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**EUROPEAN COMMITTEE ON LEGAL CO-OPERATION
(CDCJ)**

**WORKING PARTY OF THE PROJECT GROUP ON ADMINISTRATIVE
LAW
(CJ-DA-GT)**

**2nd meeting
Paris, Office of the Council of Europe, Room 2
23-25 September 1998**

MEETING REPORT

Secretariat memorandum
Prepared by the Directorate of Legal Affairs

1. Opening of the meeting by the Chairman Mr. NIEMIVUO

The second meeting of the Working Party of the Project Group on Administrative Law (CJ-DA-GT) was opened by the Vice-Chair of the Project Group on Administrative Law (CJ-DA), Mr NIEMIVUO, appointed Chairman of the CJ-DA-GT by the CJ-DA. Mr NIEMIVUO welcomed members of the Group and Mr. BODIGUEL, expert consultant of the Working Party. The list of participants appears in Appendix I to this document.

2. Adoption of the agenda

The agenda was adopted as it appears in Appendix II to this document.

3. Statement by the Secretariat

The Secretariat informed members of the Working Party about developments since the last meeting held in Paris, 3-5 June 1998 concerning the activity on the status of public officials in Europe.

The Secretariat in co-operation with Mr. BODIGUEL had revised the preliminary draft report on status of public officials in Europe in accordance with the indications given by the Working Party and included some new contributions from member States. Consideration of the revised draft appears in 4 hereafter.

In addition, in accordance with instructions given by the Working Party, the Secretariat had prepared a preliminary draft recommendation of the Committee of Ministers to member States on the Status of public officials in Europe. Consideration of the preliminary draft appears in 5 hereafter.

4. Examination of the preliminary draft report on status public officials in Europe

The Secretariat presented the revised version of the preliminary draft report mentioned above (document CJ-DA-GT (98) 1 rev).

Mr. BODIGUEL noted that the preliminary draft report was revised with a view to : making certain items clearer, including a number of national contributions, incorporating the changes suggested by delegations at the last meeting of the Working Party and correcting some factual mistakes or risky interpretations.

The Chairman invited delegations to formulate general remarks about the report. He suggested that statistics should appear as an appendix to the report. He further proposed to include an appendix on national legislation and to change the title of chapter VIII 'Recent changes' to 'New challenges facing public officials in the XXIst century.

A number of specific remarks were made which follow hereafter.

Recruitment criteria (namely Table 2)

The expert consultant noted that most countries have these criteria even if they do not indicate it expressly. Therefore, countries should not be mentioned unless there are specific circumstances requiring further explanation.

Problems connected with recruitment

The delegate of Ukraine noted that political recruitment is not considered as a problem. The expert consultant noted that this was connected with section 2.d) and the *depoliticisation* of the most senior public officials. He observed that in some countries these officials are recruited only on the basis of political merit while in others they are not. Therefore he considered it important to deal with the issue because political recruitment can concern all categories of staff and not only top senior civil service officials. In his view, in a democratic system political recruitment should be limited as far as possible and concern only top positions.

The Chairman concluded that there is ongoing discussion about this phenomenon in a number of countries.

Rights

The delegate of Ukraine noted that the right to a pension is considered part of social protection. In the expert consultant's views this showed the difficulties in harmonising States' position in this field. He noted that pension is not part of social protection but a continuation of the salary when the official is no longer active. Thus, social protection refers to active life while a pension ensures subsistence when the official is not working, i.e: it is a remuneration when the person has retired.

Obligations

Some delegations expressed doubts about the scope of the duty of discretion. The consultant-expert explained that this duty requires public officials to be prudent and moderate when expressing their political views. The Secretariat further observed that this duty would require officials, on the one hand to be discreet in expressing their opinion publicly (as mentioned by the expert-consultant) and, on the other hand, to ensure the confidentiality of the documents at their disposal. In this connection, the Secretariat informed members of the Working Party about the preparation by the

Multidisciplinary Group on Corruption (GMC) of the Council of Europe of a European Model Code of Conduct for Public Officials.

Protection of public officials' rights

Some delegations expressed some difficulties with this chapter of the report. The Secretariat informed delegations that this section was intended to cover the protection of public official's rights *vis-à-vis* their employer, the State.

Moreover, some delegations were of the view that there was no reason to have a special body or organ responsible for the protection of public officials' rights. Rather, civil courts should ensure that responsibility, as for citizens in general.

The Working Party agreed that this chapter should be thoroughly revised to present the legal remedies and the administrative and judicial organs responsible for protecting public officials' rights.

Recent Changes

The Working Party agreed to change the title of this chapter to talk not only about recent developments but also challenges for the administration and public officials on the eve of the XXIst century.

Statistics

The Working Group considered some statistical information provided by the OECD (document CJ-DA-GT (98) 1 rev addendum). The members of the Working Party thanked the observers of the OECD for their kind co-operation. However, the Working Party concluded that this information would not be of use for the purposes of the report because it was aimed at determining the share of public employment in relation to total employment. Moreover, it dealt with the public sector, yet the report is not concerned with the whole public sector but only with State public officials.

The expert consultant offered to provide the Working Party with some statistical information gathered on the basis of various research programmes.

At the close of discussion the Working Party approved the preliminary draft report subject to the changes proposed and decided to submit it to the Project Group on Administrative Law (CJ-DA) for approval.

5. Follow-up to the activity

The Secretariat introduced a preliminary draft recommendation of the Committee of Ministers to member States on the status of public officials in Europe and noted that the draft had been prepared on the basis of elements of consensus identified at the first meeting of the Working Party (see meeting report, document CJ-DA-GT (98) 5 rev.).

The Chairman opened a general discussion about the recommendation, followed by consideration of specific paragraphs.

The delegate of France observed that the preliminary draft was a very suitable basis for discussion. He stressed that recommendations are not binding and therefore proposed that the recommendation be resolute. Thus, it should be precise and, where appropriate, include several options. Moreover the purpose of the exercise is not to find the minimum common denominator, but rather help reforms by showing the right way. Delegations should therefore contribute to the exercise without being bound by their

national situation or legislation. The question is whether one or another way is the most appropriate.

The expert consultant noted that in the context of the European Union, European institutions do not have any competence regarding public officials and the principle of subsidiarity applies. Therefore, the Council of Europe's initiative in this regard is very important and will be most useful for States, particularly for countries of Central and Eastern Europe which are in the process of reforming their public administration. Therefore, it is essential that the recommendation give clear guidance.

The delegate of Ukraine stressed that the recommendation should be addressed to all member States of the Council of Europe and not only to a separate group of States.

Concerning paragraph 4, the delegate of Finland suggested the addition of the term 'neutral' and the use of the term 'people' instead of 'citizens' because it covers not only nationals with full rights but other persons residing in the territory. He observed that the term 'citoyen' in French has a wider meaning than the term 'citizen' in English which is restricted to persons with full rights. The Working Party agreed to the Finnish proposal.

Moreover, the Working Party agreed that public officials should comply with the rule of law and be loyal to the democratic institutions rather than to the Government or to the elected representatives.

Concerning paragraph 5, the delegate of the United Kingdom observed that his Government has moved away from educational qualification as the main criteria for accessing public post in order to avoid unfair discrimination against people who had not received a proper education. Therefore he suggested that a wide term be used to cover not only educational qualifications but all the necessary conditions that a person has to gather in order to access a specific post. The Working Party agreed that the terms 'necessary qualifications' could be used on the understanding that they covers not only education but all necessary elements.

Concerning paragraph 6, the delegate of Ukraine noted that reference should be made not only to rights but also to public officials' duties and obligations. The latter can be general obligations (similar to those of any citizen) and specific obligations, due to their public capacity.

Concerning paragraphs 7 and 11, the delegate of the United Kingdom suggested that reference be made respectively to improving standards of service to the public and to principles of good practice.

Further to that, the Working Group undertook consideration of the Appendix to the preliminary draft recommendation.

Introductory paragraphs

The observer of the OECD suggested that in this section where reference is made to the two major trends in public administration, these trends or systems be referred to as

'career system' and 'position-based system' and observed that the difference between the two is not the career which exists in both cases but the fact that in the career system the official is recruited into a grade depending on personal circumstance, e.g. education level; while in the position based system the official is recruited into a position. While in the first the official is promoted to a higher grade, in the second promotion is only possible by changing to a new position.

In this connection, the delegate of Ukraine noted that it was necessary to indicate that there might be a combination of both systems, thus in his country public officials are recruited to a grade but also to a position and the status or position of the public officials is defined by both grade and position.

The expert consultant noted that the purpose of the recommendation is to state a number of principles rather than choosing between one or another system. In this connection, the delegate of France suggested referring to tendencies rather than to systems.

A number of comments on the specific principles of the appendix to the recommendation follow hereafter.

Authority responsible for public officials

The expert consultant stressed the need to show the unity of the civil service and observed that conflicts of competence can be between different ministries, between different services within the same ministry, but also between different State institutions. The Working Party agreed to keep a reference to conflicts of interest but to qualify it by the term 'possible'.

Categories and levels of public officials

The delegate of Finland questioned whether top positions should be covered by this principle and possibly mentioned expressly because they might be subject to specific procedures. The observer of the OECD supported this proposal. However, the delegate of Ukraine was against the inclusion of top position appointments because of their specific features which are beyond the scope of the recommendation.

Conditions and requirements for recruitment

The delegate of the United Kingdom suggested the inclusion of a reference to competition, noting that the aim of the recruitment procedure is to get the best possible person for the post regardless of gender or race, to avoid patronage and to reinforce political impartiality because public officials are there to serve the duly elected Government.

The Working Party agreed that equality of access and merit amount to absence of discrimination and imply the need for competition, yet it agreed to include a reference to open competition.

The Working Party held a thorough discussion about restrictions to the general principles concerning recruitment. Thus, the expert consultant stressed that there

should be no exceptions to the principles.

In this connection the delegate of the Netherlands observed as an example that in his country it is illegal for the employer (including the State) to ask people about their health at all.

The delegate of France further suggested that access to public posts can only be restricted on the grounds of nationality in as far as they involve the exercise of public powers. This would constitute a clear message that nationality is no longer a condition for recruitment in a united Europe.

The delegates of Ukraine and Spain could not agree to this proposal, noting that integration is not taking place in Council of Europe but in the European Union, and that even in the more restricted context of the European Union integration in this field is very difficult.

As a result of this discussion, the delegate of the United Kingdom proposed the inclusion of a specific principle of 'non discrimination' stating that States should provide that all people should have equal opportunities for accessing public posts and for advancement on the basis of suitability and that no discrimination should exist on the basis of race, gender, sexual orientation, religion, ethnic origin, etc.

In this connection some delegations suggested using the wording of Article 14 of the European Convention on Human Rights to avoid the risk of discordance with it. Yet some other delegations opposed it as this article does not cover recruitment to public posts.

The Working Party agreed to the United Kingdom's proposal and added that some restrictions could apply only in so far as lawfully justified. Moreover, it did not consider it necessary to stick to the exact wording of the European Convention on Human Rights because some developments have occurred since it was adopted and some new grounds for discrimination appear more actual, e.g.: sexual orientation.

Recruitment procedures

The delegate of Finland observed that in the second paragraph the right of appeal appeared too strongly formulated and noted that in his country appointments are not subject to appeal.

The expert consultant stressed that the right of appeal is crucial, yet it was not necessary to state that it has a control function.

The Working Party decided to maintain the reference to it, while recognising that, on the one hand, in most cases there is some discretion by the recruitment authority and therefore in practice it is very difficult for the appeal to succeed and, on the other hand, that the right of appeal aims at fighting abuse of power and not questioning the assessment by the competent recruitment authority.

Transfers

The Working Party agreed on the importance of mobility for public officials. In so far as possible transfers should be with the agreement of the person concerned, unless required by the general or public interest. Moreover, transfers should not constitute disguised sanctions and a remedy shall be available to contest the possible unlawfulness of a decision to transfer a public official.

The Working Party held a thorough discussion about the term 'general interest'. Several synonyms were proposed by delegations such as 'public interest', 'interest of a good

public administration', etc.

Further to that, the delegate of Ukraine suggested referring to the law because the terms 'public interest' or 'general interest' were not precise enough and did not exist in his legal order. In this connection, the delegate of France noted that the reference to the public interest could only be read in the light of the European Convention on Human Rights which provides for 'restrictions required by law'. However, the expert consultant stressed that the Ukrainian proposal would significantly restrict the margin of the administration in this respect. This is something undesirable. Moreover, the law could not foresee all circumstances in which a public official could be transferred.

The observer of the OECD supported the Ukrainian proposal, but acknowledged that the law cannot provide for every circumstance. Moreover he noted that the law could provide that a transfer is possible on the grounds of the general interest.

The Working Party concluded to use of the term 'public interest'. Moreover the Working Party agreed that there should be a legal remedy for public officials because they might be the subject of abusive decisions e.g. disguised disciplinary sanctions.

The legal remedy would not allow the official to contest the appropriateness (opportunity) of the transfer but its possible unlawfulness. The Working Party acknowledged that in a number of the issues of legal remedies the situations will vary significantly from State to State depending on the type of remedy, the need to exhaust administrative appeal before accessing civil courts, the competent jurisdiction, etc.

Rights

The Working Party agreed to maintain an express reference to political rights and trade union rights which should be restricted only in so far as necessary for the proper exercise of public officials' functions.

In this connection, the Working Party agreed on the importance of ensuring public officials' participation which is very important and facilitates the smooth internal functioning of the public administration. It therefore decided to include a separate principle on this matter. In this connection, the Working Party agreed to differentiate between consultation and participation, noting that the second is broader than the first and that it should be included because consultation is just one of the mechanisms of participation.

As regards trade union rights and in particular the right to strike, the delegate of Germany stressed that his delegation would not be in favour of including an express reference to it in the text. The Working Party therefore decided not to include it in the text. In this connection, the expert consultant referred to the preliminary draft report on the status of public officials in Europe and noted that the report does not recognise an absolute right to strike and recognises that it only exists in a number of countries.

Further to that, the Working Party held a thorough discussion concerning social protection. Several delegations stressed that the recommendation should state that Governments should guarantee social protection of public officials.

In this connection, the observer of the OECD stressed the need to differentiate between social protection and social benefits. He further noted that social benefits to public officials could not be included as a general principle because in some countries that is not the case.

The Working Party agreed to introduce a separate principle on social protection.

However, it was not in favour of linking pensions to the level of salary because this is not the case in all countries and other elements may come into play, e.g.: level of

contribution and length of service. Finally, the Working Party considered that it would be useful to mention that social protection can be ensured by means of a general or a specific scheme.

Training

The Working Party agreed to include a reference to State training policies, which are crucial in achieving an efficient public administration. Moreover, it agreed that training should be contemplated as both a right for public officials and a duty for public officials to undergo, and for the public administration to provide it directly or by means of other institutions.

Duties

The Working Group discussed thoroughly the possibility of public officials having other jobs in addition to their public posts.

Some delegations, such as the delegation of the Netherlands and of the United Kingdom, did not see any problems with 'second' jobs provided that they do not put public officials in a situation of conflict of interest and that there is no interference with their public function. Other delegations recognised that, due to the very low level of remuneration in some countries, public officials have to have other sources of income in order to survive. Yet they recognised that this is a structural and economic problem and that if an appropriate level of remuneration is ensured these extra sources of income would not be justified. Finally, some delegations considered that second jobs should not be allowed in any case, unless permitted by law.

The Working Party concluded that certain restrictions can be imposed on public officials. Thus, they should not have second jobs or participate in certain activities unless otherwise provided by law. These restrictions are imposed on public officials with a view to ensuring that they devote their time to their public functions and to avoiding conflicts of interest and corruption.

The Working Party considered the issue of hierarchical subordination and concluded that this duty does not bind public officials in cases where illegal instructions are given.

6. Date and place of the next meeting

The Secretariat informed members of the Working Party that no further meetings are scheduled for 1998 and that the meeting of the Project Group on Administrative Law (CJ-DA) would be held in Strasbourg, 23-26 November 1998.

7. Other business

The Secretariat informed participants of the course of action after the meeting and until the next meeting of the CJ-DA.

The Chairman thanked participants, Mr BODIGUEL and the Secretariat for their contribution to a successful outcome and closed the meeting.

Appendix I

LIST OF PARTICIPANTS

ALBANIA/ALBANIE: -

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Appendix II

AGENDA

1. Opening of the meeting by the Chairman, Mr NIEMIVUO

Report of the 1st meeting of the CJ-DA-GT, Paris, 3-5 June 1998 CJ-DA-GT (98) 5

2. Adoption of the agenda CJ-DA-GT (98) OJ 2 rev

3. Statement by the Secretariat

4. Examination of the *revised preliminary draft report on status of public officials in Europe* CJ-DA-GT (98) 1 rev

Statistical appendix CJ-DA-GT (98) 1 rev add

Amendments proposed by the German delegation CJ-DA-GT (98) 1 rev add 2

5. Follow-up to the activity:

Preliminary recommendation of the Committee of Ministers to the Governments of Member States on the Status of Public Officials in Europe CJ-DA-GT (98) 6

Reference documents:

Selected texts, general report and conclusions of the Colloquy on the Role and Structure of the Civil Service in a Democratic State Portoroz (Slovenia), 2-3 June 1994 CJ-DA-GT (98) 3

Selected texts of the Colloquy on Civil Service Systems: the European Experience, Geneva (Switzerland), 26-27 October 1995 CJ-DA-GT (98) 4

Recommendation 1322 (1997) of the Parliamentary Assembly of the Council of Europe

6. Date and place of the next meeting

7. Other business