COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 1 October 2007 CJ-DA-GT (2007) 6

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

2nd meeting

Strasbourg, 19 – 21 September 2007

DRAFT REPORT OF THE MEETING

FOREWORD

At its meeting the CJ-DA-GT *inter alia*:

a) considered the report prepared by the scientific expert on the replies to the questionnaire on administrative appeals in Europe which was sent to member States;

b) on the basis of this report and in accordance with the specific terms of reference of the Project Group on Administrative Law (CJ-DA), considered the desirability of drafting a recommendation in this field;

c) started the drafting of a report regarding the feasibility of such an instrument.

Secretariat memorandum prepared
by the
Directorate General of Human Rights and Legal Affairs

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APPENDIX II

AGENDA

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

4. Preparation of the report on a desirability of preparing a recommendation on administrative review as a means of protecting human rights and on ways of access to justice / *Elaboration d'un rapport sur l'opportunité de préparer une recommandation sur le recours administratif en tant que moyen de protection des droits de l'homme et sur les modalités d'accès à la justice*

Working document / *Document de travail*

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APPENDIX III

DRAFT OF A PRELIMINARY DRAFT REPORT

ON ADMINISTRATIVE APPEALS IN EUROPE

Report on replies to the questionnaire sent to member states

[and guidelines for drafting a recommendation]

prepared by the CJ-DA-GT

I. Different types of appeals

1. The question as to whether there are general rules

7. The main question asked in this part of the questionnaire was whether member states had general rules or special rules which applied to administrative appeals.

8. Almost the whole of the states have general rules for administrative appeals. Only the United Kingdom stated it had no general rules, but only rules governing the withdrawal or repeal of administrative decisions. It is probable that this response would apply to Ireland as well.

9. The states which have general rules may be divided into two categories:

i. On the one hand, there are those which have adopted a general law on the procedure to be followed by administrative authorities. Now, this law usually contains provisions on administrative appeals. This is the case for Albania, Austria, Bulgaria, Croatia, Estonia, Latvia, Luxembourg, Norway, Poland, Spain, Sweden and Switzerland. It is worth noting that some of the rules governing administrative appeals are found in the laws on the administrative justice system (e.g. the rule on suspension of the time-limit within which a judicial appeal may be lodged) and that conversely, the general laws on administrative procedure do not always contain a section on administrative appeals (as, for example, in the Netherlands).

Although Italy replied that it had no general rules, but rather separate general rules for appeals to a superior administrative authority, applications to set aside (appeal to the person who took the impugned decision) and extraordinary appeals to the President of the Republic, it may be considered to belong to the group above mentioned, because the rules are enshrined in the law on administrative procedure (except in the case of extraordinary appeals).

ii. Lastly, there are a few countries which claim to have general rules on appeals, but these are in fact purely judicial and, in some cases, incomplete. In reality, they are rules on the withdrawal of administrative decisions and on hierarchical authority. This is true of France and, amongst the countries which did not reply, of Belgium. In 2000, France did, however, make a few tentative moves towards introducing a genuine set of general rules.

10. As regards special rules for administrative appeals, the replies are too patchy to allow comprehensive analysis (only France, Luxembourg and Spain gave some information).

Conclusion:

It seems both desirable and feasible that member states adopt legislation so as to introduce administrative appeal against all administrative decisions in a general manner (subject to the exceptions expressly provided for by law). This because, besides the fact that this system already exists in many countries, it has two major advantages: it allows a possibility for a review of expediency and helps reduce the workload of the courts dealing with administrative cases.

It is however difficult to make recommendations about the special rules because these cover a variety of areas and are governed by arrangements that reflect the policy adopted by the legislator on a particular subject. For example, the rules on appeals relating to access to administrative documents, to personal data protection and to immigration are closely related to the basic rules decreed by the legislator.

2. Other questions

Conclusion:

No recommendations can be made concerning these various questions, except for the last one, concerning procedural expenses. It seems appropriate that there should be a requirement to provide legal aid whenever the issues raised are mainly matters of law (see below II.5.4.).

II. Ease and effectiveness of appealing against individual administrative decisions (general rules)

1. Study confined to general rules

2. Legal basis

3. Information on administrative appeals

~~*Conclusion:*~~ *Minimum standard*

~~*In the light of these replies, it seems that member states could be recommended to made to the effect that administrative authorities should be required by law to indicate in their decisions both the available administrative remedies, if any, and the available judicial remedies.*~~

In the light of the replies, a majority of states recognised the need to supply written information on the existence of administrative appeals including any other related appeal which may exist.

4. The appeals authority

19. It appears from close scrutiny of the replies that there are only two main types of administrative appeal: appeals to the authority which took the decision and appeals to the hierarchically superior authority.

20. The other types of appeals are of a more exceptional nature and are usually governed by special rules, whether in the case of appeals to a supervisory authority (there normally has to be a law if the decision in question was taken by an independent public authority) or appeals to a more or less independent external administrative authority (for example, appeals to France's

Commission d'accès aux documents administratifs, extraordinary appeals to the President of the Republic of Italy).

21. Often, these two categories of appeal are governed by different rules.

4.1. Appeals to the authority which took the decision

22. Appeals to the administrative authority which took the decision go by different names, depending on the state: *recours gracieux* in France, "application to set aside" in Italy and "review procedure" in Switzerland. Such appeals usually have two effects: they preserve the period for lodging a judicial appeal and allow the authority which took the decision to withdraw or amend it.

23. Preservation of the period for lodging a judicial appeal is sometimes the only effect that is specifically enshrined in law. This is so in countries which have rudimentary legislation, such as France and Luxembourg, and the relevant rule is generally found in the law on administrative courts. This preservation of the period for lodging a judicial appeal is obviously conditional upon the administrative appeal being admissible and in particular, subject to compliance with the time-limit that is normally imposed for lodging an administrative appeal (see below *5.1*.).

24. The second effect of lodging an administrative appeal of this kind is to enable the authority with which the application is lodged to exercise its powers to withdraw (and hence amend) the impugned decision. This possibility arises either from a specific provision in the law on administrative procedure, or from general case-law on the withdrawal of administrative decisions (withdrawal can usually be effected either at the request of an interested party or by the authority on its own initiative, i.e. *ex officio*). Two notable examples of states which have incorporated a specific rule in their law on administrative procedure are Norway and Spain. France and Luxembourg are among the states which simply apply their case-law on the withdrawal of administrative decisions..

25. The most tangible consequence of the existence of these powers of review is that the appeals authority can review both the expediency and the lawfulness of the decision.

26. Quite remarkably, this kind of appeal does not seem to exist in states where only appeal to a superior administrative authority seems to exist (Croatia, Spain). A more logical rule is the one whereby an appeal may be lodged with the authority which took the decision only in cases where there is no superior authority (Estonia).

4.2. Appeals to a superior authority

27. This kind of appeal is usually expressly enshrined in law, as it follows from the general theory of hierarchical organisation only in a few states such as France. Indeed, the possibility of lodging an appeal with the superior authority, at least in cases where the impugned decision was taken by a subordinate authority, tends to be the rule (Albania, Bulgaria, Croatia, Estonia, Latvia), with appeals to the authority which took the impugned decision being reserved for cases where there is no superior authority.

28. That still leaves the question of whether the superior appeals authority has the power to review both the expediency and the lawfulness of the decision or only its lawfulness. In most countries, full review of the impugned decision is the norm (Bulgaria, Croatia, Estonia, France, Italy, Luxembourg, Norway, Poland, Spain, Sweden). Only a few states limit the power of the superior authority to a review of lawfulness only (Latvia, Moldova).

29. Note that the term "appeal to a superior administrative authority" is sometimes used in the broad sense, i.e. as encompassing appeals to a supervisory or regulatory authority. It is not felt, however, that the question of relations between the state and local authorities is something that this Working Party needs to address.

Suggestions:

~~*Ideally, the recommendation should suggest that all states provide for the possibility of an administrative appeal to the superior authority and that appeals to the authority which took the decision be reserved for cases where no superior authority exists.*~~

5. Conditions for lodging an administrative appeal

5.1. Time-limit for lodging an appeal

30. In all the states which replied, administrative appeals may be lodged only within a certain time-limit which runs from the date on which the decision is notified: once this time-limit has expired, the decision becomes final and may no longer be challenged except in special circumstances. The rules are expressly defined in most countries, the only difference being the length of the time-limit: 14 days (Bulgaria, Poland), 15 days (Croatia), 3 weeks (Norway, Sweden), 30 days (Estonia, Italy), 30 days (Moldova, Switzerland), 1 month (Latvia, where the time-limit may be extended to one year if the decision was not given in writing and did not indicate the period for lodging an appeal; Spain, where the time-limit may be extended to 3 months if the administrative authority fails to respond.

31. The same applies to countries such as France where the rule is not explicit: the time-limit for lodging a judicial appeal is preserved only insofar as the administrative appeal has been lodged within the period for lodging a judicial appeal (2 months). Another example is Luxembourg, where the time-limit for lodging a judicial appeal is 3 months.

~~*Conclusion:*~~*Minimum stantard*

~~*The recommendation which could be made here is that the time limit be clearly stipulated in law (and, of course, indicated in the decision as proposed in II.2.). There is no need, however, to harmonise the length of the time limits.*~~

The time limit for appealing an administrative decision should be provided for by law. It should be reasonable in duration and it should operate from when the person has been informed of the initial decision.

5.2. Communication of the grounds of the decision likely to be impugned

32. In most states, the administrative authority is required to communicate the grounds on which the decision was based before the person concerned even asks for them. In some states, however, the requirement to provide such information is not always a blanket requirement and may apply only to decisions which significantly affect the rights of individuals.

33. A general obligation exists in the following states: Albania (although it is not made clear whether the information is communicated automatically or on request), Croatia (no conditions attached), Estonia (if the decision is given in writing), Luxembourg (in some cases, however, the grounds are communicated only if the person requests them), Moldova, Poland, Spain, Norway (except in cases where the decision is not injurious to anyone), Switzerland (if the decision is favourable to the person who made the request, the grounds need not be communicated although they may be requested by any person entitled to lodge an appeal).

34. In some countries, the requirement to communicate the grounds on which the decision is based is confined to decisions listed by law. In France, for example, the grounds must be communicated in the case of almost all decisions which are unfavourable to the subject of the decision (the main exception being decisions taken at the request of a private individual) and decisions which depart from the general rules (where this is expressly permitted by law).

35. Finally, in some states, there is in fact an obligation to state the grounds on which a decision is based but only at the request of the person who is considering lodging an administrative appeal (Bulgaria).

~~*Conclusion*~~*: Minimum standard*

~~*An appropriate suggestion here would be that states introduce a general obligation to state the grounds for a decision while at the same time allowing a few exceptions, as dictated by common sense.*~~

There is no general consensus amongst member states concerning a general obligation to state systematically the grounds for an administrative decision.

The person concerned should have the opportunity to be informed of the grounds of the administrative decision. (see Resolution (77)31 on the protection of the individual in relation to the acts of administrative authorities).

5.3. Persons entitled to lodge an appeal

36. The states which replied have all adopted the principle whereby even third parties whose interests (or, by extension, rights) have been infringed may lodge an administrative appeal: Albania, Bulgaria, France, Latvia, Luxembourg, Moldova, Norway, Spain, Sweden and Switzerland. In some cases, the third party must have had the right to take part in the process of preparing the decision (Croatia and possibly Poland, where violation of a legal interest is required) but the end result is basically the same. Some states have adopted the German system whereby only the persons (including third parties) whose rights are affected by the decision may challenge it (Estonia); Italy has a similar arrangement, as the notion of interest is interpreted rather narrowly there. Under this system, the outcome is effectively the same as under the previous arrangements in the case of individuals but not for legal entities, which typically protect the rights of their members rather than their own rights.

~~*Conclusion*~~*: Minimum standard*

~~*The proposed recommendation must be content with a rather vague wording here such as*~~ *"any person whose rights or legitimate interests are affected [directly or indirectly ?] by the decision".*

The criteria applied regarding who may apply for an administrative appeal should be at least equal to the criteria applied in judicial appeals (and adversarial principle must be complied with when lodged) (see Recommendation No. Rec(2004)20).

5.4. Access to the case-file

37. Only Albania indicated that the authorities tend not to communicate the case-file. The law does, however, require the authorities to grant access to the case-file (except, of course, in the case of certain secret documents, the list of which is fairly short) and provide copies (Bulgaria, Croatia, Estonia, France, Italy, Latvia, Luxembourg, Moldova, Norway, Poland, Spain, Sweden, United

Kingdom). The relevant legislation is either the general law on administrative procedure or the law on access to administrative documents or on public information.

38. The replies are not detailed enough to allow an accurate assessment of the limits of the access (which documents are regarded as secret?) and the conditions on which it may be granted (once or more often). The questionnaire deliberately did not inquire about this, so as to avoid encroaching on the related subject of transparency.

~~*Conclusion*~~*: Minimum standard*

The recommendation to be proposed should simply call, therefore, for the adoption of the principle of access to the case-file and to any document useful to the appellant's arguments. (see. Recommendation No. on access to case-file)

5.5. Formal requirements

39. All the replies stated there were no formal requirements. In all states, however, appeals must be lodged in writing and must clearly indicate the impugned decision (or omission) as well as the legal and factual grounds for the challenge, something that is specified in certain laws, indeed.

~~*Conclusion*~~*: Minimum standard*

It seems that the future recommendation should simply require a written appeal clearly indicating the subject of, and grounds for, the challenge, while underlining that there should be no formalism.

5.6. Representation ~~and assistance~~ for the appellant

40. In none of the countries is it necessary or prohibited to be represented or assisted by a professional lawyer.

41. Most states seem to allow the appellant to be assisted or even represented by an association, or indeed by any other person: usually, all that is required is a written power of attorney (or authorisation) and, in general, the replies even state that this third person can also inspect the case-file (Albania, Bulgaria, Estonia, France, Italy, Latvia, Moldova, Spain). Some states do nevertheless prohibit representation by an association (France, because of the monopoly enjoyed by the legal profession which, in our view, is unwarranted because the procedure in question is not really a trial) or by any body that does not have legal personality (Luxembourg in the case of trade unions and political parties). Other states do not specify whether persons other than professional lawyers can represent or merely assist the appellant (Sweden, Switzerland); admittedly, the question was not put explicitly. Other states do not even allow the appellant to be assisted by an association (Croatia). In some cases, respondents disregarded the question (Poland).

~~*Conclusion:*~~ *Minimum standard*

In the light of these replies, the future recommendation could suggest that the appellant be allowed to be ~~assisted and even~~ represented by any person who possesses power of attorney and has legal capacity, including by a professional lawyer or an association.

6. The effect of lodging an administrative appeal

6.1. Suspensive effect of the administrative appeal

42. Only a few states allow for suspensive effect of lodging an administrative appeal. There are two types of suspensive effect. With the first, the administrative decision cannot be implemented as long as the time-limit for lodging an appeal has not expired and, if an appeal has been lodged, as long as the appeals authority has not ruled. There are, however, some exceptions where the opposite rule applies: the law or regulations allow the public authorities to start implementing the decision before it becomes final but the superior authority may, at the request of the appellant, order that its implementation be suspended. This is the case in Bulgaria, Croatia, Latvia, Poland and Switzerland. In Poland, however, implementation is suspended only if a proper appeal is lodged. Merely filing a complaint is not enough.

43. In contrast, some states have implented the rule according to which lodging an appeal does not result in suspending the implementation of the impugned decision. Here too, there are a couple of variations. Under the first system, the appeals authority can suspend implementation of the decision if this is necessary for the protection of the public interest or the rights of an individual. Such is the case in Estonia, Italy, Moldova (?), Norway, Spain and Sweden. Under the second system, the courts alone have the right to order implementation of the impugned decision to be suspended under summary proceedings which runs alongside the administrative appeal. Notable examples of this are France and Luxembourg.

~~*Conclusion:*~~ *Minimum standard*

~~*In the light of these replies, it seems realistic to state merely as a basic rule that the appeals authority may order a suspension of implementation of the impugned decision. This effectively amounts to adopting the proposal contained in the following paragraph.*~~

Where there is no automatic suspension of the implementation of the impugned decision pending an administrative appeal, the appeals authority or the court may order such a suspension.

6.2. Power of the appeals authority to adopt interim or protective measures

44. Several states stated the appeals authority had no such power or else did not answer the question, thereby suggesting that such is in fact the case: Croatia (?), France, Latvia, Luxembourg (?), Moldova (?), Norway. Some of these states pointed out that the courts alone could order such measures under summary proceedings (France, Norway).

45. Others stated, on the contrary, that the appeals authority could usually adopt interim or protective measures, but without specifying which ones (Albania, Estonia, Sweden, Switzerland). Sometimes, this power may be exercised only in cases where the appeals authority has ordered a suspension of implementation of the impugned decision (Spain).

46. In states which have adopted the principle of a suspensive effect, the appellant can request the appeals authority to allow the impugned decision to be implemented before it becomes final (Bulgaria). In practice, it is unlikely that an appellant would seek early implementation of a decision that they were challenging, except possibly if they were challenging the conditions attached to the benefit of that decision.

~~*Conclusion:*~~ *Minimum standard*

~~*Despite the extremely wide range of replies, it seems feasible to recommend to states to allow appeals authorities to adopt any interim measure which they deem appropriate after giving*~~

~~*the appellant and any third parties who are stated to be particularly affected the opportunity to express their opinion on the subject.*~~

The CJ-DA-GT has no recommendation to do regarding this issue.

6.3. Obligation to decide the appeal within a given time-limit

47. Several states stated that such an obligation did in fact exist. The time-limit varies from state to state: 10 days with possibility of extension to 30 days (Estonia), two weeks if the appeals authority is a single person and 1 month if it is a collective body (Bulgaria), 1 month (Albania), 1 month, after which the appeals authority must give grounds for the delay (Norway, Poland), 60 days (Croatia), 1 month with possibility of extension to 4 months, or even 1 year in exceptional circumstances (Latvia), 2 months (France), 90 days (Italy), 3 months (Luxembourg). A few respondents did not indicate the length of the time-limit (Moldova, Spain).

48. Only two states, Sweden and Switzerland, explicitly stated that no time-limit is imposed to the appeals authority.

49. Probably because the questionnaire did not systematically ask about this, most of the replies did not say what the penalty was for failure to comply with the time-limit. Only a few states did so: France and Luxembourg, where if the administrative authority fails to decide the appeal within two (France) or three (Luxembourg) months, the request is deemed to have been denied, and Spain, where the opposite applies, i.e. silence is deemed to constitute approval.

~~*Conclusion:*~~ *Minimum standard*

~~*The recommendation, in our view, should suggest that states require the appeals authority to decide the appeal within a certain time limit, but it should not specify the length of this time-limit. Once this time limit has expired, the appellant would be entitled to go to court.*~~

The appeals authority must decide an appeal within a time-limit prescribed by law. Upon a request, the administrative authority shall notify the appellant of the time within which decision on appeal is to be taken and of the legal remedies that exist if the decision is not taken within the time-limit.

7. Appeal procedure

7.1. Representation ~~*or assistance*~~ *by a third person*

50. The replies to this question match those given to the question as to whether an appeal can or must be lodged with the assistance of a professional lawyer, an individual or an association.

~~*Conclusion:*~~ *Minimum standard*

Accordingly, the suggestions are the same as for 5.6: in the light of these replies, the recommendation could suggest that the appellant be entitled to be ~~*assisted by any person or by any association and even that they should be entitled to be*~~ *represented by any person who has legal capacity and power of attorney, including by a professional lawyer or an association.*

7.2. Access to the case-file

51. Once again, the replies to this question match those given to the question about access to the case-file of the person wishing to lodge an appeal, under *5.4*. In some countries, however (such as Estonia), the applicable provisions are, in the first instance, the law on public information and, in the second instance, the law on the procedure to be followed by administrative authorities.

~~*Conclusion:*~~ *Minimum standard*

With this provison, we can thus reiterate the suggestion made under 5.4: the recommendation to suggest should call on states to adopt the principle of access to the case-file. ~~*and to any document useful to the appellant's arguments*~~*.*

7.3. Adversarial nature of the procedure

52. Quite a few states do not have adversarial procedure in which the appellant has an opportunity to respond to the counter-arguments submitted by the authority which took the decision at the hearing and which do not appear in the grounds accompanying the impugned decision: Albania, Bulgaria, Croatia, Estonia, Latvia, Luxembourg, Poland.

53. A number of countries require that both parties be heard either as a general rule (Italy, Norway, Sweden) or if the appellant asks to participate in the appeal hearing (Moldova), or only if the impugned decision is intended as a penalty (France, Spain).

54. In the case of Switzerland, the courts have not yet adopted a definitive stance on this point.

55. These replies are somewhat disappointing. Knowledge of the grounds that were attached to the impugned decision is not enough, in our view, to ensure a level playing field for the authority which took the decision and the appellant. Indeed, the appeals authority usually receives additional explanations from the authority which took the decision. It is important that the appellant be aware of these. This is at least important in cases where the authorities in question are two seperate bodies.

~~*Conclusion:*~~ *Minimum standard*

A~~*lthough this is asking a great deal of states, the recommendation should suggest that*~~ *The appellant should be given the right to know and respond to any additional arguments presented by the authority which took the impugned decision or third parties involved in the appeal* ~~*may have submitted to the appeals*~~ *authority in response to the criticisms made in the appeal.*

7.4. Legal knowledge of the appeals authority

56. ~~Personally, we feel that only a higher ranking official with legal training is capable of dealing thoroughly and effectively with an appeal that is not based solely on arguments of expediency but also and perhaps mainly on legal arguments, legal rules being the main factor in curbing an administrative authority's freedom to make decisions. The state where administrative appeals work best, Germany, happens to be exactly the state that did not reply to the questionnaire. A distinctive feature of the German system, however, is the monopoly enjoyed by the legal profession, with senior positions in public authorities tending to be held by lawyers.~~

57. ~~Unfortunately,~~ The replies received are rather vague. Broadly speaking, no legal knowledge is required. Therefore, no recommendation is made by the CJ-DA-GT. ~~the one exception being Poland where appeals authorities must be made up of lawyers if the appeal to be examined is an appeal against a decision taken by a self governing community (although the appeal in that case is really to a supervisory authority, and not to a hierarchically superior authority). The Spanish and Swiss replies indicate, however, that the higher ranking official or department responsible for hearing appeals is usually a lawyer.~~

~~*Conclusion:*~~ ~~*Minimum standard*~~

~~*In view of these replies, the recommendation could, at most, express the wish that the task of examining administrative appeals be entrusted as far as possible to officials who have a legal knowledge.*~~

8. The decision of the appeals authority

8. 1.Scope of the powers of review enjoyed by the appeals authority

8.1.1. Review of expediency and lawfulness

58. [This question has already been addressed in relation to the nature of the appeals authority: is it the administrative authority which took the decision or a superior authority, or even, in exceptional circumstances, a public authority outside the authority in question? We have come to the conclusion that the appeal is generally lodged with a superior authority, but that where the authority which took the decision is itself a supreme authority, the appeals authority is necessarily the one which took the decision. While the review triggered by the appeal can be confined to matters of law when the appeals authority is a superior authority, it cannot, in our view, be confined to matters of law only when the decision is challenged before the authority which took it. The only logical solution, therefore, is to accept the principle whereby the administrative appeals authority reviews both the expediency and the lawfulness of the decision.] para 22-23 ?

59. ~~It appears from the replies that~~ Most states allow the appeals authority to carry out a full review: Albania, Bulgaria (with a few restrictions), Croatia, Estonia, France, Italy, Latvia (except where the authority which took the decision is independent), Luxembourg, Norway, Poland, Spain (although there the review seems to be concerned more with the lawfulness than the expediency of the decision), Sweden and Switzerland. Only one state, Moldova, confines in principle the power of review to matters of law. ~~where, incidentally, the appeals authority can only be a superior authority, confines this authority's powers of review to matters of law only (except where an appeal is lodged with a state authority against a decision taken by a local authority).~~

~~*Conclusion:*~~ *Minimum standard*

~~*In view of these replies, the recommendation can merely make it clear that the review carried out by the appeals authority should cover both legal and factual issues or, in other words, both expediency and lawfulness.*~~

The appeals authority ought to be at least able to review any violation of the law, including lack of competence, procedural impropriety, and abuse of power.

If it has hierarchical powers over the authority which took the decision, or if it is the same authority, or in other cases provided by law, it should also be able to review the merits of the decision.

8.1.2. Review of compliance with the provisions of the European Convention on Human Rights

60. Most of the replies simply state that the administrative authorities, including the appeals authority, are required to ensure compliance with the European Convention on Human Rights. Some stipulate that this review to ensure compliance with the Convention may be conducted only at the request of the appellant (Croatia, Italy) or, on the contrary, that it may be carried out *ex officio* (Estonia, France, Latvia, Luxembourg, Norway, Spain, Sweden, Switzerland).

61. A number of respondents go further. Bulgaria, for example, states that any administrative decision which has been found by the European Court to be in breach of the Convention must be cancelled.

~~*Conclusion:*~~ *Minimum standard*

~~*In view of the importance that the Council of Europe attaches to compliance with the European Convention on Human Rights, it ought to be recommended that member states require any administrative authorities with which an administrative appeal has been lodged to consider the question of compliance with the Convention as a matter of course.*~~

[The administrative authority should have the power to review an administrative decision to ensure it does not contravene the European Convention on Human Rights.]

8.1.3. Consideration of arguments not advanced by the appellant and/or of which the appellant has not been informed

62. This question is obviously related to question 7.3, the difference being that this time, it is not the appeals procedure that is affected by the adversarial or other nature of the appeals authority's decision but rather the scope of its powers of review.

63. Some states confine the appeals authority's powers of review to the arguments advanced by the appellant or by the impugned decision (Albania).

64. Most states, however, say that the appeals authority is not confined to examining only the arguments advanced by the appellant and/or of which the appellant has been informed (Bulgaria, Estonia, Switzerland). It is sometimes stipulated, however, that these new arguments must have been made known to the appellant (France, Italy, Luxembourg, Spain, Sweden). In some cases, it is even stated that the appellant must not only have been informed of the arguments but must also have an opportunity to comment on them (Norway).

~~*Conclusion:*~~ *Minimum standard*

[If the intention of the proposed recommendation is to make the procedure more adversarial, then it should be recommended either that the appeals authority examine only the questions of expediency and lawfulness raised by the appellant, or that it also be entitled to examine any new questions of which the appellant has been informed and on which they have had the opportunity to comment.]

[The CJ-DA-GT is of the view that further consideration should be given to this point in order to formulate a minimum standard.]

8. 2. Scope of the decision-making powers of the appeals authority

8.2.1. Possibility of taking a decision that is even more unfavourable to the appellant

65. Most states do not allow the appeals authority to take a decision that is even more unfavourable to the appellant: Albania, Bulgaria, Italy, Luxembourg (if the original decision generated rights), Spain, Sweden.

66. Some states, however, do allow the appeals authority to take a decision that is even more unfavourable to the appellant. Some allow it to do so without any restrictions (Moldova) whereas others allow it in cases where the public interest or the interests of other individuals prevail (Norway) or where the original decision seriously interferes with public or private interests or flagrantly violates the law (Poland). Other states refer solely to the rights of third parties, requiring that the new decision should not interfere with the rights of a third party (Croatia) or,

similarly, that it should not cause damage to a third party due to their certainty that the original decision will remain in place (Estonia). Lastly, other states either prohibit the appeals authority from taking a decision that is even more unfavourable to the appellant in cases where the original decision was intended as a penalty (France) or allow it subject to compliance with a particular procedure: the appeals authority must warn the appellant that it intends to amend the impugned decision in a way that is unfavourable to him or her as it is contrary to the law and must then grant to him or her the opportunity to withdraw their appeal so as to avoid making their situation worse (Switzerland).

~~*Conclusion:*~~ *Minimum standard*

~~*The recommendation should suggest that states either prohibit the appeals authority from making any changes that would be unfavourable to the appellant or make any such change subject to restrictive conditions (such as serious damage to the interests of third parties or to the public interest or violation of the law).*~~

If the appeals authority can make an unfavourable decision against the appellant, the appellant must have been given the opportunity to put any arguments forward.

8.2.2. Possibility of taking a decision which affects the rights of third parties

67. Only a few states allow the appeals authority to take a decision which adversely affects the rights of third parties without any restrictions (Albania, France, Sweden). Likewise, only a few refuse outright to allow the appeals authority to take a decision that would affect the rights of third parties (Bulgaria, Italy).

68. Most states allow the appeals authority to take a decision affecting the rights of third parties, but only on certain conditions. In some cases, these conditions are of a substantive nature, for example they are the same as those which apply if the appeals authority wishes to amend a decision in a way that would make the appellant's situation worse: such is the case in Estonia. Other states require the appeals authority to observe a particular procedure, namely to give adequate publication in order to inform any third parties whose situation is liable to be affected by the decision to be rendered on the appeal and to thus grant them an opportunity to express their point of view (Luxembourg, Norway, Poland, Spain).

~~*Conclusion:*~~ *Minimum standard*

If we stay with the idea that the appeals procedure should be adversarial, the recommendation should suggest that states allow the appeals authority to amend the original decision to the detriment of third parties only if the latter have been notified in advance and have had the opportunity to put any arguments forward.

8. 3. Formal aspects of the decision taken by the appeals authority

8.3.1. Grounds

69. All the states require the appeals authority to give grounds for its decision: Albania, Bulgaria, Croatia, Estonia, France (if the appeals authority's decision is unfavourable and, as such, subject to the requirement to give grounds), Italy, Latvia (with the option of referring to the grounds given in the original decision), Luxembourg (if the appeal decision refuses to grant the request), Moldova, Norway, Poland, Spain, Sweden, Switzerland.

~~*Conclusion:*~~ *Minimum standard*

~~*The recommendation could reiterate the need to give grounds for the decisions taken by an appeals authority.*~~

Appropriate reasons shall be given for the decision taken on an administrative appeal, stating the legal and factual grounds on which the decision was taken, at least in cases where they affect individual rights.

8.3.2. Information on judicial remedies

70. Most of the states require appeals authorities to inform the parties to the proceedings of the judicial remedies available to them: Bulgaria, Estonia, France, Italy, Latvia, Luxembourg, Moldova, Poland, Spain, Sweden, Switzerland.

71. Unfortunately, the questionnaire did not inquire about the penalty for failure to comply with this requirement. Some states did state, however, that in that event, the time-limit for lodging an appeal is extended by two months and sometimes even six months (Bulgaria) or that it does not begin to run at all (Luxembourg).

72. A number of respondents acknowledge that this is not always the case (Albania). Norway stated that there was an obligation to provide information about judicial remedies only if judicial review were conditional upon legal action having been taken within a certain time-limit.

~~*Conclusion:*~~ *Minimum standard*

The recommendation should suggest that any decision taken by an administrative appeals authority shall indicate the judicial remedies available and the time-limits for availing oneself thereof.

8.3.3. Notification

73. Most of the states require that the decision of the administrative appeals authority be notified both to the appellant and to all the persons concerned: Bulgaria, Croatia, Estonia, Latvia, Norway, Poland, Spain, Sweden, Switzerland.

74. In some cases, only the appellant is notified (France, Luxembourg, Moldova).

75. It should be noted that a few states did not answer the question: Albania, Croatia, Italy. Some states, on the other hand, also stated that the authority which took the original decision also had to be notified, which is perhaps an important point. The questionnaire did not ask what the penalty was for failure to notify: logically, it should be suspension of the time-limit for lodging a judicial appeal against the appeals authority's decision.

~~*Conclusion:*~~ *Minimum standard*

The recommendation should suggest that states require the administrative appeals authorities to comply with this requirement of notifying their decisions to all the parties to the proceedings (appellant, other parties concerned) and also to the administrative authority which took the original/initial? decision.

9. Costs of the proceedings and legal aid

9. 1. Costs of the proceedings

9.1.1 Cases where the proceedings are free of charge

76. In a large number of states the proceedings are free of charge and the appellant is liable only for the cost of photocopying and translations: Albania (?), Bulgaria, Estonia, France, Italy

(?), Latvia, Luxembourg, Moldova, Norway (which does not specify whether photocopying costs are payable by the appellant), Poland (the appellant is liable only for the cost of making certified copies of administrative documents), Spain (the appellant is not liable for the cost of translating documents that have been drafted in one of Spain's official languages), Sweden (which did not specifically answer the question about the costs of photocopying and translations, however).

9.1.2 and 9.1.3 Cases where the proceedings are not free of charge

77. Where there are legal costs, they tend to be low, as in Croatia (approximately 7 euros). In Switzerland, however, they are fairly high (between 100 and 5,000 Swiss francs for non-pecuniary disputes and between 100 and 50,000 Swiss francs for pecuniary disputes), which is probably why parties without sufficient means can, on request, be waived.

~~*Conclusion:*~~ *Minimum standard*

~~*The recommendation should suggest that states refrain from charging substantial legal costs for examining an administrative appeal. Should they nevertheless do so, they should be able to waive payment in the case of appellants without sufficient means who have some chance of winning their case.*~~

Where legal costs are payable by the appellant in administrative appeals they should be fair and reasonable. In determining whether legal costs should be waived to individuals without sufficient means, there should be consideration of the circumstances of the particular case whether or not it is reasonable for lodging or participating in an appeal.

9.2. Costs of legal assistance

78. As stated above, the person lodging the administrative appeal is never under any obligation to enlist the services of a lawyer (see *5.6.* and *7.1.* above). If the case is a complex one, however, it may be useful to require a lawyer in order to have any chance of success.

79. Most states do not provide any financial aid in the event that a person without sufficient means should nevertheless require a lawyer: Albania, Bulgaria, France, Italy, Sweden. A few states did not answer, among them Luxembourg, Poland and Spain. It is fair to presume that they too do not provide any financial aid that would allow an appellant to enlist the services of a lawyer.

80. A few states do, however, provide financial aid in such cases: Croatia, Estonia (?), Latvia, Switzerland.

81. Sometimes indeed, the state will even reimburse the costs incurred by the party if he or she win their case (Norway), which is a good system although probably difficult to be embraced by most of the states.

~~*Conclusion:*~~ *Minimum standard*

~~*It is felt that the recommendation can safely omit to make any proposal on this issue, provided that it contains the suggestion made below (9.3).*~~

9.3. Legal aid

82. In rather many states, there is a fairly wide-ranging requirement for administrative authorities to provide legal information and advice: Albania, Croatia, Latvia, Norway, Poland, Spain.

83. Other states, however, have no such requirements: Bulgaria, France, Italy, Luxembourg, Sweden, Switzerland.

84. While there is certainly reason to presume that the administrative authority which took the original decision might be reluctant to provide legal information in case it were overruled by the appeals authority, it is also possible that this task of providing legal advice is performed correctly; it simply requires associations made up of volunteers to assist appellants in their dealings with the authority which took the impugned decision.

~~*Conclusion:*~~ *Minimum standard*

~~*The recommendation might suggest therefore that there should be a general obligation on administrative authorities to provide information on the facts and the law. This is not a crucial point, however.*~~

[In the case of an appeal, the administrative authority should give information to the appellant regarding the rules of procedure if any and practice in order to lodge an appeal.]

10. Relations between administrative appeals and judicial appeals

10. 1. Is it mandatory to have an administrative appeal before there can be an appeal to the court?

85. In some states, it is never mandatory to have an administrative appeal before there can be an appeal to the court. Such is the case in Albania.

86. In several states, an administrative appeal is mandatory only for certain subject matters: Bulgaria (tax, social security, social assistance), Estonia, France (tax since 1928, individual situation of military personnel since 2000), Italy (mainly tax and customs), Luxembourg (tax, old-age insurance, civil service), Sweden (planning permission). Norway is a special case as there, the administrative authority which took the original decision can decide that any appeal to the courts shall be subject to exhaustion of the administrative remedies.

87. A few countries do insist on an administrative appeal before there can be an appeal to the court: Croatia, Latvia (at least in cases where the decision was taken by a lower authority), Moldova, Poland (?), Spain, Switzerland.

~~*Conclusion:*~~ *Minimum standard*

~~*The recommendation should urge states to increase the number of cases where it is mandatory to have an administrative appeal before applying to the courts, at least in cases where these appeals are organised in such a way as to afford certain minimum safeguards.*~~

The CJ-DA-GT is not in a position to recommend a minimum standard as to whether an administrative appeal should be mandatory before judicial appeals without further detailed consideration. However, the CJ-DA-GT considers this to be a very important matter and, is of the view that in certain circumstances, mandatory appeals should be in place where they would be effective and necessary in order to alleviate the workload of the courts.

10. 2. Admissibility of new arguments in judicial appeals

88. Most states allow the appellant to raise new arguments in court: Albania, Bulgaria, France (with a few nuances), Latvia, Luxembourg, Moldova, Norway, Poland, Spain, Switzerland. In Italy, there is conflicting case-law on this issue.

89. A few states do not allow it: Croatia, Estonia.

~~*Conclusion:*~~ *Minimum standard*

~~*Although it may seem self-evident, for us, that new arguments should be able to be raised in any proceedings taking place for the first time in court, it is perhaps desirable that the recommendation states expressly that the powers of the court are not to be confined to the questions raised in the administrative appeal proceedings which took place earlier.*~~

The CJ-DA-GT has no recommendation to do regarding this issue.

10. 3. Effect of lodging an appeal with the court

90. In the event that the matter should be referred to the courts before the appeals authority has ruled (something that is liable to occur if judicial appeal is not mandatorily preceded by administrative appeal), can the appeals authority or even the authority which took the original decision still give the appellant satisfaction, by for example cancelling the impugned decision?

91. Many states simply replied in the affirmative: Albania, Croatia, Estonia, France, Luxembourg, Moldova, Norway, Poland, Spain, Switzerland (at least until such time as the administrative authority issues its own reply to the judicial appeal). Other states stipulated that a judicial settlement must in that case be reached: Bulgaria.

92. Some states, however, take the view that once an appeal has been lodged with the court, the administrative authorities no longer have any jurisdiction over the matter: Italy, Sweden.

~~*Conclusion:*~~ *Minimum standard*

~~*In our view, it is inadvisable to recommend that the administrative authority retain the right to withdraw or amend its decision as this is a minor issue which has more to do with the organisation of the administrative justice system than administrative appeals.*~~

The CJ-DA-GT has no recommendation to do regarding this issue.

B. Guidelines for the draft recommendation

I. Feasibility of a recommendation on administrative appeals

1. Feasibility of a recommendation on general rules governing administrative appeals

93. It seems both desirable and feasible that member states pass adopt legislation so as to introduce a system of administrative appeals against any decisions taken by public authorities in general (subject to the exceptions expressly provided for by law).

94. Apart from the fact that it already exists in many countries, there are two major advantages to this system. The first is that it allows a review of expediency and, more broadly, makes for better relations between public authorities and individuals (citizens, non-nationals) by encouraging them to communicate with one another. The second is that it helps reduce the workload of the courts dealing with administrative cases, a workload that is liable to grow as more legislation is into force and people become better educated.

95. It is desirable that general rules of this type should exist (which is not really the case in all states) and that they should afford certain minimum safeguards without, however, seeking to copy the judicial model.

2. The case against a recommendation on special rules governing administrative appeals

96. It seems difficult, on the other hand, to make recommendations for special rules governing administrative appeals, as these cover a wide range of areas and are a reflection of the policy adopted by lawmakers on a given subject. For example, the rules governing appeals relating to access to administrative documents, personal data protection and immigration are closely related to the basic rules decreed by the legislator. Any recommendation concerning special rules would therefore bring with it the need to address all sorts of issues

97. All that matters is that the subject of the decision is informed of the type of remedies available to him or her when he or she receives notification of the decision (general rules or special rules).

II. Guidelines for a recommendation on administrative appeals

1. The principles

98. Alongside special rules, it is desirable that there should be a set of general rules on administrative appeals, i.e. rules which apply to any administrative decision that cannot form the subject of a specific appeal.

99. Ideally, these general rules would have the following characteristics:

> 1. The general administrative appeal is lodged with an authority superior to the one which took the impugned decision; if there is no superior authority (as mainly in the case of ministers and senior local authority bodies), the appeal is lodged with the authority which took the impugned decision.

2. The fact that this remedy exists shall be indicated in any administrative decision, together with the name of the appeals authority and the time-limit for lodging an appeal; if it is mandatory to have this administrative appeal before it can be an appeal to the court, this needs to be specified.

3. If case the administrative authority with which the appeal has been lodged fails to respond, the appellant can apply to the appeals authority on expiry of the statutory time-limit for responding to a request; this time-limit must be notified to the appellant either automatically on receipt of the request, or later if he or she ask for the information.

4. The appeals authority shall examine the appeal within a short time-limit, prescribed by law; on expiry of this time-limit, the matter could be referred to the administrative courts.

5. The appeals authority shall examine factual and legal issues in order to review both the expediency and the lawfulness of the impugned decision.

6. The appeals authority shall seek the opinion of the authority which took the original decision, then notify the appellant of the reply received so that he or she can retort in turn.

7. The appeals authority can substitute its own decision for the impugned decision or for the public authority's failure to respond.

8. The procedure is in principle free of charge; otherwise, legal aid shall be granted.

2. Arrangements

100. The general rules could include the following arrangements:

1. The original decision

1.1. The original decision shall indicate the fact that an administrative appeal can be lodged, the time-limit within which and the authority with which it is to be lodged and whether or not such an appeal is mandatory for anyone intending to later bring the case before a court.

1.2. The original decision shall also state the factual and legal grounds for the decision, establishing both its expediency and its lawfulness.

2. Lodging the appeal

2.1. Any person whose rights or legitimate interests are affected by the decision (or failure to respond) can lodge an administrative appeal.

2.2. The authority which took the decision shall provide the person who is considering lodging an administrative appeal with the case-file on the basis of which it took its decision and shall explain to him or her, or provide him or her with comments on the grounds set out in its decision.

2.3. The administrative appeal shall be lodged in writing and shall be signed; it shall indicate the impugned decision, the purpose of the request and the grounds on which it is based.

2.4. (1) The appellant can arrange for himself or herself to be assisted by any person, including by a professional lawyer (barrister) or any association without legal personality both for the purpose of studying the case-file and for drafting the appeal. (2) He or she can be represented by any person who has legal capacity.

3. Effects of lodging an appeal

3.1. (1) The appeals authority can order a suspension of implementation of the impugned decision and, more broadly, take any interim measure. (2) It shall order such measures only after consulting the appellant and any third parties whose rights or interests are said to have been directly affected.

3.2. (1) The appeals authority shall rule within the time-limit provided for by law, which shall be notified to the appellant when he or she lodge an appeal. (2) On expiry of this time-limit, a judicial appeal may be lodged within the time-limits prescribed for such action.

4. Procedure for examining the appeal

4.1. (1) During the procedure for examining the appeal, the appellant can be assisted by any person, including by a professional lawyer (barrister) and any association without legal personality. (2) He or she can be represented by any person who has legal capacity (see 2.4 above).

4.2. During the procedure for examining the appeal, the appellant shall have access to the case-file and to any useful document (see 2.2 above).

4.3. The appellant shall have an opportunity to become acquainted with and to refute any additional arguments which the authority which took the original decision have submitted to the appeals authority in response to the appellant's arguments.

5. Decision of the appeals authority

5.1. (1) The appeals authority can consider any factual or legal issue which affects the expediency or lawfulness of the impugned decision. (2) It is bound to examine *ex officio* any legal issue, in particular any breach of the European Convention on Human Rights. (3) Where the appeals authority raises new arguments *ex officio*, it shall notify them to the appellant prior to taking its decision.

5.2. (1) The appeals authority has the power to substitute the impugned decision or the failure to respond with its decision. (2) This new decision can be more unfavourable to the appellant only if there has been serious damage to the interests of third parties or to the public interest or if there has been a violation of the law. (3) This new decision can affect the rights of third parties only if they have been warned by means of publication or notification.

5.3. (1) The decision shall state the grounds on which it is based and the judicial remedies available (including the time-limits and the competent court). (2) It shall be notified to all the parties to the proceedings and also to the administrative authority which took the original decision.

6. Costs of the proceedings and legal aid

6.1. (1) The proceedings shall be free of charge or inexpensive. (2) If the costs of the proceedings are substantial, legal aid shall be provided for persons without sufficient means.

6.2. (1) The services of a lawyer is never a statutory requirement. (2) Where the case is very complex, a system of legal aid could be introduced.

6.3. All administrative authorities shall be required to inform the individuals affected by their actions about the factual and legal issues thereof.

7. Relations between administrative appeals and judicial appeals

7.1. States are encouraged to increase the number of cases where it is mandatory to lodge an administrative appeal before the matter can be referred to the courts, at least in cases where these appeals are organised in such a way as to afford the appellant certain minimum safeguards for protecting his or her interests.

7.2. The powers of the court to which the matter is subsequently referred must not be confined to a review of the legal issues raised before the administrative appeals authority.