COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 12 December 2007 CJ-DA-GT (2007) 10

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

3rd meeting

Strasbourg, 5– 7 December2007

Draft MEETING REPORT

FOREWORD

At its meeting the CJ-DA-GT:

a) finalised and adopted the report for the attention of the European Committee on Legal Co-operation (CDCJ) on the desirability of drafting a recommendation on administrative appeals;

b) took note of the results of the European Conference "In pursuit of good administration", held in Warsaw on 29 and 30 November 2007 by the Council of Europe in co-operation with the Faculty of Law and Administration of the University of Warsaw;

c) noted that activities in the field of administrative law, and consequently the work of the CJ-DA and the CJ-DA-GT, had been suspended.

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

CONTENTS

Page

APPENDICES

I. Introduction

1. The Working Party of the Project Group on Administrative Law (CJ-DA-GT) held its 3rd meeting from 5-7 December 2007 at the Council of Europe headquarters in Strasbourg, with Ms Caroline Daly (Ireland) and Mr Philippe Gerber (Switzerland) in the chair. The list of participants appears in Appendix I to this report.

2. The Chair of the CJ-DA-GT, Ms Daly, welcomed the members of the Working Party, the other participants and Mr Michel Fromont (France), scientific expert.

3. The CJ-DA-GT discussed and adopted the draft agenda, as set out in Appendix II to this report.

4. Pursuant to the CJ-DA's terms of reference (see document CJ-DA (2007) 1), the CJ-DA-GT finalised the report on the desirability of preparing a recommendation on administrative review for the attention of the European Committee on Legal Co-operation (CDCJ).

5. The CJ-DA-GT noted that the Council of Europe's activities in the field of administrative law, and consequently the work of the CJ-DA, had been suspended.

II. Information provided by the Secretariat

6. The Secretariat of the CJ-DA-GT first informed the Working Party of the European Conference "In pursuit of good administration", which had been held in co-operation with the Faculty of Law and Administration of the University of Warsaw (Poland) on 29 and 30 November 2007, as part of the Faculty's bicentenary celebrations. The Conference was a follow-up to Recommendation CM/Rec (2007) 7 on good administration, adopted by the Committee of Ministers on 20 June 2007. The purpose of the Conference had been to present and ensure the broadest possible dissemination of this new recommendation and to promote its effective implementation in member states. Mr Gerber, Chair of the CJ-DA, and Mr Pierre Delvolvé (France), the scientific expert who had helped to draft the recommendation, had taken part in the Conference as rapporteur and general rapporteur respectively, and the Secretariat thanked them for their participation. The Conference had been well attended with some thirty countries represented (some delegations comprised several members), all the speakers invited had effectively addressed the conference and the ensuing debates had been interesting. The conclusions are set out in Appendix III to this report.

7. In reply to the question raised by the CJ-DA-GT at its second meeting concerning the future of the CJ-DA, the Secretariat told the Working Party that the Committee of Ministers had just adopted the Council of Europe's 2008 budget and that the budget for the following year did not include any resources for activities in the field of administrative law, given that the additional resources required by the European Court of Human Rights had entailed the restriction of budgetary appropriations originally earmarked for other activities, as Ms Killerby had pointed out at the second meeting (19-21 September 2007) (see document CJ-DA-GT (2007) 6, Part II).

III. Finalisation of the report on the desirability of preparing a recommendation on administrative review as a means of protecting human rights and on ways of access to justice

8. The Chair said that the draft report, as presented in document CJ-DA-GT (2007) 7, had been drafted in the light of the comments made at the meeting in September and did not contain any new elements other than the introduction and conclusion prepared by Mr Aroso de Almeida (Portugal) and Mr Gerber (Switzerland) respectively and the ensuing conclusions, which underlined the minimum rules agreed on at the previous meeting of the CJ-DA-GT. She had made only drafting and linguistic changes

to bring the English and French versions into line and make the English text easier to understand. She suggested that they discuss the presentation and style of report to be submitted to the CDCJ.

9. After discussing the matter, it was decided to structure the report in a way which would make a clear distinction between the CJ-DA-GT's position and the analysis of national laws, the relevant conclusions and guidelines for the motion for a recommendation made by the scientific expert in his report (see document CJ-DA-GT (2007) 5) and would place more emphasis on the minimum rules which the Working Party suggested should be included in any future recommendation on administrative appeals.

10. At the end of the discussions, the CJ-DA-GT finalised and adopted the report, for the attention of the CDCJ, on the desirability of preparing a recommendation on administrative appeals, to which was appended the questionnaire on administrative appeals in Europe and an excerpt from the report prepared by the scientific expert. The CJ-DA-GT's report is set out in Appendix IV to this report.

11. The report took account of the amendments recently tabled by the Estonian, French, Latvian and Polish delegations.

12. As its work on the report had been completed, the CJ-DA-GT thanked all those involved in preparing the texts for their valuable contribution; it particularly thanked Mr Michel Fromont, the scientific expert, for his written contributions, which had served as a basis for drafting the report, and for the very useful comments he had made at meetings.

13. Romania had also sent its reply to the questionnaire on administrative appeals to the Secretariat; at its request, their reply would be incorporated into the compilation of replies already received from other states, which was available on the website: www.coe.int/admin.

IV. Any other business

14. As the question of the future activities of the CJ-DA and its Working Party had already been addressed at the CJ-DA-GT's previous meeting (see document CJ-DA-GT (2007) 6, Part II), one of the items on the meeting agenda was an exchange of views on suggestions for future themes to be dealt with as from 2008 (see document CJ-DA-GT (2007) 8). However, given that it had now been confirmed that the activities of the CJ-DA were to be suspended, the CJ-DA-GT was of the opinion that it had no mandate to discuss future activities. On the other hand, the CDCJ might wish to take account of this in the discussion on its future activities, as had been mentioned at the previous meeting of the CJ-DA-GT.

15. The Chairs wished to take the opportunity of this last meeting to extend their warmest thanks to all the participants and the members of the Secretariat for having worked together over the years in preparing legal instruments in the field of administrative law. The CJ-DA-GT regretted that work in this field had been suspended, which suggested that the Council of Europe was not really interested in administrative law. It said it hoped that the Group would be re-established some time in the future, either in its current form or in another, so that it could pursue its activities in this field.

APPENDIX I

LIST OF PARTICIPANTS

CJ-DA-GT MEMBERS / *MEMBRES DU CJ-DA-GT*

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

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

ITALY / *ITALIE*
Mr Vittorio RAGONESI, Judge of the Supreme Court of Cassation, ROME

LATVIA / *LETTONIE*
Ms Jautrite BRIEDE, Judge, Supreme Court, Administrative Department, RIGA

NORWAY / *NORVEGE*
M. Arnulf TVERBERG, Legal Adviser, Legislation Department, The Norwegian Ministry of Justice, OSLO
Apologised /excusé

PORTUGAL
M. Mário AROSO de ALMEIDA, Professeur universitaire de droit administratif, Ministère de la Justice, PORTO
(Vice-Chair of the CJ-DA / Vice-Président du CJ-DA)

SWITZERLAND / *SUISSE*
M. Philippe GERBER, Chef suppléant, Unité Législation I, Office Fédéral de la Justice, Département Fédéral de Justice et Police, BERNE
(Chair of the CJ-DA / Président du CJ-DA)

SCIENTIFIC EXPERT / *EXPERT SCIENTIFIQUE*
M. Michel FROMONT, Professeur de droit public, PARIS

MEMBER STATES / *ETATS MEMBRES*

AZERBAIJAN / *AZERBAÏDJAN*
Ms Rasulova GULNAR, Deputy Director of Department of Coordination of Law Enforcement Agencies, Administration of the President, BAKU

FINLAND / *FINLANDE*
Mr Matti NIEMIVUO, Deputy Director General, Ministry of Justice, HELSINKI

POLAND / *POLOGNE*
Mr Sławomir DUDZIK, Professor of Administrative Law, University of KRAKÓW

ROMANIA / *ROUMANIE*
Mme Violeta BELEGANTE, Chef du Service, Direction de l'Elaboration des actes normatifs, des études et documentation, Ministère de la Justice, BUCAREST

RUSSIAN FEDERATION / *FEDERATION DE RUSSIE*
Mr Mark ENTIN, Director of the Institute of European Law, State Institute of International Relations, University MGIMO, MOSCOW

SPAIN / *ESPAGNE*
Mme Alba Maria TABOADA GARCIA, Avocat de l'Etat à la Cour Supérieure de la Justice de la Communauté de Madrid, MADRID

UKRAINE
Ms Tetyana RYBAN, Deputy Director of the Department on Administrative Law, Ministry of Justice, KYIV

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

HOLY SEE / *SAINT SIEGE*
Apologised / excusé

OBSERVERS WITH THE CJ-DA / *OBSERVATEURS AUPRES DU CJ-DA*

ASSOCIATION OF EUROPEAN ADMINISTRATIVE JUDGES /
FEDERATION EUROPEENNE DES JUGES ADMINISTRATIFS
M. Bernard EVEN, Vice-Président du Tribunal administratif de STRASBOURG

SECRETARIAT OF THE COUNCIL OF EUROPE / *SECRETARIAT DU CONSEIL DE L'EUROPE*

Directorate General of Human Rights and Legal Affairs, Directorate of Standard-Setting, Law Reform Department
Direction Générale des Droits de l'Homme et Affaires Juridiques, Direction des Activités normatives, Service des Réformes legislatives
www.coe.int/admin

Mme Danuta WIŚNIEWSKA-CAZALS, Secretary of the CJ-DA / Secrétaire du CJ-DA

Mme Catherine GALLAIS, Administrative Assistant / Assistante Administrative

Ms Wendy POLVECHE, Assistant / Assistante

INTERPRETATION

Mme Josette YOESLE
Mr Derrick WORSDALE

APPENDIX II

AGENDA

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

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

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

4. Finalisation 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*

Draft report on a desirability of preparing a recommendation on administrative review / *Projet de rapport sur l'opportunité de préparer une recommandation sur le recours administratif*

CJ-DA-GT (2007) 7

Background documents / Documents de référence

Report of the 1st meeting of the Working Party, 28 – 30 March 2007/ *Rapport de la 1ère réunion du Groupe de travail, 28 – 30 mars 2007*

CJ-DA-GT (2007) 2

Report of the 2nd meeting of the Working Party, 19 – 21 September 2007 / *Rapport de la 2e réunion du Groupe de travail, 19 – 21 septembre 2007*

CJ-DA-GT (2007) 6

Report prepared by the scientific expert in the light of replies to the questionnaire on administrative appeals in Europe / *Rapport préparé par l'expert scientifique à la lumière des réponses au questionnaire sur les recours administratifs en Europe*

CJ-DA-GT (2007) 5

Questionnaire on administrative appeals in Europe / *Questionnaire sur les recours administratifs en Europe*

CJ-DA-GT (2007) 1rev.

Replies to the questionnaire on administrative appeals in Europe / *Réponses au questionnaire sur les recours administratifs en Europe*

CJ-DA-GT (2007) 4

Objective setting document prepared by the scientific expert / *Document d'orientation préparé par l'expert scientifique*

CJ-DA-GT (2007) 1

Specific terms of reference of the CJ-DA for 2007 / *Mandat spécifique du CJ-DA pour 2007*

CJ-DA (2007) 1

Resolution No. 1 on victims of crime adopted by the 27th Conference of European Ministers of Justice (Yerevan, 12-13 October 2006) / *Résolution n° 1 relative aux victimes d'infractions adoptée par la 27e Conférence des Ministres européens de la Justice (Erevan, 12-13 octobre 2006)*

MJU-27 (2006) Resol.1 Final

Resolution No. (76) 5 on legal aid in civil, commercial and administrative matters / *Résolution n° (76) 5 concernant l'assistance judiciaire en matière civile, commerciale et administrative*

Res (76) 5

Resolution No. (78) 8 on legal aid and advice / *Résolution n° (78) 8 sur l'assistance judiciaire et la consultation juridique*

Res (78) 8

Recommendation No. R (81) 7 on measures facilitating access to justice / *Recommandation n° R (81) 7 sur les moyens de faciliter l'accès à la justice*

R (81) 7

Recommendation No. R (86) 12 concerning measures to prevent and reduce the excessive workload in the courts / *Recommandation n° R (86) 12 relative à certaines mesures visant à prévenir et réduire la surcharge de travail des tribunaux*

R (86) 12

5. Exchange of views on questions to be considered by the CJ-DA as from 2008 / *Echange de vues sur les questions devant être examinées par le CJ-DA à partir de 2008*

Working document / *Document de travail*

Proposals for future activities made by the CJ-DA-GT / *Propositions d'activités futures formulées par le CJ-DA-GT*

CJ-DA-GT (2007) 8

6. Any other business / *Questions diverses*

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 (2007) CM Message 2

Memorandum of Understanding between the Council of Europe and the European Union / *Mémorandum d'accord entre le Conseil de l'Europe et l'Union européenne*

CM (2007) 74

APPENDIX III

European Conference

IN PURSUIT OF GOOD ADMINISTRATION

Warsaw, 29-30 November 2007

CONCLUSIONS

The European Conference organised in Warsaw on 29 and 30 November 2007 by the Council of Europe in co-operation with the Faculty of Law and Administration of the University of Warsaw, entitled "In pursuit of good administration", gathered together the representatives of a certain number of the Council of Europe member States.

The participants examined ways of promoting and implementing Recommendation CM/Rec(2007)7 adopted by the Committee of Ministers of the Council of Europe on 20 June 2007.

After recalling the historical background of the recommendation's preparation and adoption, its contents were presented and put into perspective with regard to the notions of « good administration » and « good governance », as well as to the role of law in carrying them out. The original character of the recommendation has been highlighted as a « code of good administration » appended to the recommendation defines principles and lays down rules governing administrative decisions and possible appeals against such decisions. Thus, this document should provide guidance for the administration and serve as a tool for private persons.

The Conference questioned not only the definition of good administration and the different possible notions but also the existence of an individual right to good administration. It emphasised the importance both of law and of public authorities in a democratic society.

Taking into account the recommendation and the solutions adopted by the various national systems which have been put forward, the participants arrived at the following conclusions:

1. Good administration is an essential element of good governance, including economic governance. It concerns not only the organisation, the management, the functioning, the action and the review of public authorities in general but also the status and the conduct of their officials.

2. The right to a good administration can be considered as a third generation right (adding to formal liberties and to economic and social rights) of general scope but acknowledged with difficulty as an individual right. On the contrary, its implementation can be broken down into individual rights which can be applied against the administration, as different rules at national and european levels already show. Developing these rights requires adopting legislation or rules and implementing good practices; their safeguard can be ensured by means of judicial review, the role of which has been underlined, as well as by specialised bodies such as ombudsmen.

3. The Conference considers that the recommendation lays down the minimum standard for a good administration which member states are invited to put into practice and which they should even be able to strengthen.

4. Considering that good administration is the responsibility of each state, the Conference expresses the wish that the recommendation be made known as widely as possible to both public authorities and private persons.

5. It urges the Council of Europe to offer to its member states the assistance which they may need in the implementation of this recommendation.

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The Conference wishes to express its gratitude to the Faculty of Law and Administration of the University of Warsaw and to the Council of Europe for the organisation of this particularly important debate to meet one of the priorities set by the Heads of State and Government at their Third Summit in 2005.

APPENDIX IV

REPORT ON THE DESIRABILITY OF PREPARING A RECOMMENDATION ON ADMINISTRATIVE APPEALS

prepared by the CJ-DA-GT

I. Introduction

1. The terms of reference of the Project Group on Administrative Law (CJ–DA) for 2007 instructed the Group to carry out a study on member states' law and practice regarding the administrative appeals available to individuals and access to such remedies for deprived persons, including vulnerable victims, and, on the basis of this study, to examine the desirability of preparing a recommendation on administrative appeals as a means of protecting human rights and on access to justice in this sphere.

2. These terms of reference are part of the response to the decisions taken at the Third Summit of Heads of State and Government of the Council of Europe in Warsaw on 16 and 17 May 2005, as reflected in the Warsaw Declaration and Action Plan, underlining the fact that one of the fundamental objectives of the Council of Europe is to step up its activities to promote human rights, the rule of law and good governance.

3. To achieve this fundamental objective, the Council of Europe must make sure that all member states have appropriate and efficient mechanisms for ensuring that their administrative practice is compatible with human rights and that effective domestic remedies are available to anyone who claims that their human rights have been violated. To this end it is necessary to take stock of the applicable legislation in member states with regard to administrative appeal to assess the effectiveness of the protection individuals are given vis-à-vis the public authorities.

4. In the light of these terms of reference (first and foremost to carry out a study on the law and practice of the member states regarding administrative appeals), the CJ-DA Working party (CJ-DA-GT) drew up a questionnaire which it sent to Council of Europe member states (see Appendix I).

5. In this questionnaire, each member state was asked to supply information on the system of administrative appeals to an administrative authority where the decisions made affect the rights and interests of individuals, and in particular when those decisions violate the European Convention on Human Rights.

6. On the basis of the replies to this questionnaire and the analysis presented by the expert to the CJ-DA-GT, Professor Michel Fromont (France) (see Appendix II), the CJ-DA-GT has from those replies considered the feasibility and the desirability of a recommendation. In that regard, they have determined that a number of minimum standards and practices should be complied with by administrative authorities of member states:

II. Feasibility and desirability of a recommendation on administrative appeals

Feasibility of a recommendation on administrative appeals

7. The CJ-DA-GT is of the view that the preparation of a recommendation laying down minimum standards to be respected by internal administrative appeals is feasible. Analysis of the practice of the

different States which replied to the questionnaire shows that there is already a broad consensus on the general principles of such an appeals procedure. Those general principles could therefore easily be consolidated into a recommendation.

Desirability of a recommendation on administrative appeals

8. From a human rights's protection point of view, administrative appeals have a threefold function : firstly, they empower the public authorities to correct in a simple, quick and cost effective manner its mistakes regarding law enforcement, including infringement of human rights. Therefore administrative appeals are used as a tool of good administration, as stated in Article 22 of the code of good administration (Recommendation CM/Rec(2007)7 on good administration). Secondly, administrative appeals make it possible to reduce the workload of the courts which are reviewing administrative decisions, either by cutting the number of judicial reviews, or by facilitating these courts' examination of the law and the facts of cases, so they contribute towards ensuring the efficiency of justice (see Recommendation Rec(2001)9 on alternatives to litigation between administrative authorities and private parties, Chapter III.1). Thirdly, administrative appeals allow for a review of the appropriateness of decisions where a margin of discretion is provided for by law to public authorities which is not always the position in relation to judicial review. However, it should be pointed out that the requirement for a reasonable time limit of the procedure, which derives from Article 6 of the European Court of Human Rights, requires that the administrative appeal do not unecessarily extend in duration the procedure and that it is an efficient remedy by itself.

9. The CJ-DA-GT is of the view that the preparation of a recommendation on internal administrative appeals is desirable. Firstly, a recommendation of this kind would usefully complement Recommendation Rec(2004)20 on judicial review of administrative acts, in governing the phase prior to access to the court, as well as Recommendations Rec(2001)9 on alternatives to litigation and CM/Rec(2007)7 on good administration, both of which make only a very cursory mention of administrative appeals. A recommendation would make it possible to lay down a number of minimum standards for increasing the efficiency of administrative appeals. In particular, reinforcing the adversarial dimension of the procedure would guarantee that all the arguments of the parties would already be examined by the administrative appeals authority. Furthermore, it must be pointed out that the broad consensus among the States which replied to the questionnaire does not call into question the desirability of a recommendation. Firstly, this concensus facilitates the establishement of minimum standards and secondly consensus should be sought where differences exist.

III. Proposed minimum standards

10. In the light of the practice of States, the CJ-DA-GT has identified some minimum standards which could be included in a recommendation on administrative appeals. These minimum standards can be divided into three groups to describe the three main phases of the administrative appeals procedure: lodging the appeal, the processing of the appeal and the decision of the appeals authority.

i. Lodging the appeal

11. The following minimum standards apply to lodging an appeal and mainly seek to ensure that all persons concerned have the right to lodge an administrative appeal. They also seek to facilitate the exercising of that right upon receipt of appropriate information.

a) Individuals affected by administrative decisions should be informed as appropriate of the possibility of an administrative appeal if available, the competent authority to hear the appeal and the time limits applicable.

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

c) In order to ensure an effective appeal, appropriate reasons should be given for any individual decision taken, stating the legal and factual grounds on which the decision was taken, at least in cases where they affect individual rights (see Article 17 of the Code appended to Recommendation CM/Rec(2007)7 on good administration).

d) Access to administrative appeals should be available to individuals on the same basis as judicial review (see Article 2 of Recommendation Rec (2004) 20 on judicial review of administrative acts).

e) The appeal should be communicated or notified to affected third parties to allow them participate in the appeal procedure.

f) The administrative authority should give information to the appellant regarding the rules of procedure and practice in order to lodge an appeal.

g) The appellant should in principle have access to the case-file and any other document necessary to ground his appeal (see Recommendation Rec (2002) 2 on access to official documents).

h) States may require that an appeal should clearly state the purpose and grounds of the appeal. Any excessive formalities should be excluded.

i) The appellant should be allowed to be represented by any person who possesses a power of attorney, including by a lawyer or an association.

j) If administrative costs are payable by the appellant in administrative appeals they should be fair and reasonable. In determining whether administrative costs could 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.

ii. The processing of the appeal

12. In order for the appeal to be effective, it is necessary that the appeals authority swiftly decide and even, in some cases that the impugned decision be suspended. It is necessary that the procedure is balanced, in other words make it possible for the appellant as well as for interested third parties to be informed and heard.

a) Where there is no automatic suspension of the implementation of the impugned decision pending an administrative appeal, it should be possible to obtain such a suspension upon the request of the appellant.

b) The appeals authority shall decide an appeal within a time limit prescribed by law. If the administrative authority does not decide within this time limit, the appellant may appeal to the court.

c) Each party to the appeal proceedings should have the right to hear and respond to any additional arguments presented by the authority which took the impugned decision or by the other parties involved in the appeal. They should in principle have access to the

case file to fully participate in the appeal proceedings (see Recommendation Rec(2002)2 on access to official documents).

iii. The decision of the appeals authority

13. The administrative appeal should allow a complete reexamination of the impugned decision (except in the particular case where the impugned decision issued from an authority which enjoys a certain degree of autonomy) and fully respect the entitlement of all parties to be informed and heard.

a) The appeals authority ought to be at least able to review any violation of the law, for instance lack of competence, procedural impropriety, abuse of power and a violation of the European Convention on Human Rights. It should also be possible, in principle, to review the appropriateness of the decision.

b) 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.

c) The appeals authority cannot 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.

d) Appropriate reasons should 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 directly affect individual rights or interests.

e) Any decision taken by an administrative appeals authority shall indicate the judicial remedies available and the time limits for availing oneself thereof.

f) The appeals authority shall notify its decision to all the parties involved in the appeal, including the administrative authority which took the original decision.

iv. Additional matters

14. There are other aspects reflected in the questionnaire where the CJ-DA-GT was not able to agree minimum standards because of the differences between legal systems. Those concern in particular:

- the requirement that appeals be lodged before a superior authority,
- the obligation to appeal to an administrative authority before appealing to a court,
- the impact an administrative appeal has on a subsequent judicial review,
- the effects of lodging an appeal with the court where an administrative appeal is in being.

The CJ-DA-GT considers that these matters require further reflection.

15. The CJ-DA-GT is of the view that it might also be a good idea to consider good management in the context of administrative appeals: for instance, to ensure swift processing of appeals, to guarantee impartiality of the appeals authority, to ensure better communication with appellants, to ensure the consistence of the practice of appeals authorities and to improve the functioning of administrative authorities in relation to decisions on appeal.

IV. Case against a recommendation on judicial assistance in administrative appeals procedures

16. With regard to the second point of the CJ-DA's terms of reference concerning legal aid in administrative appeals procedures, analysis of the practices of the states which replied to the questionnaire showed that, owing to the very low cost of these appeals procedures for the parties in the vast majority of States, the question of granting legal aid does not arise in those states. The CJ-DA-GT is of the view, therefore, that this point could be dealt with in passing in a recommendation on administrative appeals but it does not merit analysis in its own right and even less so a specific recommendation on the subject.

Appendix I

QUESTIONNAIRE ON ADMINISTRATIVE APPEALS IN EUROPE

PRESENTATION OF THE QUESTIONNAIRE

I. SCOPE OF THE SURVEY

The terms of reference of the Project Group on Administrative Law (CJ-DA) are to carry out a study on the law and practice of the member states on administrative appeals with a view to examining the desirability of preparing a recommendation in this field. Accordingly, information from each country is required on the system of administrative appeals available to individuals in order to review administrative decisions which affect their rights and interests.

Administrative appeals against administrative decisions

"Administrative appeals" must be understood to arise where an application is made by an individual to a public authority to review an administrative decision. Depending on the circumstances, the authority with which the application is lodged may be:

- the authority which took the decision;
- a higher authority (hierarchically superior to or supervising the authority which took the decision);
- an independent public authority, but not of the nature of a tribunal as understood by the European Convention on Human Rights.

"Administrative decisions" shall mean non-regulatory decisions taken by public authorities when exercising the prerogatives of public power. Non-regulatory decisions may be individual or otherwise. Individual decisions are those addressed solely to individuals.

"Public authorities" shall be taken to mean:

a) any public-law entity of any kind or at any level, including state, local and autonomous authorities, providing a public service or acting in the public interest,

b) any private-law entity exercising the prerogatives of a public authority responsible for providing a public service or acting in the public interest.

II. SURVEY METHOD AND PRESENTATION OF THE REPLIES TO THE QUESTIONNAIRE

The survey will give ***a general overview***, as concise as possible, of the different types of administrative appeals available in your country. Information is sought on whether member states have general or special rules governing administrative appeals. Where special rules exist information is sought in relation to those appeals which would significantly impact on individuals in one or more specific field(s) such as tax, immigration or social welfare, or any further examples of such appeals you might wish to offer.

This will make it possible to gauge the relative importance of each of the main types of administrative appeals within your country which safeguard private persons from the adverse consequences of administrative acts.

The survey will then address the ***legal rules and the de facto situations concerning each type of administrative appeal.*** The aim is to establish what factors help make an administrative appeal easy to access and to use and enable effective protection of the interests of the private persons concerned.

QUESTIONNAIRE

I. DIFFERENT TYPES OF APPEALS

1. Are there general rules in your country which apply to administrative appeals? If so, please complete Part II of the questionnaire concerning those general rules.

2. Are there special rules in your country which apply to administrative appeals relating to specific areas? If so, please indicate the most important of these and complete Part II of the questionnaire concerning those special rules.

3. Are there special rules in your country which apply to administrative appeals relating to sensitive areas which seek to protect the rights and interests of individuals, in areas like tax, immigration, social welfare or personal data protection? If so, please complete Part II of the questionnaire concerning those special rules.

4. Are there special rules in your country which apply to administrative appeals where it is claimed that there has been a breach of the European Convention on Human Rights? If so, please complete Part II of the questionnaire concerning those special rules.

5. Are there special rules in your country which apply to administrative appeals where a public authority fails or refuses to respond to a request? If so, please complete Part II of the questionnaire concerning those special rules. If not, please explain what procedures apply in such cases.

6. Are there general rules or practices governing the payment by the State of legal expenses incurred by individuals with insufficient resources in the context of an administrative appeal? If so, please describe briefly those general rules or practices.

II. EASE AND EFFECTIVENESS OF APPEALING AGAINST ADMINISTRATIVE DECISIONS

Please complete separate sets of answers for the questions below, one set to deal specifically with appeals subject to general rules and the other sets of answers to deal specifically with appeals subject to special rules as referred to in Part I of the questionnaire.

1. Please indicate what type of administrative appeal as set out in Part I of the questionnaire is being referred to whether general or special in nature? In the latter case, please further specify which type of appeal you are referring to in the context of your reply to Part I of the questionnaire.

2. What law governs this administrative appeal?

3. Is the subject of an administrative decision informed of the right to an administrative appeal of that decision and of the manner in which the appeal can or must be lodged?

4. Before which authority can or must an administrative appeal be lodged?

   4.1 the public authority which took the impugned decision?
   4.2 a higher public authority (hierarchically superior to the authority which took the decision)?
   4.3 a public authority supervising the authority which took the decision, e.g.:
   - an authority supervising a local government authority
   - or an authority supervising an administrative body with limited powers?
   4.4 an independent public authority not linked in any way to the authority which took the decision?

5. Are restrictions placed on the lodging of an administrative appeal?

   5.1 What is the time-limit for lodging an appeal?
   5.2 Is a person who is considering to lodge an appeal entitled to know the grounds on which the decision was based (which may be communicated either automatically or on request)?
   5.3 Is the person who is affected by a decision the only person entitled to lodge an administrative appeal or can an appeal be lodged by a third party whose interests or rights have been affected?
   5.4 Is it easy to obtain access to the case-file or the documents in the possession of the public authority which took the decision?
   5.5 Which formal requirements must be complied with?
   In particular, must the complete case-file be provided or is it, for example, sufficient to submit a copy of the decision and brief arguments explaining why it is being appealed?
   5.6 Is it necessary for the appellant to be assisted by a lawyer? Is it easier for a lawyer to obtain access to the case-file as compared with a mere individual? Can the appellant be assisted by an association, for example a trade union, or by any other person in lodging an appeal? In that case, can those persons access the case-file?

6. What is the effect of lodging an appeal?

   6.1 Does the lodging of an appeal automatically result in a stay of the administrative decision being implemented? If not, is it possible to apply for a stay?
   6.2 Does lodging the appeal allow the appellant to ask the public authority ruling on the appeal to adopt interim or protective measures?
   6.3 Is the public authority obliged to decide the appeal within a given time-limit?

7. The appeal procedure:

   7.1 Can (or must) the appellant be assisted by a lawyer or by an association (in particular a trade union) or any other person?
   7.2 Does the appellant have access to all or part of the case-file?
   7.3 Is the appellant entitled to know the counter-arguments given by the public authority which made the impugned decision in response to the arguments set out in the appeal? To what extent and in which form, orally or in writing, is the appellant entitled to respond to those counter-arguments?
   7.4 Is the appeal examined by a legally qualified official? By a higher-ranking official?

8. The decision of the appeals authority:

8.1 How broad are the powers of review enjoyed by the authority deciding the appeal?
8.1.1 Can the appeals authority review in full the impugned decision or only its lawfulness?
8.1.2 Can the appeals authority review a violation of the European Convention on Human Rights either *ex officio* or on foot of the claim lodged?
8.1.3 Can the appeals authority take into consideration arguments which have not been advanced by the appellant and/or of which the appellant has not been informed?
8.2 How broad are the decision-making powers enjoyed by the authority deciding the appeal? Can it take:
8.2.1 a decision that is even more unfavourable to the appellant?
8.2.2 a decision affecting the rights of third parties?
8.3 Is it mandatory for the authority hearing the appeal to:
8.3.1 give grounds for its decision?
8.3.2 accompany its decision with information on the judicial remedies available to the appellant (including information on time-limits for appealing to the courts or other admissibility criteria)?
8.3.3 formally notify its decision? To whom (the appellant, the person concerned by the decision)?

9. Costs of the proceedings and legal assistance:

9.1 Is the administrative appeal free of charge for the appellant? Must the appellant pay for the costs of photocopying or translations for example?
9.1.1. If not, can an appellant without sufficient means seeks the costs of the appeal from the state and under what conditions?
9.1.2. Can the appeals authority make admissibility of the appeal conditional on the advance payment of costs? If so, can the person without sufficient means seek a waiver from the state of the advance payment of such costs and under what conditions?
9.2 Can the person without sufficient means obtain from the state payment of the costs of a lawyer?
9.3 Does the state ensure that an appellant without sufficient means is able to obtain necessary legal advice in respect of the 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?
10.2 In a judicial appeal, can new arguments not raised before the administrative appeal be raised in the course of judicial proceedings?
10.3 Where an appeal has been lodged before the court, is it possible for the public authority to revise the administrative decision pending the determination of the court proceedings?

Appendix II

Report on replies to the questionnaire sent to member states and guidelines for drafting a recommendation

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EXTRACT

A. Analysis of replies to the questionnaire

1. Sixteen countries replied to the questionnaire. However, not all the replies are usable, as in some cases, the authors misunderstood the subject of the survey, in particular the United Kingdom and Austria, as we will demonstrate. As a result, the number of replies used was brought down to 14.

2. The respondents can be divided into three categories: western European countries with Roman law systems, central and eastern European countries with Roman law systems and common law countries.

3. Among the western European countries with Roman law systems, replies were received from Austria, France, Italy, Luxembourg, Norway, Spain, Sweden and Switzerland. Regrettably, none were received from Germany (because it is a federal state, only the Länder had the power to reply to the questionnaire and perhaps they were not contacted), Greece, the Netherlands, Belgium and Portugal. Austria did submit a reply, but it related only to appeals made to the independent asylum chambers which the European Court of Human Rights regards as judicial bodies which fall outside the scope of the Working Party's survey.

4. Among the central and eastern European countries with Roman law systems, replies were received from Albania, Bulgaria, Croatia, Estonia (although some of the replies relate to judicial appeals), Latvia, Moldova and Poland. Regrettably, no replies were received from states being members of the Commonwealth of Independent States (in particular the Russian Federation and Ukraine) and from several member states of the European Union (in particular Hungary, Romania, Slovenia and the Czech Republic). One other notable absence was Turkey.

5. Only one common law country replied - the United Kingdom. However, the replies given by this country could not be used as the author of the reply misunderstood the term "administrative appeals" to mean appeals to "administrative tribunals", when in fact, this kind of appeal had been deliberately excluded from the scope of the Working Party's survey. Nevertheless, there are instances of genuine administrative appeals, notably in town planning (see Fromont, Droit administratif des États européens, Paris 2006, p. 113). Neither Ireland, nor Malta nor Cyprus, which have similar legal systems, replied to the questionnaire.

6. Despite these gaps, the replies may be stated to provide a representative sample of the various legal systems that exist in Europe. However, the absence of the Russian Federation and, for all intents and purposes, the United Kingdom, makes it difficult to assess the likelihood of a recommendation on administrative appeals being adopted by the Council of Europe member states.

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 confirm 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).

[…]

2. Other questions

11. None of the countries answered in the affirmative to the question as to whether there were special rules in case of a *breach of the European Convention on Human Rights*. This is hardly surprising as introducing the possibility of such an appeal would complicate the rules on administrative appeals and could only be justified in the countries where no judicial protection for human rights and fundamental freedoms is constituted. What matters here is that all the authorities of the member state be required to comply with the European Convention on Human Rights. This is a fundamental issue, however, which has to do with the role of the Convention in the domestic legal system, and is beyond the terms of reference of the Working Party.

12. The question as to whether there are special rules in cases where a public authority fails or refuses to respond to a request proved to be irrelevant as most of the countries treat failure to respond within a given time in the same way as explicit refusal and explicit refusal is deemed to be a decision like any other since in administrative appeals, the administrative appeals authority always has the

power to do more than simply revoke the impugned decision, including replacing it with a new one. Only Spain makes a distinction between cases where there has been an explicit decision and cases where an authority has failed or refused to respond, but this has little impact on the administrative appeal, owing to the traditionally wide decision-making powers enjoyed by administrative appeals authorities.

13. As regards *payment by the state of the expenses* incurred by persons who lodge administrative appeals, only a few countries have this system. The best example is Norway, where the party which obtains the alteration of the impugned decision in its favour, is entitled to payment of the expenses incurred. Also, Norway has a system of free legal aid in cases which are of particularly vital importance to the individual concerned. Most of the replies received merely state either that the appeals procedure is free and that there is no obligation to be represented by a lawyer (Bulgaria, France, Italy, Luxembourg, Moldova, Spain) or that the procedure is almost free (Croatia: 7 euros), which does not really answer the question (particularly as it is often stated that the costs of photocopying and translations remain payable by the appellant: France, Luxembourg), or that the authorities have a general obligation to provide information and assistance (Albania, Poland, Sweden). An intermediate position between these two groups of states seems to be those states where legal aid is also available for administrative appeals (Estonia, Switzerland), although sometimes with restrictions which, on the face of it, would seem entirely justified: the aid is granted only where it is necessary to be represented or assisted by a lawyer (Spain) or if the issues raised are matters of law (United Kingdom).

[…]

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

1. Study confined to general rules

14. See I.1 above

2. Legal basis

15. See I.1 above

3. Information on administrative appeals

16. It is gratifying to see that nearly all the states require administrative authorities to indicate what judicial remedies are available for challenging an administrative decision. This is one of the major progress over the past 50 years in European administrative law.

17. Can the same be stated for administrative appeals? It would seem so in cases where the possibility of lodging an administrative appeal is expressly provided for in the law on administrative procedure, as in the following countries: Albania (even though the information is not necessarily provided in writing), Bulgaria, Croatia, Estonia, Italy, Latvia, Luxembourg, Moldova, Norway, Poland, Spain, Sweden, Switzerland. It should further be noted, however, that the terminology used in the replies is not always entirely devoid of ambiguity.

18. But what of states which have no such codification? In France, for example, it is only if they receive a request for a decision that administrative authorities are required to indicate all the available remedies, including administrative appeals, when issuing the acknowledgement of receipt.

[…]

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.

[…]

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.

[…]

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, 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).

[…]

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 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.

[…]

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.

[…]

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. Some states recognise that the appeal is oral in some cases, for example in the social field (Latvia).

[…]

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).

[…]

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. This is the case in Bulgaria, Croatia, Latvia and Switzerland. 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.

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.

[…]

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.

[…]

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.

[…]

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.

[…]

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, 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.

[…]

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.

53. A number of countries require that both parties be heard either as a general rule (Italy, Norway, Sweden, Poland) 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 separate bodies.

[…]

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, 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.

[…]

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.

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, 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).

[…]

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.

[…]

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).

[…]

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).

[…]

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).

[…]

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.

[…]

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.

[…]

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.

[…]

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.

[…]

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, 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.

[…]

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.

[…]

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.

[…]

10. 2. Admissibility of new arguments in judicial appeals

88. Most states allow the appellant to raise new arguments in court: Albania, Bulgaria, Estonia, 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.

[…]

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 mandatory 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.

[…]