COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 10 January 2008 DA/ba/Conf (2007) 4 *e*

IN PURSUIT OF GOOD ADMINISTRATION

European Conference

organised by the Council of Europe
in co-operation with the Faculty of Law and Administration
University of Warsaw

Warsaw, 29-30 November 2007

Recommendation CM/Rec(2007)7 on good administration

General presentation

REPORT PRESENTED BY

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I. Introduction

Recommendation CM/Rec(2007)7 on good administration has three themes: the Model Code of Good Administration, the right to good administration and the principles of good governance. I will present the reasons behind the choices made on these three points, mainly stressing the Model Code of Good Administration.

II. The origin of the Model Code of Good Administration

The Council of Europe's inspiration for the idea of drafting a Model Code of Good Administration is, it must openly be admitted, the European Code of Good Administrative Behaviour. This code of good behaviour was to a great extent devised by the European Ombudsman of the time, Mr. Jacob Södermann, and was adopted by the European Parliament on 6 October 2001. It lays down the general principles of good administrative behaviour that apply to all the relations that the community institutions and their administrative services have with the public.

In 2003, the Parliamentary Assembly of the Council of Europe looked at the role of the ombudsman in Europe. In this context it compared the European Code of Good Administrative Behaviour with earlier Council of Europe recommendations. It considered that the content of the European code was only to a very limited extent reflected in Recommendation No. R (2000) 10 of the Committee of Ministers on codes of conduct for public officials, the primary purpose of which had been to combat corruption. Other principles certainly appeared in previous recommendations, but the Parliamentary Assembly felt that it would be useful to bring those instruments together in a single document that would provide advice, instructions and information to both public servants and the public in the context of their relations with each other. For this reason it recommended to the Council of Ministers that a single, complete and comprehensive Model Code of Good Administration should be drafted, based, in particular, on Recommendation No. R (80) 2 and Resolution (77) 31 of the Committee of Ministers and the European Code of Good Administrative Behaviour (Recommendation 1615 (2003) of the Parliamentary Assembly of the Council of Europe).

In December 2003, the Council of Europe held the first European Conference on the Right to Good Administration in Warsaw. This Conference concluded that progress had to be made by adopting a legal instrument with general scope strengthening the requirements of the good administration to which everyone has a right in a democratic society.

The Committee of Ministers of the Council of Europe then gave the Project Group on Administrative Law, the CJ-DA, the task of examining the feasibility of a recommendation and/or a model code of good administration. The CJ-DA considered that a document on good administration would, from a political point of view, fall within the scope of the mission of the Council of Europe to promote human rights and freedoms. It considered that good administration was necessary to the functioning of a democratic society within the meaning of the European Convention on Human Rights (ECHR). The CJ-DA was also of the opinion that it was appropriate from a legal point of view to draft a document on good administration. Although various standards on good administration were already contained in several Council of Europe documents, they were scattered and in some cases mentioned those standards only in a limited context.

The European Committee on Legal Co-operation and the Committee of Ministers shared the opinion of the CJ-DA and, in 2005, tasked the latter with preparing a draft recommendation with a model code of good administration appended to it. The decision to draw up this model code as a separate appended document had twofold significance. First, it implied a separation between the content of the recommendation and the model code. Second, the use of the concept of model code for the appendix gave the potential content of the appendix a specific complexion: the reference to codification meant that the purpose of the model code was to contain provisions of a standard-setting nature and not declaratory formulations.

The CJ-DA drew up the model code from 2005 to 2006, with the extremely valuable assistance of Professor Delvolvé, who assisted the Project Group in its work.

After a few changes had been made the model code was approved by the European Committee on Legal Co-operation and then by the Committee of Ministers of the Council of Europe on 20 June 2007.

III. Functions of the Model Code of Good Administration

The recommendation invites the member states of the Council of Europe to promote the right to good administration "by adopting, as appropriate, the standards set out in the model code appended to this recommendation, assuring their effective implementation by the officials of member states and doing whatever may be permissible within the constitutional and legal structure of the state to ensure that regional and local governments adopt the same standards".

The recommendation does not require the adoption in domestic law of a model code similar to the one appended to it. The Council of Europe is aware of the fact that in many states the standards contained in the code are, in whole or in part, contained in legislation on administrative procedure. In such cases it would not be appropriate to have, alongside national legislation on administrative procedure, a national code of good administration which would be redundant. It is up to member states to assess how to include the standards contained in the model code in their domestic law, whether by adapting their legislation or practices, or indeed by enacting a text similar to the Model Code.

The recommendation invites states to guarantee that the standards contained in the Code are applied by their public servants. If these standards are incorporated into domestic law, this guarantee will take the usual forms of supervision of the application of the law, whether review by a court on appeal or supervision by a higher administrative authority.

The Model Code is not aimed only at central government, but to government as a whole. States are therefore invited to see that standards similar to those contained in the Code also apply at the level of local and regional authorities.

IV. The broad lines of the Model Code on Good Administration

It is not my intention to present the substance of the Model Code in detail because it is wide-ranging and involves most aspects of general administrative law. Furthermore, such a code is the outcome of a comparative approach: many formulations are the result of taking into account often divergent national practices and terminologies. The difficulty of the task of adequately commenting on the provisions of the Code, taking into account a plurality of legal systems, is the main reason for the CJ-DA's decision not to draft an explanatory report to attach to the recommendation. Without claiming to make up for this lack, I will present a few broad lines of the Model Code of Good Administration.

The style of wording chosen is clearly of a standard-setting nature. The principles and rules are formulated as recommendations that can be directly applied. The recommendation is addressed to states, but the Model Code lays down standards that could in general be carried over into national legislation as they stand. The degree of abstraction chosen is high and is often similar to that of fundamental rights or fundamental principles in a constitution or an international agreement. In most cases the standards contained in the Model Code are not directed at private individuals but at the authorities. It is therefore not the individual element, the individual right, that is put forward but the substantive recommendation to the authorities. These two aspects are closely linked, however. Just as fundamental rights have, in addition to their individual legal function, a substantive significance imposing a rule of conduct on the authorities, the principles and rules of the Model Code will also have an individual significance once they are carried over into national law. Unlike the European Code of Good Behaviour, the standards of the Model Code are not aimed expressly and directly at the officials and officers of administrative services. Although the state acts through people, the responsibility for ensuring that the recommendations contained in the Model Code are complied with lies with the authorities; it is not primarily a personal responsibility of the people working in public administrations.

The Model Code has three sections. The first is devoted to the principles of good administration, the second to various rules of procedure, the third to appeals.

1. The general principles of good administration

The first section lays down a number of general principles that govern the functioning of the state. Some of these principles overlap with guarantees contained in the ECHR, at the same time being broader in scope. This is true of the principle of equal treatment, which is guaranteed by Article 14 of the ECHR, but only in relation to the other rights guaranteed by the ECHR. Article 3 of the Model Code, on the other hand, lays down a duty to respect equality of treatment as a general principle that applies to all the activities of the administrative authorities.

Several of the principles contained in the first part of the Code are also to be found in various recent national constitutions, sometimes as principles, sometimes as individual rights. For example, this is the case of the principle of lawfulness that appears in Article 7 of the Polish Constitution and Article 15 of the Russian Constitution of 1993 and elsewhere. Other principles are less common. The prohibition on arbitrary measures as yet laid down only in the Spanish Constitution of 1978 (Article 9, paragraph 3) and the Swiss Federal Constitution of 1999 (Article 9), is stipulated by Article 2, paragraph 1, of the Model Code as a particular case of the principle of lawfulness. The principle of impartiality provided for in Article 4 of

the Model Code appears in Article 25, paragraph 2, of the Polish Constitution. The principle referred to as "taking action within a reasonable time limit" in Article 7 of the Model Code is mentioned in Article 29 of the Swiss Federal Constitution; it can also be related to the requirement of trial within a reasonable time that results from Article 6 of the ECHR.

Two principles contained in Section 1 of the Code do not appear in the European Code of Good Administrative Behaviour: the principle of participation (Article 8) and the principle of respect for privacy (Article 9). Other principles are more broadly phrased in the Model Code than in the European Code of Good Behaviour (cf. in particular the principle of taking action within a reasonable time in Article 7 of the Model Code and in Article 17 of the European Code of Good Administrative Behaviour).

Among the principles dealt with in Section 1 of the Code, I particularly want to highlight legal certainty, which is laid down in Article 6 of the Model Code: "Public authorities shall act in accordance with the principle of legal certainty". Such a principle is expressly guaranteed by the Spanish Constitution (Article 9, paragraph 3). In German law, the principle of legal certainty is considered an ingredient of the Rule of Law, and for this reason it is acknowledged as a constitutional principle by case-law and academic law. The principle of legal certainty has also long been acknowledged by the national case-law of many countries (including the Netherlands, Belgium and Switzerland), and by the European Court of Justice. Article 6 of the Model Code gives legal certainty the status of a basic principle of good administration. It also lays down several specific aspects of the principle of legal certainty: prohibition of retroactivity, protection of vested rights and taking into account the need for transitional provisions. The main field of application of the principle of legal certainty is, however, that of changes to individual administrative decisions, governed by Article 21 of the Model Code. In several legal systems the principle of legal certainty is combined with another principle, that of expectations, also known as the principle of legitimate expectations (cf. Article 10 of the European Code of Good Administrative Behaviour). The dividing-line between legal certainty and the principle of expectations is not very clear, however, which is why the Council of Europe has opted to mention in the Model Code only the principle of legal certainty, conceived as a general principle covering a multiplicity of different aspects, including those linked with the principle of expectations.

Another principle I would like to present briefly is the principle of participation, which appears in Article 8: "Unless action needs to be taken urgently, public authorities shall provide private persons with the opportunity through appropriate means to participate in the preparation and implementation of administrative decisions which affect their rights or interests". This principle has several aspects. Two are mentioned in Articles 14 and 15 of the Model Code: the right to be heard before an individual decision is taken and the right to be involved in certain non-regulatory decisions. The principle of participation also extends to regulatory decisions, however, although this is not expressly mentioned. The right of the persons concerned to express their views before a regulatory decision is taken is, indeed, an administrative good practice: it enables the administration to assess more accurately the practicability of a new regulation and the extent to which it is acceptable to those to whom it applies. Such prior evaluation of the effects of a regulation is a key element in good legislative method. This applies in all cases where the administration is required to prepare a standard-setting document, even if the body authorised to adopt the document is the parliament or government.

2. The system of administrative decision-making

The second section of the Code lays down a number of basic rules of administrative procedure.

With respect to the preparatory phase of administrative decisions, the Code governs first the effects of the opening of the procedure by a request for an administrative decision lodged by a private individual. There is first the duty to decide within a reasonable time, a duty that results from the principle laid down in Article 7. Then there is the duty to transmit the request, wherever possible, to the competent authority if the request is made to an authority lacking the relevant competence. Lastly, there is the duty to acknowledge requests with an indication of the expected time within which the decision will be taken. Furthermore, as I have already noted, Articles 14 and 15 provide for the practical application of the right to participate in the adoption of an individual decision or a non-regulatory decision.

A second group of rules on the system of administrative decisions contained in the Code concerns the content and form of administrative decisions. They cover procedural costs, the way administrative decisions should be phrased and how such decisions should be brought to the knowledge of the persons concerned.

A third group of rules concerns the effects of administrative decisions. Article 19 lays down the time when such decisions come into force. Article 20 regulates the execution of administrative decisions by condensing the recommendation specific to this matter adopted by the Committee of Ministers of the Council of Europe in 2003. Article 21 of the Model Code lays down the principle according to which individual administrative decisions may, if necessary, be amended or withdrawn in the public interest, having regard to the rights and interests of the private persons concerned. The drafting of this article was the subject of lengthy debates in the committee of experts because of the diversity of national legal systems in this regard. The wording chosen is sufficiently abstract to cover the multiplicity of individual cases. In principle, it requires the interests to be weighed up in each case between the public interest in amending the decision and the interests of the private person concerned. The wording nonetheless leaves open the possibility of general regulation of cases of amending or withdrawing individual decisions on the basis of an abstract balancing of interests.

3. Appeals

I now come to the third section, which concerns appeals. The concept of appeal is used in two senses here. Article 22 deals with appeal in the sense of a legal channel for testing the lawfulness and merits of administrative decisions, while Article 23 concerns the private individual’s right of appeal against the authority with a view to obtaining compensation for harm resulting from an unlawful administrative decision or the negligence of one of the authority’s officers.

V. From the right to good administration to good governance

1. The right to good administration in the recommendation

As well as requesting the drafting of a Model Code of Good Administration, Recommendation 1615 (2003) of the Parliamentary Assembly of the Council of Europe invited the Committee of Ministers of the Council of Europe to draft a model text for a basic individual right to good administration. In doing so, the Parliamentary Assembly explicitly referred to Article 41 of the Charter of Fundamental Rights of the European Union, which had been published in 2000. Article 41 lays down the right to good administration in its title, but the concept is not taken up in the various paragraphs of this provision, which lay down a number of specific rights.

The concept of a right to good administration was the subject of the first Warsaw Conference, held in December 2003. In his general report at the time, Professor Delvolvé noted that the acknowledgement through a general formulation of the right to good administration was not enough to enable a private individual to assert it as an individual right. A general formulation should be considered a mere analytical tool for the acknowledgement of specific individual rights that can be covered by the concept of the right to good administration.

The Project Group on Administrative Law adopted the approach Professor Delvolvé suggested in 2003. The Model Code of Good Administration does not mention the right to good administration. The recommendation, on the other hand, invites member states to "promote the right to good administration in the interests of all, by adopting, as appropriate, the standards set out in the model code … assuring their effective implementation". The fact that the right to good administration must be promoted *in the interests of all* clearly demonstrates the wish to make this right collective in scope. It is not, therefore, an enforceable individual right. Furthermore, the recommendation uses the expression "right to good administration" in the political context of wishes expressed to member states. The right to good administration is not conceived as an individual right that must be guaranteed and respected. It is a precept, an objective that must be strived for with due regard for the components of this precept. This emerges clearly from the Model Code, which, according to Article 1, "lays down principles and rules which should be applied by public authorities in their relations with private persons, *in order to achieve good administration*". The purpose of good administration is therefore to set a goal to be achieved.

2. Over and above the right – actually implementing good governance

The recommendation is not limited to requiring the adoption of the rules of the Model Code. It goes far beyond rules of substantive administrative law or procedural law. Good administration also requires the appropriate organisation, management and supervision of the administrative authorities. The recommendation calls on states to see that the organisation and functioning of public authorities are effective, efficient and give value for money. In other words, public services must first be able to achieve the goals that the state has set itself. They must then be able to do so using the means at their disposal appropriately. Lastly, they must use state resources prudently. The administration has to be motivated in order to transform it from a bureaucratic model into an organisation that is concerned about the quality of its services and is flexible and efficient. With this aim, the recommendation stresses first strengthening the instruments of supervision of state action. It says that a system of objectives and performance indicators in the implementation of tasks has to be established.

The recommendation then highlights the need for regular monitoring by the administration to see whether the goals pursued by public action could be better achieved in another way. In doing this the recommendation goes way beyond the framework of the "right" to good administration in order to include in it some aspects of good governance. Moreover, in its preamble, it states that good administration is an aspect of good governance and that it is not just concerned with legal arrangements but also depends on other questions such as those pertaining to the organisation and management of administrative services.

The Project Group on Administrative Law initially envisaged including in the Model Code of Good Administration a section devoted to principles of good public management. It abandoned the idea, however, because of the difference in kind between the legal rules that appear in the Model Code and the more political nature of the principles of good public management. It would also have been much more difficult to reach a consensus on the practical principles of good public management because of the diversity of the organisation of public administrative services in the member states of the Council of Europe.

VI. Conclusion

The development of good governance with a view to enhancing protection of human rights is a recurrent theme in the activity of the Council of Europe. This theme has been broken down into numerous aspects, such as local democracy and even sport. Since 1977, the Committee of Ministers has adopted a dozen or so recommendations on the functioning of the administration which have been drafted by the Project Group on Administrative Law. Among all these recommendations, the one on good administration stands out, not only by the scale of its subject, but also by the density of its appendix, the Model Code. I hope that the publicity the second Warsaw Conference will give this recommendation will make it more familiar to member states and encourage them to examine whether their legislation and the practices of their administrative authorities comply with the expectations of the Council of Europe concerning good administration.