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EUROPEAN COMMITTEE ON LEGAL CO-OPERATION (CDCJ)

Protection of the individual in relation to
the acts of administrative authorities

Final activity report
submitted to the Committee of Ministers

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I. Terms of reference

- a. To finalise the text of the draft Resolution on the protection of the individual in relation to the acts of administrative authorities taking into account observations made by governments of member States;
- b. to examine in greater detail the possibility of carrying out work with a view to preparing adequate solutions within the Council of Europe concerning the two following questions in the field of administrative law:
 - i. the exercise of discretionary powers,
 - ii. the liability of administrative authorities.

Work Programme 1977 no. 2124/17.

II. List of items submitted to the Committee of Ministers for decision

The Committee of Ministers is invited:

- a. to adopt the draft Resolution on the protection of the individual in relation to the acts of administrative authorities, reproduced in Appendix B to this report;
- b. to authorise publication of the explanatory memorandum, reproduced in Appendix C to this report.

III. Report

Background

1. At its 26th meeting (6-10 December 1976) the European Committee on Legal Co-operation (CCJ) considered the final activity report submitted by the Sub-Committee for the study of the protection of the individual in relation to the acts of administrative authorities /CCJ (76) 527. This report contained:
 - i. a draft Resolution on the protection of the individual in relation to the acts of administrative authorities, together with the explanatory report thereto;
 - ii. proposals for the study of questions relating to administrative law on which action is likely to be taken at a European level.
2. Having taken note of this report, the CCJ decided:
 - a. to postpone until its 27th meeting (27 June - 1 July 1977) the examination of the draft Resolution and to invite governments of member States to submit their written observations if any to the Secretariat before 15 March 1977;

- b. to create, subject to the approval of the Committee of Ministers, a Committee of Experts with the task of:
 - i. finalising the text of the draft Resolution on the protection of the individual in relation to the acts of administrative authorities taking into account the observations made by governments of member States;
 - ii. studying in greater detail the possibility of carrying out work with a view to preparing adequate solutions within the Council of Europe concerning the two following questions relating to administrative law:
 - the exercise of discretionary powers; and
 - the liability of administrative authorities;
 - iii. submitting a report on the results of this work to the 27th meeting of the CCJ.
3. At its 265th meeting at Deputy level (14-25 February 1977) the Committee of Ministers approved the decision taken by the CCJ and authorised the convocation of the new committee of experts on administrative law to hold a four day meeting in 1977 /CM/Del.Concl. (77) 265, point XIII (vi)7.
- A. Re-examination of the draft Resolution
4. The Committee of experts first proceeded to the finalisation of the text of the draft Resolution on the protection of the individual in relation to the acts of administrative authorities and the draft explanatory report thereto.
5. No written observations having been made by governments of member States on this matter the Committee took into account the sole oral observation made by the expert from France and consequently decided to insert the words "keeping of public order" into paragraph 12 in fine of the explanatory report.
6. Furthermore the Committee decided to add to the operative provisions of the draft Resolution, in fine the following new paragraph:

"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.",

such in view of the fact that observers from these States had participated in the work in this field.
7. The Committee was also informed of an observation made in writing to the Director of Legal Affairs by the Secretary General of the Hague Conference on International Private Law concerning the notion of "interest" referred to in the Resolution; and took note of the answer given to it by the Director of Legal Affairs.

8. The texts submitted for adoption are contained in Appendices B and C to this report.

B. Examination of new subjects to be studied

9. The Committee of Experts then examined in detail, on the basis of a memorandum prepared by the Directorate of Legal Affairs /Doc. EXP/Adm. (77) 17, the two subjects of administrative law - the exercise of discretionary powers and the liability of administrative authorities - referred to it by the competent bodies of the Council of Europe for a further study on the possibility of carrying out work with a view to preparing adequate solutions.

10. After a full exchange of views the Committee agreed on a text for the attention of the CCJ setting out the views expressed by the Committee in this respect and submitting some proposals for the study of the two subjects.

The Committee was of the opinion that both subjects were important and justified an activity of the Council of Europe.

11. The study of the two subjects mentioned above could be entrusted with profit to the present committee of experts which has already conducted a preliminary examination and seems well suited to carry on this activity.

12. The Committee is of the opinion that the two subjects should be studied one after another, not simultaneously. Since the question of the exercise of discretionary powers lends itself now to a study by the Committee of experts, it was recommended that this project should be given priority. For the sake of efficiency, the Secretariat could in the meantime be given the additional task of carrying out preparatory work on the second subject, ie the liability of administrative authorities, which requires a preliminary survey of legal systems existing in Europe in this field.

13. a. Study of the question of the exercise of discretionary powers

The Committee intends to set up a working group composed of the experts from Belgium, the Federal Republic of Germany, Portugal, Sweden and the United Kingdom. This working group would have the task to prepare and submit to the Plenary a working document setting out the various aspects to be dealt with as well as the methodology to be followed.

The working group could meet for a three-day meeting towards the end of 1977.

b. Preparatory work on the question of liability of administrative matters

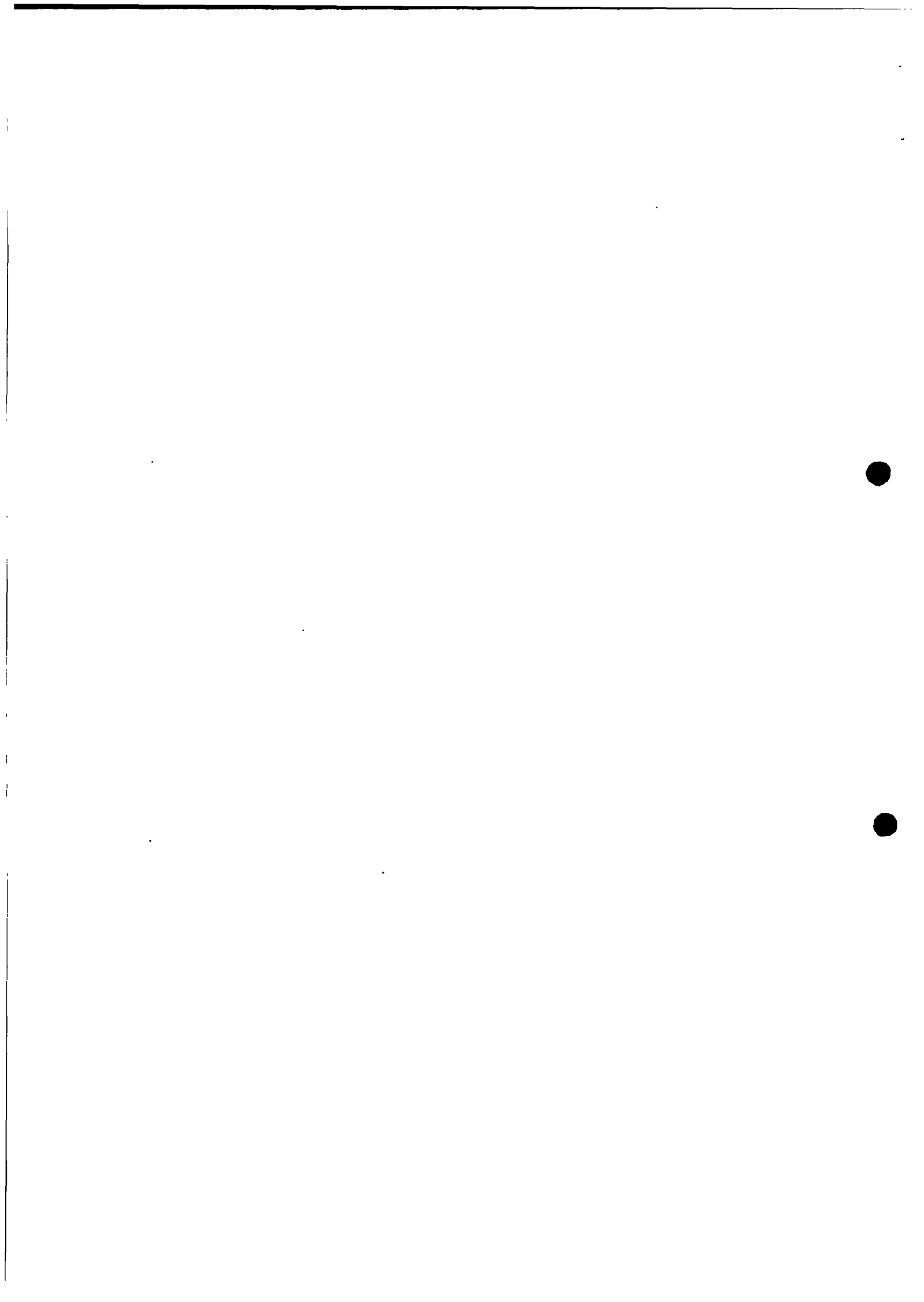
This work could be entrusted mainly to the Secretariat which would undertake to gather documentation on the relevant legislation, legal theory and case law of different member

States and to prepare on the basis of these data an analytical survey. This work might, if necessary, be done in the form of "case studies" rather than an exhaustive inventory of all relevant national law systems.

When the Secretariat paper is in hand the Committee would approach the CCJ with a proposal for further action.

Examination of the report by the European Committee on Legal Co-operation

14. At its 27th meeting /1st meeting as a Steering Committee (27 June - 1 July 1977) the European Committee on Legal Co-operation (CDCJ) examined the report and the relevant texts submitted by the Committee of experts on administrative law and decided:
- A. with regard to the draft Resolution on the protection of the individual in relation to the acts of administrative authorities to approve this draft and recommend the Committee of Ministers:
 - a. to adopt the draft Resolution;
 - b. to authorise the publication of the explanatory memorandum;
 - B. with regard to the new activities, to give the Committee of experts on administrative law, subject to the approval of the Committee of Ministers, the following task:
 - a. to classify approaches and aims in respect of the study on the exercise of discretionary powers and to indicate the possibilities for practical action in this field at European level;
 - b. to begin the study of the question of the liability of administrative authorities;
 - c. to submit an interim report on the results of this work at the 28th meeting of the CDCJ (28 November - 2 December 1977).



A N N E X E A

A P P E N D I X A

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LIST OF PARTICIPANTS

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Addendum II
au CDCJ (77) 1
Annexe A/Appendix A

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A P P E N D I X B

Draft Resolution
on the protection of the individual in relation
to the acts of administrative authorities

PREAMBLE

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.

A N N E X

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.

IV

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.

A P P E N D I X C

Draft 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-a-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 Co-operation (CCJ) 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 CCJ 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 CCJ 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. The Sub-Committee held four more meetings from 1975 to 1976 during which it drafted a "Resolution on the Protection of the Individual in relation to the Acts of Administrative Authorities". This draft was examined and revised by the CCJ at its 27th meeting, and the text as submitted to it by the CCJ was then adopted by the Committee of Ministers on at theth meeting of the Ministers' Deputies.

GENERAL CONSIDERATIONS

7. In conformity with its terms of reference (cf. Para. 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, legislative procedures (ie 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 Sub-Committee'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 (eg confidentiality of information in the possession of the administrative authority), or major public interests (eg 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 (eg 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 of non-application of certain principles in particular cases or in specific areas of public administration (eg 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 was 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.

COMMENTARIES

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. Para. 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, ie 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, eg 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, eg 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 (eg 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. Para. 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, ie qualifications or conditions of the assistant or the legal representative.

27. Nor does it deal with free legal aid, ie 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. Para. 5 above), the Sub-Committee decided not to deal with it in this Resolution because another committee working under the authority of the CCJ (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. Para. 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 (eg 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.

