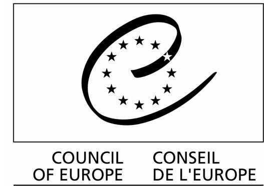

Strasbourg, 30 June 2006 **CJ-DA-GT (2006) 1**

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

3rd meeting
Strasbourg, 5 – 7 April 2006

MEETING REPORT

FOREWORD

In the course of the meeting the CJ-DA-GT:

a. examined part of the preliminary draft recommendation on good administration and consolidated model code of good administration;

b. began considering the CJ-D's future activities, from 2007 onwards, particularly in the connection with the drafting of the CJ-DA's terms of reference for 2007and 2008 and the 27th Conference of European Ministers of Justice (Yerevan, Armenia, 12 and 13 October 2006).

Secretariat memorandum
prepared by the
General Directorate of Legal Affairs

TABLE OF CONTENTS

Page

I. INTRODUCTION 3

II. PREPARATION OF THE PRELIMINARY DRAFT RECOMMENDATION ON GOOD ADMINISTRATION AND CONSOLIDATED MODEL CODE OF GOOD ADMINISTRATION 3

III. EXCHANGE OF VIEWS ON QUESTIONS TO BE EXAMINED BY THE CJ-DA FROM 2007 19

IV. DATE OF THE NEXT MEETING 21

APPENDICES

APPENDIX I: LIST OF PARTICIPANTS 23

APPENDIX II: AGENDA 27

APPENDIX III: PRELIMINARY DRAFT RECOMMENDATION ON GOOD ADMINISTRATION AND CONSOLIDATED MODEL CODE OF GOOD ADMINISTRATION 31

I. INTRODUCTION

1. The Working Party of the Project Group on Administrative Law (CJ-DA-GT) held its third meeting from 5 to 7 April 2006 at the Council of Europe headquarters in Strasbourg, with Mr Vittorio Ragonesi (Italy) in the Chair. The list of participants is set out in Appendix I to this report.

2. The CJ-DA-GT examined and adopted the draft agenda, as set out in Appendix II.

3. The Secretariat informed the CJ-DA-GT:

- that the CJ-DA's current terms of reference would expire at the end of 2006 and that consideration should therefore be given to the activities the CJ-DA-GT wanted to undertake as from 2007, so that the draft terms of reference of the CJ-DA for 2007 and 2008 could be prepared (*see, also, Section III*);

- that the 27th Conference of European Ministers of Justice would be held in Yerevan, Armenia, on 12 and 13 October 2006 on the theme "Victims: place, rights and assistance" (*see, also, Section III*);

- that the next meeting of the CJ-DA-GT, initially scheduled for 5 to 7 July 2006, had been postponed (*see, also, Section IV*).

4. It reminded the working party that it needed to finalise the text of the preliminary draft recommendation on good administration and consolidated model of good administration at its next meeting so that they could be examined and approved by the CJ-DA at its next plenary meeting, in October 2006.

II. PREPARATION OF THE PRELIMINARY DRAFT RECOMMENDATION ON GOOD ADMINISTRATION AND CONSOLIDATED MODEL CODE OF GOOD ADMINISTRATION

13. The scientific expert, Professor Pierre Delvolvé, submitted for the CJ-DA-GT delegations' appraisal his revised version of the preliminary draft recommendation on good administration and consolidated model code of good administration (document CJ-DA-GT (2005) 1 rev. 4). The content of the articles of the code of good administration had not been changed, but the layout was more coherent and consistent. The scope and the definition of the concept of public administration were now set out in a separate article from the provisions concerning administrative decisions and their definition, and there was a new Section II on rules governing administrative decisions and a new Section III dealing specifically with appeals. The CJ-DA-GT delegations approved the proposed reorganisation of the text. As had been decided at their second meeting (14-16 December 2005), they resumed consideration of the preliminary draft, beginning with the code proper rather than the recommendation. The working party did, however, wish to make a few preliminary comments on the text of the draft recommendation.

Preliminary comments

14. It was pointed out that there were differences between the English version and the French original and that the two texts should be made to tally. The Chair of the CJ-DA said, in that connection, that she had suggested some amendments to the English version of the text (see document

CJ-DA-GT (2005) 1 rev. 4 bis, in English only). She reminded the working party that the draft code should contain not only principles that the CJ-DA-GT had taken from existing conventions, recommendations and resolutions but also new elements. The principle of equality, referred to in Section I, concerned both private persons and public authorities, which had to ensure equal treatment internally for public servants. The code should both highlight the principles with which the authorities should comply and set out the way in which they should take administrative decisions.

15. It was observed that the code now on the drawing board was eagerly awaited in many European capitals as a means of putting across new ideas about good governance. Although it already contained good ideas, it was always possible to add new ones. Several delegations wanted the document to be drafted in such a way that readers who were not specialists in the law (public servants and members of the public) could read and understand it easily.

16. One delegation added that, if the CJ-DA-GT was fully to complete the task entrusted to it by the CDCJ and meet all the expectations of member states, three areas of activity to which good administration was relevant needed to be taken into account:

- the authorities and the people in charge of them, and the efficacy and efficiency of the authorities in serving the public;
- relations between the authorities and the public;
- relations between the authorities and private persons: the working party had concentrated on this third area of activity, which was at the very heart of the Council of Europe's work but which, for all its importance, would not make for an exhaustive document. The scope could therefore usefully be extended and the other areas of activity broached. Moreover, since good administration also concerned good relations within the authorities, between the authorities and the public and between the authorities and private individuals, it was also important to take an interest in conflicts between the authorities and individuals, and therefore in the conduct of the authorities.

17. One delegation said that the main purpose of the code was to enshrine the major principles of Article 6 of the European Convention on Human Rights (ECHR), and that this essentially concerned relations between the authorities and individuals. Another delegation said that it also concerned the actual workings of the authorities, insofar as the aim was, in both cases, to provide a service: in short, if the authorities did not operate appropriately and efficaciously, they were incapable of providing the services the public expected.

18. Another delegation said the approach adopted when the code had been prepared had been based on the right to good administration. Reference was made to the December 2003 Warsaw conference on this theme and the reports that had been presented at it, which revealed two approaches:

1) *a legal approach*, insofar as, in order to be effective, good administration entailed the establishment of legal duties incumbent on the authorities in respect of private persons. There was a reference to the right to good administration in the European Union Charter of Fundamental Rights and in the European Ombudsman's Code. The concept of good administration as set out in the European Ombudsman's Code had been defined in relation to the concept of maladministration, which the European Court of Justice had used in both the legal and the technical sense.

2) *a technical approach*, insofar as public authorities had a duty to be well organised, efficacious and efficient so that they functioned properly and provided the services the public expected of them. The CJ-DA-GT considered that it was not part of its remit to establish, and set out in a code, criteria concerning the efficiency of public authorities. The CJ-DA's terms of reference also reflected a political dimension of the concept of good governance. For all the problems entailed, an attempt should be made to ensure that this dimension was specifically reflected in provisions in a legally binding code, either in the first part, concerning fundamental principles, or in provisions that were not immediately enforceable. Failure to include such a political dimension would be likely to disappoint the people for whom the code was intended, as the code would in that case simply codify a set of legal rules or principles that were, by and large, common to the legal systems of several European countries.

19. Some delegations thought, on the other hand, that more forceful articles should be included on aspects relating to the organisation and functioning of the authorities, which the CDCJ had, moreover, wished to elaborate on in the recommendation. Dealing with organisational issues was a way of improving the operation of the authorities, both internally and in dealings with individuals, if account was taken of the latter's expectations. As systems varied greatly from one country to the next, it seemed preferable, rather than including a whole section on the organisation of public authorities, to leave the arrangements for the workings of public authorities open, expand the "efficacy" aspect and concentrate on the principles underpinning the authorities' activities from the angle of the service provided.

20. Given that it was not possible to describe all the factors that went to make up good administration, one delegation suggested elaborating on the rules in the code by stating, for instance, that all the activities of the authorities should increase public confidence in the authorities. In the event of a dispute, the authorities were increasingly using not only legally binding instruments but other tools, such as persuasion, mediation and compromise. Since civil servants were a crucial element, in that they carried out the duties of the State, and since the text did not contain any provisions on their conduct, it would be useful to mention the obligations and ethical conduct required of public servants.

21. One delegation endorsed the proposal to strengthen public confidence in the authorities by actually making this a new principle, and the idea of the authorities' fostering public awareness in order to reduce the amount of litigation in the administrative courts.

22. Another delegation thought it would be a good idea to look into the meaning of "good administration" by examining the concept from three angles: the efficacy, efficiency and profitability of government administrative departments. The code was fairly comprehensive as it stood and clearly illustrated the conduct required of the authorities in their dealings with the public. The last paragraph of the recommendation, which set out the purpose of the recommendation, could be fleshed out in order to include provisions on the actual structure of the authorities, their organisation and their operation, in order to provide a more logical link with the code, which was, as it were, the authorities' guide to dealings with the public. It was the actual structure of the authorities that was a hindrance to full compliance with the principles set out, and not the civil servants, who were quite willing to be responsible for efficacious administration. It was necessary, moreover, to explain to readers of the text what approach had been adopted when the model code had been drawn up.

23. A delegation replied that the purpose of the code was to enshrine a set of legal principles concerning relations between the authorities and private persons. It had still, however, to be decided for whom the code was intended. The explanatory report could present the code as an appendix to a recommendation covering the organisation of the authorities and the means at their disposal for

functioning properly and ensuring good administration, specifying this entailed compliance with the rules set out in the code. Such an approach would make it possible to include other aspects of administration.

24. The scientific expert said the document was a draft recommendation to which the model code was appended. He admitted that the text reflected a legal conception of the right to good administration, and yet good administration was not confined to the law and legal processes. Moreover, there were different models for organising public authorities, given that each country had its own conception, its traditions, its mentalities and its own system.

25. It was pointed out that the changes to the recommendation made it more balanced, but that they were not reflected in the actual body of the code, which was therefore less balanced.

26. One delegation wondered whether there was any point in setting out principles that neither the authorities nor the public could apply in practice, and whether it would not be better to supplement the existing list with other principles that could give rise to a discussion between the authorities and the individual, or indeed within the authorities themselves. The delegation also wanted to see the distinction between individual rights and rules of law addressed in the code.

27. The Chair suggested that the working party introduce two or three new principles, for instance the principle of effectiveness or rational management, confining itself to relations between the authorities and individuals, without broaching the question of the general organisation of the authorities. The organisational aspects of public authorities should be dealt with only insofar as they concerned relations between the authorities and the public.

28. Opinions on this proposal differed. It might be tricky to include organisational aspects in the code, given, firstly, that member states had different rules and, secondly, that individuals were not directly concerned by such matters. There were those who suggested incorporating them in the text of the recommendation, while others proposed that, if it were impossible to include the principles of efficacy and profitability in the code, the latter should at least incorporate the principle of transparency in the management of public authority budgets and expenditure.

29. The scientific expert considered that incorporating the organisational aspects of public authorities in the text of the recommendation, as suggested, would make it possible to flesh out the actual body of the recommendation with all the references to the general organisation, functioning and supervision of public authorities, while the code would contain only provisions directly relating to relations between the authorities and the public. The result would be a comprehensive and coherent document.

30. One delegation informed the CJ-DA-GT that its country’s Constitution contained a provision on good administration, just as the law on administrative procedure had a section on good administration and its underlying principles. He suggested that the working party find out whether other countries had such specific references, which could be a source of ideas.

31. With regard to efficacy and profitability, the scientific expert explained that public authorities must indeed organise themselves and operate in such a way as to ensure that they were efficacious. They were already, without prompting, conscientiously seeking to obtain the desired results at lesser cost. It was difficult to affirm that the public enjoyed a right that they could assert in the courts – the right to good administration – but it was acceptable that certain provisions should not be worded in terms of a right enjoyed by the public but should call on the authorities to behave in a certain way. The provisions concerning good governance should therefore be drafted in such a way that they could not give rise to litigation in the member states' administrative courts, which were already snowed under.

32. The Chair pointed out in connection with disputes and respect for privacy that many countries had an Ombudsman who intervened to bring about an amicable settlement of disputes between the public and the authorities, for instance by encouraging the authorities to modify their conduct or adopt solutions more compatible with private interests.

33. Reference was made to the European Conference on the "training of civil servants to achieve good administration", which the Council of Europe had held in Vilnius in October 2005 as part of the Action Plan of the Third Summit of Heads of State and Government of the Council of Europe member states, who had decided to promote standards concerning democracy and good governance. One delegation wondered what sort of obligations should be imposed on states with regard to the functioning of public authorities and the structural organisation and conditions that enabled civil servants to provide a good service, and consequently ensure good administration. It was of prime importance to come up with a clear definition of what constituted good administration.

34. Since the code set out basic principles to be applied by public authorities, one delegation wondered whether the word "rules" could not be inserted.

35. The Chair invited the delegations to suggest new points that they would like to see included in the document.

36. The participants came up with several new ideas, including:

- the accessibility of the authorities and public services: the organisation of government administrative offices on the basis of the principle of proximity and suitable opening hours etc could facilitate access to the authorities, as could the use of new technology, which broadened public access to the authorities;
- efficiency/efficacy could be of help in achieving the objectives inherent in the authorities' specific function;
- simplification of administrative procedures and the elimination of pointless formalities;
- courtesy: although the word need not necessarily be used, the idea could be brought out, as in the European Ombudsman's Code, which included an article on courtesy;
- minimum standards;
- private individuals had the right to have matters concerning them properly dealt with by the authorities;
- advice: the code should clearly indicate the duty of public authorities to give advice to individuals, and the type of advice and the competent authorities, which had still to be determined.

37. The Chair said that this last point was related to the question of access to the authorities and not to legal assistance to individuals, which the authorities could provide only in the context of their activities. They were already under an obligation to organise themselves structurally and operate in such a way as to attain their objectives as efficaciously as possible.

38. It was pointed out that Section I contained articles covering very specific principles, but that the links between these principles were not established. It would therefore be desirable to add a general article stating that the fundamental principles of good administration included the principles of equality, lawfulness, etc, but that this list was not exhaustive, that there was no order of precedence among the various principles, which were all important, and that the combination of these principles had a synergic effect on which the efficacy of the service depended.

39. Several delegations pointed out that the bulk of public service activities involved managing and preserving the public interest and providing services with a view to satisfying society. This must be mentioned in such a way that there was no conflict between individual and collective interests.

40. The Chair raised the idea of oversight, whether internal or external, of the authorities' activities, with regard both to the authorities themselves and to civil servants, the aim being to check not only that the objectives had been achieved but also that they had been achieved in a satisfactory manner.

41. One delegation thought it would be preferable to restrict the scope of the principles to be applied in the day-to-day functioning of the authorities to the operational level, and to group together, under the broad principle of efficacy, the clauses concerning reasonable time that were already in the text.

42. In response to this profusion of ideas, the scientific expert said that the aspects concerning the accessibility of the authorities and public services, opening hours, the use of new technology and the simplification of procedures were related to the idea of bringing the authorities closer to the public; the other aspects concerned the efficient functioning of the authorities as such and went beyond relations with the public. As for the idea of supervising the activities of the authorities themselves and civil servants, which was a somewhat different matter from relations between the authorities and private persons, he wondered whether it would be a good idea to extend the scope of Section III to include a clause on inspections at the instigation of the authorities. As for the idea of providing advice, he confirmed that this was related to the accessibility of the authorities. He was not in favour of linking the principle of reasonable time to that of effectiveness, for the former principle deserved to be mentioned as such, particularly as he did not think the principle of effectiveness was as forceful as the other principles. He pointed out that a reasonable time was not necessarily a short time.

43. One delegation had difficulty in understanding the terms "effectiveness" and "efficiency" and their content and wanted a short definition to be included.

44. It was pointed out that some Constitutions enshrined efficacious administration as an objective and that the code covered the way in which this principle applied directly to relations between the authorities and individuals. Efficacy and efficiency were two different concepts, which should be kept separate in this case.

45. The scientific expert defined the terms "efficacy", "effectiveness" and "efficiency": efficacy related to the result obtained, and to its quality; effectiveness to the action that actually took place; and efficiency to the quality of the means used to obtain the anticipated result.

46. The Chair said that the principle of efficiency should be included in the text of the recommendation.

47. In order to include a general principle of efficacy in the recommendation, it was suggested that paragraphs 1 and 2 of Article 7 be reworded and that a paragraph linking them with the principle of efficacy be added. The idea was to ask public authorities to perform their duties within a reasonable time and at lesser cost and to reassure the public that their requests were being dealt with. Although it was not essential to add a paragraph on the efficacy of decisions, it was essential to state that the authorities must provide quality services.

48. The Chair said the idea was to have an administrative procedure that was quick and cheap - or at least reasonable in cost - and effectively achieved the aims in question.

49. Attention was drawn to the ambiguity of the principle of efficacy. Whether the authorities should be efficient was a very broad issue that went far beyond the provisions of Article 7. Since efficacy and efficiency were not issues that concerned all administration, it would be preferable to refer to them in the recommendation rather than the code. On the other hand, the right to a reply within a reasonable time was sufficiently important to be set out in the code. Article 7, paragraph 2, could be redrafted accordingly. The question of reasonable cost, which was not necessarily the same thing as low cost, was connected more with proportionality than with actual procedure. These two aspects could be set out not as principles but as rules of procedure for administrative decisions and consequently be covered by an article in Section II.

50. One delegation suggested having a recommendation on good administration with an appended model code on certain aspects of good administration. It also raised the question of the title of the code, with reference to the European Ombudsman's Code, which was entitled "Code of Good Administration Conduct". This proposal was endorsed by another delegation, which considered that the code could not be more binding than the recommendation itself.

51. One participant suggested entitling Section I, "Basic principles". For the sake of making the document more readable and ensuring that the reader took the text more seriously, he wondered whether, rather than beginning all the paragraphs in the same way, with "Considering …", the text of the recommendation could not be amended so that it began, "Considering that public administration …", and then continued with something like "It is desirable that …", and so on. Lastly, he suggested numbering the paragraphs in the third part of the recommendation, which contained the Council of Europe's recommendations to the governments of its member states.

52. With regard to the layout of the recommendations, the Chair said that it had to be borne in mind that recommendations did not generally have any substantive content. The Secretariat specified that there were no rules on the subject but that there were two main ways of setting out recommendations. Most recommendations currently came with an appendix. Indeed, it was increasingly common to begin by putting the recitals in the recommendation part, and then to add the recommendations, for example the recommendation to apply the principles set out in an appendix. The second approach entailed putting all the content in the text of the recommendation and not having an appendix, an example being Recommendation Rec(2004)20 on judicial review of administrative acts, prepared by the CJ-DA. The Secretariat said that in this particular case the CJ-DA-GT did not have the official leeway needed to take such a decision since its terms of reference required it to prepare a recommendation accompanied by a model code of good administration.

53. One delegation said that both layouts had been used for former CJ-DA recommendations and that the working party was in fact seeking to combine the two methods, with a recommendation with its own substantive content and an appendix that was just as important since, ideally, it was designed to be adopted as such by member states, which had never been the case so far. The model was therefore unique.

54. The Chair mooted the idea of producing two separate appendices.

Article 1: Scope

55. Many delegations thought the Code's scope too limited and wanted to broaden it - particularly since, as one of them pointed out, the CDCJ was expecting a text which went beyond existing ones.

56. One delegation suggested that this article should indicate the Code's aims, not its scope.

57. The scientific expert said that use of the same French word in two concepts – the right (droit) to good administration and administrative law (droit) – gave the wording of Article 1 a certain ambiguity. That article was a perfect illustration of the gap between a "code of good administration" and the "right to good administration". Recognition of the right to good administration had generated a series of proposals on individuals in relation to public authorities and participation by individuals, which he suggested inserting in the "principles" section of the Code, with a view to ensuring that public authorities were well organised and functioned as they should. He suggested reviewing the title and content of Article 1, and including requirements relating to the organisation, functioning, effectiveness, efficiency and improved performance of public authorities.

58. One delegation suggested that paragraph 1 should be linked with the last recommendation on action to promote the right to good administration. This would mean deciding whether the recommendation should speak of a right to good administration: if it did, the present wording of Article 1 would remain. It suggested stating that private persons were entitled to good administration, in accordance with the Code of good administration, which regulated the conduct of public authorities and their staff.

59. The scientific expert said that it would be better to keep the original wording, since the Code did not apply only to relations with private persons. One delegation wondered, however, and wondered whether focusing Article 1 on relations between public authorities and private persons was judicious, since it felt that the Code was nor limited to private persons.

60. The Chair said that it was too soon to decide this question, which would be discussed again at the Working Party's next meeting.

61. It was also suggested that paragraphs 1 and 2 be deleted, and paragraphs 3 and 4 revised to emphasise that public authorities must provide proper services for individuals.

62. Some participants thought that the definitions in paragraphs 3 and 4 – "public law entity", "private law entity", "providing a public service", "acting in the public interest" – should be reviewed. In this connection, a decision was needed as to whether the term "private law entity" had its place in paragraph 3b, and whether it implied obligations for public authorities.

63. The scientific expert said that public law entities were not defined, and that only their status was considered in connection with the functions which they exercised. The private law entities covered by the Code, i.e. entities which were not public authorities in the strict sense, but were "responsible for providing a public service or acting in the public interest", or which exercised "the prerogatives of a public authority", were subject - because their functions connected them with public authorities – to the same rules on good administration as public law entities.

64. To remove all ambiguity concerning private law entities, one delegation suggested speaking only of "private law entities exercising the prerogatives of a public authority". It also pointed out that the comment which had been made referred to the Recommendation itself and to the effects which the CJ-DA-GT's interpretation of the concept of "public authority" might have on these rules. It noted in passing that the Recommendation, as structured, could also apply to private entities.

65. Since function determined the applicability of the rules on good administration, another delegation suggested that it would be a mistake to omit activities which in principle involved exercising public authority prerogatives.

66. It was proposed that the projected Article 1bis be deleted, and Section I headed: "Principles".

Article 1bis

67. To take account of the delegations' proposals on the reasonable cost of procedure, the scientific expert suggested adding an Article 1bis stating that the cost of procedures should be reasonable, both for the authorities and the public – although this Article 1bis would have no legal force or scope.

68. One delegation was against including an article which had no rule-making scope.

Article 2: Principle of lawfulness

69. One delegation pointed out that the last principle in paragraph 4 had nothing to do with lawfulness.

70. The scientific expert explained that paragraph 4 referred to misuse, not abuse, of powers.

71. One delegation thought "abuse of power" also covered misuse of power. The point was made that the European Code of Good Administrative Behaviour included a special article on "absence of abuse of power", which also covered misuse of power. It would thus be best to include this provision under the principle of lawfulness, and not in a section dealing with misuse or abuse of powers.

72. It was pointed out that the French and English versions of paragraph 4 did not tally.

73. The scientific expert agreed that the proposed English sentence, although it referred to purpose of powers, did not mention relevant facts and legal provisions.

74. The Chair suggested that the problem might be solved by omitting the reference to legal provisions in both versions, but one delegation objected that this would mean that only misuse of powers would be covered, which raised the question of restrictions on misuse of powers in domestic law. It accordingly felt that paragraph 4 should be either deleted or kept as a whole.

Article 3: Principle of equality

75. It was noted that paragraph 2 referred to positive discrimination, and paragraph 3 to negative discrimination.

76. In reply, one delegation made the point that neither type of discrimination was the same thing as "difference". Here, "discrimination" meant negative discrimination. The explanatory report should clarify this question. Another delegation suggested that "arbitrary discrimination" – the term used by the constitutional court in its country - was a better one, since "discrimination" was not always negative. In terms of paragraph 2, "arbitrary discrimination" would be discrimination which had no objective justification.

77. The scientific expert said that discrimination existed only when it was arbitrary, or unjustified because it was based on some factor which should not have been considered.

78. It was suggested that "arbitrary discrimination" be replaced by "arbitrary or unjustified distinction".

79. One delegation said that discrimination existed when the authorities treated people in a manner which was not inherently unlawful, but motivated by their unfavourable situation, sex, membership of a specific social group, etc.

80. The scientific expert suggested inserting a fourth paragraph covering the unfavourable situation of individuals, but one delegation thought that discrimination could not be defined in those terms.

81. It was also suggested that the first paragraph of all the articles might be deleted, since the principles and their purpose were already stated in the headings. Stating the principles at the start of each article, without expounding their content, would remove the need to spread them over two paragraphs. It was also suggested that setting out all the principles in the preamble would avoid systematic repetition of the same sentence at the start of every article.

82. The scientific expert thought that deleting the first paragraph of all the articles would be going too far, since headings were not provisions, and had no rule-making force. Each article should thus start by stating a principle, whose content would then be explained.

83. One delegation said that its national parliament had just adopted a new law on administrative procedure (copies were circulated to all the participants), and also the draft Constitution which the Council of Europe had helped to prepare. The new law contained a section on equality, and the Constitution contained an article which prohibited discrimination based on language. It suggested that language be added to the list of grounds of discrimination given in paragraph 3.

84. This proposal was supported by another delegation, particularly since the two member states concerned had been working successfully together on this question for a long time.

85. Without denying that such discrimination existed and was unacceptable, the scientific expert thought it better to state that language could not be a ground of discrimination or, failing that, some such formula as "any other grounds" or "inter alia". Otherwise, there was reason to fear that minority groups in single-language states might lodge complaints.

86. One delegation suggested inserting the phrase "in accordance with the law" in the new paragraph 4.

Article 4: Principle of impartiality

87. One delegation said that paragraph 4 was totally at odds with the principle of impartiality, since public officials could not, as provided for in the present version of the draft text, obtain benefits from third parties.

88. The absence of a logical link between paragraphs 2 and 3 was also noted.

89. Referring to paragraph 3, one delegation said that was not always enough for public officials to be neutral, when action was urgently needed in the public interest.

90. Insertion of the terms "objectivity" and "impartiality", used in the Council of Europe's handbook "The Administration and You", was also suggested. Recommendation No. R(80)2 concerning the exercise of discretionary powers by administrative authorities was referred to in this connection.

91. One delegation wanted to keep the word "objectivity" in paragraph 2, and add "special interests" to paragraph 3.

92. Another delegation thought that paragraph 3 should be clarified in the explanatory report, since public authorities in abstracto would find it hard to monitor compliance with an impartiality requirement applying solely to public officials.

93. It was suggested that the words "irrespective of their beliefs, their own interests" covered the essential points, and that adding undefined phrases to a common form of wording might create confusion and ultimately make it harder to achieve the Working Party's aim.

Article 5: Principle of proportionality

94. The words "appropriate to the public interest" in paragraph 2 caused some difficulties. Some delegations wanted a more precise form of wording, and suggested emphasising the measure's purpose. Instead of stating it in terms of obligations, it was suggested that breaking down the principle of proportionality into three elements - measures should be suitable, necessary and proportionate - would achieve its purpose.

95. The scientific expert thought that insisting that measures must be necessary was going too far, since this would eliminate discretionary powers. The concept of necessity was needed in connection with linked powers, not in connection with discretionary powers.

96. Agreeing with this approach, one delegation said that necessity was a feature, not of all types of measure, but only of those which created obligations. The principle of proportionality applied, for example, to compulsory purchase measures, although it was not an obligation in the strict sense. A broader formula, covering the three elements in the principle, was needed.

97. It was suggested that some such formula as "Public authorities may select the measure which interferes least with the rights of private individuals" be used.

98. One delegation suggested making a distinction between necessary measures, which might involve reversing earlier decisions, and useful measures, which imposed undue burdens on individuals, but were basically opportune and unassailable, even if they gave rise to compensation. Measures could be excessive, without being arbitrary or unlawful.

99. Another delegation suggested that the problem of the principle's scope could be solved by not referring, when defining it, to the interests involved. Another delegation agreed and referred to the handbook "The Administration and You", which spoke of means appropriate to the aim pursued. It admitted, however, that the principle of proportionality, as formulated by the CJ-DA-GT, did seem more complex.

100. The Chair agreed that earlier Council of Europe texts should be taken into account, and asked the Working Party to consider the distinction between necessary and useful measures, while disregarding the problem of compensation. He also made the point that, in exercising discretionary powers, public authorities were free to decide which measures to take - but not to take disproportionate measures. He suggested referring to the rights and freedoms of private persons affected by official decisions, since this was part of the balance inherent in proportionality.

101. The scientific expert questioned the utility of paragraph 3, as currently worded, which might prove dangerous if misunderstood by readers who were not judges, and which also duplicated the prohibition on arbitrary powers. He suggested deleting it.

102. Several delegations rejected this proposal, arguing that paragraph 3 was chiefly concerned with the principle of proportionality in the strict sense.

103. The point was also made that disproportionate measures were, quite simply, unlawful. There was a danger that the words "manifestly excessive" might give the authorities the impression that they were free to take disproportionate action.

104. The Chair said that the lawfulness of measures need not concern the Working Party, since this was determined by law and by the courts.

105. One delegation thought the definition in paragraph 2 too restrictive, and suggested that it did not tally with the formulas used in other texts, such as Recommendation No. R(80)2.

Article 6: Principle of certainty of the law

106. Paragraph 2 of this article gave rise to lively argument. The delegations agreed to keep it – on condition that it was reworded as flexibly as possible, taking account of the many questions raised, the many different approaches to the problem adopted in different legal systems, and the member states' case-law. The fact that the following articles also referred to rule-making powers made it necessary to keep it. One delegation suggested rewriting the whole article.

107. The point was also made that certainty of the law was a basic principle, and useful when applied to official measures which affected individuals - but had not been defined. “Legal situations” or “acquired rights” would be better terms than “final situations”, which was neither clear nor precise.

108. The Chair, and various delegations, made the point that established legal situations were irreversible. He said that the positive effects for private persons of official measures (acquired rights) could not be modified. The text must state clearly that public authorities were obliged to respect established rights. He acknowledged, however, that finally established rights produced effects which could be annulled or set aside at any moment.

109. One delegation thought the proposed wording on time-limits inadequate. The Chair said that rules which specified time-limits gave the public notice that they would apply for a stated time, and that reasons must be given if the time originally stated was subsequently shortened. This was a matter of overall consistency, certainty of the law and legitimate confidence.

110. The point was also made that unlawful measures could not, in principle, be rescinded after a reasonable time if they had created rights for individuals – although there were cases where official measures had created rights, but had to be rescinded later, because some paramount general interest made this necessary. In such cases, this was not only possible, but lawful.

111. One delegation thought that the principle of certainty of the law should not apply to rule-making decisions.

112. It was noted that a public authority which repeatedly altered individual or rule-making decisions, without taking account of the interests of private persons, became arbitrary. If public authorities could not be compelled to avoid repeatedly changing the rules in piecemeal fashion, and to respect transitional provisions, there should be guidelines urging them to do so. Their conduct must be reasonably predictable and consistent. One delegation wondered, however, whether it was wise to insist on the need for consistency when rules were being changed.

113. Other delegations suggested that transitional provisions, which were often provided for in law, should be given as an example, but the scientific expert said that such provisions were sometimes unnecessary, when measures had to be introduced and enforced as a matter of urgency.

114. One delegation thought that the principle of legitimate confidence should not be linked with that of certainty of the law, since it varied between countries. It added that inconsistency of official decisions might mislead individuals who had legitimate confidence in them.

115. The scientific expert said that the discussion highlighted the confusion caused by the term “principle of certainty of the law”, which was admittedly vague. Certainty of the law might indeed be involved, particularly when transitional measures were adopted. Legitimate confidence was a different concept, although the two were connected. Although its scope was extremely hard to define, the principle of certainty of the law must be stated as such.

116. One delegation said that prohibiting retroactive measures was one aspect of certainty of the law. The scientific expert agreed that the link was a strong one, but said that retroactive measures might be needed in a few exceptional cases, if only to fill a legal vacuum. This point needed further, qualified explanation.

117. It was also pointed out that the ban on retroactive measures applied only to negative measures, i.e. those which interfered with interests. The phrases, "prohibition of retroactive effects" and "with a few exceptions", commonly used in Council of Europe texts, were also referred to. Another delegation added that retroactive measures were permissible only in cases provided for in law. Private individuals must know in advance what measures the authorities intended to take, and what the transitional period would be. Certainty of the law implied that private persons must, whenever possible, be informed of the authorities' intentions, so that they could take any action needed - particularly since the authorities sometimes took measures which automatically damaged their interests. Such measures must be challengeable in the courts and give rise to compensation.

118. Discussion of Article 6 showed that there was a problem of linkage with Article 16.

Article 7: Principle of reasonable time

119. Referring to reasonable time, the scientific expert explained that paragraph 1 of Article 7 was a general provision, and probably too remote from the central question of the authorities' relations with the public. The same was true of paragraph 2. Paragraph 3 should be moved, unchanged, to Article 17.

120. In cases where individuals were required, not simply to discharge their obligations, but also to avail of their rights, within a reasonable time, and take the action needed for that purpose, one delegation wondered whether a broader formula, covering all eventualities, might not be better.

121. Another delegation thought that there should be a separate provision, clearly specifying a reasonable time (neither too short nor too long), within which public authorities must respond to requests from private persons.

122. One delegation wondered whether the principles of certainty of the law and reasonable time, which were very closely linked, could really be distinguished, and suggested moving paragraphs 2 and 3 of Article 7 to Article 6.

123. The scientific expert insisted that highlighting the principle of reasonable time, however closely linked with that of certainty of the law, was useful.

124. A problem of linkage between Articles 7 and 17 was noted.

Article 8: Principle of respect for privacy

125. With special reference to the title of Article 8, the Chair mentioned Recommendation No. R(86)1 on the protection of personal data used for social security purposes, which spoke of "respect for privacy".

126. Referring to the ECHR, which guaranteed the right to private and family life, and to Recommendation No. R(81)19 on access to information held by public authorities, which spoke of privacy, one delegation thought "privacy" a better term than "private sphere". Another delegation agreed.

127. The delegations differed on paragraph 2. Several favoured deleting it, and said that defining general conditions on which respect for privacy might be restricted was pointless, since this was not the subject of the recommendation, even though specific conditions were justified. Others thought it should be kept, at least in part. The first part ("they may only intervene in private and family life") could be kept, but the second ("to protect public order") could not, since it was not certain that "public order" covered health, security, etc. in the law of all countries. If paragraph 2 were kept, one delegation proposed adding the words "in accordance with the law", which were used in paragraph 2 of Article 8 of the ECHR.

128. Some delegations thought that respect for privacy was not an absolute principle, and that the wording used in the ECHR, the case-law of the European Court of Human Rights and most legal systems should be adopted; others thought it an absolute right, and that paragraph 2 should therefore remain. One delegation suggested modifying the heading of the article to take more account of paragraphs 3 and 4 and their content. Another suggested that the first two paragraphs could be deleted, because they simply restated existing legal principles or, alternatively, kept, since they indicated that the right in question was not absolute.

129. The Chair wondered whether this article might not be limited to protecting personal data, since the authorities' use of private data was the only point which needed emphasising.

130. It was pointed out that "privacy" was a far broader term in common-law countries than it seemed to be in Article 8, and that paragraphs 3 and 4 were solely concerned with data protection. It was accordingly suggested that the article should refer either to data protection or to the right to privacy. One delegation thought it necessary at least to indicate that the principle stated in paragraph 1 could be waived in certain circumstances.

131. One delegation thought paragraphs 3 and 4 important, since they covered implementation of the principle, but said that the wording needed reviewing. It was also important to cover the new media, including the electronic media, which public authorities were increasingly using in their dealings with the public, and to store information.

132. Finally, it was suggested that verification of data should also be mentioned.

133. Replying to the many comments made, the scientific expert first made the point that the Code was not designed to justify the authorities' action in certain situations. The wording in paragraph 2 had been taken from paragraph 2 of Article 8 of the ECHR, and referred - even though it dealt with relations between the authorities and the public - to one form of action by the authorities in general. Paragraphs 3 and 4 were the most specific in their scope. An article comprising only those two paragraphs, which covered data processing, would be somewhat limited by comparison with those in Section I, and should not, for that reason, be included either in the section on principles or the section on measures. Computerised processing of data was widespread, and so it was well to mention it, and indicate that the rules which governed it were all rooted in the basic principle of respect for privacy. Although paragraphs 1 and 2 differed in scope from paragraphs 3 and 4, the two were connected. Finally, it was by no means pointless – in a unique text dealing with relations between the authorities and the public - to state the principle of respect for privacy and the basic obligation which went with it.

Article 9: Principle of transparency

134. The scientific expert said that transparency was part of the general requirement that administration be open, but wondered whether it was actually a principle, and whether the CJ-DA-GT wished to affirm it categorically.

135. One delegation said that a clear distinction must be made between two types of text: official documents, which were not usually available to everyone, and public documents. The question was whether private individuals had a right to inspect official documents. Having said that, it was not convinced that these two types of document should be mentioned in the same article.

136. Another delegation suggested that the distinction between public and official documents should be made and explained in the explanatory report. It insisted that documents of personal interest to individuals, whether public or not (e.g. medical files), could be made available to them, and said that this had a bearing on data protection. It also wondered whether it might not be well to go beyond private persons and their interests and refer to the media.

137. A third delegation suggested that the real distinction was not between official and public documents, but between the ways in which documents were published.

138. Another delegation warned the Working Party that member states had different concepts of public and official documents. It said that the public documents of general interest referred to in paragraph 1 were among the public documents referred to in paragraph 3. On the question of access to these documents, it referred to Recommendation Rec(2002)2 on access to official documents, Section III of which – General principle on access to official documents – stated that "member states should guarantee the right of everyone to have access, on request, to official documents held by public authorities", and said that "everyone" included the media.

139. The scientific expert made the point that Article 9, as formulated, actually covered two issues: action which the authorities must take to make certain documents available to the public (paragraphs 1 and 2), and requests from the public which the authorities must consider and process (paragraphs 3 and 4). These provisions were highly practical, and were placed here because they were linked to the principle of transparency. Finally, he confirmed that the provisions in this article did cover the media.

140. It was suggested that the Preamble should refer to Recommendation Rec(2002)2.

141. Since many problems were caused by the public's ignorance of the data possessed by the officials they were dealing with, one delegation suggested adding that they were also entitled to have access to such data.

142. The Chair concluded discussion of the draft text. The changes agreed when the first nine articles were discussed are included in the preliminary draft text which appears, in revised form, in Appendix III to this report.

143. To facilitate work at the CJ-DA-GT's next meeting, the Chair suggested that delegations send their comments, and details of problems encountered with articles still to be examined, to the Secretariat. Although the Working Party had still to decide on the Recommendation's final form, he also asked the scientific expert to draft its provisions in the form of an appendix on the principles stated in it.

144. The scientific expert promised to make every effort to do this, but warned the delegations that, even if he managed to draft the Recommendation in appendix form, there was a danger that it might be unbalanced by comparison with the Code itself.

III. EXCHANGE OF VIEWS ON QUESTIONS TO BE EXAMINED BY THE CJ-DA FROM 2007

145. The CJ-DA-GT held an exchange of views on work which the CJ-DA might do from 2007.

146. The Secretariat reminded the delegations that they had, at previous meetings, shown interest in preparing a legal instrument on administrative remedies, as a continuation of work already done by the CJ-DA. It also said that the CJ-DA-GT's proposal might be supported by the European Ministers of Justice at their 27th Conference (cf. Chapter I). Adoption by the Ministers of a resolution on preparation of an instrument in the field of administrative law would provide a strong argument for approval of the CJ-DA's terms of reference.

147. The 27th Conference would be held in Yerevan (Armenia) on 12-13 October 2006, coinciding with the CJ-DA's plenary meeting. "Victims: place, rights and assistance" would be the theme. At its plenary meeting on 22-24 March 2006, the CDCJ had selected three sub-themes, which were detailed in the information document CDCJ(2006)8:

1 - Liabilities/responsibility and compensation,
2 - Vulnerable victims and their access to public services and justice,
3 - The role of, and the sharing of, good practice between public bodies, institutions and NGOs in assisting victims, in particular vulnerable victims.

148. It was proposed that an "administrative law" aspect concerned with protection of victims be added if possible. Decisions might also be taken on proposals for future CJ-DA activities.

149. The Chair said that issues covered by liability and compensation included protection of relatives and witnesses, new identities and relocation in other countries. Lacking experience in this area, the Working Party had reservations on tackling this question.

150. Several delegations pointed out that the sub-themes for the conference covered various areas of law: criminal, civil and administrative. Where liability/responsibility and compensation were concerned, the situation in Council of Europe member states could hardly be more varied.

151. Recommendation No. R(84)15 on public liability was referred to, and it was suggested that the possibility of updating it should be considered, focusing on acts committed by public officials or the role of public authorities in setting up special courts to consider, in procedural terms, compensation for the victims of unlawful acts.

152. One delegation was not convinced that new and stricter regulations were required at present, since finding points of contact on liability/responsibility between the various legal systems was difficult. It did not have the impression that Recommendation No. R(84)15 really needed total revising. Assistance for victims was covered partly by public law and partly by the law of criminal procedure, and a Council of Europe committee of experts had already considered it. Even supposing that it had the requisite knowledge, the Working Party did not have the necessary practical experience. Vulnerable victims were essentially a matter for criminal law. This issue could, however, be made more specific by broadening the definition and speaking of "vulnerable persons". One possible

approach would then be to focus on the law on the police and, specifically, the use of coercion by the police on vulnerable persons, but it would be necessary to decide whether the CJ-DA-GT was really competent to deal with this question.

153. Another delegation said that Recommendation No. R(84)15 was over 20 years old, and that updating could easily be envisaged.

154. One delegation said that it would ask the ministers of justice and the interior in its country for proposals on the Committee's future work, and would send their replies to the Secretariat. The CJ-DA-GT had done a vast amount of work on various aspects of administrative procedure, and questions relating to substantive law should not be forgotten. So far, for example, the Working Party had not tackled the question of administrative sanctions for minor offences. It was true that the Council of Europe had prepared a recommendation on administrative sanctions (No. R(91)1), but this did not deal, in a basic sense, with administrative penalties and sanctions in general.

155. The Chair acknowledged that there was no instrument on disciplinary sanctions, although there was one on administrative sanctions (see above). The recommendation on public liability was concerned with the behaviour of the public authorities, and he thought that compensation was a better line to follow than liability, since the authorities should regard compensation as an obligation.

156. One delegation said that European countries' thinking on liability of public authorities in relation to the public - not only fault liability, but also, and above all, no-fault liability – had changed radically in the previous 20 years, and that the plight of victims of official action had been seriously considered. It accordingly suggested that problems be identified and also aspects on which the member states were agreed.

157. Another delegation said that its country would certainly be interested in work on liability connected with lawful acts -particularly restrictions on ownership and entrepreneurial rights imposed, for example, to protect the natural or urban environment.

158. The point was made that liability was an interdisciplinary topic, since it took various forms - disciplinary, civil, criminal, etc. - and various legal rules applied to it.

159. When the Secretariat reminded the delegations that they had first intended to prepare a legal instrument on administrative remedies, one said that administrative remedies, and particularly internal administrative remedies, were a possible alternative, making it possible to go beyond Recommendation Rec(2001)9 on alternatives to litigation between administrative authorities and private parties, by suggesting ways of involving the persons concerned in the procedure, settling disputes within authorities and so relieving the burden on the administrative courts. The idea of using internal remedies to reduce reliance on the courts and so indirectly achieve the reasonable time objective was supported by another delegation.

160. Administrative remedies were a very live issue in two member states. One delegation told the meeting that a document on this very question would shortly be published in its country, and a working party established to study it. It thought that seeking the support of the Ministers of Justice and focusing on liability were promising ideas.

161. The Chair agreed that administrative remedies were a question which the Working Party knew well, and on which it could work effectively, but thought that other subjects should be considered as

well.

162. Finally, after an exchange of views, one delegation recapitulated the new themes selected for the Committee's future work, i.e.: liability in connection with lawful acts, the practicalities of compensation for the victims of acts of violence, the use of coercive measures, and administrative remedies.

163. The CJ-DA-GT delegations asked the Secretariat to give them time to consider and submit further proposals which were both logical choices and of interest to several member states. Proposals should reach the Secretariat before the end of April.

164. At the Chair's request, the Secretariat provided a reminder of the timetable constraints applying to the CJ-DA's draft terms of reference for 2007-2008. Since the European Committee on Legal Co-operation (CDCJ) had decided, at its plenary meeting (22-24 March 2006), to ask its Bureau to examine the CD-DA's new terms of reference at its next meeting, and had requested that the members of the CDCJ also be consulted in writing on the draft, the CJ-DA would have to examine the draft terms of reference at its plenary meeting on 11-13 October.

IV. DATE OF THE NEXT MEETING

165. The CJ-DA-GT's next meeting, initially scheduled for 5-7 July 2006, had had to be postponed, since the CJ-DA Secretariat had been given the task of preparing the Conference of Prosecutors General of Europe, which would be taking place in Moscow on those dates.

166. The Working Party decided to hold its last meeting for 2006 from 10 to 12 July at the Council of Europe in Strasbourg.

APPENDIX I

WORKING PARTY OF THE PROJECT GROUP ON ADMINISTRATIVE LAW/
GROUPE DE TRAVAIL DU GROUPE DE PROJET SUR LE DROIT ADMINISTRATIF
(CJ –DA-GT)

3rd meeting/3e *réunion*
Strasbourg, 5 – 7 April/*avril 2006*

LIST OF PARTICIPANTS

MEMBER STATES / *ETATS MEMBRES*

CJ-DA-GT Members / *Membres du CJ-DA-GT*

BELGIUM / BELGIQUE apologised / excusée

FINLAND / FINLANDE
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IRELAND / IRLANDE
Mrs Caroline DALY, Advisory Counsel, Office of the Attorney General, DUBLIN **(Chair of the CJ-DA / Présidente du CJ-DA)**

LUXEMBOURG
M. Georges RAVARANI, Président du Tribunal Administratif, Tribunal Administratif, LUXEMBOURG

ITALY / ITALIE
Mr Vittorio RAGONESI, Judge of the Supreme Court of Cassation, Cour de Cassation, ROME **(Chair of the CJ-DA-GT / Président du CJ-DA-GT)**

NETHERLANDS / PAYS-BAS
Mr Theo SIMONS, Senior Vice-President of the Administrative Court of Appeal, UTRECHT

POLAND / POLOGNE
Mme Teresa GÓRZYŃSKA, Chef du Département de Droit Administratif, Institut des Sciences Juridiques, Académie Polonaise des Sciences, VARSOVIE

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M. Mário AROSO de ALMEIDA, Professeur universitaire de droit administratif, Ministère de la Justice, PORTO

RUSSIAN FEDERATION / FEDERATION DE RUSSIE
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Others / Autres

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Mme Dominique GENIEZ, Chargée de Mission auprès du Directeur des Affaires Civiles et du Sceau, Premier Conseiller de Tribunal Administratif, Direction des Affaires Civiles et du Sceau, DACS/Justice, Ministère de la Justice, PARIS

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Mme Olga PAPADOPOULOU, Maître de Requêtes, Conseil d'Etat, ATHENES

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EUROPEAN COMMISSION / COMMISSION EUROPEENNE
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OBSERVERS WITH THE COUNCIL OF EUROPE/
OBSERVATEURS AUPRES DU CONSEIL DE L'EUROPE

CANADA not represented / non représenté

HOLY SEE / SAINT SIEGE apologised / excusé

JAPAN / JAPON not represented / non représenté

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UNITED STATES OF AMERICA / ETATS-UNIS D'AMERIQUE not represented / non représentés

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CENTRE EUROPEEN DE DROIT PUBLIC

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COMITE DIRECTEUR POUR LES DROITS DE L'HOMME (CDDH) apologised / excusé

CONGRESS OF LOCAL AND REGIONAL AUTHORITIES OF EUROPE /
CONGRES DES POUVOIRS LOCAUX ET REGIONAUX DE L'EUROPE not represented/non représenté

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SECRETARIAT OF THE COUNCIL OF EUROPE
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INTERPRETATION
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ANNEXE II

<u>ORDRE DU JOUR</u>

WORKING PARTY OF THE PROJECT GROUP ON ADMINISTRATIVE LAW/
GROUPE DE TRAVAIL DU GROUPE DE PROJET SUR LE DROIT ADMINISTRATIF
(CJ –DA-GT)

3rd meeting/3e *réunion*
Strasbourg, 5 – 7 April/*avril 2006*

1. Opening of the meeting / *Ouverture de la réunion*

2. Adoption of the agenda / *Adoption de l'ordre du jour*

3. Information by the Secretariat / *Informations par le Secrétariat*

4. Preparation of the preliminary draft recommendation concerning good administration and consolidated model code of good administration / *Elaboration de l'avant-projet de recommandation concernant une bonne administration et de code modèle consolidé de bonne administration*

<u>Working documents / *Documents de travail*</u>

Preliminary draft recommendation on good administration and consolidated model code of good administration as amended by the CJ-DA-GT / *Avant-projet de recommandation concernant une bonne administration et de code modèle consolidé de bonne administration tel qu'amendé par le CJ-DA-GT*

CJ-DA-GT (2005) 1 rev. 3

Preliminary draft recommendation on good administration and consolidated model code of good administration as revised by the scientific expert / *Avant-projet de recommandation concernant une bonne administration et de code modèle consolidé de bonne administration tel que révisé par l'expert scientifique*

CJ-DA-GT (2005) 1 rev. 4

<u>Background documents / *Documents de référence*</u>

Preliminary draft recommendation on good administration and consolidated model code of good administration prepared by the scientific expert and the Secretariat / *Avant-projet de recommandation concernant une bonne administration et de code modèle consolidé de bonne administration préparé par l'expert scientifique et le Secrétariat*

CJ-DA-GT (2005) 1

Report of the 1st meeting of the Working Party of the Project Group on Administrative Law (CJ-DA-GT) (Strasbourg, 14-16 November 2005) / *Rapport de la 1e réunion du Groupe de travail du Groupe de projet sur le droit administratif (CJ-DA-GT) (Strasbourg, 14-16 novembre 2005)*

CJ-DA-GT (2005) …

Report of the 2nd meeting of the Working Party of the Project Group on Administrative Law (CJ-DA-GT) (Strasbourg, 14-16 December 2005) / *Rapport de la 2e réunion du Groupe de travail du Groupe de projet sur le droit administratif (CJ-DA-GT) (Strasbourg, 14-16 décembre 2005)*

CJ-DA-GT (2005) …

Revised specific terms of reference of the CJ-DA for 2005-2006 / *Mandat spécifique révisé du CJ-DA pour 2005-2006*

CJ-DA (2005) 6

Report of the 17th meeting of the Project Group on Administrative Law (CJ-DA) (Strasbourg, 28 February-2 March 2005) / *Rapport de la 17ème réunion du Groupe de projet sur le droit administratif (CJ-DA) (Strasbourg, 28 février-2 mars 2005)*

CJ-DA (2005) 5

Preliminary draft report on the feasibility and desirability of preparing a recommendation and/or a consolidated model code of good administration prepared by the CJ-DA / *Avant-projet de rapport sur la faisabilité et l'opportunité de préparer une recommandation relative à une bonne administration et/ou un code modèle consolidé de bonne administration préparé par le CJ-DA*

CJ-DA (2005) 4

Principles of good administration in Council of Europe member States / *Principes de bonne administration dans les Etats membres du Conseil de l'Europe*

CJ-DA-GT (2004) 7

Parliamentary Assembly Recommendation 1615 (2003) on the institution of ombudsman and its explanatory memorandum / *Recommandation 1615 (2003) de l'Assemblée Parlementaire sur l'institution du médiateur et son exposé des motifs*

CJ-DA-GT (2004) 1

Reply by the Committee of Ministers to Parliamentary Assembly Recommendation 1615 (2003) on the institution of ombudsman / *Réponse du Comité des Ministres à la Recommandation 1615 (2003) de l'Assemblée Parlementaire sur l'institution du médiateur*

CJ-DA-GT (2004) 2

Council of Europe instruments relevant to the preparation of a draft opinion on the feasibility of preparing a consolidated model code of good administration / *Instruments du Conseil de l'Europe pertinents pour l'élaboration d'un projet d'avis sur la faisabilité de l'élaboration d'un code modèle consolidé de bonne administration*

CJ-DA-GT (2004) 3

The European Code of Good Administrative Behaviour of the European Ombudsman / *Le code européen de bonne conduite administrative du Médiateur européen*

CJ-DA-GT (2004) 4

Conclusions of the European Conference on «Training of civil servants to achieve good administration» (Vilnius, Lithuania, 27-28 October 2005) / *Conclusions de la Conférence européenne sur «La formation des fonctionnaires dans l'intérêt d'une bonne administration» (Vilnius, Lituanie, 27-28 octobre 2005)*

DA/Conf (2005) Conclusions

5. Exchange of views on questions to be considered by the CJ-DA as from 2007 / *Echange de vues sur les questions devant être examinées par le CJ-DA à partir de 2007*

Background documents / *Documents de référence*
Legal instruments of the Council of Europe in the field of administrative law / *Les instruments juridiques du Conseil de l'Europe dans le domaine du droit administratif*

CJ-DA (2005) Inf.

6. Any other business / *Divers*

Background documents / *Documents de référence*

Warsaw Declaration – Third Summit of Heads of State and Government of the Council of Europe (Warsaw, 16-17 May 2005) / *Déclaration de Varsovie – Troisième Sommet des Chefs d'Etat et de Gouvernement du Conseil de l'Europe (Varsovie, 16-17 mai 2005)*

CM (2005) 79 final

Plan of Action – Third Summit of Heads of State and Government of the Council of Europe (Warsaw, 16-17 May 2005) / *Plan d'Action – Troisième Sommet des Chefs d'Etat et de Gouvernement du Conseil de l'Europe (Varsovie, 16-17 mai 2005)*

CM (2005) 80 final

Message from the Committee of Ministers to the Committees involved in the intergovernmental co-operation at the Council of Europe / *Message du Comité des Ministres aux Comités oeuvrant dans le cadre de la coopération intergouvernementale du Conseil de l'Europe*

CJ-DA (2005) CM Message

APPENDIX III

PRELIMINARY DRAFT RECOMMENDATION ON GOOD ADMINISTRATION AND CONSOLIDATED MODEL CODE OF GOOD ADMINISTRATION

*Note: changes adopted by the working party at its meetings on 14-16 November and 14-16 December 2005 are indicated **in red**; changes to the initial preliminary draft which have not yet been discussed by the working party are indicated **in green**; the remaining parts of the text are those of the initial preliminary draft.*

The Committee of Ministers, under the terms of Article 15.*b* of the Statute of the Council of Europe,

Having regard to Recommendation 1615 (2003) of the Parliamentary Assembly, which calls on the Committee of Ministers to draft a model text for a basic individual right to good administration and a single, comprehensive, consolidated model code of good administration, deriving in particular from Committee of Ministers Recommendation No. R (80) 2 and Resolution (77) 31 and the European Code of Good Administrative Behaviour, thus providing elaboration of the basic right to good administration so as to facilitate its effective implementation in practice;

Having regard to Resolution (77) 31 of the Committee of Ministers on the protection of the individual in relation to the acts of administrative authorities;

Having regard to Recommendation R (80) 2 of the Committee of Ministers concerning the exercise of discretionary powers by administrative authorities;

Having regard to Recommendation R (81) 19 of the Committee of Ministers on the access to information held by public authorities;

Having regard to Recommendation R (84) 15 of the Committee of Ministers relating to public liability;

Having regard to Recommendation R (87) 16 of the Committee of Ministers on administrative procedures affecting a large number of persons;

Having regard to Recommendation R (91) 10 of the Committee of Ministers on the communication to third parties of personal data held by public bodies;

Having regard to Recommendation R (2000) 10 of the Committee of Ministers on codes of conduct for public officials;

Having regard to Recommendation R (2003) 16 of the Committee of Ministers on the execution of administrative and judicial decisions in the field of administrative law;

Considering that the aim of the Council of Europe is to achieve a greater unity between its members;

Considering that public administration plays a key role in democratic societies; that it is active in numerous spheres; that its activities affect private persons' rights, liberties and interests, that national legislation and various international instruments, particularly those of the Council of Europe, offer these individuals certain rights with regard to government; that the European Court of Human Rights has applied the Convention for the Protection of Human Rights and Fundamental Freedoms to the protection of private persons in their relations with government;

Considering that it is desirable to combine the various rights with regard to government into a right to good administration and to clarify its content, based on the example of the European Charter of Fundamental Rights;

Considering that everyone in a democratic society has a right to good administration, whose requirements may be reinforced by a general legal instrument; that these requirements are linked to the fundamental principles of the rule of law, such as those of equality, non-discrimination, neutrality, impartiality, the rights of the defence, transparency, proportionality and effectiveness; and that they call for procedures to protect persons, provide them with information and enable them to participate in the official decision making process;

Considering that the authorities must provide private persons with a certain number of services and issue certain instructions and rulings, and that when they are required to take action, they must do so within a reasonable period;

Considering that there must be appropriate procedures, including possibly judicial procedures, to deal with complaints of maladministration, whether as a result of official inaction, delays in taking action or action in breach of official obligations;

Considering that good administration must be ensured by the quality of the regulations, which must be clear, accessible, easily understood and appropriate;

Considering that good administration implies the provision of services meeting the basic needs of society;

Considering that good administration is an aspect of good governance; that it is not just concerned with legal arrangements; that it depends on quality of organisation and management; that it must meet the requirements of effectiveness, efficiency and relevance to the needs of society; that it must maintain, uphold and safeguard public property and other public interests; that it must comply with budgetary requirements; and that it must preclude all forms of corruption;

Considering that good administration also depends on the quality of human resources, training and officials' attitudes;

Recommend to Governments of Member States:

- To promote good administrion by the organisation and functioning of public authorities in accordance with the principles of efficiency, effectiveness and quality for value. These principles:

  - require [that public authorities/administration] to check wether current services [which are required] are/can be provided at a lesser cost [services are provided in a cost effective manner], if they should be replaced by other services, if they became obsolete/useless and, in that instance, be suppressed;
  - impose on administration to seek/ensure the best means to obtain the best results are pursued, especially concerning costs;
  - impose on administration to ensure acts are performed within a reasonable time…….;
  - need to ensure that objectives are set and performance indicators are devised in order to monitor and measure on a regular basis the achievement of these objectives by the administration and its public officials / ensure that the objectives are reviewed as to whether they have been achieved and how they have been achieved;
  - shall be guaranteed by internal and external monitoring mechanisms of administration and its public officials' actions;

- To recognise a right to good administration by approving a single, comprehensive and consolidated national code of good administration based on the model code of good administration appended to this Recommendation.

~~[Recommends that the governments of the member states encourage recognition of a right to good administration and, in attempting to achieve this, approve a single, comprehensive and consolidated code of administration which seeks to ensure the needs of modern society are met by public authorities in supplying services in an efficient, effective and cost effective manner.]~~

Appendix to the recommendation
Code of good administration

Article 1 Scope

[1. **Private persons have a right to good administration in accordance with this code.]**

2. ~~This code applies to public authorities [in their relations with private persons].~~
This code lays down principles and rules which must be applied by public authorities [in their relations with private persons], ~~in providing services to private persons~~ in order to achieve good administration.

3. For the purposes of this code, public authorities shall be taken to mean: *(former Article 2, para. 1)*

a) **any public-law entity of any kind or at any level, including state, local and autonomous authorities,** providing a public service or ~~operating~~ acting in the public interest,
b) **or any private-law entity** exercising the prerogatives of a public authority **responsible for providing a** public service or acting in the public interest.

4. For the purposes of this code, private persons shall be taken to mean individuals and legal persons under private law who are the subject of public authorities' activities. *(former Article 2, para .2)*

Section I

~~Basic/substantive~~ Principles of good administration

~~*(Title that should be adopted: Basic principles)*~~

~~Article 1 bis~~

~~The principles listed in this section do not follow a hierarchy.~~

~~Together they contribute to good administration.~~

~~They constitue the minimum of principles necessary for good administration.~~

~~They may be strengthened and supplemented by other principles.~~

Article 2 Principle of lawfulness

1. Public authorities shall act in accordance with the law. **They shall take no arbitrary measures, ~~even~~ including when exercising discretion** / They shall not act in an arbitrary manner including where they may exercise their discretion.

2. **They shall comply with** domestic law, international treaties and the general principles of law governing their organisation, functioning and activities.

3. **They shall ~~apply/~~act in accordance with** the rules defining their powers and procedures laid down in their governing legislation.

4. ~~**They** shall exercise their powers in accordance with the relevant facts and legal provisions and for the purpose for which they have been conferred.~~
They shall exercise their powers if the established facts and the applicable law entitle them do so and solely for the purpose for which they have been conferred.

Article 3 Principle of equality

1. Public authorities shall respect the principle of equality [between / with regard to private persons.]

2. **They** shall treat private persons who are in the same situation in the same way. ~~**Any difference in treatment made shall be objectively justified.**~~ **Any difference in treatment by public authorities or their public officials ~~made~~ shall be objectively justified.**

3. **They** shall not discriminate [arbitrarily] between private persons on grounds, ***inter alia*****,** of sex, ethnic origin, religion or **belief ~~, or on any other similar grounds~~.**

~~4. They may take steps in a favour of private person who are in an unprivileged situation in conformity with the law.~~

Article 4 Principle of [objectivity and] impartiality

1. Public authorities shall **respect** the principle of impartiality. ~~**and ensure that** it the principle of impartiality **is respected.**~~

2. They shall act with objectivity [~~and impartiality~~], taking into account only relevant elements / having regard to relevant matters only.

3. They shall ensure that their public officials carry out their duties with neutrality [and impartiality], irrespective of their beliefs and their ~~own~~ personal interests [and other specific interests, and without deriving any personal benefits.] ~~and any benefits obtained from third parties / they might obtain.~~

Article 5 Principle of proportionality

1. Public authorities shall respect the principle of proportionality.

2. ~~**They** shall only impose obligations on private persons to the extent that these are appropriate to the public interest.~~ They shall impose measures affecting rights, liberties or interests of private persons only if they are necessary; their content should be appropriate and capable of reaching the goal/aim pursed.

3. ~~When exercising discretion, they shall not take manifestly excessive measures.~~
When exercising their discretion, they shall maintain a proper balance between any adverse effects which their decision may have on the rights, liberties or interests of private persons and the purpose which they pursue, any measures taken by them must not be excessive.

Article 6 Principle of [legal] certainty [of the law]

1. Public authorities shall respect the principle of [legal] certainty [of the law].

2. ~~They may not take any retroative measures which affect the rights and interests of private persons. except to meet the needs steering from judicial orders when there is a legal vacum.~~
They may not take any retroative measures [which affect ~~the~~ rights and interests of private persons] except in duly justified circumstances [where they have unfavourable effect, they have been announced or they fill legal vacum, *inter alia* following judicial decisions.] (*see together with Article 16*)

3. They shall not interfere with vested rights and final legal situations except where required in the public interest / except for the needs overriding the public interest. ~~overights the legimate confidence except to meet public interests.~~

4. They shall adopt/comply with transitional measures in order to apply new measures, except when public interest requires an immediate implementation of such measures. / They shall introduce transitional measures in new measures they adopted for their implementation, except when public interest requires an immediate implementation of such measures.

[They shall be consistent [and accountable in their opinions] /and not change opinions unecessarily/all the time.]

[They shall not modify or abrogate measures which are associated with a time limit before this time limit except for the needs overriding the public interest / except where required in the public interest.]

5. They shall comply with confidence of private persons in keeping/maintaining final legal situations.

[~~2. They shall allow private persons a reasonable time to perform the obligations imposed on them, except in urgent cases where they shall duly state the reasons for this.~~

[They shall not infringe / shall comply with final legal situations.
They shall not infringe / shall comply with vested rights.

Rule-making decisions should provide for transitional measures when it is necessary to preserve the legal status of those concerned.]

~~*(Note: it is only worth keeping this article if a number of complements are added by way of illustration, as in the other articles on principles)*~~

Article 7 ~~**Principle of reasonable time**~~
[Principle of reasonable time limit for taking action]

1. Public authorities shall act within a reasonable time.

2. ~~**They** shall carry out the duties conferred on them within a reasonable time.~~
They shall carry out their duties within a reasonable time.

~~3. **They** shall allow private persons a reasonable time~~ [~~to exercise their rights and fulfill their obligations~~] ~~to perform the obligations imposed on them, **except in urgent cases where they shall duly state the reasons for this.**~~

3. They shall respond to requests made by private persons wihin a reasonable time.

4. The time limits they impose on private persons shall be reasonable.

Article 8 **Principle of respect for privacy**

1. ~~Public authorities shall respect **the right to privacy.**~~
Public authorities shall respect privacy, *inter alia* in processing personal data.

~~[2. **They** may only intervene in private and family life to protect public order.]~~

~~3~~ 2. **When public authorities are authorised to process personal data or files,** particularly by electronic means, ~~there~~ **they** shall **take all necessary measures to guarantee privacy.** ~~be safeguards and guarantees ensuring that privacy is protected~~.]

~~4~~ 3. Private persons shall have the right to consult personal information concerning them and secure the **rectification or** removal of any information that is inaccurate or should not have been recorded.

Article 9 Principle of transparency

1. Public authorities shall take appropriate steps to inform interested persons of official documents of general ~~interest~~/scope/range. *(former Article 18, para. 1)*

2. Public authorities shall publish important documents of general interest/[scope/range?], in particular documents which relate to the general application of legislation, such as directives, instructions and circulars. *(former Article 18, para. 2)* / Public authorities shall ensure that important public documents which are of general interest/scope/range are published and available to private persons. ~~publish important documents of general interest,~~ They shall ensure that legislation including directives, instructions and circulars [which explain the legislation] are published and accessible by private persons. ~~ein particular documents which relate to the general application of legislation, such as directives, instructions and circulars. *(former Article 18, para. 2)*~~

3. Private persons shall have the right of access to **official** documents. *(former Article 19, para. 1)*

4. ~~For the purposes of this code, **official** documents shall be taken to mean **all information recorded in any form, drawn up or received and held by public authorities and linked to any administrative function. They shall include in particular decisions of administrative authorities,** files, reports, studies, records, minutes, statistics, directives, instructions, opinions and forecasts. *(former Article 19, para. 2)*~~

5. Access to official documents may be refused **where their secrecy or confidentiality must be preserved to protect ~~essential/paramount~~ public or private interests defined by law**. *(former Article 19, para. 3)*

6. Documents ~~in~~ under preparation shall not be communicated. *(former Article 19, para. 4)*

7. In the case of refusal or failure to communicate the requested document within a reasonable time, the applicant shall have an effective remedy. *(former Article 19, para. 5)* / In the case of refusal or failure to communicate ~~the~~ requested documents within a reasonable time, the applicant shall be provided with an effective remedy. ~~have an effective remedy. *(former Article 19, para. 5)*~~

8. Communication and copying of official documents may be subject to the payment of an amount covering the real cost of this. *(former Article 19, para. 6)* / Public authorities may charge a fee for the administrative cost involved in communicating and copying documents to private individuals. ~~Communication and copying of official documents may be subject to the payment of an amount covering the real cost of this. *(former Article 19, para. 6)*~~

8. For the purposes of this code, **official** documents shall be taken to mean **all information recorded in any form, drawn up or received and held by public authorities and linked to any administrative function. They shall include in particular decisions of administrative authorities,** files, reports, studies, records, minutes, statistics, directives, instructions, opinions and forecasts. *(former Article 19, para. 2)*

Section II

Rules governing administrative decisions

Article 10 **Definitions** (*former Article 2)*

1. For the purposes of this code, administrative decisions shall be taken to mean decisions taken by the public authorities exercising the prerogatives of a public authority. These decisions may be either rule-making decisions or non-regulatory decisions. *(former Article 2, para. 3)*

(Variant: For the purposes of this code, decisions of public authorities shall be taken to mean rule-making decisions taken in the exercise of regulatory power and non-regulatory decisions)

2. Non-regulatory decisions may be individual or otherwise. *(former Article 2, para. 4)*

3. Individual decisions are those that directly affect the person(s) concerned. *(former Article 2, para. 5)*

Article 11 **Requests from private persons** *(former Article 10)*

1. All **private** persons shall have the right to ask **public authorities** to take one or more individual decisions **that lie within their competence**.

2. When such a request is made, within a public authority, to an authority lacking the relevant competence, the latter shall forward it to the competent authority within this public authority and advise the applicant that it has done so.

3. All requests for individual decisions made to public authorities shall be acknowledged in writing with an indication, if the law so provides, of the time within which the decision will be taken, and of the consequences of a decision not being taken.

4. **Decisions in response** to requests to public authorities shall be taken within a reasonable time defined by law or regulations. [Failure to respond within the specified time shall **implicitly** signify rejection or acceptance of the request.]

Article 12 **Right of private persons to be heard with regard to individual decisions** *(former Article 11)*

1. If an administrative authority intends, on its own initiative or at the request of a private person, to take an individual decision that will directly affect the rights of private persons, those persons shall/should be given an opportunity to be heard within a reasonable time.

2. They [shall/should] have the right to be informed of the plan.

3. They [shall/should] have the right to express their views in writing or orally, if necessary with the assistance of a person of their choice.

Article 13 **Right of private persons to be involved in certain non-regulatory decisions** *(former Article 12)*

1. If a public authority **intends to take a non-regulatory decision that may collectively affect the situation of an indeterminate number of people, it** should o**bserve procedures enabling them to be involved in the preparation of this decision.**

2. These procedures should **include consultations and public enquiries.**

3. Those concerned in such consultations and public enquiries shall be clearly informed of the proposals in question and have a full opportunity to express their views. The proceedings shall take place within a reasonable time.

4. The views expressed in these consultations and public enquiries shall be summarised in a form that enables the relevant authorities to take them into consideration.

Article 13 bis Procedures for developing administrative decisions

1. These procedures should be known by citizens in order to enable them either to participate or to check they are implemented.

2. The cost of such procedures should be adapted to the purpose of these procedures.

Article 14 **Form of administrative decisions** *(former Article 13)*

1. Administrative decisions shall be **formulated** in simple and clear language that is easily understood by private persons **to whom they are directed.**

2. **Adequate** reasons shall be given **for any unfavourable individual decision** taken with regard to private persons**, stating the legal and factual grounds on which the decision was taken.**

Article 15 **[Notification and] publication of administrative decisions** *(former Article 14)*

1. Administrative decisions shall be subject to publication in order to make it possible for those concerned to have an exact and comprehensive knowledge [according to circumstances,] by personal notification or publication of general and impersonal nature.

2. Individual decisions shall be notified to those concerned **except in exceptional circumstances where publication alone is possible. In all cases, appeal procedures including time-limits shall be indicated**.

Article 16 **Entry into force of administrative decisions** *(former Article 15)*

1. Administrative decisions may not be made retroactive to a date prior to their adoption and notification or publication, unless this is justified by special circumstances or prior information has been supplied on the future adoption of such decisions.

2. Individual decisions may not be applied until those concerned have been notified of them.

3. Rule-making decisions may not be applied until they have been properly publicised.

4. **In certain cases, a** reasonable time **shall / may have to** elapse between the adoption and notification or publication of an administrative decision **imposing new obligations** and the date on which **[it becomes applicable] these obligations will apply**.

See also Article 6

Article 17 **Execution of administrative decisions** *(former Article 16)*

1. Public authorities shall be responsible for the **execution** of their own decisions.

2. An appropriate system of administrative and criminal penalties shall normally be established to ensure that private persons comply with decisions of the public authorities.

3. Enforced execution by public authorities [shall / should] be expressly prescribed by law. Private persons subject to the execution of a decision shall be informed of the procedure and of

the justification for it. They are to be given the possibility to comply with the administrative decision within a reasonable time except in urgent duly justified cases. Enforced execution measures shall be proportionate.

4. [They shall allow private persons a reasonable time to perform the obligations imposed on them, except in urgent cases where they shall duly state the reasons for this. (*former Article 6)*]

Article 18 Changes to individual administrative decisions *(former Article 17)*

[Public authorities can change administrative decisions only taking into account the requirements of the public interest and the protection of the rights of those affected by such decisions.]

Administrative decisions can be modified if justified by the requirements of public interest and as far as the protection of the rights of those affected by the decision permit so. /

Administrative decisions affecting the rights and interest of individuals can be changed by public authorities if changes required in the public interest and the rights and interest of individuals are taken into consideration. /

Public authorities can not change administrative decisions except when the change is necessary in the public interest and the rights of individuals affected by the decision are taken into consideration. /

In order to change administrative decisions, public authorities shall take into consideration the requirements of the public interest and of the rights of those affected by the decision.

Section III

Appeal

Article 19 Appeal against administrative decisions *(former Article 20)*

1. Private persons **shall be entitled to seek, directly or by way of exception, judicial review of an administrative decision which affects directly their rights and interests.** *(former Article 20, para. 1)*

2. In principle, administrative appeals [should/shall] be possible in relation to any administrative decision. They may concern the expediency and/or legality of an administrative decision. *(former Article 20, para. 2)*

3. Administrative appeals may, in some cases, be compulsory, as a prerequisite to seeking judicial reviews. *(former Article 20, para. 3)*

4. Private persons should not suffer any prejudice from public authorities for appealing an administrative decision. *(former Article 20, para. 4)*

Appeal time-limit and duration

5. A prior review by an administrative body should be possible or in certain cases should be obligatory, before bringing cases before the courts. *(former Article 21)*

Article 20 Appeal for compensation ***(variant: appeal for damage(s?))*** *(former Article 22)*

1. **Public authorities shall provide compensation to private persons who are the victims of unlawful administrative decisions or administrative negligence on the part of the administration or its officials for damage suffered.** *(former Article 22, para. 1)*

2. Before bringing actions for damages against public authorities in the courts, private persons may first be required to submit their case to the authorities concerned. *(former Article 22, para. 2)*

3. Court orders **against** public authorities to provide compensation for damage suffered shall be executed within a reasonable time. *(former Article 22, para. 3)*

4. **It should be possible to seek to establish the personal liability of public officials *in an appropriate manner,* where appropriate, either by public authorities or either by victims.**
(former Article 23, para. 1)

5. Public authorities may only object to proceedings brought by private persons against their officials if the errors committed by the latter are related to the performance of their duties. *(former Article 23, para. 2)*