to provisional protection against administrative regulatory acts.

Principles

I When a court is seized of a challenge to an administrative act, and the court has not yet pronounced its decision, the applicant may request the same court or another competent court to take measures of provisional protection against the administrative act.

The person concerned shall have the same right to request a competent court to take measures of provisional protection, prior to his challenging the act in accordance with the first sub-paragraph, in case of urgency or when an administrative complaint, the making of which does not have in itself any suspensive effect, has been lodged against the administrative act and has not yet been decided.

II In deciding whether the applicant should be granted provisional protection, the court shall take account of all relevant factors and interests. Measures of provisional protection may in particular be granted if the execution of the administrative act is liable to cause severe damage which could only be made good with difficulty and if there is a prima-facie case against the validity of the act.

III Measures of provisional protection ordered by the competent court may take the form of suspending the execution of the administrative act, wholly or partially, ordering wholly or partially the restoration of the situation which existed at the time when the administrative act was taken or at any subsequent time, and imposing on the administration any appropriate obligation in accordance with the powers of the court.

Measures of provisional protection shall be granted for such period as the court thinks fit. They may be subject to certain conditions. They may be revised.

Measures of provisional protection in no way prejudge the decision to be taken by the court seized of the challenge to the administrative act.

IV Proceedings before the court shall be speedy.

Save in cases of urgency, the procedure shall be adversarial and shall allow access by interested third persons.

When, in cases of urgency, interested persons could not be heard before the court granted provisional protection, the matter shall be liable to a new examination within a short time, under a procedure conforming to the preceding sub-paragraph.

Explanatory memorandum

1. Recommendation No. R (89) 8 on provisional court protection in administrative matters is an extension of earlier work by the Council of Europe in the field of administrative law.

As before, it is founded on concern to ensure fairness in relations between citizens and the public authorities. In all the states, the public authorities are constantly taking measures, in the name of public interest, which significantly affect the activities, rights and interests of individuals. In doing so, they are required to comply with the law and, if challenged, to show before the competent courts that they have so complied. The immediate execution of acts thus challenged may, in some circumstances, conflict with the fairness which should prevail in relations between citizens and public authorities. This raises the question of provisional protection against acts of administrative authorities.

2. In 1986, on a proposal from the European Committee on Legal Cooperation (CDCJ), the Committee of Ministers called on the Committee of Experts on Administrative Law (CJ-DA) to examine the question of provisional protection in administrative matters and to devise an appropriate instrument.

3. Detailed information on the present state of the law in the member states was obtained by means of a questionnaire. An analysis of the replies confirmed the usefulness of undertaking harmonisation at European level. It was concluded that an important guarantee for individuals in this field was that they should have the possibility of applying to a court for provisional protection measures against administrative acts which had been challenged or were about to be challenged before the same or another court.

The recommendation prepared by the Committee of Experts on Administrative Law is founded on this general approach.

Sphere of application

4. The principles by which the member states are invited to be guided in their law and practice apply to provisional court protection against administrative acts.

5. To avoid difficulties of terminology in connection with the use of the term "administrative act", the recommendation refers expressly to the definition of this term given during the Council of Europe's earlier work, particularly in Resolution (77) 31 on the protection of the individual in relation to the acts of administrative authorities. This definition, which refers to measures or decisions "taken in the exercise of public authority", covers not only acts of administrative authorities but also measures taken by other persons, public or private undertakings or individuals in whom a measure of public authority has been vested.

Those acts are covered by the recommendation in so far as they directly affect rights or legally protected liberties or interests of persons.

6. The concept of an "administrative act" under Resolution (77) 31 refers to "individual measures or decisions" ; it thus includes measures and decisions applying to a number of given persons, but does not cover measures and decisions of general application.

It was realised that a legitimate need for provisional protection could also exist in the case of certain acts of general and impersonal application taken by administrative authorities, such as decrees and regulations directly impinging on rights or interests which do not require individual acts or measures to enforce them.

The sphere of application of the recommendation is consequently extended to cover provisional protection *vis-à-vis* "regulatory administrative acts", with the important reservation that such acts must be susceptible to direct remedies before the courts under national law.

While legislative acts are obviously excluded, the area actually covered will depend, for each country, on the powers of administrative authorities to take measures of general application. It will also depend, in certain cases such as town planning where decisions concern a number of persons, on whether such decisions are to be taken in the form of regulatory acts or sets of individual acts. In any event, only those administrative regulatory acts which can be challenged before a court will be covered by the recommendation.

7. As will be indicated below in connection with the first principle, provisional court protection is a "wait-and-see" measure. It cannot be conceived in the absence of a challenge to an act, the outcome of which is being awaited.

In certain states, regulatory acts are not susceptible to direct remedies before the courts. They may only be challenged as such before an administrative court or an ordinary court, with a view to being set aside

or altered. At most, the validity of such acts may be contested incidentally by means of proceedings brought against an individual measure enforcing them. In such cases a request for provisional protection would be pointless.

On the other hand, in states where regulatory acts, or certain categories thereof, may be challenged before the courts, the principles contained in the recommendation apply : persons affected may, on the conditions laid down in the various principles, request that the regulatory act shall not for the time being modify their legal position.

Principles

Principle I

8. The first paragraph of this principle states the general rule upon which the whole recommendation is based. It recognises, in substance, the right of any person who has challenged an administrative act before a court to request a court to take provisional protection measures against that act.

The requirement of a challenge to the act before a court does not call for long explanations. Provisional protection temporarily paralyses or restricts in a given case the power conferred on administrative authorities in the general interest immediately to enforce, where necessary by constraint, its decisions or measures which are self-executory by law. Such restriction may only be justified where the act itself, from whose execution a person seeks to protect himself, is capable of being altered or annulled.

9. The recommendation takes into account the wide diversity of legal systems and institutions in the member states and leaves them the greatest possible degree of freedom of choice in the means by which this basic principle should be put into effect. It makes little difference whether the administrative act has been challenged before an administrative or an ordinary court or whether the aim of the action, in accordance with the features peculiar to each legal system, is to set aside or alter the act or to prevent it from taking effect. As soon as the challenge has been brought before a court in accordance with national law, and pending the court's decision, the applicant must have the opportunity to request an order for provisional measures. This request will usually be made to the court before which the challenge has been brought and, naturally enough, it will often be made with the challenge. It may nevertheless have to be made to another court that is competent under national law to take urgent measures.

10. It is recalled here that a recommendation sets out principles which the states accept as common minimum standards. None of its provisions may be interpreted as preventing a state from going beyond those minimum standards or as implying a limitation on a guarantee already accorded by a member state. Consequently, the first paragraph does not affect more favourable provisions existing in any states which give suspensory effect to any action brought before a court against an administrative act.

11. Under the first paragraph, the possibility of requesting provisional protection is linked to the bringing of an action before a court to have an individual or regulatory administrative act set aside or altered or to prevent it from taking effect. It is recognised, however, and this is the aim of the second paragraph, that it must be possible in certain circumstances for a request to be made for provisional measures before any substantive action has been brought before the court.

This is naturally true when the interested person can claim urgency : enforcement of an act is impending in such manner that a request for provisional protection could in no way be delayed. Another situation is also envisaged : prior to challenging an act before a court, the person was led to make an administrative complaint, the making of which does not in itself have any suspensory effect ; administrative authorities were not empowered or prepared to formally stay the execution, thereby keeping the person, possibly for a long period, under a continuing threat of execution.

Principle II

12. The aim behind provisional court protection is not to hinder the efficiency of public authorities' actions, but rather to preserve the fairness which should prevail in relations between individuals and the administration. Guaranteeing such fairness is a matter for the courts.

This is emphasised by the second principle which provides that, when called upon to decide on whether provisional protection is to be granted, the court shall take account of all relevant factors and interests. Society, the addressee of the act, third persons may have highly different and contrasted interests regarding the immediate and full enforcement of the administrative act.

13. A balance between these different factors may be very difficult to strike. It is not really possible to lay down strict criteria for the granting of protection. The principle, however, mentions two circumstances which

should weigh in favour of a positive decision : firstly, that the execution of the administrative act *vis-à-vis* the applicant is liable to cause severe damage which could only be made good with difficulty, in particular because a setting aside of the challenged act could not lead to the applicant's prior legal status being reinstated ; secondly, that there are prima facie serious legal grounds against the administrative act.

Principle III

14. The aim of the third principle is to ensure the greatest possible flexibility in provisional protection measures, so that individuals are protected against irreversible actions or the immediate imposition of heavy obligations (where it is not prima facie evident that a challenge to such actions or imposition is groundless) without unnecessarily hindering the pursuit of the public interest. Several types of measures are referred to which may be adapted according to circumstances and according to the powers conferred on various courts in the member states. They range from total or partial suspension of the act, or from a total or partial restoration of the legal and *de facto* situation which would exist in the absence of the act, to various forms of injunctions issued by the court to the administration in countries where such power of injunction is or will be vested in the courts.

15. The desired flexibility relates not only to the nature and scope of measures which may be taken, but also to the period, which may be fixed or undetermined, of their validity and the conditions to which they may be subject. The necessary flexibility will be guaranteed principally by the power of the court to reassess the situation when warranted by circumstances and consequently to amend measures taken earlier.

16. As emerges from the third paragraph, provisional protection is a safeguard and a "wait-and-see" measure. A court ordering such protection is not called upon to pronounce itself on the legality or appropriateness of the administrative act ; the measures which it orders do not in any way prejudge the decision to be taken subsequently on the challenge to the administrative act.

Principle IV

17. An administrative act is as a rule immediately enforceable. Any request to have its enforcement postponed, limited or modified *vis-à-vis* an individual must therefore be examined rapidly.

The fourth principle therefore lays down that proceedings must be speedy, which implies that any procedural deadlines may have to be shortened considerably and that an oral hearing can also be dispensed with. The proceedings must, however, remain adversarial, the aim being to arbitrate, albeit provisionally, between different interests. As the concept of adversarial procedure may in this context be liable to different interpretation in different countries, it is stressed that proceedings should involve the applicant and a representative of the administrative authorities as well as the addressee of the act where the latter is not the applicant himself. As for interested third persons, they have the possibility of presenting their views, but the recommendation does not require them to be summoned. The recommendation does not explicitly concern itself with the decision concluding the proceedings. As these are adversarial but at the same time speedy and of a provisional nature, it follows that the court may, if necessary, give brief, but clear, reasons.

18. There are circumstances in which the urgency of the case makes it impossible to organise an adversarial court hearing. The third paragraph of this principle admits the existence of such cases, and lays down that the question of provisional protection shall be liable to a new examination within a short time in adversarial proceedings. Such new examination shall take place at the wish of one of the interested persons that the court would have had to hear before its decision according to the second paragraph, but could not hear because of the urgency of the case, or if the court before which the urgent case is brought so decides.

Recommendation No. R (91) 1 on administrative sanctions

(Adopted by the Committee of Ministers on 13 February 1991, at the 452nd meeting of the Ministers' Deputies)

The Committee of Ministers, in accordance with Article 15.*b* of the Statute of the Council of Europe;

Considering that the aim of the Council of Europe is to achieve greater unity between its members;

Considering that administrative authorities enjoy considerable powers of sanction as a result of the growth of the administrative state as well as a result of a marked tendency towards decriminalisation;

Considering that it is desirable, from the point of view of protection of the individual, to contain the proliferation of administrative sanctions by submitting them to a set of principles;

Recalling the general principles governing the protection of the individual in relation to acts of administrative authorities set out in its Resolution (77) 31 and the principles concerning the exercise of discretionary powers by administrative authorities contained in its Recommendation No. R (80) 2;

Considering that administrative acts imposing an administrative sanction should be subjected to additional guarantees;

Recommends the governments of member states to be guided in their law and practice by the principles set out in this recommendation.

Scope

This recommendation applies to administrative acts which impose a penalty on persons on account of conduct contrary to the applicable rules, be it a fine or any punitive measure, whether pecuniary or not.

These penalties are hereinafter referred to as administrative sanctions.

The following are not considered to be administrative sanctions:

– measures which administrative authorities are obliged to take as a result of criminal proceedings;
– disciplinary sanctions.

In the implementation of these principles, the requirements of good and efficient administration, as well as major public interests should be taken into account.

Where these requirements make it necessary to modify (or exclude) one or more of these principles, either in particular cases or in specific areas of public administration, every effort should nevertheless be made to observe respect for the greatest possible degree of equity, according to the general aims of this recommendation.

Principles

Principle 1

The applicable administrative sanctions and the circumstances in which they may be imposed shall be laid down by law.

Principle 2

1. No administrative sanction may be imposed on account of an act which, at the time when it was committed, did not constitute conduct contrary to the applicable rules. Where a less onerous sanction was in force at the time when the act was committed, a more severe sanction subsequently introduced may not be imposed.

2. The entry into force, after the act, of less repressive provisions should be to the advantage of the person on whom the administrative authority is considering imposing a sanction.

Principle 3

1. A person may not be administratively penalised twice for the same act, on the basis of the same rule of law or of rules protecting the same social interest.

2. When the same act gives rise to action by two or more administrative authorities, on the basis of rules of law protecting distinct social interests, each of those authorities shall take into account any sanction previously imposed for the same act.

Principle 4

1. Any action by administrative authorities against conduct contrary to the applicable rules shall be taken within a reasonable time.

2. When administrative authorities have set in motion a procedure capable of resulting in the imposition of an administrative sanction, they shall act with reasonable speed in the circumstances.

Principle 5

Any procedure capable of resulting in the imposition of an administrative sanction which has been instituted in respect of a person shall give rise to a decision which terminates the proceedings.

Principle 6

1. In addition to the principles of fair administrative procedure governing administrative acts as set out in Resolution (77) 31, the following principles shall apply specifically to the taking of administrative sanctions:

i. Any person faced with an administrative sanction shall be informed of the charge against him;

ii. He shall be given sufficient time to prepare his case, taking into account the complexity of the matter as well as the severity of the sanctions which could be imposed upon him;

iii. He or his representative shall be informed of the nature of the evidence against him;

iv. He shall have the opportunity to be heard before any decision is taken;

v. An administrative act imposing a sanction shall contain the reasons on which it is based.

2. Subject to the consent of the person concerned and in accordance with the law, the principles in paragraph 1 may be dispensed with in cases of minor importance, which are liable to limited pecuniary penalties. However, if the person concerned objects to the proposed sanction, all the guarantees of paragraph 1 shall apply.

Principle 7

The onus of proof shall be on the administrative authority.

Principle 8

An act imposing an administrative sanction shall be subject, as a minimum requirement, to control of legality by an independent and impartial court established by law.

Explanatory memorandum

General considerations

1. Recommendation No. R (91) 1 on administrative sanctions is to be viewed in the context of a series of activities which the Council of Europe has embarked upon in the field of administrative law. The common purpose of these activities is to promote protection of the individual *vis-à-vis* the action of public authorities with a view to maintaining the balance which characterises the sphere of public freedoms.

2. Failing efforts to preserve it, this balance may appear extremely precarious in the field of administrative sanctions, the volume of which has constantly expanded through a combination of factors. The first of these is the growth of the administrative state, which has not been substantially called into question by recent trends towards deregulation and privatisation. Administrations now play a part in the regulatory framework governing many different sectors of social life : they lay down the rules, supervise their enforcement and wield a broad panoply of instruments for compelling individuals to comply and for sanctioning failure to do so. This applies particularly to such areas as social security, taxation, environmental protection, town planning, public health, trade, etc. This situation is compounded by decriminalisation processes, which tend to transfer punishment of a number of offences from the criminal to the administrative sphere.

Administrative sanctions are administrative acts of a particular type which can have very severe consequences for individuals, for instance when they comprise measures involving restriction or deprivation of rights. It seems desirable to supplement the general principles applicable to performance of administrative acts and exercise of discretionary powers (embodied, for instance in Resolution (77) 31 on the protection of the individual in relation to the acts of administrative authorities and Recommendation No. R (80) 2 concerning the exercise of discretionary powers by administrative authorities) with a number of specific principles, without prejudice to possible application of the guarantees contained in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such is the purpose of the present recommendation.

3. This recommendation was drawn up under the responsibility of the European Committee on Legal Co-operation (CDCJ) by the Committee of Experts on Administrative Law (CJ-DA) with a view to its adoption by the Committee of Ministers of the Council of Europe.

Scope

4. The principles on which the member states are invited to draw in their law and practice apply to administrative acts which impose sanctions on individuals for conduct contrary to the applicable rules.

The term "administrative act" has the same meaning as in the previous recommendations.[1] This definition, which concerns measures or decisions "taken in the exercise of public authority", covers not only the acts of administrative authorities but also measures taken by other persons, public or private undertakings or individuals in the exercise of public authority prerogatives conferred upon them. The drafters were aware of the problems that the application of this recommendation might pose with respect to sanctions the recourse to which is automatic in nature.

Conduct contrary to applicable rules includes omissions where such rules impose a duty to take action.

The meaning of the word "sanction" for the purpose of this recommendation requires clarification. A sanction is imposed by an administrative act. Not all administrative acts placing a burden on or affecting the rights or the interests of private citizens are to be considered "sanctions". Such acts could pursue a plurality of goals including the pursuit of public interest and public policy, the protection of the community against an imminent danger (to public health, the quality of the environment, security of employment, etc.) by way of preventive measures as well as a punitive goal. Often there might be uncertainty as to which is the prevailing aim of the administrative act. This recommendation shall apply only to those administrative acts, here defined as administrative sanctions, whose principle aim is of a punitive nature. By way of example, refusal to grant, or to renew, a licence on the grounds that the applicant is not a fit and a proper person, within the meaning of the applicable rules, shall not be considered as an administrative sanction for the purposes of this recommendation. The same goes for prohibitions or the withdrawal of licences in order to protect the environment, public health, etc., from further acts of the person concerned.

Administrative sanctions may take many forms. Without aspiring to give an exhaustive list, one might mention fines or higher charges, confiscation of goods, closure of an undertaking, a ban on practising an activity and suspension or withdrawal of licences, permits or authorisations necessary to the conduct of a business, industry or occupation or to the exercise of some form of freedom.

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1. See, in particular, Resolution (77) 31 mentioned above.

Whilst the rules whose breach entails the legal consequence of an administrative sanction might be classified under any branch of the law (civil, criminal or other), sanctions (civil, criminal or other) that do not fall within the concept of administrative sanctions as described above, do not fall within the scope of this recommendation.

Not classed as administrative sanctions within the meaning of the recommendation are administrative measures which arise as a necessary consequence of a criminal conviction as well as disciplinary sanctions, both sanctions applicable within the administration and sanctions applicable within organised professional activities. Since disciplinary sanctions are excluded, *a fortiori* other measures taken by an administrative authority with respect to its staff for reasons pertaining to the latter's behaviour, are also excluded.

In keeping with the previous recommendations, the persons concerned may be physical or legal, in as much as administrative sanctions may be imposed on legal persons under the domestic law of the state implementing the recommendation.

5. In the implementation of the principles set out in the recommendation, account should be taken of the requirements of good and efficient administration ; further, their application should not go against the interests of third parties (for example the protection to be given to third parties' personal data) or major public interests (for instance, public health, environmental protection, security of the state). Where these requirements or interests necessitate provision for exceptions to the application of one or more of the principles, it is vital to guarantee observance of the greatest possible degree of equity in keeping with the recommendation's general aims.

6. It should be borne in mind that the recommendation sets out principles which all the states are to accept as minimum shared standards. No provision in this recommendation may be interpreted as preventing a state from going further than these minimum standards or implying a limitation on an already recognised guarantee.

Principles

Principle 1

The first of the principles applicable in this field is that of legality. In a democratic society, it is not possible for the administration at the same time to lay down rules of conduct, determine the sanctions applicable in case of non-observance and put these sanctions into effect. Legislation

is required, at least to lay down the scale of pecuniary sanctions applicable, to empower the administrative authorities to apply such sanctions so as to ensure observance of particular legislative measures and to define those cases in which sanctions restricting the exercise of fundamental rights can be applied. The reference to "the law" encompasses the well established rules of common law. However, a lesser degree of precision may suffice in the definition of the specific circumstances in which the sanctions may be imposed.

This principle does not constitute an obstacle to the fixing of sanctions by means of contracts between the administration and the persons concerned in as much as the conclusion of these contracts complies with the principle of the parties' freedom of contract and they are consequently not unilateral acts in disguise. Such sanctions, often referred to as "penalty clauses", are not covered by this recommendation.

The Committee has emphasised the usefulness from the point of view of guaranteeing individuals' rights of single codes or texts laying down rules governing competence, types of sanctions and their maximum rates, guiding principles for their enforcement, procedure and avenues of appeal.

Principle 2

This principle, which is derived from the legality principle, concerns the non-retroactivity of laws. It further draws on the criminal law principle of immediate application of less harsh legislation.

This principle should not be interpreted as preventing the imposition of an administrative sanction or a more severe administrative sanction under a law that no longer applies to present circumstances where the act in question dates back to the period in which that law was fully enforceable.

The principle embodied in paragraph 2 also applies where the act in question is no longer contrary to any rule.

Principle 3

Paragraph 1 establishes the *ne bis in idem* rule whereby nobody may be punished twice for the same offence on the basis of the same rule.

The transfer to administrative law of this principle, which also originated in criminal law, does not preclude the possibility that one offence may constitute two or more unlawful acts in administrative terms, each giving rise to a specific sanction, whereby these sanctions may fall under

the competence of different administrative authorities. Paragraph 2 requires in this case that each of the authorities should take into account any sanction already imposed for the same act, for instance where it has to select the sanction to be imposed from a range or scale of sanctions applicable.

The Committee noted that the application of the *ne bis in idem* rule gives rise to difficulties where a single act may simultaneously lead to sanctions under both administrative and criminal or civil law. However, it considered that the solution to this problem should not be sought in the framework of this recommendation.

Principle 4

Prompt expedition of any procedure for the determination of individuals' rights and obligations is an intrinsic element of justice.

The promptitude requirement in respect of procedures, which is also to be found in Article 6, paragraph 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, is further imposed by the objective of certainty of the law.

The time within which the decisions should be taken must be "reasonable". That implies, *inter alia*, that it should be proportionate to the social interest pursued and will normally be shorter than the periods provided for in criminal procedure.

Principle 5

This principle too is imposed by the need to ensure the certainty of the law. Before a decision is taken terminating administrative sanction proceedings and up to expiry of the limitation period, the proceedings remain pending and hence the legal situation remains undefined.

Moreover, only a decision terminating the proceedings gives rise to the possibility of taking action, either through litigation or by way of a complaint, against the procedure or the final decision.

The terminating decision may take the form of a sanction, a finding that there is insufficient evidence or that the facts do not warrant a sanction or, finally, of a notification that the proceedings have been discontinued.

Principle 6

This principle subsumes a series of rules which embody, within administrative procedure in matters of sanctions, the guarantees of

fair administrative procedure set out in Resolution (77) 31 as well as the well-established guarantees in criminal procedure.

However, with regard in particular to mass litigation, in which the strict observance of these guarantees is not feasible without entailing a disproportionate administrative burden, and in cases where the penalties applicable are limited pecuniary sanctions, paragraph 2 of this principle allows the non-application of these guarantees provided that the person concerned has not objected to the procedure adopted nor to the sanction imposed.

In certain cases, notably parking tickets, it would not even be possible to seek the consent of the person concerned. In such cases the requirements of good and efficient administration as set out in the introduction above, might provide grounds for the non-application of this particular rule.

Principle 7

This principle reflects a general rule of procedure obliging the administrative authority which instigates the sanction measure to produce proof of the offence in question.

Principle 8

The Committee has drawn up this rule as a minimum rule, considering that developments in European legal thinking did not allow it to set out a more ambitious rule for the time being. Such a rule could provide for a control not only of legality but also of the merits.

Recommendation No. R (91) 10 on the communication to third parties of personal data held by public bodies[1]

(Adopted by the Committee of Ministers on 9 September 1991 at the 461st meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of Article 15.*b* of the Statute of the Council of Europe,

Considering that the aim of the Council of Europe is to achieve greater unity between its members;

Noting that automatic data processing has enabled public bodies to store on electronic files the data, including personal data, which they collect for the purposes of discharging their functions;

Aware of the fact that new automated techniques for the storage of such data greatly facilitate third party access to them, thus contributing to the greater circulation of information within society which the Committee of Ministers has encouraged in its Recommendation No. R (81) 19 on access to information held by public authorities as well as in its Declaration of 29 April 1982 on freedom of expression and information;

Believing however that automation of data collected and stored by public bodies makes it necessary to address its impact on personal data or personal data files which are collected and stored by public bodies for the discharge of their functions;

Noting in particular that the automation of personal data or personal data files has increased the risk of infringement of privacy since it allows

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1. When this recommendation was adopted and in application of Article 10.2.*c* of the Rules of Procedure for the meetings of the Ministers' Deputies:

- the Representative of Ireland reserved the right of his government to comply or not with Principles 6.2, 6.3 paragraph 2, and 7.1 of the appendix to the recommendation;
- the Representatives of Norway and the United Kingdom reserved the right of their governments to comply or not with Principles 6.2 and 6.3 paragraph 2 of the appendix to the recommendation;
- the Representative of Sweden reserved the right of his government to comply or not with Principle 6.2 of the appendix to the recommendation.

greater access by telematic means to personal data or personal data files held by public bodies as well as communication of such data or personal data files to third parties;

Mindful in this regard of the increasing tendencies on the part of the private sector to exploit for commercial advantage the personal data or personal data files held by public bodies as well as the emergence of policies within public bodies envisaging communication by electronic means of personal data or personal data files to third parties on a commercial basis;

Determined therefore to promote data protection principles based on the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data[1] to ensure that the communication by public bodies of personal data or personal data files to third parties, in particular by electronic means, has its basis in law and is accompanied by safeguards for the data subject;

Noting in particular that these data protection principles should be reflected in the new automated context which now characterises the communication of personal data or personal data files to third parties under legal provisions governing accessibility by third parties to personal data or personal data files,

Recommends that the governments of the member states:

i. take account of the principles contained in the appendix to this recommendation whenever personal data or personal data files collected and stored by public bodies may be made accessible to third parties;

ii. have due regard to the principles contained in the appendix to this recommendation in their law and practice regarding the automation and communication to third parties by electronic means of personal data or personal data files;

iii. ensure wide circulation of the principles contained in the appendix to this recommendation among public bodies;

iv. bring the principles contained in the appendix to this recommendation to the attention of authorities set up under data protection legislation or legislation on access to public-sector information.

1. Strasbourg, 1981, European Treaty Series, No. 108 (hereinafter called Convention No. 108).

Appendix to Recommendation No. R (91) 10

1. Scope and definitions

1.1. The principles contained in this recommendation apply to the automatic processing of personal data which are collected by public bodies and which may be communicated to third parties.

1.2. Member states may extend the scope of this recommendation so as to include data relating to groups, companies, associations, etc., regardless of whether or not they possess legal personality, as well as to personal data in non-automated form.

For the purposes of this recommendation:

1.3. – the expression "personal data" refers to any information relating to an identified or identifiable individual (data subject). An individual shall not be regarded as "identifiable" if the identification requires an unreasonable amount of time, cost and manpower;

– the expression "public bodies" refers to any administration, institution, establishment or other body which exercises public service or public interest functions as a consequence of it being attributed with public powers.

Domestic law may broaden the scope of the expression "public bodies";

– the expression "files accessible to third parties" refers to files held by public bodies containing personal data which may be communicated to the public or to third parties having a particular interest and which are in accordance with general laws on access to public-sector information or freedom of information, constitutional provisions as well as specific laws, regulations or case-law which authorise third parties to have access to information held by public bodies, including by means of official publication;

– the expression "communication" refers to making files or personal data accessible, such as by authorising their consultation, transmitting them, disseminating them or making them available regardless of the means or media used;

– the expression "third party" refers to legal and natural persons to whom personal data are communicated by public bodies to the exclusion of other public bodies.

Domestic law may broaden the scope of the expression "third parties".

2. Respect for privacy and data protection principles

2.1. The communication, in particular by electronic means, of personal data or personal data files by public bodies to third parties should be accompanied by safeguards and guarantees designed to ensure that the privacy of the data subject is not unduly prejudiced.

In particular, the communication of personal data or personal data files to third parties should not take place unless:

a. a specific law so provides; or

b. the public has access thereto under legal provisions governing access to public-sector information; or

c. the communication is in conformity with domestic legislation on data protection; or

d. the data subject has given his free and informed consent.

2.2. Unless domestic law provides appropriate safeguards and guarantees for the data subject, personal data or personal data files may not be communicated to third parties for purposes incompatible with those for which the data were collected.

2.3. Domestic legislation on data protection should apply to the processing by a third party of personal data communicated to him by public bodies.

3. Sensitive data

3.1. Personal data falling within any of the categories referred to in Article 6 of Convention No. 108 should not be stored in a file or in part of a file generally accessible to third parties.

Any exception to this principle should be strictly provided by law and accompanied by the appropriate safeguards and guarantees for the data subject.

3.2. The provisions of Principle 3.1 are without prejudice to the possibility of storing in files accessible to third parties, categories of data which in other circumstances would be regarded as sensitive but which concern those data subjects in public life who perform functions which belong to the public domain and as a result their data are accessible to third parties.

4. Generally accessible data

4.1. The purposes for which the data will be collected and processed in files accessible to third parties as well as the public interest justifying their being made accessible should be indicated in accordance with domestic law and practice.

4.2. Before or at the time of the collection, the data subject should be informed, in accordance with domestic law and practice, of the compulsory or optional nature of the collection, of the legal bases and the purposes of the collection and processing of personal data as well as the public interest justifying their being made accessible.

4.3. Public bodies should be able to avoid the communication to third parties of personal data which are stored in a file accessible to the public and which concern data subjects whose security and privacy are particularly threatened.

5. Access to and communication of personal data by electronic means

5.1. The automated processing of personal data contained in files accessible to third parties should be carried out in accordance with domestic law.

Domestic law should lay down the conditions governing communication of and access to the data and, in particular, provide the conditions governing the automatic communication and on-line consultation of such data.

5.2. At the time of automatic communication, technical means designed to limit the scope of electronic interrogations or searches should be introduced with a view to preventing unauthorised downloading or consultation of personal data or files containing such data.

6. Processing by third parties of personal data originating in files accessible to third parties

6.1. Where the data subject is legally obliged to provide his data for storage in files accessible to third parties, the processing of personal data by third parties should either be subject to obtaining the express and informed consent of the data subject or be in accordance with statutory requirements.

Where the consent requirement applies, the data subject should be able to withdraw his consent at any time.

6.2. Where the storage of the personal data in a file accessible to third parties is not obligatory, the data subject should be informed before or at the time of the collection of his rights :

a. not to have his data stored in a file accessible to third parties ; or

b. to have his data stored in such a file and communicated without however their being processed by third parties ; or

c. to object to his data continuing to be processed by third parties; or

d. have his data deleted at any time.

6.3. If a third party creates files containing personal data obtained from files accessible to third parties, such files should be subject to the requirements of domestic legislation on data protection, including the rights of the data subject.

In particular, the data subject should be able to know of the existence of the new file, of its purpose and of his right to have his data erased from the file in question.

7. File interconnection/matching

Unless permitted by domestic law providing appropriate safeguards, the interconnection – in particular by means of connecting, merging or downloading – of personal data files consisting of personal data originating from files accessible to third parties with a view to producing new files, as well as the matching or interconnection of files or personal data held by third parties with one or more files held by public bodies so as to enrich the existing files or data, should be prohibited.

8. Transborder data flows

8.1. The principles of this recommendation are applicable to the transborder communication of personal data which are collected by public bodies and which may be communicated to third parties.

8.2. The transborder communication of personal data to third parties residing in a state which has ratified Convention No. 108 and which thus has a data-protection law should not be subjected to special conditions concerning the protection of privacy.

8.3. Where the principle of equivalent protection is respected, no restriction should be placed on the transborder communication of personal data to third parties residing in a state which has not ratified Convention No. 108 but which has legal provisions which are in conformity with the principles of that convention and of this recommendation.

8.4. Unless otherwise provided for by domestic law, the transborder communication of personal data to third parties residing in a state, the legal provisions of which are not in conformity with Convention No. 108 or with this recommendation, should not as a rule occur unless:

a. necessary measures, including of a contractual nature, to respect the principles of the convention and this recommendation have

been taken and the data subject has the possibility to object to communication, or

b. the data subject has given his free and informed consent in writing and has the possibility to withdraw his consent at any time.

8.5. Measures should be taken to avoid personal data or files containing such data from being subjected to automatic transborder communication to third parties without the knowledge of the data subjects.

9. Co-ordination/Co-operation

Where general legislation governing access to public-sector information provides for the establishment of a supervisory body to implement such legislation and there exists at the same time general data-protection legislation with a separate authority responsible for the implementation of that legislation, the respective authorities should come to an arrangement designed to facilitate the exchange of information relating to the conditions governing communication of personal data originating in files accessible to third parties.

Explanatory memorandum

Preamble – The issues explained

1. "Greater unity between its members" – the aim of the Council of Europe – may be furthered in a range of different ways. Article 1 of the Statute of the Organisation makes specific reference to the Council of Europe's mission in maintaining and promoting human rights and fundamental freedoms as a way of achieving this "greater unity".

2. This recommendation falls squarely within this role. It is a human rights instrument. It is concerned with the circulation of information within society and at the same time with the protection of the private life of the individual. In other words, Article 8 (the right to private life) and Article 10 (freedom of expression) of the European Convention on Human Rights underlie the approach which motivates the various principles contained in the recommendation.

3. It is against this human rights background that references are made in the preamble to certain key legal instruments adopted by the Committee of Ministers of the Council of Europe in the field of both general information policy as well as privacy policy : Recommendation No. R (81) 19, the Declaration of the Committee of Ministers of

29 April 1982, the Data Protection Convention of 28 January 1981.[1] All these legal instruments are designed to promote further (and reconcile) the fundamental freedoms spelt out in Articles 8 and 10 of the European Convention on Human Rights.

4. Freedom of information policy and privacy policy may compete for priority. The application of each of these fundamental values must be premised on respect for its counterpart. Reconciliation is sometimes necessary. This is why, for example, the implementation of freedom of information policy contained in Recommendation No. R (81) 19 is made subject to the need to respect, *inter alia*, the private life of the individual. From the privacy point of view, the implementation of data protection policy must, as is declared in the preamble to the Data Protection Convention, take account of the need "... to reconcile the fundamental values of respect for privacy and the free flow of information between peoples". For the intergovernmental Committee of Experts on Data Protection, the drafters of this legal instrument, freedom of information policy and data protection are not necessarily conflicting values. Data protection is to be seen as consistent with the broader aspects of information policy within society. It does not seek to place *a priori* restrictions on the circulation of personal information within society. Rather, the principles of data protection seek to determine the conditions under which personal data may be collected, processed and communicated to third parties, and used by them.

5. It should be stressed at the outset that the aim of this recommendation is not to promote transparency within public administration or open government or to encourage freedom of information. The desirability of making public bodies accountable by means of freedom of information principles is already catered for in Recommendation No. R (81) 19 of the Committee of Ministers.

The sort of principles advocated in Recommendation No. R (81) 19 are reflected in a number of national legal systems – for example, general laws on access to public sector information exist in Austria, Denmark, Finland, France, Greece, Netherlands, Norway and Sweden. Other countries envisage access to certain categories of public sector information. The drafters of this text are primarily concerned with the way in which the openness principle – whether in the context of a general law or a

1. The Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (European Treaty Series, No. 108). The convention entered into force on 1 October 1985. At the date of publication of the explanatory memorandum the convention had been ratified by the following states: Austria, Denmark, Finland, France, Germany, Iceland, Ireland, Luxembourg, Norway, Spain, Sweden and United Kingdom; it has been signed by Belgium, Cyprus, Greece, Italy, Hungary, Netherlands, Portugal and Turkey.

sectoral law – interacts with the protection to be accorded to the private life of the individual whose personal data may be communicated to third parties following an access request. Moreover, if personal information must be collected, stored and used by public bodies in accordance with general data protection policy and if, as noted earlier (paragraph 4), data protection policy does not block *a priori* the communication of personal data by public bodies to requesting third parties under access legislation, how are the conditions for communication to be determined?

6. Furthermore, a complete approach to personal data or personal data file communication by public bodies to third parties may not be limited solely to situations foreseen in provisions governing access to public sector information. The recommendation is also concerned with those many situations in which public bodies collect and store various categories of personal data with a view to their being made accessible to third parties in accordance with the whole range of legal provisions governing accessibility. In particular, the recommendation addresses those categories of so-called "public files" which contain personal data which are published in accordance with the law. Such files – examples are provided in paragraph 24 of this commentary – are available for public consultation and the data contained in them may be communicated to third parties.

7. The data protection concerns of the drafters of this recommendation are being expressed in the context of new trends in the handling of personal data or personal data files by public bodies – namely the electronic delivery of personal data or personal data files to requesting third parties, which has been made possible by virtue of the fact that data processing technology has allowed public bodies to store the data which they collect on electronic files. Given the fact that the interventionist and regulatory nature of public powers touches the lives of every citizen, it is not surprising that the databases held by public bodies contain massive quantities of personal information. The richness of this information is, not surprisingly, of great interest to third parties, particularly commercial enterprises working within the private sector.

8. As the preamble notes, there is an increasing tendency on the part of the private sector to exploit personal data or personal data files held by public bodies in order to further marketing campaigns, plan economic strategy, target possible consumer populations, enrich existing personal data files, etc. It is precisely the automation of personal data which facilitates their exploitation by third parties. The data may be accessed on-line, or public bodies may download electronically various

categories of personal data files to third party databases. Print-outs of names and addresses in the form of automated labels may be sold by public bodies responsible for various types of public files. Alternatively, a third party may simply buy a magnetic tape containing particular personal data files.

9. It is interesting to note that the Commission of the European Communities has promulgated guidelines which are designed to improve the synergy between the public and private sectors in the so-called "information market". The guidelines, adopted in 1989, note the wealth of information at the disposal of public bodies and encourage its greater availability in the private sector:

"Public administrations regularly and systematically collect basic data and information in the performance of their governmental functions. These collections have value beyond their use by governments, and their wider availability would be beneficial both to the public sector and to private industry." (Principle 1 of the guidelines.)

10. Of course, the policy advocated may be easily analysed in terms of freedom of information. It is quite compatible with, for example, Article 10 of the European Convention on Human Rights which is not simply limited to guaranteeing information circulation for the preservation and promotion of a democratic and pluralist society. The Declaration of the Committee of Ministers of 29 April 1982 notes, *inter alia*, that freedom of information and the right to seek and receive information are necessary for the social, economic, cultural and political development of every human being. However, as noted above, it is necessary to integrate data protection policy into this scheme of things whenever the information in question is of a personal nature. For the drafters of this recommendation, this is even more vital in view of the risks which electronic storage of personal information by public bodies, and its communication telematically to third parties may bring about, namely: electronic profiling of individual income, family situation, property ownership, indebtedness; the search for names in various disparate public files, the matching or interconnection of various pieces of personal information contained in those files; the use of data for purposes which did not motivate their collection and storage in a public file, etc.

In other words, the drafters of the recommendation have proceeded on the basis that the fact that personal data or personal data files are to be made accessible to third parties in accordance with "legal provisions" does not necessarily mean that they should not be protected

from the point of view of data protection policy. This is in fact the primary purpose of the recommendation: to determine the conditions under which personal data may be collected and stored in such files and, in particular, the conditions under which these personal data may be communicated to, and used by, third parties.

11. In discussing the communication of personal data or personal data files by public bodies to third parties in the two situations described above – in accordance with provisions governing access to public sector information or in accordance with specific legal provisions on publicity – the drafters of the recommendation are seeking to emphasise that a legal framework is essential before any communication may be effected. In so doing, they are seeking to avoid the existence of a grey zone, or a situation between law and non-law, wherein vague administrative practices or policies operate. It may be noted in passing that the sort of action which is proposed in this recommendation is consistent with the conclusions which emerged from the conference organised jointly between the Council of Europe and the Commission of the European Communities (Luxembourg, 27-28 March 1990) which dealt, *inter alia*, with the question of access to public sector information in the new automated environment.

Operative part – Sort of action which could be taken

12. As with the previous recommendations which it has elaborated for particular sectors, the Committee of Experts on Data Protection is once again offering a body of data protection principles for the benefit of national policy makers for a new context in which data processing technology has intervened to create new risks for the privacy of the individual. The principles contained in the appendix to the recommendation may in many ways be regarded as a counterpart to the guidelines produced by the Commission of the European Communities for improving synergy between the public and private sectors in the information market. It is to be noted that these guidelines alert public administrations to the need to protect "legitimate public or private interests" in implementing the policy outlined in the guidelines. In addition to information to which access may be restricted for reasons of national security, external relations, commercial confidentiality, etc., the guidelines also recognise that the protection of personal privacy and personal data is a legitimate reason for refusing to make available to third parties information held by public bodies. It is possible therefore to view the corpus of principles offered by the Committee of Experts on Data Protection as detailed guidance on how that need may be realised in practice by the governments of community member states – as well as non community members of course.

13. The importance of the role of national data protection authorities in applying these principles is also noted in the operative part of the recommendation. Some such authorities have already shown their readiness to place limitations on the use which may be made by public bodies of the personal data which they collect and which may be accessible to third parties. In addition, the recommendation also seeks to bring authorities established under provisions governing access to public sector information into the scheme of protection advocated in this recommendation. As is shown later in the text, a cross-fertilisation of the role of these agencies and the competence of data protection authorities is encouraged so as to ensure consistency of approach to the communication of personal data or personal data files by public bodies to third parties.

Appendix to the recommendation

1. Scope and definitions

14. As noted in the preamble, the principles contained in the recommendation cover the totality of personal data which are collected by public bodies and which may be communicated to third parties. The text of Principle 1.1 avoids making any reference to the need for such data to be collected by public bodies in the discharge of their official functions. While it goes without saying that public bodies should only collect and store personal data for specific and lawful purposes linked to their authorised tasks, the drafters of the recommendation feel that it is worthwhile to include within its scope all personal data collected and held by public bodies which may be communicated to third parties.

15. Principle 1.1 emphasises that the recommendation is primarily concerned with personal data which are automatically processed by public bodies. This is consistent with the main concern which motivates the need for this recommendation, namely the electronic storage and communication of personal data to third parties by telematic means. Nevertheless, as noted in Principle 1.2, member states may extend the recommendation's principles to personal data which are held by public bodies in manual form. This flexibility is important since various categories of data held by public bodies may exist in both automated form as well as in hard copy. For example, the telephone directory – a personal data file for the purposes of this recommendation – exists both in hard copy form as well as in electronic form. It may also be noted in passing that the data protection legislation of a number of member states covers both automatic as well as manual processing.

16. Similarly, freedom to extend the scope of the recommendation applies to data concerning corporate bodies, groups, associations, etc.,

even though they do not possess legal personality in accordance with domestic company law. Much of the information held by public bodies concerns such entities. Reference may be made to files accessible to third parties such as companies' or commercial registers. This is an important factor to be borne in mind by policy makers whose data protection regimes cover both natural and legal persons, as well as any other body not possessing legal personality.

17. It may be noted that the possibilities for extending the scope of the recommendation described in Principle 1.2 are consistent with the provisions of Article 3, paragraph 2, sub-paragraphs *b* and *c*, of Convention No. 108.

18. Principle 1.3 is devoted to the definition of various critical terms which are used frequently throughout the recommendation.

19. The definition of "personal data" referred to in Principle 1.3 should not raise too many problems since the formula has been accepted by all member states in previous sectoral recommendations of the Committee of Ministers in the field of data protection. Policy-makers should pay particular attention to the issue of statistical data which, although held in non-nominate form, may nevertheless be linked, using sophisticated data processing technology, to named individuals. The drafters of the present recommendation have noted that the Committee of Experts on Data Protection has recently embarked on work in the area of statistical data and it is expected that a separate legal instrument will be elaborated which will deal with the new problems arising out of the use, including communication, of statistical data held by public bodies.

20. It is of course the case that personal data may be put into circulation and made available to the public by private sector bodies. For example, traders may produce public registers containing the names and addresses of their members. Similarly, professional bodies in the private sector may bring out directories containing various degrees of personal information on their members – name, address, professional qualifications, their specialised fields, etc. However, this recommendation is only concerned with personal data handling by "public bodies". Such bodies perform public service or public interest activities. They may be found at state level or at the level of territorial communities. As opposed to private bodies, public bodies are amenable to principles of public law, in particular the possibility to seek judicial review of their administrative acts. There is of course a grey area between the activities of private bodies and public bodies. For example, it may be the

case that certain bodies, linked budgetarily to the state or to territorial communities, compete in the market-place with private enterprises and under the same conditions as private enterprises. Moreover, private bodies may in certain countries perform public service or public interest activities. One has only to refer in this regard to privatised companies which, prior to deregulation policies, were legally and economically situated within the public sector.

21. While noting that it is possible to identify certain common criteria in all states for public bodies, the text admits that domestic law may take a more expansive view of the type of body which may be termed "public" for the purposes of the recommendation.

22. Principle 1.1, as noted earlier, is limited to those personal data which are collected by public bodies and "which may be communicated to third parties". The recommendation takes as its point of departure the need for communication of such data to be carried out on a legal basis. More often than not, such data will be contained in "files". The data should only be communicated to third parties if such files are in fact "accessible to third parties".

Principle 1.3, sub-paragraph 4, identifies the various ways in which third parties may access personal data files and obtain communication of personal data stored in them. In the first place, files may be accessible to third parties in accordance with provisions governing access to public sector information or freedom of information. These provisions may be found in general laws governing freedom of information or access to public sector information. Alternatively, such provisions may be found in more limited legal contexts. In some countries, it may be the case that both general and sectoral access provisions exist. Other countries will only possess sectoral rules on access. As noted earlier, it is not the intention of the drafters to advocate general principles of access to public sector information or freedom of information or to adjust national law and procedure for granting access, or to harmonise the scope of legislation on openness. The Committee of Ministers has already encouraged this action in Recommendation No. R (81) 19. The present recommendation is only concerned with addressing the new situation which has arisen since the automation of public sector databases and the possibilities which this has offered to third parties to have easier access to the nominate data contained in the databases without having to justify the reasons why they are seeking personal data files.

23. Moreover, files may be accessible to third parties, including the general public, because this was the intention of the legislator in specific

enactments. These categories of files refer to the so-called "public files" which contain personal data which are collected and stored by public bodies with a view to their official publication. Although such files are generally accessible, it may be the case that access is limited to closed groups – for example certain states restrict access to files on criminal convictions to those operating within the criminal justice system. This "closed user group" restriction explains the reference in Principle 1.3, sub-paragraph 4, to "third parties having a particular interest".

24. These "public files may include, in particular, telephone directories, electoral registers, land registers, files containing the names and addresses of consumers of electricity and gas, patent and trademark registers, files containing personal data relating to guardianship, commercial registers, vehicle-licensing registers, registers established by data protection authorities containing information on data users, etc. The recommendation proceeds on the basis that such public files must have been created in accordance with specific legal provisions. These may take the form of statutes, regulations, statutory instruments, etc. What is necessary is that the publication of information and its being made accessible to the public, including third parties, are mandated by law including, in the case of some countries, in accordance with provisions governing access to public sector information but, more commonly, in accordance with specific legal provisions governing public files.

25. There are many reasons why public files may come into existence. For example, they may be set up under statutes with a view to promoting the needs of transparency in a particular economic activity, typically the publication of the names of company directors. Again, information may be made public with a view to promoting public interest in various domains, for example the decision to make accessible to the public the names and addresses of those entitled to vote in national or local elections. Or, information may be made public so as to facilitate dealings between members of the public, as is the case with telephone directories. Finally, the interventionist nature of public powers leads to increased regulation of various activities. Regulation brings with it control over the persons involved in those activities – for example, through licensing procedures. It is not uncommon to find lists of licence-holders (data users, holders of firearm certificates, fishing permits, etc.) published under statutory authority and thus made available to the public.

26. "Communication", a term which appears in the very title of the recommendation, is given a broad definition. It covers both bulk communication of personal data as well as communication of isolated items of

personal data contained in files accessible to third parties. The definition is intended to be technologically relevant. It covers communication by electronic or telematic means, electronic consultation by on-line methods as well as the physical delivery of magnetic tapes and electronic downloading of personal data or personal data files.

27. The "third parties" are defined so as to specifically exclude communication to public bodies. The definition obviously covers private sector companies, groups, associations, etc., as well as individuals. The drafters of this recommendation have not dealt with the issue of communication of personal data or personal data files between public bodies, whether for public interest purposes linked to their official functions or for other purposes such as marketing or economic planning outside the strict framework of such functions. As with the issue of statistical data discussed in paragraph 19, the drafters of the recommendation have noted that the Committee of Experts on Data Protection might look specifically at the issue of the communication of personal data between public bodies, with a view to elaborating a separate legal instrument.

28. Nevertheless, as noted in the course of the discussion, in the definition of "public bodies" a grey area may exist between the activities of public and private bodies, and different states may have different perceptions of what constitutes a private body and a public body. It is for this reason that the recommendation allows a certain flexibility in regard to the scope of the expression "third parties" by allowing states to broaden the scope of the expression "third parties" (Principle 1.3, sub-paragraph 7).

2. Respect for privacy and data protection principles

29. The principles laid down in the recommendation are of course designed to ensure respect for the private life of the data subject when his data are to be communicated by public bodies to third parties. As such, the protective framework proposed in the body of the recommendation is consistent with the guarantees for privacy laid down in Article 8 of the European Convention on Human Rights. The drafters of the recommendation have also proceeded on the basis that the right to private life should be reinforced by reference to data protection principles which regulate the conditions in which personal data may be communicated and, in particular, the extent of involvement of the data subject in determining those conditions. In other words, the recommendation is more concerned with respect for privacy in terms of informational self-determination rather than in terms of a "right to be let alone". This view of privacy protection is better adapted to the new

technological realities of personal data handling by public bodies as well as the new threats to individual privacy, autonomy, dignity and identity arising out of the misuse of personal data by technical means once the data have been communicated to third parties.

30. With these factors in mind, Principle 2 of the recommendation notes the need for safeguards and guarantees to accompany the communication of personal data or personal data files to third parties. Principle 2.1 stresses the need to make communication conditional on the existence of a legal basis authorising communication. To illustrate this, reference is made to specific laws, for example laws governing particular types of public files ; to freedom of information provisions, whether general or sectoral in nature ; to authorisation granted under data protection legislation, including for example, the authorisation of an authority established under such legislation. All these different legal sources may constitute the basis for communication.

In the absence of such a legal basis, Principle 2.1.*d* states that the communication must be conditional on obtaining the "free and informed consent" of the data subject.

31. Principle 2.2 highlights the importance of continuing to respect the principle of purpose specification or finality after the stage of communication. The personal data collected by public bodies will have been collected for specific and lawful purposes linked to their official tasks. In accordance with Article 5, paragraph *b*, of Convention No. 108, the data so collected should not be used, including communicated, for other incompatible purposes. Principle 2.2 attempts to concretise the principle of purpose specification or finality in the sector covered by the recommendation. With this objective in mind, Principle 2.2 provides that personal data or personal data files may not be communicated to third parties for purposes incompatible with those for which the data were collected, unless appropriate safeguards and guarantees exist in domestic law. What may constitute "appropriate safeguards and guarantees" is discussed in paragraph 33. As regards the expression "domestic law", a broad interpretation may be given to this term. It may range from authorisation included in a statute, creating a particular public file, to a decision taken by a data protection authority or an agency set up under freedom of information legislation.

32. It is an accepted principle in many laws governing access to public sector information (one of the legal mechanisms to allow personal data files to be accessible to third parties) that the requesting third party need not justify the reasons why he seeks access to the data or to the data

files, nor the purposes for which he will use them. Recommendation No. R (81) 19 of the Committee of Ministers also embodies the same principle of non-justification of an access request. Accordingly, in many countries where general laws on freedom of information or access to public sector information exist, public bodies may not restrict the communication of personal data to requesting third parties on the basis that the data sought will be used for incompatible purposes. This said, at the time of drafting this explanatory memorandum, some countries in Europe envisaged restricting the use of access to public sector information for the purpose of commercial exploitation of the data sought. The drafters of this recommendation feel that new trends towards storing personal data or personal data files in electronic form allowing them to be communicated telematically, including in bulk form, in accordance with provisions governing access to public sector information, require all states to review the uses which are being made of such laws. It may be the case that this new phenomenon was not in the minds of the drafters of such legislation when they sought to promote transparency within public administrations and the accountability of decision-makers.

33. As regards the sort of safeguards and guarantees which could be provided, reference may be made to such matters as the need to seek the free and informed consent of data subjects before the data are to be communicated for incompatible purposes, or at least to inform them at the time of the collection of the data that these may be communicated to third parties for purposes other than those which motivated their collection, thus allowing them the possibility of raising an objection. These matters are dealt with in greater detail in Principles 4 *et seq*.

34. Principle 2.3 contains a general statement to the effect that the processing of the data by a third party after their communication is subjected to the requirements of domestic data protection legislation, including the procedural controls (notification, declaration, registration, etc., of personal data files) exercised by the data protection authorities. Principle 6 gives further details on how data may be used by the third parties to whom they have been communicated. However, Principle 2.3 makes it quite clear that data protection legislation covers use as well as other processing stages, such as conservation of the data.

3. Sensitive data

35. The drafters of the recommendation have structured their approach to the issue of data communication in accordance with the nature of the data collected by public bodies. The nature of the data determines

their accessibility to third parties and, accordingly, the conditions for their communication. This approach is reflected in the provisions of Principle 3 of the recommendation as well as in Principles 4 *et seq*., of the recommendation. Principle 3 relates to personal data which are generally non-accessible to third parties because of their sensitivity or their potential to prejudice the private life of data subjects if they were to be communicated to third parties. Principles 4 *et seq*., on the other hand, deal with personal data which are generally accessible in accordance with legal provisions. The nature of such data is different and, rather than blocking or taking an extremely restrictive approach to their communication, as with the type of data covered by Principle 3, the issue becomes one of determining the conditions under which such data may be communicated.

36. Principle 3.1 regards as "sensitive data" any of those categories of sensitive data which are referred to in Article 6 of Convention No. 108 (personal data revealing racial origin, political opinions, religious or other beliefs, personal data concerning health, sexual life or criminal convictions). It should be borne in mind that the list outlined in Article 6 is not exhaustive. Member states may have other perceptions of what constitutes personal data of a sensitive nature.

37. The general rule on sensitive data is clearly stated in Principle 3.1 – such data should not be placed in a file or in part of a file which is generally accessible to third parties. The drafters of the recommendation have recognised that such a general rule may not be absolute in nature. For example, in certain countries, lists of judgments in bankruptcy against certain individuals may be available for public consultation. Given that some of these countries may regard judgments in bankruptcy as criminal convictions, the list which is made accessible to third parties will contain one of the categories of sensitive data referred to in Article 6 of Convention No. 108. Moreover, the need to monitor the employment activities of enterprises in regard to their policy concerning the recruitment of ethnic or religious minorities may give rise to the creation of files accessible to third parties which contain sensitive data. Nevertheless, given the fundamental nature of the safeguard stated in Principle 3.1, any exception to it may only be tolerated in well-defined circumstances laid down by law and accompanied by compensatory safeguards and guarantees. This is the purpose of the clause contained in the second sub-paragraph of Principle 3.1. In drafting this clause the drafters of the recommendation base themselves on the relevant derogations specified in Article 9 of Convention No. 108. For example, the two permissible exceptions referred to previously may be based on the provisions in

Article 9 which refer to "the suppression of criminal offences" as well as "protecting the rights and freedoms of others". As regards the "appropriate safeguards and guarantees" referred to in the second sub-paragraph of Principle 3.1, the drafters had in mind the sort of safeguards referred to in Article 6 of the convention.

38. The reference to "stored in a file or in part of a file" is justified by reason of the fact that certain files which may be generally accessible may also contain personal data of a sensitive nature. The protective framework set out in Principle 3.1 would be seriously undermined if it did not deal with this possible lacuna.

39. Principle 3.2 is concerned with those situations in which public bodies hold lists of politicians' names and their political allegiance or lists of names of individuals who, although not politicians, are nevertheless involved in political life. For example, such individuals may be appointed to the private office of government ministers on the basis of their political affiliation. Of course, such data are prima-facie sensitive since they fall within one of the categories set out in Article 6 of Convention No. 108.

40. Other types of situations not involving data concerning political beliefs may also be envisaged. For example, public bodies may hold lists of names of church leaders with indications on their particular religious affiliations. Once again, such data fall, prima facie, within Article 6 of Convention No. 108 since they relate to religious beliefs.

41. Nevertheless, the drafters of the recommendation believe that prima-facie sensitive data in such circumstances may be made accessible to third parties since the data in question fall within "the public domain".

42. The drafters of this recommendation have come to this conclusion on the basis of an interpretation of Article 6 of Convention No. 108. In their view, such data concerning individuals involved in public life do not, within the strict meaning of the article, "reveal" such matters as political opinions or religious beliefs. In addition, the drafters of the recommendation believe that making data falling within the public domain accessible to third parties is also justified on the basis of Article 9, paragraph 2.*b*, of the Convention. It is felt that the accessibility of the data is justified as it is intended to contribute to open democracy and as such is for the protection of "the rights and freedoms of others".

43. In addition, in elaborating this provision, the drafters bore in mind the judgment of the European Court of Human Rights in the Lingens[1] case

1. Publications of the Court, Series A, No. 103, judgment of 8 July 1986, paragraph 42.

in which the Court noted that, unlike a private individual, a politician "... inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large...". It is felt that similar reasoning may be applied to any data subject in public life.

44. Principle 3 does not deal with personal data which, while not being sensitive *stricto sensu*, are nevertheless capable of prejudicing the privacy of data subjects if they are made generally accessible. For example, data held by public bodies concerning human factors such as guardianship, adoption or divorce, etc., in civil status registers or registers on births, marriages and deaths, may be the cause of distress to individuals if they are made generally accessible. It is felt that member states should elaborate specific policies for the communication of such data based on the need to avoid prejudice being caused to the privacy of data subjects. For example, consideration could be given to communicating such data only to third parties having a legitimate interest in obtaining them, or to preventing or restricting mass delivery of the files in which the data are held.

It is of course the case that names contained in files accessible to third parties may suggest sensitive data, such as racial origin or religion. This point is not treated in the recommendation. It is felt that it is an unavoidable consequence of having one's name included in a public file. Nevertheless, reference should be made to the provisions of Principles 5.2 and 5.7 which seek to regulate the circumstances in which names may be extracted from files accessible to third parties.

4. Generally accessible data

45. Principle 4 provides specific guidance on how "generally accessible data" should be collected by public bodies. Principle 4, it will be seen, is linked to the provisions of Principle 6 since the circumstances surrounding the collection of data will influence the conditions under which they may subsequently be communicated to third parties.

46. Principles 4.1 and 4.2 must be regarded as basic principles of transparency at the stage of data collection. In addition, they reflect the need to ensure that the individual is not to be regarded simply as a rich and unconscious source of personal data. The individual must be brought into the information circuit. Moreover, Principle 4.1 emphasises that the fact that files are to be made accessible to third parties, is not a neutral data protection issue. Once again, the need for a legal framework to govern the communication of personal data to third parties is being stressed.

47. All of these safeguards and guarantees contribute to the elaboration of a data protection policy for personal data or personal data files accessible to third parties. As with other principles in the recommendation, they are intended to ensure that the new information market which is being established and which is specifically encouraged in the Guidelines adopted by the Commission of the European Communities referred to earlier does not ignore the fact that personal information is not to be seen simply in terms of an economic commodity. It must also be seen in terms of human rights and fundamental freedoms, in particular the right to data protection.

48. With these factors in mind, Principle 4.1 requires that the purposes for which the data will be collected and processed in files accessible to third parties as well as the public interest justifying their being made accessible, should be indicated in accordance with domestic law and practice. The factors mentioned in Principle 4.1 may be indicated either expressly or implicitly, and not necessarily by law. The reference to "practice" allows member states to use means such as the media, official forms or other appropriate mechanisms to indicate the purposes for which data will be collected and processed in files accessible to third parties as well as the public interest motivating their accessibility. For example, it is sufficient that there exists a law on access to public sector information or freedom of information in a particular country which authorises general access to personal data held by public bodies. Moreover, the public interest justifying the accessibility is to be found in the nature of such general legislation – the need to promote an open and accountable public administration. As regards those categories of "public files" in the classic sense of the term, specific statutes very often govern the purposes for which they may be brought into being as well as the reasons why this is the case.

49. As with Principle 4.1, Principle 4.2 refers to domestic law and practice as the appropriate vehicle for communicating to data subjects before or at the time of the collection whether or not they are legally obliged to provide their data to a public body. What may constitute domestic law and practice has been discussed in paragraph 48. In the case of the census or the electoral register, the individual should be informed that he is obliged under law to provide certain personal details. Alternatively, in the case of a telephone directory, the data subject should be informed that there is no legal compulsion to have his data stored in a file which is accessible to third parties. Moreover, data subjects should be informed of the legal basis for data collection as well as the purposes

for which the data are to be collected and processed. Finally, data subjects should be informed of the public interest which justifies their data being made accessible to third parties.

50. Principle 4.3 encourages public bodies to be sensitive to the needs of those data subjects whose security and privacy may be particularly at risk if their data were to be made accessible to the public at large. For example, public bodies should heed the requests of individuals working in the security services or who have other legitimate reasons for avoiding publicity not to have their data open to public scrutiny.

5. Access to and communication of personal data by electronic means

51. Principle 5 of the recommendation advances a number of safeguards and guarantees in respect of the personal data which are automatically processed and which are contained in files accessible to third parties. In the first place, the processing operations effected by public bodies are subject to the provisions of domestic law. Such provisions, and they may take the form of specific regulations for various types of electronic databases held by public bodies, should determine how personal data may be communicated to and accessed by third parties. In particular, the use of technical means for communicating or for consulting electronic files should be placed within a legal framework. There are practical ways of doing this. For example, whenever public bodies make their electronic files available on-line to the public, they should enter into a contract with third parties who wish to download telematically personal data files on to their databases. Such a contract could contain clauses which reflect any conditions and limitations governing the personal data files being sought. In addition, the contract could oblige the third party to respect any conditions which have been imposed by the data subject on subsequent reuse of the data. Moreover, the contract could be used as a vehicle to alert the third party to the need to use personal data in accordance with domestic law and procedure on data protection.

52. The provisions of Principle 5.2 are intended to address the issue of security of the electronic files which may be accessed or consulted on line. Technical measures should be taken so as to prevent mass downloading of personal data files in breach of the regulations governing the keeping and communication of electronic files. In addition, consideration should be given to the possible need to limit the criteria on the basis of which personal data may be searched. This issue is discussed later in the commentary on Principle 6.3.

6. – Processing by third parties of personal data originating in files accessible to third parties

53. i. Situation in which the data subject was legally obliged to provide the data (Principle 6.1) :

It should be stressed that the term "legally obliged" refers not simply to cases of statutory obligation to provide data, for example in accordance with tax or census obligations, but also covers situations in which data subjects have to provide data in order to receive various social goods or services, for example, education, social security or even the benediction of the state to get married.

ii. Situation in which the data subject volunteered his data to the public body (Principle 6.2) :

The data subject may, for example, have replied to a questionnaire sent out by a local authority, answers to which will help the local authority to have an idea of the needs of the local population.

54. Given that the data subject did not have the possibility to opt out of the collection and subsequent inclusion of his data in files accessible to third parties, because he was legally obliged to furnish the data, Principles 6.1 and 6.2 give the data subject compensatory guarantees so as to regulate subsequent processing of his data by third parties. With this in mind, Principle 6.1 requires that the expressed and informed consent of the data subject – and this consent is revocable at any moment – should be sought before the data may be reused by third parties. In order to make the principle of expressed and informed consent meaningful, the individual should of course be asked at the stage of collection whether or not he is willing to allow his personal data to be communicated to third parties by the public body responsible for collecting and making the data accessible. In the absence of the expressed and informed consent of the data subject, the processing of personal data by third parties must only be carried out in conformity with the requirements laid down in legislative enactments. Such statutory requirements or prescriptions may be included in the laws governing specific categories of public files, data protection legislation or freedom of information legislation.

55. Where the individual has not been obliged to provide his data in the sense described above, he should be able to exercise a number of rights in regard to the data which are stored in a file accessible to third parties. The rights set out in Principle 6.2, paragraphs *a, b, c,* and *d,*

need not all be reflected in domestic law. Principle 6.2 makes it clear that they are options, one at least of which should be contained in domestic law.

56. Principle 6.3 emphasises the data protection rights of the data subject in regard to his data which are being processed by third parties and which were obtained from files accessible to third parties. These rights include the right of access, rectification and erasure where the data have been processed contrary to data protection principles. The rights set out in Principle 6.3 are a simple statement of the content of Article 8 of the Data Protection Convention. However, Principle 6.3, sub-paragraph 2, refers in particular to the right of the data subject to have his data erased from those new files which have been brought into existence by third parties on the basis of data accessible to third parties. Although the right to erasure under Article 8 of the Data Protection Convention is conditional on the data having been wrongfully processed, the drafters of the recommendation have felt nevertheless that an unrestricted right to have them disappear is appropriate in the situations covered by this recommendation. It may be noted that the approach of the drafters to the right to erasure is compatible with an earlier approach followed in Recommendation No. R (85) 20 on the protection of personal data used for the purposes of direct marketing. Reference should be made to this recommendation for additional principles governing the way in which personal data covered by the present recommendation may be reused by third parties for marketing purposes.

7. File interconnection/matching

57. The principles contained in this recommendation are intended to be technologically relevant. As noted in various parts of the text, the main concerns are directed at avoiding possible abuses arising out of the introduction and use of data processing technology by public bodies and the new electronic means of communicating the data which they hold.

58. Data processing technology is also at the disposal of third parties to whom the data may be communicated. Using software techniques, they may scan public files electronically with a view to isolating names and addresses on the basis of certain criteria – for example age or racial origin. Third parties are now able to produce new and more interesting data files out of information contained in various unrelated files held by public bodies. The new files which come into existence as a result of this process may be extremely rich in terms of personal data,

and certainly more informative than one file taken by itself. For example, it is possible to interconnect an electronic telephone directory with another category of public file so as to enhance the value of the information contained in the electronic telephone directory.

59. There are obvious dangers in these techniques of file interconnection or file matching. In particular they may produce automatic lifestyle profiles on individuals without their knowledge and consent. In addition, the possibility to isolate names from public files on the basis of the nationality or religion suggested by the name allows files to be created containing sensitive data. It is for this reason that Principle 5.2 of the recommendation has proposed limitations on the scope of electronic interrogations or electronic searches of files accessible to the public. For example, consideration should be given to the need to prevent electronic searches of public files which are limited to particular names of people living in specific regions or localities. The downloading of such information, coupled with the possibility of matching or interconnecting it with another file, could allow third parties to have quite precise data of a sensitive nature on well-defined groups.

60. Aware of the problems discussed in the previous paragraph, the drafters of the recommendation have recommended that file matching or file interconnection techniques should only be permissible if domestic law permits them. In addition, domestic law – which once again should be interpreted broadly – should provide appropriate safeguards for the data subject in the event of authorisation being given to third parties to use these techniques.

8. Transborder data flows

61. The principles discussed so far address specific national contexts in which personal data or personal data files are communicated by public bodies to third parties. The safeguards and guarantees discussed up to now are based on considerations of domestic law. However, the communication of personal data or personal data files held by public bodies in one country to third parties situated in other countries cannot be ignored. The state of technology now enables third parties to access remotely, from country A, personal data files held by public bodies in country B. The data may, for example, be downloaded from one country to another country. Alternatively, magnetic tapes may be sent by public bodies through the postal service to third parties resident in another state. In other words, it is also necessary to discuss the data protection issues raised in this sector in the context of transborder communication of personal data or personal data files (Principle 8.1).

62. The drafters of the recommendation have sought to adapt the principles of Article 12 of the Data Protection Convention so as to provide specific principles for communication in this sector. Principle 8 of the recommendation analyses a number of situations in which transborder communication may take place:

- the communication may be to the territory of a state which has ratified the convention;
- the communication may be to the territory of a state which, although not a Contracting Party to the convention, nevertheless has legal provisions in conformity with the convention and with the present recommendation;
- the communication may be to the territory of a state which is not possessed of legal provisions in conformity with the convention or with this recommendation.

63. Taking in turn each of the various hypotheses outlined above, the drafters of the recommendation have provided the following legal framework for transborder data flows.

64. As regards the first hypothesis and in accordance with the principles of Article 12, paragraph 2, of Convention No. 108, Principle 8.2 of the recommendation sets out the principle of the free flow of data. Since a Contracting Party to the convention must be possessed of data protection norms consistent with the treaty's basic principles, there is no prima-facie justification for restricting the flow of data to it. This is certainly the case when the exporting state is also a Contracting Party.

However, Principle 8 of the recommendation is not exclusively concerned with the situation in which the communicating country is a Contracting Party. It also envisages personal data being communicated by non-Contracting Parties, including states which have not yet adopted legislation on data protection. The drafters of the recommendation have sought to encourage the acceptance by all countries of the principle of the free flow of data to states which have ratified Convention No. 108.

The provisions of Principle 8.2 are without prejudice to the right of a Contracting Party to determine the conditions for the transfer of particular categories of personal data or personal data files in accordance with the provisions of Article 12, paragraph 3.*a*, of Convention No. 108.

65. Principle 8.3 deals with the situation in which the receiving state has legal provisions which reflect the basic principles of Convention No. 108 as well as the philosophy of this recommendation, but has

not yet ratified the convention. Certain states have in fact adopted data protection laws in conformity with the convention but have not yet reached the stage of depositing their instruments of ratification. As with Principle 8.2, Principle 8.3 similarly encourages the free flow of data to such states. It is felt that, even though ratification of the convention is an absolute necessity at some stage, the legal situation in regard to data protection in such countries should be accepted as sufficient and transfrontier communication should be allowed to take place without further conditions. To use the terminology of the convention, an "equivalent level of protection" may be deemed to exist in such countries, at least when the data are to be exported from the territory of Contracting Parties.

66. Principle 8.4 deals with a situation in which the country of destination has not ratified Convention No. 108 and possesses no legal provisions on the protection of personal data or at least no provisions which may be considered as being compatible with the basic principles of the convention. In this case, and so as not to weaken the protection of data subjects and thus undermine the scope of data protection principles, in particular the principles laid down in the convention as well as this recommendation, exporting states should consider imposing restrictions on the communication of personal data to third parties resident in such countries.

67. In the first place, the drafters of the recommendation have suggested that no communication should take place in the absence of the free and informed consent in writing of the data subject. In addition, such consent should be revocable at any time. It is thought that increasing the level of the consent requirement so as to include "written consent" is justified in the circumstances envisaged in Principle 8.4, since the individual's data are to be communicated outside his national territory to a country where it is impossible to monitor the fate of the data.

68. Principle 8.4 also provides for an alternative method of ensuring data protection in the event of communication of data to countries which have not yet legislated for data protection. The alternative method envisages the exporting country adopting measures which could guarantee the integrity of the data, including respect for the principles laid down in the convention and in this recommendation, in the territory of the country of destination. One such measure could require the importing third party to commit himself contractually to respecting data protection principles. In this regard, reference should be made to the draft model contract which has been drawn up by the Consultative Committee

of the Contracting Parties to Convention No. 108. The use of contract law, it should be emphasised, is to be regarded as a stopgap measure pending the enactment of data protection provisions in the country of destination and should not be seen as replacing the need to adopt such provisions at some stage. So as to allow for dispute resolution free from considerations of national law, the contract should provide for a system of independent arbitration. The competence of the independent arbitrators should extend to enabling the data subject to enforce his rights in regard to his data and to awarding him compensation in the event of such rights being denied by the third party. Principle 8.4 stresses that the use of such measures as an alternative to requiring the free, informed and written consent of the data subject is conditional on the data subject being informed of the possibility that his data may be communicated to third parties situated in countries not having data protection provisions, and on being given the opportunity to object to the communication.

69. Principle 8.5 highlights a particular problem raised by the transborder possibilities of on-line access to or remote downloading of generally accessible data or data files. This problem is rendered more acute in the case of communication to states without data protection legislation. Given the concern of the drafters of the recommendation to produce a text which is technologically relevant, it was felt important to bring the issue of remote consultation or downloading from abroad to the attention of national legislators.

9. Co-ordination/co-operation

70. Reference was made in the operative part of the preamble to the recommendation of the need to bring it "to the attention of authorities set up under data protection legislation or legislation on access to public sector information". Principle 9 of the recommendation encourages a cross-fertilisation of the role of such authorities so as to ensure consistency of approach to the communication to third parties of personal data or personal data files held by public bodies. The dialogue encouraged in Principle 9 should allow the respective agencies to have information on the conditions which should govern communication. By way of illustration: the communication of personal data under provisions governing freedom of information is invariably restricted where communication would result in prejudice being caused to the privacy of the data subject. The interpretation of such a proviso is usually left undefined in freedom of information legislation. It is felt that authorities entrusted with the interpretation of the proviso could usefully borrow from the

conditions which have been laid down by data protection authorities on the use which may be made of personal data which have been declared or notified or registered with them. Given that data protection authorities may place limitations on the use which may be made by public bodies, including communication, of the personal data files which they hold, it is felt appropriate that the agency operating under freedom of information legislation should take note of those conditions.

Recommendation No. R (93) 7 on privatisation of public undertakings and activities

(Adopted by the Committee of Ministers on 18 October 1993 at the 500th meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of Article 15.*b* of the Statute of the Council of Europe,

Considering that the aim of the Council of Europe is to achieve a greater unity between its members,

Recommends the governments of member states to be guided in their law and administrative practice by the principles set out in the appendix to this recommendation,

Invites the Secretary General of the Council of Europe to bring the terms of this recommendation to the notice of the governments of the other European states.

Appendix to Recommendation No. R (93) 7

Scope and definitions

The present recommendation sets out certain principles by which member states should be guided in the interests of natural and legal persons (including groups of persons) in connection with privatisation.

For the purpose of this recommendation:

a. "privatisation" means:

i. the total or partial transfer from public to private ownership or control of a public undertaking so that it ceases to be a public undertaking;

ii. the transfer to a private person of an activity previously carried on by a public undertaking or public authority, whether or not accompanied by a transfer of property;

b. "public undertaking" means any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it. A dominant influence

on the part of the public authorities shall be presumed when these authorities, directly or indirectly, in relation to an undertaking :

i. hold the major part of the undertaking's subscribed capital ; or

ii. control the majority of the votes attached to shares issued by the undertaking ; or

iii. can appoint more than half of the members of the undertaking's administrative, managerial or supervisory body ;

c. "public authority" means :

i. any entity of public law of any kind and at any level ;

ii. any private person, when exercising prerogatives of official authority.

Section 1 : Protection of the democratic rights of citizens

Where proposed privatisation or a programme of privatisation is important, whether by reason of its scale or of the number of the public undertakings or the nature of the activities involved, the public authorities should ensure that the general public receives the information necessary for the effective exercise of democratic control. Information should be given on the reasons for the decision to privatise and the conditions under which the privatisation is to take place.

The disclosure of such information should only be limited to the extent that the general interest or requirements of confidentiality guaranteed by law render this necessary.

The public authorities should indicate the reasons which have led them not to disclose such information, unless such indication would of itself prejudice the interests which gave rise to such non-disclosure.

Section 2 : Protection of users' and consumers' rights

In the case of privatisation concerning :

– a public utility, such as the provision of public transport, telecommunications, water, gas, electricity, as well as any other activity determined by national law to be in the nature of a public utility, or

– a monopoly providing goods or services to a large public which will continue to be a monopoly after privatisation,

the conditions of the privatisation should be determined with due regard to the continuity, accessibility (including price) and quality of the service in the public interest. Consultation of consumers or users should take place where this is appropriate.

The interests taken into account pursuant to the previous paragraph should, if necessary, be safeguarded by means of a regulatory authority with effective possibilities to compel compliance on the part of the privatised undertaking or on the part of the person carrying out the privatised activity, or by other effective means including, where appropriate, the availability of speedy and inexpensive judicial or administrative remedies or arbitration.

Before proceeding to such a privatisation, the public authorities should inform, by any appropriate means, the users or consumers of the ways in which they intend to protect the interests taken into account pursuant to the two preceding paragraphs.

Section 3 : Protection of employees' rights

Where privatisation involves the transfer of employees to a new employer, particular regard should be had to the protection of the rights and interests of those employees.

In such a case, the employees' representatives should be provided with full information concerning the conditions of the privatisation which are relevant to the employees' interests.

The information mentioned in the preceding paragraph should be given in due time before privatisation so as to allow the presentation of observations concerning the effects of privatisation on employees' interests and the measures planned concerning them.

Section 4 : Protection of the environment

The conditions imposed on the privatised enterprise or on the person carrying out the privatised activity should have due regard to the necessity to protect the environment.

The privatisation should not jeopardise the possibility of obtaining compensation for damage caused to the environment by the undertaking or activity in question by reason of its operations prior to the privatisation.

Section 5 : Protection of potential purchasers

The procedures for privatisation should be established with due regard to the need for transparency and equal treatment of potential

purchasers. These aims may be achieved by a variety of means, for example, public tender or competitive sale.

Where privatisation involves, in particular, sale by public tender or competitive sale :

a. potential purchasers should receive adequate information to enable them to assess their interests in the privatisation ;

b. potential conflicts of interest involving those concerned with the privatisation should be avoided.

Explanatory memorandum

1. Introduction

1.1 Recommendation No. R (93) 7 is the result of work undertaken by the Project Group on Administrative Law (CJ-DA) under the aegis of the European Committee on Legal Co-operation (CDCJ). The work of the project group on this recommendation was carried out in fulfilment of a particular point of the terms of reference assigned to it by the CDCJ, namely, to examine problems of administrative law which lend themselves to co-operative action at European level and in particular to prepare an appropriate instrument concerning "Privatisation of public services and enterprises, particularly with respect to the question of the useful and possible extent of privatisation in the light of fundamental principles of public law and of safeguards protection the rights and interests of the users of public services."

1.2 This work is a logical sequel to earlier work of the Group (formerly known as the Committee of Experts on Administrative Law) as a result of which, in the interests of protection the individual in respect of acts of the administration, the Committee of Ministers has already adopted a number of recommendations in the administrative law sphere. These concern the protection of the individual in relation to the acts of administrative authorities (Recommendation No. R (77) 31), the exercise of discretionary powers of the administration (Recommendation No. R (80) 2), public liability (Recommendation No. R (84) 15), administrative procedures affecting a large number of persons (Recommendation No. R (87) 16), provisional court protection in administrative matters (Recommendation No. R (89) 8) and administrative sanctions (Recommendation No. R (91) 1).

1.3 The work on privatisation of the project group was undertaken in the light, in particular, of the papers submitted to the Council of Europe's XXIst Colloquy on European Law, which was devoted to the

subject of privatisation and was held in Budapest in October 1991, and of the contributions made and conclusions emanated not only from experts from the member states of the Council of Europe, but also from a large number of central and eastern European non-member states.

1.4 The remit of the project group is directed to questions of administrative law, and it was therefore not possible for the group to address the problems of a political and economic nature which arise in the sphere of privatisation. Such problems are particularly acute for the former socialist countries in the context of the fundamental transformation of their economies following the recent political changes in central and eastern Europe. The project group was solicitous of the views, not only of the experts from the former socialist states which are now full members of the Council of Europe, but also of experts from a considerable number of other non-member central and eastern European countries who attended and participated in the meetings of the group, in the interest of ensuring that the relevance of the recommendation would not be confined to those states in which the market economy is long established.

2. Structure and approach of the recommendation

2.1 The recommendation takes the form of previous recommendations in the field of administrative law adopted by the Committee of Ministers under Article 15 (b) of the Statute of the Council of Europe, that is to say, it recommends the governments of the member states to be guided in their law and administrative practice by the principles which are set out in the appendix to the recommendation. Though the recommendation does not therefore constitute an international convention or agreement having legally binding effects in international law or in domestic law, it may nonetheless be expected that it will be effective in practice in that the due adherence of the member states to the principles which it contains will, as is the normal practice in the case of such recommendations, be monitored by the Committee of Ministers at political level.

2.2 The appendix to the recommendation, containing the relevant principles, commences with a section stating the scope of the recommendation and setting out the definitions of certain key terms, and is then followed by five further sections which deal with the particular topics within the sphere of privatisation which it was considered appropriate to address, namely, protection of the democratic rights of citizens, protection of users' and consumers' rights, protection of employees' rights, protection of the environment and protection of potential purchasers

(of the undertaking or activity to be privatised). The recommendation limits itself to setting out the principles and leaves it to the member states to determine the modalities which ensure the respect of those principles.

2.3 The margin of appreciation thus accorded to member states is all the more necessary given that, even between those member states in which the market economy has long been established, there are widely differing approaches and practices regarding privatisation. The recommendation does not seek to interfere with the discretion of member states in this regard; it does however seek to ensure that, whatever policies they may wish to follow and procedures they wish to adopt regarding privatisation in their particular circumstances, due regard will be had to the need to ensure that certain important rights and interests which are liable to be affected by privatisation are given a certain minimum of protection. The manner in which such protection should be accorded is left to each member state to decide.

2.4 The recommendation has nothing to say to the question whether, in any particular case, an undertaking or activity should or should not be privatised. This is a matter entirely for each member state as it sees fit.

3. The text of the recommendation

3.1 As already stated, the instrument

> "Recommends the governments of member states to be guided in their law and administrative practice by the principles set out in the appendix to this recommendation."

3.2 The appendix to the recommendation

3.2.1 Scope and definitions

The opening paragraph of this section defines the scope of the recommendation by stating the purpose of the principles set out in the appendix. This is to ensure that the interests, by reference to the topics which are dealt with in the subsequent sections of the recommendation, of natural and legal persons (including groups of persons) in connection with privatisation are protected in the law and practice of the individual member states.

For this purpose, it is necessary in the recommendation to define the terms "privatisation", "public undertaking" and "public authority".

"Privatisation" as defined by this recommendation means either the transfer (whether total or partial) from public to private ownership or control of a public undertaking (as defined in the recommendation)

so that it ceases to be a public undertaking, or the transfer to a private person of an activity previously carried on by such an undertaking or by a public authority.

Thus, the subject matter of the privatisation may be an undertaking (effectively controlled by the public authorities in accordance with the definition of "public undertaking" – see below) which is already in existence at the time of the privatisation. The use of the expression "ownership or control" in this part of the definition of privatisation is intended to indicate that it is the transfer of the effective control of the undertaking in question which is the key consideration. This is consistent with the definition of "public undertaking" as an undertaking over which the public authorities may exercise, directly or indirectly, a dominant influence.

Alternatively, the privatisation may involve no alteration of ownership of any undertaking and no alteration of the ownership of any assets, but simply the transfer of the right or duty to carry out an activity previously performed by the public undertaking or the public authorities. Privatisation as defined by this recommendation covers also these types of case irrespective of the form they may take. Thus, on the one hand, the sub-contracting by a local authority of the task of rubbish collection within its functional area, which would mean that the local authority had not divested itself of its responsibility for this public utility but had arranged for the discharge of that function by a private person on the basis of a sub-contractual relationship, would be a "transfer of an activity", as would, on the other hand, for example, the simple transfer by the public authorities, lock, stock and barrel, of an undertaking such as the postal service to some private undertaking.

It has to be recognised that the term privatisation can be used to capture situations other than those covered by the definition in the recommendation. Thus, the withdrawal of monopoly rights guaranteed by law or the withdrawal of state financial support whereby the public undertaking is compelled to operate thenceforth in a competitive environment, to mention but two, may be regarded as forms of privatisation. In the recommendation, however, the concept of privatisation is confined to the two categories of case just described ; these appear not only to be the main categories of privatisation as that concept is commonly understood, but also to be those categories which most obviously give rise to the need for protection of the individual.

Nonetheless, it is recognised that some of the principles in this recommendation may be relevant to changes in the status of public undertakings which fall short of "privatisation" as defined in this recommendation.

Thus, member states should consider the need to apply these principles in the context of a change in the status of a public undertaking which, though not in itself constituting a privatisation as defined by the recommendation, affects the concerns to which the recommendation is addressed. Such would, for example, be the case where a public undertaking which was governed by public law was to be converted into a private corporation, the shares of which remained in the ownership of the state, but which, from the outset was intended in due course to be privatised according to the definition of the recommendation.

The definition of "public undertaking" is based on the existence of a dominant influence on the part of the public authorities over the undertaking. This dominant influence may exist by virtue of ownership, financial participation or the rules governing the undertaking. The definition is identical to that contained in the Directive of the Council of the European Communities No. 80/723/EEC of 25 June 1980 on the transparency of financial relations between the member states and public undertakings (Official Journal of 1980, No. L195, p. 35).

The definition of "public authority" is drawn from the previous recommendation of the Committee of Ministers on Public Liability (No. R (84) 15).

3.2.2 Section 1 – Protection of the democratic rights of citizens

As already stated, the question whether it is advisable that any particular public undertaking or activity should be privatised is a matter for each member state in the execution of its own national policy. However, a privatisation or programme of privatisation may, by reason of its scale, the number of undertakings involved or the nature of the activities concerned, be of such general importance as to require, in a democratic society, that the general public should be given sufficient information concerning the proposal to enable public opinion to be heard. The public may be informed in a variety of ways, for example, through the representatives of the public in parliament, or by means of a white paper or a similar publication, etc., or in the case of privatisations of local rather than national importance, through such procedures as public enquiries. The purpose of providing information is to enable the general public to make informed representations to those charged with the task of making decisions concerning the privatisation. While leaving it to each member state to decide for itself when a proposed privatisation or programme of privatisation is of such importance as to call for the protection of the democratic rights of citizens in this way, and to decide the manner in which such information should be given

to the public, the principle contained in section 1 draws attention to the fact that cases may arise which call for such protection, and recommends that when they do, member states should ensure that the general public is given the appropriate information to this end.

Such information should include a statement of the reasons for the decision to privatise and of the conditions under which the privatisation is to take place. However, it is recognised that the requirements of confidentiality guaranteed by the law, or indeed the general interest (which may, depending on the circumstances, include considerations of confidentiality which are not strictly guaranteed by the law) may call for the imposition of limitations on the disclosure of such information. In such cases it is recognised that the imposition by the authorities of limitations on the extent of such disclosure may be necessary. When this is the case, the public authorities should indicate, at least in general terms, the reasons which have led them to refrain from disclosing such information, unless the giving of such reasons would itself prejudice the interests which such non-disclosure is designed to protect.

It should be stressed that the principles contained in this section only fall to be observed in cases where the public authorities which implement the privatisation retain some discretion as regards the advisability of the privatisation as well as the conditions under which the activity in question will be carried on after privatisation.

In cases where these questions have previously been decided upon by the legislator, democratic control will normally have taken place during the parliamentary procedure and the principle contained in this section will therefore necessarily have been complied with.

3.2.3 Section 2 – Protection of users' and consumers' rights

The privatisation of certain undertakings or activities is liable to have direct implications for the interests of those members of the public who are users or consumers of the product (whether goods or services) of the undertaking or activity in question. This arises in particular where the undertaking or activity to be privatised is a "public utility". The notion of a public utility is not precise but it is traditionally related to such essential activities in the public interest as the provision of gas, electricity, water, public transport, telecommunications, etc. This is not an exhaustive list and the precise definition of the concept of public utility must ultimately be left to the national legal system. A second case in which the protection of users and consumers is of particular importance is where the undertaking or activity to be privatised is a state

monopoly providing goods or services to a large public which will retain its monopoly status after privatisation. The transfer from public into private hands of a monopoly (whether a legal monopoly or a *de facto* monopoly) in respect of the provision of goods or services to a large public is liable to call for special measures to protect the interests of users and consumers after privatisation.

This principle indicates a number of particular concerns to which the member states ought to have due regard. These are:

- the need to ensure that the continuity, accessibility (including price) and quality of the service is maintained after privatisation;
- the need, where this is appropriate, for the public authorities to consult consumers or users to this end;
- the fact that it may be necessary (a necessity which it is for the member state concerned to assess) to provide a means whereby the privatised undertaking, or those in charge of the privatised activity, can be effectively compelled to comply with those conditions of the privatisation which are directed to the protection of users and consumers. These means may, if necessary, involve the setting up of a regulatory authority, or the provision of special, speedy and inexpensive judicial or administrative remedies or arbitration; and
- the need to inform, by appropriate means, the users or consumers concerned in advance of the means by which their interests, above referred to, will be protected.

The principle contained in Section 2 nonetheless leaves it to individual member states to make their own appreciation as to when protection is necessary and as to the best means to achieve it. Thus, the first paragraph of this section calls on the member states to determine the conditions of privatisation with due regard to the interests therein set out; and, in the second paragraph, these interests should, if necessary, be safeguarded in the particular ways therein mentioned. By the words "if necessary" it is intended to recognise that the circumstances of the case, including for example, the existence of competitive conditions in relation to the activities of a public utility after privatisation, may be adequate to safeguard the interests in question without further measures of compulsion.

3.2.4 Section 3 – Protection of employees' rights

The position of employees whose employment is transferred to a new employer consequent on privatisation can be a particularly delicate

matter. The principle contained in this section of the recommendation does not attempt to resolve the difficult economic and organisational problems which may arise in this context concerning, for example, the maintenance of staff numbers and of salaries and of benefits enjoyed by employees prior to the privatisation.

However, it may be stated that the principle in section 3 seeks to encourage member states to provide, for employees, protection of the kinds afforded, for example, in the European Community by Council Directive 77/187 of 14 February 1977 on the approximation of the laws of the member states relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (Official Journal L61 of 5 March 1977, p. 26). That protection includes the transfer to the new employer of the transferor's rights and obligations under the employment contract as well as the obligation to inform and consult the employees' representatives in good time concerning the transfer of the undertaking to the new employer; it seems also appropriate to envisage such protection in cases of privatisation.

Accordingly, the recommendation calls on the member states to have particular regard to the protection of the legitimate rights and interests of the employees affected, and, in particular, to ensure that the employees' representatives are provided, in good time, with all the information which is relevant to the employees' interests, so as to enable the representatives to present their observations on the privatisation. Implicit in this is the principle that such observations, once furnished, will be taken into account by the public authorities without, however, binding the latter.

3.2.5 Section 4 – Protection of the environment

By this principle, the member states are asked to have due regard to the necessity for environmental protection in the conditions imposed on the privatised enterprise or on the person carrying on the privatised activity. These conditions may be laid down by law or in the contractual arrangement giving effect to the privatisation. Moreover, the transfer of assets and liabilities which frequently forms part of a privatisation, and the other conditions of the privatisation, should not produce the result that persons who, pursuant to national law, would, but for the privatisation, have had a right of action against the public undertaking or the public authorities for compensation for damage caused to the environment by acts or omissions of that undertaking or those authorities committed prior to the privatisation, are effectively deprived in practice of the possibility of obtaining effective relief. The necessity to

ensure that effective relief in such cases can still be obtained, notwithstanding the privatisation, should be addressed at the time of the privatisation.

3.2.6 Section 5 – Protection of potential purchasers

The aims to which member states are called upon to have due regard in this principle are transparency and equal treatment of potential purchasers. "Transparency" implies openness on the part of the public undertaking or public authorities with regard to the disclosure of relevant information ; equal treatment arises not only as regards the provision of information but also as regards all other aspects of the privatisation where there are a number of potential purchasers. The principle points out the usefulness of public tender or competitive sale as a means of achieving these aims but it does not seek to restrict the public undertaking or the public authorities to the choice of these procedures. Nor is it assumed that there must necessarily be a multiplicity of potential purchasers. However, the principle contained in Section 5 refers in particular to public tender or competitive sale as especially likely, in the event that there is more than one potential purchaser, to result, in practice, in the aims stated in this principle being achieved.

The question as to who should be admitted to the position of a potential purchaser, and in particular, whether foreign nationals or undertakings should be allowed to participate in the privatisation process, is a matter for the domestic law of the member states in accordance, if appropriate, with international engagements undertaken by those states, such as the EC treaties.

Where the chosen procedure is public tender or competitive sale, this principle stresses not only the necessity to give adequate information (in respect of which equal treatment is, as already stated, particularly important) to potential purchasers, but also the necessity that those concerned with the privatisation should not be in a position of potential conflict between their private interests and their public duty. In particular, care should be taken to ensure that the persons who participate in the management of the enterprise to be privatised or who are in charge of organising the privatisation are not in a position to take illicit advantage of their situation.

In some member states the concerns to which this section is directed may be addressed by the ordinary private law governing contract and commercial transactions without its being necessary to institute specific procedures.

Recommendation No. R (94) 12
on independence, efficiency and role of judges

(Adopted by the Committee of Ministers on 13 October 1994 at the 516th meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of Article 15.*b* of the Statute of the Council of Europe,

Having regard to Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the Convention") which provides that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law" ;

Having regard to the United Nations Basic Principles on the Independence of the Judiciary, endorsed by the United Nations General Assembly in November 1985 ;

Noting the essential role of judges and other persons exercising judicial functions in ensuring the protection of human rights and fundamental freedoms ;

Desiring to promote the independence of judges in order to strengthen the rule of law in democratic states ;

Aware of the need to reinforce the position and powers of judges in order to achieve an efficient and fair legal system ;

Conscious of the desirability of ensuring the proper exercise of judicial responsibilities which are a collection of judicial duties and powers aimed at protecting the interests of all persons,

Recommends that governments of member states adopt or reinforce all measures necessary to promote the role of individual judges and the judiciary as a whole and strengthen their independence and efficiency, by implementing, in particular, the following principles.

Scope of the recommendation

1. This recommendation is applicable to all persons exercising judicial functions, including those dealing with constitutional, criminal, civil, commercial and administrative law matters.

2. With respect to lay judges and other persons exercising judicial functions, the principles laid down in this recommendation apply except where it is clear from the context that they only apply to professional judges, such as regarding the principles concerning the remuneration and career of judges.

Principle I – General principles on the independence of judges

1. All necessary measures should be taken to respect, protect and promote the independence of judges.

2. In particular, the following measures should be taken :

a. The independence of judges should be guaranteed pursuant to the provisions of the Convention and constitutional principles, for example, by inserting specific provisions in the constitutions or other legislation or incorporating the provisions of this recommendation in internal law. Subject to the legal traditions of each state, such rules may provide, for instance, the following :

i. decisions of judges should not be the subject of any revision outside any appeals procedures as provided for by law ;

ii. the terms of office of judges and their remuneration should be guaranteed by law ;

iii. no organ other than the courts themselves should decide on its own competence, as defined by law ;

iv. with the exception of decisions on amnesty, pardon or similar, the government or the administration should not be able to take any decision which invalidates judicial decisions retroactively.

b. The executive and legislative powers should ensure that judges are independent and that steps are not taken which could endanger the independence of judges.

c. All decisions concerning the professional career of judges should be based on objective criteria, and the selection and career of judges should be based on merit, having regard to qualifications, integrity, ability and efficiency. The authority taking the decision on the selection and career of judges should be independent of the government and the administration. In order to safeguard its independence, rules should ensure that, for instance, its members are selected by the judiciary and that the authority decides itself on its procedural rules.

However, where the constitutional or legal provisions and traditions allow judges to be appointed by the government, there should be guarantees to ensure that the procedures to appoint judges are transparent and independent in practice and that the decisions will not be influenced by any reasons other than those related to the objective criteria mentioned above. These guarantees could be, for example, one or more of the following :

i. a special independent and competent body to give the government advice which it follows in practice ; or

ii. the right for an individual to appeal against a decision to an independent authority ; or

iii. the authority which makes the decision safeguards against undue or improper influences.

d. In the decision-making process, judges should be independent and be able to act without any restriction, improper influence, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason. The law should provide for sanctions against persons seeking to influence judges in any such manner. Judges should have unfettered freedom to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in pursuance of the prevailing rules of the law. Judges should not be obliged to report on the merits of their cases to anyone outside the judiciary.

e. The distribution of cases should not be influenced by the wishes of any party to a case or any person concerned with the results of the case. Such distribution may, for instance, be made by drawing of lots or a system for automatic distribution according to alphabetic order or some similar system.

f. A case should not be withdrawn from a particular judge without valid reasons, such as cases of serious illness or conflict of interest. Any such reasons and the procedures for such withdrawal should be provided for by law and may not be influenced by any interest of the government or administration. A decision to withdraw a case from a judge should be taken by an authority which enjoys the same judicial independence as judges.

3. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.

Principle II – The authority of judges

1. All persons connected with a case, including state bodies or their representatives, should be subject to the authority of the judge.

2. Judges should have sufficient powers and be able to exercise them in order to carry out their duties and maintain their authority and the dignity of the court.

Principle III – Proper working conditions

1. Proper conditions should be provided to enable judges to work efficiently and, in particular, by :

a. recruiting a sufficient number of judges and providing for appropriate training such as practical training in the courts and, where possible, with other authorities and bodies, before appointment and during their career. Such training should be free of charge to the judge and should in particular concern recent legislation and case-law. Where appropriate, the training should include study visits to European and foreign authorities as well as courts ;

b. ensuring that the status and remuneration of judges is commensurate with the dignity of their profession and burden of responsibilities ;

c. providing a clear career structure in order to recruit and retain able judges ;

d. providing adequate support staff and equipment, in particular office automation and data processing facilities, to ensure that judges can act efficiently and without undue delay ;

e. taking appropriate measures to assign non-judicial tasks to other persons, in conformity with Recommendation No. R (86) 12 concerning measures to prevent and reduce the excessive workload in the courts.

2. All necessary measures should be taken to ensure the safety of judges, such as ensuring the presence of security guards on court premises or providing police protection for judges who may become or are victims of serious threats.

Principle IV – Associations

Judges should be free to form associations which, either alone or with another body, have the task of safeguarding their independence and protect their interests.

Principle V – Judicial responsibilities

1. In proceedings, judges have the duty to protect the rights and freedoms of all persons.

2. Judges have the duty and should be given the power to exercise their judicial responsibilities to ensure that the law is properly applied and cases are dealt with fairly, efficiently and speedily.

3. Judges should in particular have the following responsibilities:

a. to act independently in all cases and free from any outside influence;

b. to conduct cases in an impartial manner in accordance with their assessment of the facts and their understanding of the law, to ensure that a fair hearing is given to all parties and that the procedural rights of the parties are respected pursuant to the provisions of the Convention;

c. to withdraw from a case or decline to act where there are valid reasons, and not otherwise. Such reasons should be defined by law and may, for instance, relate to serious health problems, conflicts of interest or the interests of justice;

d. where necessary, to explain in an impartial manner procedural matters to parties;

e. where appropriate, to encourage the parties to reach a friendly settlement;

f. except where the law or established practice otherwise provides, to give clear and complete reasons for their judgments, using language which is readily understandable;

g. to undergo any necessary training in order to carry out their duties in an efficient and proper manner.

Principle VI – Failure to carry out responsibilities and disciplinary offences

1. Where judges fail to carry out their duties in an efficient and proper manner or in the event of disciplinary offences, all necessary measures which do not prejudice judicial independence should be taken. Depending on the constitutional principles and the legal provisions and traditions of each state, such measures may include, for instance:

a. withdrawal of cases from the judge;

b. moving the judge to other judicial tasks within the court;

c. economic sanctions such as a reduction in salary for a temporary period ;

d. suspension.

2. Appointed judges may not be permanently removed from office without valid reasons until mandatory retirement. Such reasons, which should be defined in precise terms by the law, could apply in countries where the judge is elected for a certain period, or may relate to incapacity to perform judicial functions, commission of criminal offences or serious infringements of disciplinary rules.

3. Where measures under paragraphs 1 and 2 of this article need to be taken, states should consider setting up, by law, a special competent body which has as its task to apply any disciplinary sanctions and measures, where they are not dealt with by a court, and whose decisions shall be controlled by a superior judicial organ, or which is a superior judicial organ itself. The law should provide for appropriate procedures to ensure that judges in question are given at least all the due process requirements of the Convention, for instance that the case should be heard within a reasonable time and that they should have a right to answer any charges.

Explanatory memorandum

Introduction

1. Within the framework of the activities undertaken to promote and guarantee the efficiency and fairness of civil and criminal justice, it was decided to prepare a recommendation on the independence, efficiency and role of judges.

2. Indeed, the Council of Europe includes among its aims the institution and protection of a democratic and political system characterised by the rule of law and the establishment of a constitutionally governed state, as well as the promotion and protection of human rights and fundamental freedoms.

3. The recommendation on the independence, efficiency and role of judges recognises and emphasises the pre-eminent and significant role played by judges in the implementation of these aims. The independence of judges is one of the central pillars of the rule of law. The need to promote the independence of judges is not confined to individual judges only but may have consequences for the judicial system as a whole. States should therefore bear in mind that, although a specific measure does not concern any individual judge directly, it might have consequences for the independence of judges.

4. The texts of the draft recommendation and its explanatory memorandum were prepared by the project group on Efficiency and Fairness of Civil Justice (CJ-JU). After examination by the European Committee on Legal Co-operation (CDCJ), the draft recommendation and its explanatory memorandum were submitted to the Committee of Ministers of the Council of Europe. The Committee of Ministers adopted the text of the draft recommendation and authorised the publication of the explanatory memorandum to the recommendation.

5. In addition to representatives of the member states of the Council of Europe and the Commission of the European Community, the following observers attended the meetings of the project group which prepared these texts: Albania, Holy See, Latvia, Russia, the European Association of Judges Sitting in Commercial Courts and the International Association of Judges.

6. In order to establish an efficient and fair legal system, it is necessary to strengthen the position and powers of judges and to ensure the proper exercise of judicial responsibilities. When preparing this recommendation, account was taken of the United Nations Basic Principles on the Independence of the Judiciary (1985) and the procedures for the effective implementation of these principles adopted in 1989. The Basic Principles of the United Nations are, in relation to the draft recommendation, to be seen as a basic text expressing minimum standards which are fully compatible with the recommendation. This implies, on the one hand, that it was not always considered necessary to deal with all subjects covered by the Basic Principles which would therefore apply. On the other hand, where further protection of the independence of judges within the framework of the like-minded member states of the Council of Europe was considered possible, this has been reflected in the recommendation. Because of its importance, the Committee felt however that it was appropriate to insert the text of Basic Principle No. 12 in the text of the recommendation, without making any amendments to it (see Principle I, paragraph 3).

7. The starting-point for the recommendation is the idea that the powers conferred on judges are counterbalanced by their duties. The recommendation fits into the framework of measures to be taken to make the judicial system fairer and more efficient. One of the cornerstones of a fair system of justice is the independence of judges. It is necessary to give judges appropriate powers guaranteeing their independence. However, such powers do not authorise them to act in an arbitrary manner. Judges are also subject to certain duties. Judicial responsibilities are accordingly determined by the relationship between the powers and the duties of judges.

8. Consequently, with the same aim of preserving the independence of judges, it is essential to make judges liable to a system of supervision which makes sure that their rights and duties are respected.

9. The recommendation calls upon the member states to adopt or reinforce, as the case may be, all measures necessary to promote the role of judges and strengthen their efficiency and independence.

10. It contains six principles which should be applied by the governments of member states. These principles relate to the independence of judges, the authority of judges, proper working conditions, the right to form associations, judicial responsibilities and the consequences of failure to carry out responsibilities and disciplinary offences. Although the recommendation enumerates principles, it was felt necessary to give details concerning these principles, so as to provide guidance to the states implementing the recommendation. In view of the different legal traditions of the member states relating to the protection of judges, the recommendation does not seek a complete harmonisation of the law on this matter but provides examples or general rules which show the direction in which steps need to be taken.

Scope of the recommendation

11. The scope of the recommendation is not confined to specific fields of law and also covers both professional judges and lay judges, except, in the case of lay judges, with regard to the question of remuneration and certain other matters such as the requirement to have proper legal training. It covers the resolution of civil and criminal cases but also administrative law and constitutional law. The recommendation, when defining the scope, refers to persons exercising judicial functions rather than to judges, as some persons exercising judicial functions in certain states do not have the title of judges although they enjoy the same independence as judges in the exercise of their functions. For instance, some countries have a system whereby specialists perform the function of judges in cases which need highly specialised knowledge, such as auditors or experts in land surveying. Such experts exercising judicial functions cannot be compared with "lay judges" since they are often appointed because of their specialist knowledge. A number of these recommendations would also be appropriate for such persons. For reasons of convenience, it was however felt appropriate to use the term "judge" for any person exercising judicial functions. In any case, it is a matter for the internal law, and in particular the constitutions, to decide who are considered judges for the purposes of this recommendation.

The recommendation does not interfere with systems designated to discharge the courts of minor cases in, for instance, criminal or administrative matters (for example, the so-called "*ordonnance pénale*" in France or the "*Ordnungswidrigkeiten*" in Germany). On the contrary, the Council of Europe has previously encouraged the adoption of such measures.[1]

Commentary on the principles

Principle I – General principles on the independence of judges

12. Support for the independence of the judges is expressed in the first principle which calls for all necessary measures to be taken to respect, protect and promote the independence of judges. The scope of the concept of "independence of judges" is not confined to judges themselves but covers the judicial system as a whole.

13. The independence of judges should be guaranteed pursuant to the provisions of the Convention and constitutional principles (cf. paragraph 2.*a* of this principle). This requirement implies that the independence of judges must be guaranteed in one way or another under domestic law. Depending on the legal system of each country, this guarantee may take the form of a written or unwritten constitution, a treaty or convention incorporated in the national legal system, or even written or unwritten principles of superior status, such as general legal principles.

14. With regard to the measures for implementing this principle, several aspects should be considered, taking into account the legal traditions of each state. The law should lay down rules on how and when appeals may be made against judges' decisions to courts enjoying judicial independence. A revision of decisions outside that legal framework, by the government or the administration would clearly not be admissible. Similarly, the term of office of judges and their remuneration should be guaranteed by law. As to the term of office, the recommendation provides specific rules on when it would be admissible to suspend judges or permanently remove them (cf. Principle VI). Moreover, a specific recommendation (cf. Principle III.1.*c*) is made in respect of the remuneration of judges. Courts should also be able to decide on their own competence, as defined by the law, and the administration or government should not be able to take decisions which render the judges' decisions obsolete, with the exception of very special cases of amnesty, pardon, clemency or similar situations. Such exceptions are known in every democracy and find their justification in humanitarian principles of superior value.

1. See Recommendation No. R (87) 18 on the simplification of criminal justice.

15. The independence of judges is first and foremost linked to the maintenance of the separation of powers (cf. paragraph 2.*b* of this principle). The organs of the executive and the legislature have a duty to ensure that judges are independent. Some of the measures taken by these organs may directly or indirectly interfere with or modify the exercise of judicial power. Consequently, the organs of the executive and legislative branches must refrain from adopting any measure which could undermine the independence of judges. In addition pressure groups and other interest groups should not be allowed to undermine this independence.

16. It is essential that the independence of judges should be guaranteed when they are selected and throughout their professional career (cf. paragraph 2.*c* of this principle) and that there should be no discrimination.[1] All decisions concerning the professional life of judges should be based on objective criteria and even though each member state has its own method of recruitment, election or appointment, the selection of candidates for the judiciary and the career of judges must be based on merit. In particular where the decision to appoint judges is taken by organs which are not independent of the government or the administration or, for instance, by the parliament or the president of the state, it is important that such decisions are taken only on the basis of objective criteria.

All decisions affecting the professional career of judges should be based on objective criteria. It is not only at the time of appointment as judge that judicial independence needs to be preserved but throughout the entire professional career as judge. For instance, a decision to promote a judge to another position could in practice be a disguised sanction for an "inconvenient judge". Such a decision would of course not be compatible with the terms of the recommendation. In order to deal with such situations, some states, such as Italy, have adopted a system of separation of judicial careers and judicial functions.

The recommendation seeks (paragraph 2.*c*, sub-paragraph 1) to propose standards which should be upheld in all member states, ensuring that decisions are taken without any undue influence from the executive branch or the administration.

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1. The United Nations Basic Principles on the judiciary provides in paragraph 10: "Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement that a candidate for judicial office must be a national of the country concerned shall not be considered discriminatory."

Although the recommendation proposes an ideal system for judicial appointments, it was recognised (cf. sub-paragraph 2) that a number of the member states of the Council of Europe have adopted other systems, often involving the government, parliament or the head of state. The recommendation does not propose to change these systems which have been in operation for decades or centuries and which in practice work well. But also in states where the judges are formally appointed by the government, there should be some kind of system whereby the appointment procedures of judges are transparent and independent in practice. In some states, this is ensured by special independent and competent bodies which give advice to the government, the parliament or the head of state which in practice is followed or by providing a possibility of appeal by the person concerned. Other states have opted for systems involving wide consultations with the judiciary, although the formal decision is taken by a member of government.

It was not felt appropriate to deal explicitly in the text of the recommendation with systems where appointments are made by the president or the parliament, although the Committee was of the opinion that the general principles on appointments would apply also for such systems.

An important aspect of ensuring that the most suitable persons are appointed as judges is the training of lawyers. Professional judges must have proper legal training. In addition, training contributes to judicial independence. If judges have adequate theoretical and practical knowledge as well as skills, it would mean that they could act more independently against the administration and, if they so wish, could change legal profession without necessarily having to continue to be judges.

17. In the decision-making process, judges should be able to act independently (cf. paragraph 2.*d* of this principle). The judge should have unfettered freedom to decide a case impartially, in accordance with his conscience and his interpretation of the facts, and in pursuance of the prevailing rules of law. The purpose of this provision is to ensure that no pressure of any kind and from any quarter obliges the judge to deliver judgment along the lines desired by a party, the administration, the government or any other person. Attempts to corrupt judges should be punished under criminal law. In some states, judges are obliged to report, for instance, on backlog of cases to the president of the court or to official authorities. Such reporting obligations, which are necessary for an efficient management of scarce resources in courts and for planning purposes are of course compatible with the concept of judicial independence. However, as it could be used as a means of exerting influence on judges, they should not be obliged to report on the merits of the cases with a view to justifying their decisions.

18. There are various possible systems for the distribution of cases, such as the drawing of lots, distribution in accordance with the alphabetical order of the names of the judges, or by giving cases to the divisions of the court in an order specified beforehand (so-called "automatic distribution"), or the sharing out of cases among judges by decision of the president of the court (cf. paragraph 2.*e* of this principle). What matters is not so much the system of distribution, but the fact that the actual distribution should not be tainted by outside influence and should not benefit one of the parties. In some states, a decision by the president of the court is considered acceptable. Appropriate rules for substituting judges could be provided for within the framework of the rules governing the distribution of cases. This would ensure that where, as may occur relatively frequently (e.g., illness, vacation), a judge is unable to hear a case, it is dealt with properly. In that way extraordinary decisions (cf. paragraph 2.*f* of this principle) would be necessary only in a limited number of cases. Rules for the substitution of judges should take account of the period of absence of the judge.

19. Nevertheless, it might on some occasions be necessary to withdraw a particular case from a judge. Therefore, and out of the same concern to preserve the independence of the judicial system, the law should provide that a case should not be withdrawn from a judge by the appropriate body without valid reasons (cf. paragraph 2.*f* of this principle). The aim is to prevent a case from being withdrawn from a judge by the executive because the likely decision would not correspond to the expectations of, say, the government or the administration.

20. A case may not be withdrawn from a judge unless there are valid reasons and the decision is taken by the competent body. The concept of "valid reasons" covers all grounds of withdrawal which do not affect the independence of judges. Reasons of efficiency may also constitute valid grounds. For example, when a judge faces a backlog in his caseload due to illness, it is possible for cases to be withdrawn from him and assigned to other judges. Similarly, it may prove necessary to withdraw cases from judges who have been assigned a time-consuming case which may prevent them from dealing with other cases already assigned to them. It may prove necessary for the list of valid reasons to be determined by statute. In no event does this provision affect the right of parties to withdraw a case.

21. With regard to the question of the possibility for a judge to withdraw from a case, see Principle V (paragraph 3.*c*).

Principle II – The authority of the judges

22. In order to ensure that the judge enjoys the respect due to him as a judge and that the proceedings are conducted efficiently and smoothly, all persons connected with a case (e.g., parties, witnesses, experts) must be subject to the authority of the judge in accordance with domestic law. State bodies or their representatives must also submit to the authority of the judge.

23. Judges should have available to them the necessary practical measures and appropriate powers to maintain order in their courts. Once such powers are allocated to judges, they have a responsibility to prevent the occurrence of situations which call in question their independence.

24. By way of example, reference may be made to the contempt of court procedures which exist in certain member states. In addition, the presence of security guards at hearings could be useful for the purpose of ejecting persons who disturb public order.

Principle III – Proper working conditions

25. Proper working conditions for judges are a particularly noteworthy aspect of the arrangements for improving the efficiency and fairness of justice. Such working conditions, to which judges are entitled, derive in fact from the powers bestowed on them and the independence they are required to exercise.

26. The following measures will contribute to the provision of proper conditions enabling judges to work efficiently.

27. It is necessary to recruit judges in sufficient numbers to avert an excessive workload and enable the proceedings already started, regardless of their volume, to be finalised within a reasonable time (cf. paragraph 1.*a*). States may wish to give consideration to the possibility of allowing single judges to deal with cases of first instance.[1]

28. With a view to ensuring that the law is properly applied, it is not enough merely to require, at the selection stage, that judges possess suitable qualifications ; they must also be given appropriate training before their appointment and during their career. It lies with member states to determine the content of such training although the recommendation proposes some fields where training is of importance. In some cases, training prior to appointment may be very limited, for example when the

1. Paragraph V of Recommendation No. R (86) 12 concerning measures to prevent and reduce the excessive workload in the courts provides "Generalising, if not yet so, trial by a single judge at first instance in all appropriate matters."

national system provides for the appointment of former practising lawyers as judges. In the course of their career, judges must receive training which keeps them abreast of important new developments, such as recent trends in legislation and case law, social trends and relevant studies on topical issues or problems.

29. Status and remuneration are important factors determining appropriate working conditions (cf. paragraph 1.*b*). The status accorded to judges should be commensurate with the dignity of their profession and their remuneration should represent sufficient compensation for their burden of responsibilities. These factors are essential to the independence of judges, especially the recognition of the importance of their role as judges, expressed in terms of due respect and adequate financial remuneration.

30. Paragraph 1.*b* is closely bound up with the reference in Principle I to all decisions concerning the professional life of judges, which obviously includes their status and their remuneration.

31. The quality of judicial decisions depends primarily on the quality and competence of judges. Some member states have great difficulty in attracting the best lawyers to the judge's profession and retaining their services. There is intense competition with the private sector because the latter offers more attractive career prospects. Paragraph 1.*c* is therefore aimed at encouraging member states to make efforts to ensure that such lawyers can expect a successful career as judges. To this end, they must improve career structures, provide for genuine opportunities for promotion and increase remuneration.

32. Judges will also be able to work more efficiently and deliver their judgments promptly if they are assisted by adequate back-up staff and equipment (cf. paragraph 1.*d*). In order to ensure improved management of courts and of case files, it is necessary to make all office automation and data processing facilities available to judges.

33. Finally, in order to ease the burden on judges and enable them to concentrate on their work of hearing and determining cases, it is important to relieve them of all non-judicial tasks which can be assigned to other persons (cf. paragraph 1.*f*). Judges are not normally themselves empowered to delegate certain tasks to other persons, but it is the law in the broad sense of the term which would authorise the transfer of such non-judicial tasks.[1]

1. See also Recommendation No. R (86) 12 concerning measures to prevent and reduce the excessive workload in the courts, and in particular the appendix thereto (examples of non-judicial tasks of which judges in some states could be relieved, according to the particular circumstances of each country).

34. However, delegation cannot be done in such a manner that it will endanger the judicial independence of judges. Judicial tasks should, of course, remain within the exclusive purview of the judge.

35. A final aspect in relation to working conditions concerns the safety and physical protection of judges (cf. paragraph 2). Member states should provide adequate facilities to ensure the protection of judges when this is necessary. While protection is needed more especially for judges dealing with criminal cases, it may also be needed for judges handling civil or commercial cases. The presence of security guards on court premises and police protection for judges who are the victims of serious threats are measures which could be envisaged.

Principle IV – Associations

36. Under this principle, judges are given the right to take collective action to safeguard their professional independence and protect their interests. To this end, judges are free to form associations whose activities are confined to defending the independence and the interests of the profession. Such associations may, for example, take part in salary negotiations with the Ministry of Justice or contribute to the training of judges. The associations act either alone or with another body.

37. In some member states, judicial bodies or the Ministry of Justice have a hand in the administration of the courts and tribunals. Once again, such intervention must always be based on respect for the independence of judges.

Principle V – Judicial responsibilities

38. The independent allotted task of judges is that of safeguarding the rights and freedoms of all persons within the scope of their duty to administer justice (cf. paragraph 1). The judge is responsible for protecting the rights and freedoms granted to individuals. This obligation should not only be seen as a duty to protect the minimum rights as expressed in the European Convention of Human Rights. The obligation goes further but it is difficult to define in precise terms its scope. Ultimately, the obligation has to do with the defence of democracy and the rule of law, safeguarding against oppression and the totalitarian state as expressed in the Statute of the Council of Europe.

39. This principle, which deals with the responsibilities of the judge, covers the relationship between the judge's duties and powers. Judges should be given appropriate powers to assure them of total independence in the fulfilment of their tasks. Judges have a duty to exercise the powers bestowed on them (cf. paragraph 2).

40. Judges should be given proper working conditions to ensure that they are able to carry out their responsibilities (cf. Principle III). A balance is struck between the right of judges to adequate working conditions and their responsibility for the use of the resources placed at their disposal, but a lack of adequate working conditions is no excuse for failing to carry out the judicial responsibilities referred to in paragraph 3.

41. Paragraph 3 specifies several responsibilities entrusted to judges.

a. First of all, it is incumbent on judges to act independently in all cases, unaffected by any outside influence. This does not apply to cases where a lower court is bound by a higher court in respect of points of law.

b. Independent judges should give impartial decisions based solely on an assessment of the facts and their understanding of the law. Sub-paragraph 3.*b* refers expressly to the principle of fairness and the rights of the parties as enshrined in the Convention, more particularly in Article 6.1 of that Convention, which stipulates that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

c. Judges have an obligation to give judgment in the cases assigned to them. This responsibility counterbalances Principle I, paragraph 2.*f*. If a case cannot be withdrawn from a judge by the appropriate body without valid reasons, judges are also not entitled themselves to withdraw from a case without valid reasons. On the other hand, where such reasons exist, judges should have an obligation to withdraw from the case. This twofold requirement contributes to guaranteeing the independence of judges. This responsibility is more particularly applicable to situations where judges withdraw from cases solely because the judgments to be delivered would be unpopular though justified. However, judges can disqualify themselves if there is a conflict of interest or any other valid reason. A "valid reason" can be defined by legislation or case law. Other examples of valid reasons are serious health problems or the interests of justice. This latter concept is difficult to define but relates to some extent to the principle that "justice must not only be done, but must also be seen to be done". For instance, if a case concerns a neighbour of a judge and the judge does not know this neighbour, there is no conflict of interest. However, the judge

may consider it necessary to withdraw from the case in the interests of justice so as not to cast any shadow of a doubt over the impartiality of the court.

d. It is also the duty of the judge in the interests of justice, to give an impartial explanation of certain procedural matters in appropriate cases to the parties. In particular, parties who are not represented by lawyers often need explanations concerning the procedure, and judges must ensure that such parties are sufficiently informed to enable them to understand the proceedings.

e. The responsibility of encouraging the parties, where appropriate, to reach a friendly settlement underscores the importance of the conciliatory role played by the judge for the sake of efficiency of justice. In addition, it is the natural function of the judge to secure the reconciliation of the parties : discussion is better than litigation. Judges must however carry out this task with tact and sense and in such a manner that their impartiality cannot be questioned.

f. Again in the interests of guaranteeing the efficiency and fairness of justice, judges must give clear and complete reasons for their judgments, which as far as possible should be comprehensible to the parties. They should try to avoid using complex words when there are more common synonyms, or quotations in a foreign language when an equivalent exists in the language of the country. The obligation to give reasons is, however, not absolute. In some states, it is not necessary to give reasons in specific types of cases, for instance judgments by default or which are based on the defendants approval (Germany), where a jury has tried the case or in matters concerning provisional measures (Malta) or where a Court of Appeal does not change the decision of the District Court (Sweden). Usually, such situations dispensing from the main principle are defined by law or, at least, established in long standing practice of the courts.

g. In order to counterbalance the obligation placed on states to provide for appropriate training for judges before their appointment and during their career (Principle III.1.*a*), judges should participate in any training needed for the efficient and proper performance of their duties. Indeed, if member states make training facilities available, judges should use them. This responsibility is more particularly concerned with the obligation to keep abreast of recent changes in legislation or case law.

Principle VI – Failure to carry out responsibilities and disciplinary offences

42. This final principle places an obligation on judges to exercise their powers and assume their responsibilities. Like any other representative of one of the branches of state authority, judges are subject to monitoring of their compliance with this obligation.

43. When judges fail to carry out their duties in an efficient and proper manner, appropriate measures must be taken. Such measures may, for instance, include, depending on the legal traditions of the state, withdrawal of cases from the judge, moving the judge to other judicial tasks within the court, economic sanctions such as a reduction of salary for a temporary period or suspension (cf. paragraph 1 of this principle). It goes without saying that taking such measures must remain exceptional in order to preserve judicial independence. It lies with the member states to decide which is the appropriate body for monitoring judges' activities, which is why the recommendation in paragraph 3 only requests the member states to "consider" setting up a special competent body. It should be possible to appeal against decisions of this body to a court. It could be a judicial body, but other bodies, such as the Ministry of Justice, fulfil this task in some member states. Any measure taken by the supervisory body must be based on respect for the independence of judges. For example a ministry should not, under the pretext of exercising its supervisory authority, be allowed to withdraw a case from a judge whose decision does not appear likely to be consistent with the wishes of the administration. However, if a judge faces a substantial backlog in his case-load, the president of the court, a higher judicial authority or the Ministry of Justice may decide to undertake an investigation into the reasons for this state of affairs. In such cases, the requirement of efficiency of justice does not impair the independence of the judge.

44. Where, according to domestic law, judges are alleged to have committed disciplinary offences, it is essential that any proceedings brought against them should safeguard their independence and that any competent tribunal or body should be independent and impartial. In some member states, a judge suspected of having committed a disciplinary offence is brought before a tribunal composed of judges or composed of judges and other persons not belonging to the judiciary. Other member states have no real disciplinary courts or tribunals. The only disciplinary sanction in such countries is dismissal. In certain countries only the national parliament is entitled to dismiss judges of higher courts from their posts. In conclusion : the fact that the tribunal conducting the disciplinary proceedings does not fall under the jurisdiction of judges or is not

subject to a degree of influence by judges, is not a source of difficulty, provided that the independence of the tribunal or body and the impartiality of the proceedings are respected.

45. Paragraph 2 takes account of the different circumstances in which judges may be removed from office before the age of retirement.

46. The principle of absolute security of tenure for judges given permanent appointments is aimed at guaranteeing their independence and ensures that a permanently appointed judge cannot be removed from office without valid reasons before he reaches the mandatory retirement age. However, some member states do not guarantee security of tenure for judges up to the age for retirement. This applies to cases where either judges have to be re-elected after a certain period or some judges undergo a period of "probation" when they first take up their duties, during which they can be dismissed.

47. The concept of "valid reasons" covers cases involving disciplinary offences or incapacity. It goes without saying that, in dismissal proceedings, judges enjoy the same rights and procedural guarantees as any other party to litigation. Reference should also be made to the United Nations Basic Principles on the judiciary.[1]

Parting from the principle that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, in accordance with the European Convention on Human Rights, this recommendation deals with some basic principles to safeguard judicial independence. For instance, decisions of judges should not be the subject of any revision outside any appeals procedures as provided for by law; the terms of office of judges and their remuneration should be guaranteed by law; all decisions concerning the professional career of judges should be based on objective criteria, and the selection and career of judges should be based on merit, having regard to qualifications, integrity, ability and efficiency. In the decision-making process, judges should be independent and be able to act without any restriction, improper influence, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason. The recommendation also deals with judges' working conditions and with judicial responsibilities.

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1. Paragraph 19 of the United Nations Basic Principles on the judiciary provides: "All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct."

Appendix 4: Information on the genesis of the handbook

The genesis of the handbook

The mandate to draft this handbook came from the European Committee on Legal Co-operation of the Council of Europe (CDCJ) which envisaged the preparation of:

> "appropriate instruments [on] some basic administrative and procedural rules reflecting a common European standard aimed at creating a pattern for an administrative and court system which guarantees legal security for citizens"

and this

> "for the purpose of intensifying co-operation and information exchange between all the states of Europe, and particularly the states of central and eastern Europe".

Furthermore, at the 4th Round Table with European ombudsmen, which was held under the aegis of the Council of Europe in June 1994 in Lisbon, the ombudsmen requested the Council of Europe Secretariat to "draw up a collection of texts on European administrative law including the case-law of the bodies of the European Convention on Human Rights as well as the recommendations of the Committee of Ministers regarding the protection of the individual with respect to the acts of the administration".

Consequently, an expert committee working under the authority of the CDCJ, the Project Group on Administrative Law (CJ-DA), was entrusted with the task of actually formulating the basic administrative and procedural rules contemplated in the mandate and to propose the form which the instrument under preparation should take. The government appointed experts from the member states of the Council of Europe, assisted by experts from observer states, met seven times between 1993 and 1995 (five plenary meetings, plus two meetings of a seven-member drafting group), until the handbook was finalised in May 1996. The European Committee on Legal Co-operation, to whom the Project Group on Administrative Law had referred its text, authorised its publication on 31 May 1996.

Consolidated list of participants

in the meetings of the Project Group on Administrative Law (CJ-DA) and its drafting group in which this handbook was prepared

List of meetings

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2.	20-22 September 1993	Chairman: Vice-Chairperson:	Mr Plunkett Ms Oros	project group
3.	8-10 June 1994	Chairman: 1st Vice-Chairman: 2nd Vice-Chairman:	Mr Irresberger Mr Ragonesi Mr Hodgson	project group
4.	17-20 October 1994	Chairman: 1st Vice-Chairman: 2nd Vice-Chairman:	Mr Irresberger Mr Ragonesi Mr Hodgson	project group
5.	23-25 November 1994	Chairman:	Mr Hodgson	drafting group
6.	27-29 June 1995	Chairman:	Mr Van der Flier	drafting group
7.	5-8 December 1995	Chairman: Vice-Chairman:	Mr Irresberger Mr Ragonesi	project group

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