COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 19 March 2004 CJ–DA (2004) 9

PROJECT GROUP ON ADMINISTRATIVE LAW
(CJ-DA)

Report of the 16th meeting
Strasbourg, 3-5 March 2004

REPORT TO THE EUROPEAN COMMITTEE ON LEGAL CO-OPERATION (CDCJ)

FOREWORD

The CJ-DA invites the CDCJ to note that it, in particular:

a. approved the text of the draft recommendation on judicial review of administrative acts (see section III of this report and Appendix III);
b. decided that the final version of the explanatory memorandum to the recommendation should be prepared by the Secretariat in the light of written comments sent by the delegations of the CJ-DA (see section IV of this report and Appendix IV);
c. prepared the CJ-DA's draft terms of reference for 2005-2006 (see section V of this report and Appendix V);
d. adopted the opinion on Recommendation 1615 (2003) of the Parliamentary Assembly on the institution of ombudsman (see section VI of this report and Appendix VI);

Secretariat memorandum
prepared by
the Directorate General of Legal Affairs

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I. ITEMS SUBMITTED TO THE CDCJ

1. The European Committee on Legal Co-operation (CDCJ) is invited :

a. to approve, subject to any amendments which it may wish to introduce, the draft recommendation on the judicial review of administrative acts (see part III and Appendix III below) with a view to transmitting it to the Committee of Ministers for adoption;

b. to approve, subject to any amendments which it may wish to introduce, the draft explanatory memorandum to the recommendation (see part IV and Appendix IV below) with a view to transmitting it to the Committee of Ministers for authorisation of publication;

c. to approve, subject to any amendments which it may wish to introduce, the draft revised terms of reference for the CJ-DA for 2005-2006, with a view to transmitting it to the Committee of Ministers for adoption (see part V and Appendix V below);

d. to take note of the Opinion on Recommendation 1615 (2003) of the Parliamentary Assembly on the institution of ombudsman, which was submitted to its Bureau with a view to transmitting it, subject to any amendments, to the Committee of Ministers' Rapporteur Group on Legal Co-operation (GR-J) (see part VI and Appendix VI below);

e. to take note that Ms Caroline DALY (Ireland) and Mr Philippe GERBER (Switzerland) were elected respectively as Chair and Vice-Chair of the CJ-DA (see part VII b below);

f. to take note of this report as a whole.

II. INTRODUCTION

2. The Project Group on Administrative Law (CJ-DA) held its 16th meeting from 3 to 5 March 2004 at the Council of Europe headquarters in Strasbourg, with Mr Vittorio Ragonesi (Italy) in the Chair. The list of participants appears in Appendix I to this report.

3. The CJ-DA took note that the Committee of Ministers had, at its 851st meeting on 9 September 2003, adopted Recommendation No. (2003) 16 on the execution of administrative and judicial decisions in the field of administrative law.

4. The CJ-DA took note that the Committee of Ministers had adopted, at its 852nd meeting on 17 September 2003, the specific terms of reference of the CJ-DA for 2004.

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

III. DRAFT RECOMMENDATION ON THE JUDICIAL REVIEW OF ADMINISTRATIVE ACTS

6. In accordance with its specific terms of reference for 2004, adopted by the Committee of Ministers at its 852nd meeting on 17 September 2003, the CJ-DA finalised the draft recommendation on the judicial review of administrative acts, having taken account of delegations' observations and proposals sent in by Professor David Harris, the scientific expert. The text as revised by the CJ-DA at this meeting is set out in Appendix III.

7. The CJ-DA did not consider justified the amendments proposed by the Consultative Council of European Judges (CCJE), which had commented on the draft recommendation at the request of the Working Party of the Project Group on Administrative Law (CJ-DA-GT).

A. Definitions

8. In the definition of "administrative acts" the CJ-DA added a reference to paragraph A.1.b to clarify that refusal to act or an omission to do so constitutes situations where the administrative authority is under an obligation to implement a procedure following a request.

9. The CJ-DA extended the definition of "judicial review" to include a requirement for "the adoption of appropriate measures" and to provide for the exclusion of review by a constitutional court from the scope of the Recommendation. This covers the problem raised by several delegations that, in some countries, normative acts cannot be challenged before administrative tribunals.

B. Principles

The scope of judicial review

10. With regard to principle 1.a, the CJ-DA modified the corresponding paragraph 26 of the Explanatory Memorandum in order to clarify the distinction between direct judicial review and review of the lawfulness of a measure on which a decision that has been challenged is based.

11. The CJ-DA improved the wording of the French version of principle 1.b and added a reference in the corresponding paragraph 30 of the Explanatory Memorandum clarifying the abuse of power.

Access to judicial review

12. The CJ-DA broadened the scope of principle 2.a in order to encourage member states to allow greater access to judicial review.

13. With regard to principle 2.b, a footnote was added in the Explanatory Memorandum containing examples of time limits for lodging appeals in 12 member states. The wording of the English version of the principle was modified in the interests of clarity.

The right to a fair hearing

14. In principle 4.c, which requires the administrative authority to make the relevant information available to the tribunal, the CJ-DA provided for "exceptions in important cases" in view of issues such as professional secrecy which may require greater confidentiality.

15. The words "at least" were added to principle 4.i as it might be impractical for appeal to be permitted in all cases before tribunals.

The effectiveness of judicial review

16. The words "where appropriate" were added to the final sentence of principle 5.a in the interests of flexibility.

17. The CJ-DA invited the CDCJ to approve, subject to any amendments which it may wish to introduce, the draft recommendation on the judicial review of administrative acts set out in Appendix III to this report with a view to transmitting it to the Committee of Ministers for adoption.

IV. DRAFT EXPLANATORY MEMORANDUM TO THE RECOMMENDATION

18. The CJ-DA amended the draft explanatory memorandum to the draft recommendation, prepared by the Secretariat (doc. CJ-DA (2004) 1) in the light of the changes made to the draft recommendation and the points raised during the meeting and instructed the Secretariat to prepare a revised version on the basis of comments to be sent by the delegations before 19 March 2004.

19. The CJ-DA invited the CDCJ to approve, subject to any amendments which it may wish to introduce, the draft explanatory memorandum to the recommendation set out in Appendix IV to this report with a view to transmitting it to the Committee of Ministers for authorisation of publication.

V. PREPARATION OF PROPOSALS FOR ACTIVITIES AIMED AT STRENGTHENING THE LEGAL FRAMEWORK OF GOOD ADMINISTRATION AS AN ESSENTIAL ELEMENT OF GOOD GOVERNANCE

20. The CJ-DA examined its draft revised specific terms of reference prepared by the Secretariat on the basis of discussion by the CJ-DA-GT as set out in document CJ-DA (2004) 5.

21. Several delegations confirmed the importance of the right to good administration and good administrative decision-making, especially in countries that had not yet reformed their administrative law. It is proposed sending out a questionnaire in order to prepare the basis of the report. The importance of access to information and documents was emphasised. A proposal was made to appoint a scientific expert to prepare a report.

22. The CJ-DA revised the wording of the questions to be studied in the framework of activities aimed at strengthening the legal framework of good administration as an essential element of good governance in order to remove any ambiguity in connection with regard to the terms "administrative contracts" and "the principle of legitimate confidence.

23. The CJ-DA invited the CDCJ to approve, subject to any amendments it might wish to make, the draft revised specific terms of reference for 2005-2006 set out in Appendix V to this report with a view to transmitting it to the Committee of Ministers for adoption.

VI. OPINION ON RECOMMENDATION 1615 (2003) OF THE PARLIAMENTARY ASSEMBLY ON THE INSTITUTION OF OMBUDSMAN

24. In accordance with the instructions of the Chair of the CDCJ, the CJ-DA examined the draft opinion on Parliamentary Assembly Recommendation 1615 (2003) on the institution of ombudsman, prepared by the Secretariat (see doc. CJ-DA (2004) 7).

25. The first sentence of paragraph 6 was modified in order to moderate it, as one delegation felt that the difficulty of defining the right of good administration was overstated. Another expert considered that a definition was unnecessary – it was the context of the recommendation that should be considered.

26. In the English version of paragraph 8, the term "subjective rights" was changed to "individual rights". The wording of the third sentence was improved in the interests of clarity.

27. The word "other" was deleted from the second sentence of paragraph 14; it depends on national legislation whether the ombudsman can be considered as an appeal body.

28. The CJ-DA invited the CDCJ to take note of the Opinion on Recommendation 1615 (2003) of the Parliamentary Assembly on the institution of ombudsman set out in Appendix VI to this report, which was submitted to its Bureau with a view to transmitting it, subject to any amendments, to the Committee of Ministers' Rapporteur Group on Legal Co-operation (GR-J).

VII. OTHER BUSINESS

a. CJ-DA Working Party

29. In accordance with its revised specific terms of reference, subject to their adoption by the Committee of Ministers, and in order to ensure a balanced geographical distribution within the CJ-DA-GT, the CJ-DA agreed to the appointment of the members of the Working Party, comprising the Chair, Mr Vittorio RAGONESI (Italy), and 11 members: Ms Hrisanti PRASMAN (Belgium), Ms Sandra MALESIC (Bosnia and Herzegovina), Ms Taisia ČEBIŠOVÁ (Czech Republic), Mr Matti NIEMIVUO (Finland), Mr Theodore FORTSAKIS (Greece), Ms Caroline DALY (Ireland), Ms Jautrite BRIEDE (Latvia), Mr Theo SIMONS (Netherlands), Mr Mário AROSO de ALMEIDA (Portugal), Ms Violeta Eugenia BELEGANTE (Romania) and Mr Philippe GERBER (Switzerland).

b. Election of the Chair and the Vice-Chair of the CJ-DA

30. In accordance with the rules applicable to elections of Chairs and Vice-Chairs of committees, as laid down in Resolution (76) 3, the CJ-DA unanimously elected Mrs Caroline DALY (Ireland) and Mr Philippe GERBER (Switzerland) its Chair and Vice-Chair respectively, for a period of one year.

c. Dates of next meetings

31. The CJ-DA agreed on the following dates for meetings of the CJ-DA-GT in 2004: 29 September-1 October and 8-10 December.

APPENDIX I

PROJECT GROUP ON ADMINISTRATIVE LAW/
GROUPE DE PROJET SUR LE DROIT ADMINISTRATIF
(CJ-DA)

16th meeting/ 16e réunion
Strasbourg, 3-5 March/mars 2004

LIST OF PARTICIPANTS / LISTE DES PARTICIPANTS

MEMBER STATES

ALBANIA / ALBANIE
Mr Ansi SHUNDI, Head of Section, Department of Public Administration, TIRANA

ANDORRA / ANDORRE not represented / non représentée

ARMENIA / ARMENIE
Ms Armenuhi HARUTYUNYAN, Chief Specialist, Ministry of Justice, YEREVAN

AUSTRIA / AUTRICHE
Ms Elisabeth GROIS, Legal Adviser, Division of International Affairs and General Administrative Affairs, Federal Chancellery, Constitutional Service, VIENNA

AZERBAIJAN / AZERBAIDJAN
Ms Gulnar RASULOVA, Senior Adviser, Department of Legislation and Legal Expertise, Executive Office of the President of the Republic of Azerbaijan, BAKU

BELGIUM / BELGIQUE
Mme Hrisanti PRASMAN, Conseiller Adjoint, Service de Coordination et d'appui, Service Juridique, BRUXELLES

BOSNIA AND HERZEGOVINA / BOSNIE-HERZEGOVINE
Ms Sandra MALESIC, Legal Adviser, Ministry of Justice, SARAJEVO

BULGARIA / BULGARIE
Ms Rumiana PAPAZOVA, Judge, Supreme Administrative Court, SOFIA

CROATIA / CROATIE
Mr Edmond MILETIĆ, Deputy-State Secretary, Central Governmental Office for Administration, ZAGREB

CYPRUS / CHYPRE not represented / non représenté

CZECH REPUBLIC / RÉPUBLIQUE TCHÈQUE
Ms Taisia ČEBIŠOVÁ, Associate Professor, Faculty of Law, Administrative Law Department, Charles University, PRAGUE

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ESTONIA / ESTONIE not represented / non représentée

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

FRANCE not represented / non représentée

GEORGIA / GEORGIE not represented / non représentée

GERMANY / ALLEMAGNE not represented / non représentée

GREECE / GRECE apologised / excusé
Mr Theodore FORTSAKIS, Professeur de Droit Public, Université d'Athènes, ATHENES

HUNGARY / HONGRIE
Mr Imre VEREBÉLYI, Professor and Extraordinary Envoy to the OECD, PARIS

ICELAND / ISLANDE apologised / excusé
Mr Kristjan Andri STEFANSSON, Head of Division, Legal Affairs, Prime Minister's Office, REYKJAVIK

IRELAND / IRLANDE apologised / excusée
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ITALY / ITALIE
Mr Vittorio RAGONESI, Conseiller à la Cour de Cassation, ROME (**Chair of the CJ-DA / Président du CJ-DA**)

Mr Paolo TROIANO, Conseilleur d'Etat, Secrétaire du Conseil d'Etat, ROMA

LATVIA / LETTONIE
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LIECHTENSTEIN apologised/excusé

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LUXEMBOURG not represented / non représenté

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MOLDOVA
Mme Maria SECRIERU, Chef de Section du Régime Constitutionnel et des Autorités publiques, Département de la législation, Ministère de la Justice, CHISINĂU

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Mr Theo SIMONS, Senior Vice-President of the Administrative Court of Appeal, UTRECHT

NORWAY / NORVEGE
Ms Kristin RYAN, Higher Executive Officer, Legislation Department, The Royal Ministry of Justice, OSLO

POLAND / POLOGNE
Mme Teresa GÓRZYŃSKA, Maître de conférences à l'Institut des Sciences Juridiques, Académie Polonaise des Sciences, Professeur à la Haute Ecole de Gestion, VARSOVIE

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SAN MARINO / SAINT MARIN not represented / non représenté

SERBIA AND MONTENEGRO / SERBIE-MONTENEGRO
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SLOVAK REPUBLIC / RÉPUBLIQUE SLOVAQUE
Mr Miroslav GAVALEC, Judge of the District Court, Okresny Sud Bratislava III, BRATISLAVA

SLOVENIA / SLOVÉNIE
Mr Samo GODEC, Legal Advisor, Academy of Administration, LJUBLJANA

SPAIN / ESPAGNE not represented / non représentée

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SWITZERLAND / SUISSE
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« THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA »/
« L'EX-REPUBLIQUE YOUGOSLAVE DE MACEDOINE
not represented / non représentée

TURKEY / TURQUIE
Mr Ahmet IMIRZALIOGLU, Judge, Ministry of Justice, ANKARA

UKRAINE
Mr Vladyslav GURTENKO, Chief of Division, Department of International Co-operation, Ministry of Justice of Ukraine, KIEV

UNITED KINGDOM / ROYAUME-UNI not represented / non représenté

SCIENTIFIC EXPERT/EXPERT SCIENTIFIQUE apologised / excusé
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EUROPEAN UNION / UNION EUROPEENNE

EUROPEAN COMMISSION / COMMISSION EUROPEENNE
not represented / non représentée

COUNCIL OF THE EUROPEAN UNION / CONSEIL DE L'UNION EUROPEENNE
not represented / non représenté

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

CANADA not represented / non représenté

HOLY SEE / SAINT SIEGE
Mme Odile GANGHOFER, Docteur en Droit, Mission Permanente du Saint-Siège, STRASBOURG

JAPAN / JAPON
M. Pierre DREYFUS, Assistant, Consulat Général du Japon, STRASBOURG

Mr Naoyuki IWAI, Consul (Attorney), Consulat General du Japon, STRASBOURG

MEXICO / MEXIQUE not represented / non représenté

UNITED STATES OF AMERICA /
ETATS-UNIS D'AMERIQUE
Mr Michael P. TIERNAN, Consul, Consulat Général des Etats-Unis d'Amérique, STRASBOURG

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

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD) /
ORGANISATION DE COOPERATION ET DE DEVELOPPEMENT ECONOMIQUE (OCDE)
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UNITED NATIONS / NATIONS UNIES not represented / non représentées

INTERNATIONAL COMMISSION ON CIVIL STATUS /
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EUROPEAN PUBLIC LAW CENTRE /
CENTRE EUROPEEN DE DROIT PUBLIC not represented / non représenté

EUROPEAN FEDERATION OF ADMINISTRATIVE JUDGES /
FEDERATION EUROPEENNE DES JUGES ADMINISTRATIFS
M. Pierre VINCENT, Vice-Président de la Fédération Européenne des Juges Administratifs, Tribunal Administratif de Strasbourg, STRASBOURG

M. Patrick KINTZ, Président de Chambre, Cour Administrative d'Appel de Nancy, NANCY

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Directorate General of Legal Affairs, Department of Public Law/
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Mr Giovanni PALMIERI, Head of the Department / Chef du Service

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Mme Josette YOESLE-BLANC

APPENDIX II

PROJECT GROUP ON ADMINISTRATIVE LAW/ GROUPE DE PROJET SUR LE DROIT ADMINISTRATIF (CJ -DA)

16th Meeting/16ème *réunion*
Strasbourg, 3-5 March/*mars 2004*

AGENDA / *ORDRE DU JOUR*

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

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

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

4. Preparation of the preliminary draft Recommendation on the judicial review of administrative acts and the preliminary draft Explanatory memorandum to the Recommendation / *Elaboration de l'avant-projet de recommandation sur le contrôle juridictionnel des actes de l'administration et de l'avant-projet d'exposé des motifs de cette recommandation*

Working documents / *documents de travail*

Preliminary draft Recommendation on judicial review of administrative acts adopted by the CJ-DA-GT / *Avant-projet de recommandation sur le contrôle juridictionnel des actes de l'administration adopté par le CJ-DA-GT*

CJ-DA-GT (2003) 9 rev.

Comments on the preliminary draft Recommendation on the judicial review of administrative acts prepared by the Consultative Council of European Judges (CCJE) / *Commentaires sur l'avant-projet de recommandation sur le contrôle juridictionnel des actes de l'administration préparés par le Conseil Consultatif de Juges Européens (CCJE)*

CJ-DA (2004) 4

Preliminary draft Explanatory memorandum to the recommendation prepared by the Secretariat / *Avant-projet d'exposé des motifs de la recommandation préparé par le Secrétariat*

CJ-DA (2004) 1

Background documents / *Documents de référence*

Report of the 1st meeting of the Working Party of the Project Group on Administrative Law (CJ-DA-GT) (Strasbourg, 10-12 March 2003) / *Rapport de la 1ère réunion du Groupe de travail du Groupe de projet sur le droit administratif (CJ-DA-GT) (Strasbourg, les 10-12 mars 2003)*

CJ-DA-GT (2003) 1

Report of the 2nd meeting of the Working Party of the Project Group on Administrative Law (CJ-DA-GT) (Strasbourg, 10-12 June 2003*) / Rapport de la 2ème réunion du Groupe de travail du Groupe de projet sur le droit administratif (CJ-DA-GT) (Strasbourg, les 10-12 juin 2003)*

CJ-DA-GT (2003) 6

Report of the 3rd meeting of the Working Party of the Project Group on Administrative Law (CJ-DA-GT) (Strasbourg, 3-5 November 2003) / *Rapport de la 3ème réunion du Groupe de travail du Groupe de projet sur le droit administratif (CJ-DA-GT) (Strasbourg, les 3-5 novembre 2003)*

CJ-DA-GT (2003) 11

5. Preparation of proposals for activities aimed at strengthening the legal framework of good administration as an essential element of good governance */ Elaboration des propositions d'activités visant le renforcement du cadre juridique d'une bonne administration en tant que composante essentielle de la bonne gouvernance*

Working documents / *documents de travail*

Preliminary draft specific terms of reference for the CJ-DA for 2005-2006 / *Avant-projet de mandat spécifique révisé pour le CJ-DA pour 2005-2006*

CJ-DA (2004) 5

Background documents / *Documents de référence*

Specific terms of reference of the CJ-DA for 2004 as approved by the Committee of Ministers / *Mandat spécifique du CJ-DA pour 2004 tel qu'approuvé par le Comité des Ministres*

CJ-DA (2003) 3

Future activities of the CJ-DA – Proposals for activities aimed at strengthening the legal framework of good administration as an essential element of good governance */ Travaux futurs du CJ-DA – Propositions d'activités visant le renforcement du cadre juridique d'une bonne administration en tant que composante essentielle de la bonne gouvernance*

CJ-DA (2004) 2

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

CJ-DA-GT (2003) 10

Information memorandum on the European Conference on « The right to good administration » (Warsaw, 4-5 Décember 2003) / *Note d'information sur la Conférence européenne sur « Droit à une bonne administration » (Varsovie, les 4-5 décembre 2003)*

CJ-DA (2004) 6

6. Preparation of the opinion on the Recommendation 1615 (2003) of the Parliamentary Assembly on the institution of ombudsman / *Elaboration de l'avis sur la Recommandation 1615 (2003) de l'Assemblée Parlementaire sur l'institution du médiateur*

Working documents / *documents de travail*

Draft opinion on the Recommendation of the Parliamentary Assembly 1615 (2003) « institution of ombudsman » / *Projet d'avis sur la Recommandation de l'Assemblée Parlementaire 1615 (2003) « institution du médiateur »*

CJ-DA (2004) 7

7. Review of the membership of the Working Party / *Réexamen de la composition du Groupe de travail*

8. Dates of the future meetings of the CJ-DA-GT */ Dates des prochaines réunions du CJ-DA-GT*

9. Election of the Chair and the Vice-Chair / *Election du Président ou de la Présidente et du Vice-président ou de la Vice-présidente*

Information document / *Document d'information*

Election of the Chair and the Vice-Chair / *Election du Président ou de la Présidente et du Vice-président ou de la Vice-présidente*

CJ-DA (2004) 3

10. Any other business / *Divers*

APPENDIX III

DRAFT RECOMMENDATION
ON JUDICIAL REVIEW OF ADMINISTRATIVE ACTS

as adopted by the CJ-DA
at its 16th meeting
(Strasbourg, 3-5 March 2004)

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

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

Recalling Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms which provides that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law" and the relevant case law on administrative disputes of the European Court of Human Rights;

Considering that effective judicial review of administrative acts to protect the rights and interests of individuals is an essential element of the system of protection of human rights;

Taking into account the results of the monitoring of member states' observance of their commitments on the subject of "functioning of the judicial system" and of the decision taken by the Ministers' Deputies at their 693rd meeting on 12 January 2000 on the possibility and scope of judicial review of administrative decisions;

In the light of the conclusions of the 1st Conference of Presidents of supreme administrative courts in Europe, which had as its theme "The possibility and scope of the judicial control of administrative decisions in member states" (Strasbourg, 7-8 October 2002);

Taking into account the legal instruments of the Council of Europe in the field of administrative law and in particular Resolution (77) 31 on the protection of the individual in relation to the acts of administrative authorities;

Bearing in mind Recommendation No. R (94) 12 on the independence, efficiency and role of judges;

Recalling Recommendation No. R (2003) 16 on execution of administrative and judicial decisions in the field of administrative law;

Seeking to strengthen the rule of law and human rights, fundamental values of the legal systems of Council of Europe member states;

Seeking to ensure effective access to judicial review of administrative acts**;**

Convinced that other methods of control of administrative acts, which may include internal appeal to the administrative authorities and control by the ombudsman as well as appeal to alternatives to litigation set out in Recommendation No. R (2001) 9 on alternatives to litigation between administrative authorities and private parties, are useful for improving the functioning of jurisdictions and for the effective protection of everyone's rights;

Recommends that the governments of member states apply, in their national legal system and in practice, the principles set out below:

A. Definitions

For the purposes of this Recommendation,

1. By “administrative acts” are meant:

   a. legal acts – both individual and normative – and physical acts of the administration taken in the exercise of public authority which may affect the rights or interests of natural or legal persons;

   b. situations of refusal to act or an omission to do so in cases where the administrative authority is under an obligation to implement a procedure following a request.

2. By “judicial review” is meant the examination and determination by a tribunal of the lawfulness of an administrative act and the adoption of appropriate measures, with the exception of review by a constitutional court.

B. Principles

1. The scope of judicial review

a. All administrative acts should be subject to judicial review**.** Such review may be direct or by way of exception.

b. The tribunal should be able to review any violation of the law, including lack of competence, procedural impropriety and abuse of power.

2. Access to judicial review

a. Judicial review should be available at least to natural and legal persons in respect of administrative acts that directly affect their rights or interests. Member states are encouraged to examine whether access to judicial review should not also be opened to associations or other persons and bodies empowered to protect collective or community interests.

b. Natural and legal persons may be required to exhaust internal administrative remedies before having recourse to a tribunal. The length of the preliminary procedure should not be excessive.

c. Natural and legal persons should be allowed a reasonable period of time in which to commence judicial review proceedings.

d. The cost of access to judicial review should not be such as to discourage applications. Legal aid should be available to persons lacking the necessary financial resources where the interests of justice require it.

3. An independent and impartial tribunal

a. Judicial review should be conducted by a tribunal established by law whose independence and impartiality are guaranteed in accordance with the terms of Recommendation No R (94) 12.

b. The tribunal may be an administrative tribunal or part of the ordinary court system.

4. The right to a fair hearing

a. The time within which the tribunal takes its decision should be reasonable in the light of the circumstances of each case.

b. There should be equality of arms between the parties to the proceedings. Each party should be given an opportunity to present his or her case without being placed at a disadvantage.

c. Unless national law provides for exceptions in important cases, the administrative authority should make available to the tribunal the documents and information relevant to the case. The applicant should have access to these documents and information.

d. The proceedings should be adversarial in nature. All evidence admitted by the tribunal should in principle be made available to the parties with a view to adversarial argument.

e. The tribunal should be in a position to examine all of the legal and factual issues relevant to the case presented by the parties.

f. The proceedings should be public, other than in exceptional circumstances.

g. Judgment should be pronounced in public.

h. Reasons should be given for the judgment. Tribunals should indicate with sufficient clarity the grounds on which they base their decisions. Although it is not necessary for a tribunal to deal with every point raised in argument, a submission that would, if accepted, be decisive for the outcome of the case requires a specific and express response.

i. The decision of the tribunal that reviews an administrative act should, at least in important cases, be subject to appeal to a higher tribunal, unless the case is directly referred to a higher tribunal in accordance with the national legislation.

5. The effectiveness of judicial review

a. If a tribunal finds that an administrative act is unlawful, it should have the powers necessary to redress the situation so that it is in accordance with the law. In particular, the tribunal should be competent at least to quash the administrative decision and if necessary to refer the case back to the administrative authority to take a new decision that complies with the judgment. The tribunal should also be competent to require of the administrative authority, where appropriate, the performance of a duty.

b. The tribunal should also have jurisdiction to award costs of the proceedings and compensation in appropriate cases.

c. The necessary powers to ensure effective execution of the tribunal's judgment should be available in accordance with Recommendation No R (2003) 16.

d. The tribunal should be competent to grant provisional measures of protection pending the outcome of the proceedings.

APPENDIX IV

DRAFT EXPLANATORY MEMORANDUM

I. Introduction

1. The rule of law is inconceivable without access for all citizens to an independent, impartial tribunal established by law and capable of meeting the requirements of a fair trial. This is particularly important where the possibility of challenging administrative acts is concerned because such measures or decisions are taken in the exercise of public authority and often directly affect the rights and freedoms secured under the European Convention on Human Rights (hereafter ECHR). Given the specific nature of administrative acts, the member States of the Council of Europe should ensure that their judicial organisation and control procedures are in line with the requirements of the ECHR in order to guarantee the effectiveness of the control of administrative acts.

2. Nevertheless, at a time when the expansion of the public sector in the member States and the effects of such expansion on people's lives are highlighting the need for special new arrangements, the States remain free to define the framework and procedure for supervising administrative acts. However, given that the lack of a judicial remedy against administrative acts might be interpreted as a denial of justice, member States are required to guarantee the reality and efficacy of the control of such acts.

3. For these reasons, and in the light of the results of the procedure for monitoring the honouring of commitments entered into by member States on the theme of "functioning of the judicial system", which showed that some member States had structural problems linked to the absence of judicial review of administrative acts, the Committee of Ministers, on a motion from the European Committee on Legal Co-operation (CDCJ), entrusted the Project Group on Administrative Law (CJ-DA) with the task of formulating an appropriate instrument on the judicial review of administrative acts.

4. On 7 and 8 October 2002, the Council of Europe organised a Conference of Presidents of Supreme Administrative Courts in Europe in order to secure a preliminary assessment of the problems arising out of the judicial control of the Administration. At the close of this Conference the participants adopted conclusions in which they proclaimed their support for the work assigned to the CJ-DA by the Committee of Ministers and came down in favour of continuing to study the issue of judicial review of administrative acts.

5. This Conference debated the optimum ways and means of ensuring effective control of administrative acts in the light of the case-law of the European Court of Human Rights (hereafter European Court). It recalled that the ECHR had not originally been intended to apply to administrative proceedings, but that the European Court's case-law had partly remedied this situation. The CJ-DA took account of the proceedings of the conference during its discussions on the content of the present recommendation, and the explanatory memorandum is largely based on them.

II. General considerations

6. The Recommendation on the judicial review of administrative acts is aimed at establishing the principles governing judicial review of administrative acts in a State governed by the Rule of Law. It should be noted that in all States governed by the rule of law the Administration is subject to the law and supervision by the courts on the same basis as any individual and any citizen, in accordance with the principle of the pre-eminence of law. The Recommendation strives to present pointers for the desirable future development of administrative justice, while taking account of the disparities between administrative and

judicial systems in the various member States. It attempts to avoid any traditional conception of judicial review of administrative acts, i.e. acts adopted by the authorities having consequences for the rights and interests of citizens. Its main aim is to ensure effective access to judicial review, thus helping to consolidate the rule of law and human rights in Europe.

7. The Recommendation draws on the principle that all administrative acts must be subject to judicial review. As was emphasised by the Conference of Presidents of Supreme Administrative Courts in connection with the lawfulness of such acts, this obligation results from both their nature and their effects. By nature they are a prime means of action for the Administration on behalf of the public authorities, and members of the community are required to execute and implement them. On the other hand, the principles of democracy require the addressees of the acts to be able to enlist the services of a judge to verify their lawfulness, in formal and substantive terms. In terms of their effects, these acts may violate the rights and freedoms secured under national legislation and various international instruments. For instance, Article 13 of the ECHR states that “everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity”.

8. The Recommendation sets out five groups of principles which are to be applied by the governments of member States. These principles concern the scope of judicial review, access thereto, the independence and impartiality of the courts, the right to a fair trial and the effectiveness of judicial review. It was decided to define the basic concepts used in the Recommendation, namely “administrative act” and “judicial review”, in order to clarify the ambit of the principles and recommendations, which relate both to the national legal systems and to actual practice.

9. With a view to guaranteeing constant respect for Article 6 of the ECHR in administrative matters, this recommendation supplements the legal instruments adopted with reference to civil and criminal proceedings.

10. Taking account of the variety of legal traditions in member States in the field of administrative proceedings, the Recommendation sets out the general rules to be observed in organising the judicial review of administrative acts, without attempting to achieve complete harmonisation of the relevant legislation.

A. Comments on the definitions

11. The definitions adopted for the purposes of the Recommendation were drawn up on the basis of a functional criterion aimed at delimiting the scope of the text. This involves, firstly, protecting the rights and interests of citizens in respect of a wide range of acts adopted by the Administration vis-à-vis the constantly expanding area of administrative activity in parallel to the increasing scope of State intervention, and secondly, guaranteeing the powers of the Administration. Consequently, the definitions adopted are not identical to those of similar concepts set out in other Council of Europe instruments.

1. Administrative acts

12. The administrative acts covered by the Recommendation are broadly defined in order to ensure judicial review of all administrative activities by the Administration, with very limited exceptions established by law. While the concept of administrative decision (*acte administratif*) has very specific connotations in some legal systems, the concept of administrative act (*acte de l’administration*) covers a wider area of activities conducted by administrations. This concept implies the possibility of an individual appeal procedure.

13. The definition of administrative act adopted by the recommendation embraces several possible actions by the public administration. It comprises individual administrative acts constituting decisions taken by the Administration in respect of specific individuals. It also covers prescriptive acts and statutory acts accompanied by general, non-personal regulations addressed to an unspecified number of persons. It further includes material actions which will have consequences in terms of the legal regulations governing natural or legal persons, on the understanding that changes to the legal situation entail creating both rights and obligations.

14. Lastly, the definition also covers situations of refusal or failure to act on the part of the public administration in cases where there is an obligation for the administrative authority to act. The Recommendation considers that the concept of administrative act also covers cases where the Administration fails to respond to a request or where it explicitly or implicitly refuses to adopt a given decision or act. The tribunal should be empowered to act in both these situations.

15. The Recommendation applies only to such administrative acts as have been implemented by the Administration in the exercise of public authority. Such authority allows the Administration to impose obligations, issue acts and confer rights. These acts have the effect of changing the legal and factual situation of the persons concerned, depending on the scope of the act. The Recommendation specifically targets administrative acts which infringe the rights or interests of natural or legal persons. Private acts lie outside the ambit of the text.

16. Under no circumstances may a citizen's interests be harmed by the administration's remaining silent. After a certain time prescribed by law, this silence should open access to a tribunal. In such cases the administrative authority will be required to explain to the tribunal its reasons for refusing the applicant's request. If the authority fails to give grounds, the tribunal shall hold its act to be unlawful.

2. Judicial review

17. The concept of judicial review covers different ideas in different countries. As mentioned at the Conference of Presidents of Supreme Administrative Courts, experience shows that the rule of law and the subjection of the public authority to law and the courts are not self-evident, and that there is a constant temptation to exempt administrative acts from legal rules and control by the courts. It is therefore vital to ensure that administrative acts can be controlled and set aside - or rebutted by exceptional remedy - if they prove unlawful.

18. The Recommendation is aimed at guaranteeing the right of everyone, in accordance with the ECHR, to a fair hearing by an independent and impartial tribunal also in administrative cases. This principle of a fundamental right to a tribunal is inherent in the rule of law, and it is imperative for the States having ratified the ECHR to respect it. Both the Statute of the Council of Europe and the Preamble to the ECHR stress the rule of law and genuine democracy. These two principles therefore involve judicial review of administrative acts, if only in order to mitigate the inequality of arms between the administration and the citizen.

19. The concept of judicial review adopted in this recommendation is broader than that consisting in merely examining the lawfulness of an act; it also encompasses the tribunal's power to annul an act following its review or to award compensation. The administrative court's role is to protect individuals by means of the law.

20. Therefore, the tribunal must be empowered to instigate proceedings to verify the lawfulness of administrative acts, including administrative silence or failure to act, and to draw the requisite conclusions from its findings. It is a case not only of controlling the lawfulness of such acts but also of verifying fault or risk liability on the part of the administration.

21. The concept of lawfulness of an administrative act is broadly construed: it concerns infringements of interests which, by law, are worthy of protection. Infringing a protected interest accordingly amounts to breaking the law.

22. Judicial review is an objective activity which can be initiated at the request of an individual or of another body, particularly a public body. One of the functions of judicial review is the protection of the individual vis-à-vis the administration. However, such control is also geared to safeguarding and clarifying the administration's powers.

23. The subjects of judicial review comprise all the types of administrative act covered by the definition of such acts.

24. The Recommendation does not apply in cases where, in accordance with national legislation, the constitutional court exercises the review. In a number of countries review of certain normative administrative acts is entrusted to the constitutional court. In such cases, a specific procedure is followed, different to that before an administrative tribunal or ordinary court. This is why review of administrative acts by a constitutional court does not fall within the scope of the Recommendation. This does not affect the requirement of compliance with Article 6 of the ECHR.

B. Comments on principles

25. The field of administrative proceedings varies widely in the different member states' legal systems. This fact has highlighted the need to specify the general principles applicable to administrative proceedings in order to prevent Article 6 of the ECHR from being implemented in different ways in different countries.

26. It is true that the ECHR was not originally intended to apply to the administrative field. However, as early as 1971, the European Court stated the following in its *Ringeisen* judgment: "to be applicable to a case ("contestation") it is not necessary that both parties to the proceedings should be private persons (…). The character of the legislation which governs how the matter is to be determined (civil, commercial, administrative law, etc) and that of the authority which is invested with competence in the matter (ordinary court, administrative body, etc) are therefore of little consequence".

27. Taking account of the specific nature of judicial review of administrative acts, this part of the recommendation lists the principles applicable to the exercise of such review, including those set out in the ECHR.

1. The scope of judicial review

Principle 1.a

28. This principle mainly concerns the subject of judicial review, viz administrative acts as defined in this recommendation. Review may take two forms. It is direct when it deals with the act contested before the court. It is by way of exception when, in proceedings concerned with an act, the tribunal reviews another act connected with it (for instance, when the tribunal reviews the lawfulness of the normative act on which the decision challenged is based). It should be noted that if an administrative act cannot be referred direct to a tribunal (as is the case with normative acts in several legal systems), the state should ensure that the act can be reviewed by way of exception.

29. With regard to administrative acts involving exercise of a discretionary power, although such a power is, in principle**,** exempt from judicial review, the tribunal may seek to determine whether the administration has overstepped permitted limits in the use of its discretionary power or whether it has committed manifest errors.

30. Administrative sanctions are deemed equivalent to administrative acts and therefore subject to judicial review.

Principle 1.b

31. This principle contains, firstly, a general assertion that the courts should be able to review any violation of the law and, secondly, examples of grounds for invalidating an act.

32. The arguments on which the applicants can base their complaints embrace violation of the law, including lack of competence, procedural flaws and abuse of authority. Violation of the law may take the form of a lack of legal basis, a direct violation of a legal standard or a legal error, in which latter case the administration has misjudged the scope of a rule. Lack of competence may stem from spatiotemporal considerations or the subject of the decision. Procedural flaws include such irregularities as a failure to conduct compulsory consultation. Lastly, abuse of power refers mainly to cases where an authority uses a power vested in it by law, but for another purpose than that provided for by law. The Recommendation draws a distinction at this point between formal violations and those arising out of lack of competence, on the one hand, and those involving misapplication, misinterpretation or ignorance of the law, on the other.

33. The function of the tribunal adjudicating in administrative proceedings is fundamentally different from that of civil and criminal courts because of the subject of the review. The issues to be addressed by administrative tribunals have already been the subject of a lawful or unlawful decision on by an authority hypothetically so empowered by law. It is therefore unnecessary, in principle, for the judicial decision to deal directly with the questions that originated the dispute. The tribunal's primary function is to review the lawfulness of the decision taken by the administration in the exercise of its attributions. However, the legal systems of some member States do empower the administrative tribunal to examine the substance of cases involving individual acts, and to pronounce both on the merits and the appropriateness of the administrative act and to replace the administration's decision with a fresh ruling.

2. Access to judicial review

34. The Recommendation does not specify how judicial review should be organised. The States are free to organise judicial review in administrative cases in accordance with their specific legal tradition and culture: by specialised administrative tribunals, by the ordinary courts or by a combination of both.

Principle 2.a

35. This principle defines capacity to bring court proceedings. Natural and legal persons can obtain judicial review of administrative acts that infringe any of their rights or interests worthy of protection.

36. In order to protect collective or community interests that have been jeopardised by an administrative act, the recommendation encourages the member states to take into consideration the possibility of granting associations or other persons or bodies empowered to protect these interests the capacity to bring proceedings before a court. The reference is to administrative decisions which adversely affect not just one individual but also those which affect any community. Such decisions, which might relate, for instance, to the environment

or consumers' rights, could be eligible for judicial review without the direct interests of any particular individual being at issue.

37. Each state is entitled to extend the capacity to bring court proceedings. This remedy may for example be available to third parties concerned by the act.

38. The recommendation applies solely to cases where rights or interests are directly affected. This means that there must be a close link between the act and the rights or interests concerned. If the link between the challenged act and the right asserted is too tenuous and distant, the recommendation does not apply (*Balmer-Schafroth* judgment, 1997). Such acts must therefore adversely affect the applicant and have the effect of altering his/her legal situation. This precludes certain categories of administrative acts from a judicial remedy, such as preliminary measures. It is for national law to give practical definition to the rights or interests protected under this recommendation.

Principle 2.b

39. This principle stipulates the conditions of access to judicial review.

40. Natural and legal persons have access to a number of preliminary channels for settling the dispute before reaching the judicial appeal stage. The recommendation states that the applicant may have to exhaust all internal remedies with the administration in order to gain access to judicial review.

41. The right of access to judicial review must be an effective right. The recommendation seeks to ensure that the obligation for natural and legal persons to exhaust internal remedies before initiating court proceedings does not prevent them from seeking judicial review of the administrative act.

42. It specifies that the time needed to deal with the case must be reasonable even during the preliminary procedure, as from the taking of the initial act. It is true that the safeguards laid down by Article 6 of the ECHR have, in principle, only to be respected at the judicial proceedings stage. However, according to the case-law of the European Court, the reasonableness of the length of proceedings conducted before one or more administrative bodies partly depends on the length of any preliminary proceedings before an administrative body, where such an administrative procedure exists as a remedy which must be exhausted before the case can be brought before the courts. The period to be taken into account can therefore begin as soon as an administrative appeal is lodged with an administrative appeal body (*König* judgment*,* 1978).

43. Exhaustion of internal administrative remedies makes it possible to prevent an excessive workload for the ordinary courts with a view to judicial efficiency. This is in the interests of both the judiciary and the administration and may also contribute to reducing the cost of the procedure for the individual.

Principle 2.c

44. This provision aims to guarantee that parties are allowed a reasonable time for bringing the matter before the courts. If the time-limit is too short, the parties may be unable to lodge an appeal against an administrative act.

45. States are accordingly required to set a reasonable time-limit for challenging the lawfulness or legitimacy of an administrative act before a tribunal, in order to guarantee the applicant effective access to judicial review. The time-limit for lodging an appeal with a tribunal must not disregard the length of the preliminary procedure. National legislation

generally specifies the reasonable time.[1] In certain justified circumstances this period may be extended.

46. The recommendation makes no reference to the concept of taking cognisance of the act, but time naturally begins running from when the natural or legal person is deemed to have cognisance of the act's notification. The recommendation does not specify any fixed period between the time of formal or implicit notification of the act and the application for judicial review, rather leaving this matter to the states' discretion.

Principle 2.d

47. In order to make judicial review widely accessible to natural and legal persons, the cost of proceedings must not constitute a deterrent to judicial action. The point at issue here is the cost of access to judicial review, rather than merely the cost of judicial review itself.

48. This effective access condition implies a right to legal assistance to guarantee access to court for applicants who cannot afford to pay the costs, whatever the judicial body competent to adjudicate in cases involving the Administration.

3. An independent and impartial tribunal

Principle 3.a

49. This principle confirms that settlement of an administrative dispute is a matter for a tribunal established by law, in accordance with the requirements of the ECHR.

50. The principle of independent and impartial tribunals is confirmed by Article 6 of the ECHR. In order to reinforce respect for this principle, the Council of Europe drew up Recommendation No. R (94) 12 on the independence, efficiency and role of judges, which specifies the preconditions for judicial independence. Opinion No. 1 (2001) of the Consultative Council of European Judges (CCJE) concerning the independence of the judiciary and the irremovability of judges further develops the provisions of this Recommendation: in endorsing the requirements of the European Charter on the Statute for Judges in this respect, the CCJE considered that "the fundamental principles of judicial independence should be set out at the constitutional or highest possible legal level in each member state, and its more specific rules at the legislative level."

51. In view of the specific risks surrounding an administrative judge since he or she is required to settle disputes concerning the public authorities, this principle reasserts the requirement of both subjective impartiality (taking account of the judge's personal conviction or interest in a given case) and objective impartiality (which consists in ascertaining whether the judge offers sufficient guarantees to exclude all legitimate doubt in this respect), as upheld in the case-law of the ECHR (*Piersack*, 1982, *De Cubber*, 1984, *Demicoli*, 1991, *Sainte-Marie*, 1992, judgments). In this connection, the CCJE confirmed in its Opinion No. 3 (2002) that "judges should, in all circumstances, act impartially to ensure that there can be no legitimate reason for citizens to suspect any partiality."

52. Even though there are international legal instruments aimed at protecting such independence and impartiality, it appeared important to explicitly confirm this principle in the Recommendation on judicial review of administrative acts. The independence and impartiality of judges adjudicating in administrative cases are essential for guaranteeing the effective protection of citizens' rights.

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[1] **For example, applicants usually have a period of 30 days in Albania, Azerbaijan, Finland, Hungary, Romania and Switzerland, of 60 days in Belgium and Italy, of 6 months in Malta and Norway, and of 6 weeks in Austria and the Netherlands.**

Principle 3.b

53. This principle supplements principle 3.a; it specifies the characteristics of the body responsible for judicial review of administrative acts: it refers to both administrative tribunals and ordinary courts dealing with administrative proceedings, both categories of court having the same status. Each state will choose one or the other type of court to deal with administrative proceedings depending on its own system of organisation of the courts.

54. Both administrative tribunals and ordinary courts must satisfy the requirements of principle 3.a.

4. Right to a fair trial

55. This section further develops the provisions of Article 6 of the ECHR with practical measures to be applied to the examination of administrative cases. The recommendation takes account of the problems arising in some countries in connection with safeguarding the principles set out in Article 6 on proceedings relating to formal administrative acts.

Principle 4.a

56. According to the case-law of the European Court, the reasonableness of the time-limit stipulated in Article 6 of the ECHR must always be evaluated in the light of the specific circumstances of the case, such as its complexity, the applicant's conduct and the manner in which the case is dealt with by the administrative or judicial authorities (*O.*, 1987, *Tomasi*, 1992, *Poiss,* 1987, judgments). As stated in paragraph 42 above, the "reasonable" length of time stipulated in Article 6 of the ECHR does not refer solely to the duration of the proceedings conducted before the administrative tribunal. The time taken into consideration may begin on the day the party starts an appeal procedure within the administration, if this is a precondition for the judicial review in question.

Principle 4.b

57. The concept of a fair trial necessitates respect for the principle of equality of arms between the parties to proceedings. In administrative cases there is a particular risk of infringement of this principle by the parties' relative positions, with one side representing the authorities and the other demanding that their rights be respected. Applicants should therefore have the full benefit of the protection provided by Article 6.1 of the ECHR in general in order to make good this inequality inherent in administrative proceedings.

58. The principle of equality of arms requires that each party have the same facilities for presenting its case under conditions which do not place it at a clear disadvantage compared with the opposing party (*Dombo Beheer B.V.* judgment, 1993, *Stran Greek Refineries and Stratis Andreadis* judgment, 1994). Compliance with this principle also involves the availability of legal aid.

Principle 4.c

59. This principle confirms that the administrative authority is obliged to make available all the documents in its case-file on which it bases its decision.

60. Access by parties to the administrative file is one of the preconditions for a fair trial. According to the case-law of the ECHR, this principle implies that a citizen must have access to the administrative file as forwarded to the tribunal by the administration (S*chuler-Zgraggen* judgment, 1993). This requires the administration to supply all the facts on which its act was based. The European Court has confirmed this requirement in connection with documents that might help the applicant in putting his/her case (*Bendenoun* Judgment, 1994). It is essential for the fairness of the trial that the administrative file be forwarded in sufficient time.

61. In certain circumstances it shall be possible to apply filtering procedures to documents (for instance, where national security, company secrets, professional secrecy or intellectual property rights are at stake).

Principle 4.d

62. The right to adversarial proceedings in administrative cases involves notifying the appeal to the opposing party and any other interested parties.

63. According to the case-law of the ECHR, the fundamental right to adversarial proceedings "means the opportunity for the parties to have knowledge of and comment on the observations filed or evidence adduced by the other party" (*Ruiz-Mateos* judgment, 1993).

64. The recommendation applies solely to evidence admitted by a tribunal.

65. The adversarial nature of the proceedings must be safeguarded in cases where evidence concerning the case's admissibility is disputed.

Principle 4.e

66. This principle confirms that a court must be in a position to examine all the arguments raised by the parties (*Ortenberg* judgment, 1994). The arguments relied on may concern points either of law or of fact.

67. Regarding questions of law, where the contested measure was taken under the administration's regulatory powers, the tribunal to which the case is referred must be empowered to examine whether the administrative authority remained within the limits of the law; in this connection, the tribunal must be able to review the challenged measure "in the light, inter alia, of principles of administrative law" (*Oerlemans* judgment, 1991).

68. Regarding the facts, the court must be competent to ascertain these (*Fischer* judgment, 1995) or at least to correct errors of fact (*Albert and Le Compte* judgment, 1983). One possibility is that the court should be able to ascertain the relevant facts itself by rehearing the case. However, Article 6.1 of the ECHR apparently does not preclude a system whereby the court must rely on the facts ascertained by the administrative authority. In that case it is nonetheless vital that the procedure before the administrative authority should offer guarantees concerning the decision-making process and also that the court should be able to ascertain, firstly, that the administration's findings of fact were based on sufficiently sound evidence and, secondly, that the administrative act did not result from a conclusion which no administrative authority, acting rightly, would have drawn from the facts (*Potocka* judgment, 2001).

69. A number of legal systems allow administrative tribunals to rule on the lawfulness of the contested act, even where the ground relied on in a finding of unlawfulness was not raised by a party, if it finds that the act is unlawful. This system strengthens judicial control of the administration by a tribunal and thus the judicial protection of applicants.

70. The administrative tribunal is entitled and obliged to offset any inequality between the parties. For instance, the tribunal may invite the parties to submit additional factual evidence (or to supplement the information available on the circumstances of the case). The tribunal must have the initiative in determining the progress of the administrative proceedings.

71. In annulment proceedings the tribunal should verify the existence of the facts. Where the administrative act involved the exercise of a discretionary power, it ascertains that the limits on the exercise of that power have not been overstepped. It also verifies application of the law to the facts.

Principle 4.f

72. Proceedings must be public in order to protect the citizens against any secret, arbitrary judicial approach.

73. The right to public proceedings in principle includes the right to a public hearing, if none of the exceptions laid down in the second sentence of Article 6.1 of the ECHR apply (*Håkansson and Sturesson* judgment, 1990). Nevertheless, the question of whether a hearing is necessary is dealt with differently in different national laws, particularly for administrative proceedings as they are often written proceedings and mainly concern questions of law. The right to a public hearing is particularly important where the tribunal examines contested questions of fact.

74. Both written and oral procedure should be public. All members of the public should be able to acquaint themselves with the proceedings, in particular their course and conduct.

75. Where a case is examined at different levels by different bodies and is of a highly technical nature, it may be justifiable not to hold a public hearing in the final stages of the proceedings (*Eisenstecken* judgment, 2000). In proceedings before a court of first and only instance "exceptional circumstances" must be shown in order to justify dispensing with a hearing (*Göç* judgment, 2001). Such circumstances are difficult to prove where the court deals with questions not only of law but also of fact (*Fischer* judgment, 1995).

76. Where it is in the public interest, the procedure should be oral. The choice between a written or an oral procedure in specific cases should be determined by national law.

77. The parties should be able to waive the right to a public hearing of their own free will, either expressly or tacitly. However, this waiver should be ineffective where it runs counter to an important public interest (*Schuler-Zgraggen* judgment, 1993).

Principle 4.g

78. The principle that judgments should be pronounced in public, which is confirmed by Article 6 of the ECHR, requires all interested parties to have access to a judgment in which they have a legitimate interest, whereby judgments of general scope should also be accessible to a broad public, taking account of language considerations and such facilities as publication in a journal or in the electronic media (*Pretto* judgment, 1983).

Principle 4.h

79. Reasons must be given for the judgment pronounced by the tribunal. The reasoning of the judgment should be presented in writing and relate to the tribunal's response to all of the applicant's arguments, justifying the decision reached. The scope of this obligation may vary in accordance with the nature of the judgment. The reasons given must be specific and suited to the facts of the case, not confined to mere references to certain pieces of legislation. However, no detailed reply is required to each argument, as the European Court confirmed in its *Ruiz Torija* judgment (1994). Any lack of or inadequacy in the reasons given is liable to invalidate the judgment in formal terms.

80. The terminology used in the reasons is extremely important for the parties' understanding of them. Special attention must be paid to the use of terms from other fields which might prove inappropriate in the judicial context.

Principle 4.i

81. Proper judicial protection involves the right to two-tier proceedings. Nevertheless, while appeal facilities are not compulsory under the ECHR, they are still possible with a view to reducing the risk of arbitrary decisions, *inter alia* within the judicial system. This principle should be applied to the most important cases, particularly those involving heavy administrative sanctions, subject to any exceptions provided for in domestic legislation. The applicant's right to appeal against the judgment pronounced should be recognised in each State within a reasonable time-limit defined by the individual national system. States will decide the extent to which appeals can be lodged with higher courts.

82. The recommendation accordingly goes further than the ECHR and requires a right of appeal in the most important cases, for instance where a significant sum is at stake. National law should specify the conditions of appeal and the jurisdiction of the appeal body, which must satisfy the requirements of Article 6 of the ECHR. Involvement of a higher instance in administrative proceedings is essential to guarantee the consistency of administrative case-law.

83. This principle does not apply where a case is referred directly to the higher tribunal pursuant to national law.

5. The effectiveness of judicial review

84. The recommendation recognises that judicial review of administrative acts must be effective so that citizens' rights and interests are afforded genuine protection and to ensure the credibility vis-à-vis society and the efficiency of the administration itself.

Principle 5.a

85. The recommendation seeks to guarantee that a tribunal may take the necessary measures to restore a lawful situation. It covers provisional measures, procedural and substantive decisions, i.e. the power to prevent potentially prejudicial material actions; the power to order the adoption of a material action which should have been but was not adopted, particularly in connection with enforcing administrative decisions already taken; the power to order the adoption of administrative acts and decisions, in the case of limited discretion; and the possibility of preventing the adoption of decisions in cases of limited discretion, where the Administration has acted *ultra vires*.

86. The recommendation does not exclude the possibility of the tribunal replacing the administrative act where such a measure would be compatible with national legislation. The case-law of the ECHR does not require the administrative tribunal to substitute an act held to be unlawful. Nevertheless, the tribunal must be in a position to impose its judgment on the administrative authority when the latter issues a fresh decision, on referral after the original judgment has been set aside. This rule does not apply to cases where after annulment of an act the administration is not required to take a new decision (for instance, in appointment matters, if an appointment decision is annulled, the administration has discretionary power to decide whether to resume the appointment procedure).

Principle 5.b

87. This principle recognises that the tribunal has jurisdiction not only to deal with the substance of a complaint, but also, where the complainant is successful, to award some form of redress. Where appropriate, compensation for both pecuniary and non-pecuniary damage

resulting from a violation must in principle be possible and be part of the system of redress instituted (*Z and Others* judgment, 2001). The tribunal should also be empowered to exempt parties from liability for costs where justified. In general, compensation is made by setting the decision aside.

Principle 5.c

88. The execution of judgments is an important aspect of the effectiveness of control, and it is imperative to ensure that the administrative authorities in question execute the tribunal's judgments. This Recommendation endorses Recommendation No. R (2003) 16 on the execution of administrative and judicial decisions in the field of administrative law.

89. The possibility of enforcing the administrative authority's compliance with the judicial decision should be guaranteed. Means of enforcement should be consistent with national legal tradition.

Principle 5.d

90. This principle is aimed at ensuring that implementation of the contested measure can be suspended in cases where its enforcement would place the person concerned in an irreversible situation (*Jabari* judgment, 2000, and *Čonka* judgment, 2002).

91. The Recommendation recognises that the tribunal should have authority to grant provisional measures of protection pending the outcome of judicial proceedings. Such measures can include the full or partial suspension of the execution of the disputed administrative act, thus enabling the tribunal to re-establish the *de* facto and *de jure* situation which would prevail in the absence of the administrative act or to impose appropriate obligations on the administrative authorities.

92. In this respect this principle is consistent with Recommendation No. R (89) 8 of the Committee of Ministers to member states on provisional court protection in administrative matters, which provides that an applicant may request the court or another competent body to take measures of provisional protection against the administrative act.

DRAFT REVISED SPECIFIC TERMS OF REFERENCE OF THE PROJECT GROUP ON ADMINISTRATIVE LAW (CJ-DA) for 2005-2006

1. Name of Committee: Project Group on Administrative Law (CJ-DA)

2. Type of Committee: Committee of experts

3. Source of terms: European Committee on Legal Co-operation (CDCJ)

4. Terms of Reference:

Under the authority of the European Committee on Legal Co-operation (CDCJ) and having regard, in particular, to Parliamentary Assembly Recommendation 1615 (2003) on the institution of ombudsman, the CJ-DA is instructed in particular:

a. to implement activities aimed at strengthening the legal framework of good administration as an essential element of good governance and, in particular, to study what improvements should be made to administrative decision making;

Within the framework of these activities, the CJ-DA shall study the following questions in particular:

- the administrative decision making process in the member States,
- the administrative contract as a way of organising relations between the government and citizens,
- the principle of legitimate confidence in relations between the government and citizens;

b. based on the findings of the above study, to prepare:

i. a report containing the main findings of the study, together with a review of national legislation in this field, examples of good practice and suggestions for strengthening the legal framework in order to reinforce the guarantees of effective protection of the rights of private persons in their relations with the administrative authorities.

This work shall be done by the CJ-DA and its Working Party on the basis of the delegations' replies to a questionnaire and a preliminary report prepared by a scientific expert. The final report shall be submitted to the CDCJ for proposals with a view to the preparation of one or more international instruments, including one or more draft recommendations of the Committee of Ministers;

ii. if necessary, one or more draft recommendations on the subject, comprising rules or principles to be applied to administrative decision making in the member states, and guidelines on policies to be put in place to foster better public authority decision making;

This work shall be done by the CJ-DA and its Working Party, on the basis of the report drawn up by and with the assistance of the scientific expert, and shall be submitted to the CDCJ to be transmitted to the Committee of Ministers for adoption;

c. to carry out any other activity with which the CDCJ might entrust it in execution of its own terms of reference or in implementing the priorities identified by the Committee of Ministers.

5. Membership of the Committee:

a. The governments of all member States are entitled to appoint members with the following desirable qualifications: senior officials having responsibilities as regards administrative law and administrative justice.

The Council of Europe's budget bears travelling and subsistence expenses for one expert per member State.

b. The European Commission and the General Secretariat of the Council of the European Union may send one representative to the meetings of the CJ-DA, but without the right to vote or to defrayal of expenses.

c. The following observers with the Council of Europe may send representatives to meetings of the CJ-DA, but without the right to vote or to defrayal of expenses:

- Canada,
- Holy See,
- Japan,
- Mexico,
- United States of America.

d. The following observers with the Committee may send representatives, without the right to vote or defrayal of expenses, to meetings of the Committee:

- OECD,
- UN and its specialised organs,
- the International Commission on Civil Status,
- the European Public Law Centre and
- the European Federation of Administrative Judges.

6. Working structures and methods:

The CJ-DA may set up working parties, use consultants and organise hearings and consultations.

7. Duration: These terms of reference shall be reviewed before 31 December 2006.

APPENDIX VI

OPINION
ON PARLIAMENTARY ASSEMBLY RECOMMENDATION 1615 (2003)
"THE INSTITUTION OF OMBUDSMAN"

as adopted by the CJ-DA

I. INTRODUCTION

1. Recommendation 1615 (2003) on the Institution of Ombudsman was adopted by the Standing Committee, on behalf of the Parliamentary Assembly of the Council of Europe, at its meeting in Naples on 8 September 2003.

2. At its 853rd meeting (Strasbourg, 24 September 2003) the Committee of Ministers decided to forward it to the Steering Committee for Human Rights (CDDH), the European Committee on Legal Co-operation (CDCJ), the Commissioner for Human Rights of the Council of Europe, the Congress of Local and Regional Authorities of Europe (CLRAE) and the European Commission for Democracy through Law (Venice Commission) for comments.

3. The Committee of Ministers' Rapporteur Group on Legal Co-operation (GR-J) plans to consider these bodies' comments in April 2004.

4. Having regard to the timetable, the Chair of the CDCJ has instructed the CJ-DA to draw up an opinion on Recommendation 1615 (2003) and submit it to the Bureau of the CDCJ (CDCJ-Bu) for approval. The Bureau will consider the opinion at its next meeting, on 24-25 March 2004, for forwarding to the GR-J.

5. The CJ-DA examined the draft opinion on Recommendation 1615 (2003) on the institution of Ombudsman, drawn up by the Secretariat, at its 16th meeting (Strasbourg, 3-5 March 2004) and modified it accordingly. The opinion adopted by the CJ-DA appears in Appendix I to this document and the text of Recommendation 1615 (2003) in Appendix II.

II. ACTION

6. In accordance with the instructions of the Chair of the CDCJ, the CJ-DA submits the opinion on Recommendation 1615 (2003) on the institution of Ombudsman to the CDCJ-Bu for forwarding to the GR-J, subject to any amendment that the CDCJ-Bu may wish to make.

Appendix I

OPINION
ON PARLIAMENTARY ASSEMBLY RECOMMENDATION 1615 (2003)
"THE INSTITUTION OF OMBUDSMAN"

1. The delegations of the Project Group on Administrative Law (CJ-DA) note with satisfaction the Parliamentary Assembly's adoption on 8 September 2003 of Recommendation 1615 (2003) on the institution of ombudsman. They consider that, if implemented, this recommendation could help to strengthen the role of ombudsmen in member states and offer individuals greater protection of their rights in their dealings with administrative authorities.

2. In view of its terms of reference *"to work out (....) proposals for activities aimed at strengthening the legal framework of good administration as an essential element of good governance*", the CJ-DA notes with particular interest the Assembly's recommendation to the Committee of Ministers to draft:

- a model text for defining a basic individual right to good administration;
- a model code of good administration.

3. Recommendation 1615 (2003) refers in this context to Article 41 of the Charter of Fundamental Rights of the European Union, which under the heading "right to good administration" sets out the rules that must be respected "*by the institutions and bodies of the Union*". It also refers to the European Code of Good Administrative Behaviour, approved by a resolution of the European Parliament adopted on 6 September 2001, "*which European Union institutions and bodies, their administrations and their officials should respect in their relations with the public*".

4. To a certain extent the Parliamentary Assembly recommendation goes further than the two European Union texts, since it invites the Committee of Ministers to "*encourage governments of Council of Europe member states in adopting and implementing the [proposed] right and code*". It even concludes that the right to good administration should be adopted at constitutional level by states. However it says nothing about the adoption and implementation of this right and code by international institutions. The CJ-DA considers that persons having direct contact with international administrative bodies should have the same protection as those in contact with their national, local or regional equivalents.

5. Some of the Group's members attended the European Conference on "<u>the right to good administration</u>", held in Warsaw on 4-5 December 2003, as part of the Council of Europe's co-operation programmes for strengthening the rule of law. The issue under consideration was whether a further step should be taken by recognising, at the level of the Council of Europe, a right to good administration.

6. The Conference showed how difficult it is to define such a right and to identify the situations to which it applies. It covers both basic principles and procedural safeguards, and the procedural aspects are just as important as the ultimate objective. They are an integral part of the right to good administration - how government is conducted is just as important as what it seeks to achieve.

7. The Conference also brought out the distinction between the right to good administration and other, already acknowledged, rights, be they formal freedoms phrased in essentially negative terms or economic and social rights, which mainly give rise to positive benefits for those concerned. The right to good administration initially places obligations on the state, as a result of which rights are created for individuals.

8. Recognition of the right to good administration raises the key question of whether this is an individual right that those concerned can seek to enforce. Conference participants offered a qualified response, depending on whether such a right was viewed as a whole or in terms of specific aspects. In the former case, in the absence of a precise instruction or direct service, the right to good administration cannot be an individual right. Although Article 15 of the French 1789 Declaration of the Rights of Man and Citizens grants society *"the right to require of every public agent an account of his administration"* – which amounts to a right to good administration – this in no sense entitles each individual to require public officials to account for their actions. Article 41 of the European Union Charter of Fundamental Rights recognises this – the right to good administration is only the title and is not repeated in the detailed clauses of the article. The latter clarify what is to be understood by this general right by specifying what rights derive from it for *"every person"*. These alone are individual rights, which anyone can insist on being applied by the administrative authorities of the Union.

9. The CJ-DA considers that to be effective, an international legal instrument establishing a right to good administration must specify its consequences in terms of different aspects of the relations between the administration and those with whom it deals.

10. The CJ-DA welcomes the proposal to prepare a model code of good administration. According to Recommendation 1615 (2003) the code should be based on Committee of Ministers Recommendation No R (80) 2 concerning the exercise of discretionary powers by administrative authorities and Resolution (77) 31 on the protection of the individual in relation to the acts of administrative authorities. The CJ-DA considers that other Council of Europe instruments on administrative matters could also be taken into account, in particular those on access to information held by public authorities[2], public liability[3], administrative procedures affecting a large number of persons[4], communication to third parties of personal data held by public bodies[5] and the execution of administrative and judicial decisions in the field of administrative law[6]. The European Court of Human Rights has also delivered various judgments that offer individuals additional protection in their relations with public administration and should therefore be considered in any model code of good administration.

11. The CJ-DA observes that for society to exist and flourish within law-governed states, the principles of the rule of law must be built into the administrative culture and be automatically acknowledged as the natural point of reference by public officials when carrying out their duties.

12. The development of modern societies has led to more demands on public administration - both quantitative and qualitative - in response to the needs of natural and legal persons, or even of associations. The CJ-DA considers that a model code of good administration could help to create greater awareness among officials that in carrying out their duties they should be guided by the interests of those concerned as well as by the general interest, and greater awareness of their rights by those concerned.

13. Solutions for guaranteeing action by the administrative authorities vary widely in Europe, in terms of both how decisions are made and rectifying administrative shortcomings and omissions affecting individuals' rights. Judicial and non-judicial remedies are usually available to challenge administrative actions and decisions, including failure to act[7].

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[2] Recommendation No. R (81) 19 of 25 November 1981
[3] Recommendation No. R (84) 15 of 18 September 1984
[4] Recommendation No. R (87) 16 of 17 September 1987
[5] Recommendation No. R (91) 10 of 9 September 1991
[6] Recommendation No. R (2003) 16 of 9 September 2003
[7] In this context, reference should be made to a draft recommendation prepared by the CJ-DA on judicial review of administrative acts.

14. Concerning the latter, in addition to internal administrative means of redress, nearly all the Council of Europe's member states have appointed an ombudsman, whose office offers citizens additional protection against the authorities to that supplied by the courts. The institution has general competence to fill the gaps left by appeal bodies and deal with all types of cases of maladministration.

15. The CJ-DA agrees with the Assembly that the institution of ombudsman makes an essential contribution to protecting citizens' rights with regard to public administration. Its special status and role may suffice to force the authorities to acknowledge rights they did not initially recognise, without the need to resort to the courts.

16. It notes that according to the Recommendation ombudsmen should be given "*a mandate which clearly encompasses human rights as being fundamental to the concept of good administration*" and considers that such a mandate would strengthen respect for the principles of good administration at national level and highlight ombudsmen's fundamental role in this area.

17. The CJ-DA remains at the Committee of Ministers' disposal and is prepared to contribute actively, under the authority of the European Committee on Legal Co-operation (CDCJ), to work in this area, particularly as this relates to the field of administration.

Appendix II

RECOMMENDATION 1615 (2003)[1] OF THE PARLIAMENTARY ASSEMBLY THE INSTITUTION OF OMBUDSMAN

1. The Parliamentary Assembly confirms the importance of the institution of ombudsman within national systems for the protection of human rights and the promotion of the rule of law, and of its role in ensuring the proper behaviour of public administration. Ombudsmen have a valuable role to play at all levels of public administration, and they report on their activities to the political bodies to whom they are accountable.

2. The Assembly recalls the previous work of the Council of Europe, notably its own Recommendation 757 (1975), and Committee of Ministers Recommendations No. R (85) 13, No. R (80) 2 and Rec(2000)10 and Resolution (77) 31. It fully supports the important co-ordinating and supportive role played by the Commissioner for Human Rights and expresses the desire to become regularly involved in this work. It also recalls the work of the United Nations General Assembly and the European Ombudsman.

3. The Assembly notes that the development of methods of human rights protection has influenced the role of the ombudsman in that respect for human rights is now included in the standards to be respected by a good administration, on the basis that administrative actions which do not respect human rights cannot be lawful. National constitutional and legal circumstances particular to each country, furthermore, may dictate that ombudsmen in different countries require mandates conferring various additional responsibilities with respect to human rights protection. Nevertheless, the Assembly believes that the role of intermediary between individuals and the administration lies at the heart of the ombudsman's functions.

4. A further role for ombudsmen exists with respect to officials within the administration itself. Where such officials become aware of situations of a particular gravity and where resorting to any internal procedures would be ineffective or otherwise unreasonable, there should be an exceptional mechanism for addressing such information directly to the ombudsman.

5. The neutrality of the ombudsman and the fact that he or she is universally respected by both complainants and the subjects of investigations are vital to the proper functioning of the institution of ombudsman. The Assembly considers that these attributes are best preserved by limiting enforcement powers to the moral pressure inherent in public criticism, with reports on maladministration to, and subsequent political condemnation of it by, parliament. The Assembly therefore considers that ombudsmen's access to administrative and constitutional courts should be limited to applications for interpretative judgments on legal questions relating to the mandate or particular investigations, unless representing an individual complainant with no direct access to such courts. It is preferable, however, that individuals with otherwise sufficient *locus standi* should be able to apply directly to such courts.

6. The Assembly believes that ombudsmen should have at most strictly limited powers of supervision over the courts. If circumstances require any such role, it should be confined to ensuring the procedural efficiency and administrative propriety of the judicial system; in consequence, the ability to represent individuals (unless there is no individual right of access to a particular court), initiate or intervene in proceedings, or reopen cases, should be excluded.

7. The Assembly therefore concludes that certain characteristics are essential for any institution of ombudsman to operate effectively, namely:

> i. establishment at constitutional level in a text guaranteeing the essence of the characteristics described in this paragraph, with elaboration and protection of these characteristics in the enabling legislation and statute of office;

ii. guaranteed independence from the subject of investigations, including in particular as regards receipt of complaints, decisions on whether or not to accept complaints as admissible or to launch own-initiative investigations, decisions on when and how to pursue investigations, consideration of evidence, drawing of conclusions, preparation and presentation of recommendations and reports, and publicity;

iii. exclusive and transparent procedures for appointment and dismissal by parliament by a qualified majority of votes sufficiently large as to imply support from parties outside government, according to strict criteria which unquestionably establish the ombudsman as a suitably qualified and experienced individual of high moral standing and political independence, for renewable mandates at least equal in duration to the parliamentary term of office;

iv. prohibition of the incumbent from engaging in any other remunerated activities and from any personal involvement in political activities;

v. personal immunity from any disciplinary, administrative or criminal proceedings or penalties relating to the discharge of official responsibilities, other than dismissal by parliament for incapacity or serious ethical misconduct;

vi. the appointment of an identified deputy on the recommendation of the ombudsman and with parliamentary approval, capable of acting in the full capacity of ombudsman when necessary;

vii. guaranteed sufficient resources for discharge of all responsibilities allocated to the institution, allocated independently of any possible interference by the subject of investigations, and complete autonomy over issues relating to budget and staff;

viii. guaranteed prompt and unrestricted access to all information necessary for the investigation;

ix. internal procedures guaranteeing the highest administrative standards in the institution’s own work, in particular fairness, efficiency, transparency and courtesy;

x. public accessibility (in terms of both availability and comprehensibility) of information on the existence, identity, purpose, procedures and powers of the ombudsman, along with wide and effective publication of information on the institution’s activities, findings, opinions, proposals, recommendations and reports;

xi. application procedures which are easily and widely accessible, simple and free of charge, and which convincingly establish their confidentiality in all cases;

xii. guaranteed confidentiality and, when publicised, anonymity of investigations;

xiii. the authority to give opinions on proposed legislative or regulatory reforms and *proprio motu* to make such proposals with a view to improving administrative standards and, where consistent with the overall mandate, respect for human rights;

xiv. the requirement that the administration furnish within a reasonable time full replies describing the implementation of findings, opinions, proposals and recommendations or giving reasons why they cannot be implemented;

xv. presentation by the ombudsman of an annual report to parliament, as well as of specific reports on matters of particular concern, or where the administration has failed to implement recommendations.

8. The Assembly notes with approval Committee of Ministers Recommendation No. R (2000) 10 on codes of conduct for public officials. The Assembly observes, however, that this text is not analogous to the European Ombudsman's European Code of Good Administrative Behaviour and lacks most of the latter's provisions, but finds that many of these are set out in other Committee of Ministers texts, notably the appendices to Recommendation No. R (80) 2 and Resolution (77) 31. The Assembly considers that these instruments could usefully be consolidated into a single text providing guidance, instruction and information to both administrative officials and members of the public in their mutual relations.

9. The Assembly notes that the European Ombudsman benefits from the inclusion in Article 41 of the Charter of Fundamental Rights of the European Union of a right to good administration. The Assembly believes that incorporation of such a right into national legislation could also be of great value, for similar reasons to those for the adoption of a code of good administrative behaviour: indeed such a code would elaborate, for practical implementation, the detailed standards implicit in the basic right.

10. Accordingly, the Assembly recommends that the governments of Council of Europe member states:

i. create at national level (and at regional and local level as appropriate), where it does not already exist, an institution bearing a title similar to that of "parliamentary (/regional/ local government) ombudsman", preferably by incorporation into the constitution;

ii. ensure that the institution of parliamentary ombudsman exhibits the characteristics described in paragraph 7 above, and that these characteristics are sufficiently protected and appropriately elaborated in the enabling legislation and statute;

iii. give this institution a mandate which clearly encompasses human rights as being fundamental to the concept of good administration, and which includes a wider role in human rights protection where, in the absence of specific complementary alternative mechanisms, national circumstances so require;

iv. exclude from the mandate of this institution the power to enter into litigation against either the administration or individual officials, whether before criminal or administrative courts, but to consider allowing the ombudsman to apply to the constitutional court for interpretative judgments;

v. engage fully with the Commissioner for Human Rights in his work of co-ordinating the activities of member states' ombudsmen;

vi. following the drafting of a model text by the Committee of Ministers, adopt at constitutional level an individual right to good administration;

vii. following the drafting of a model text by the Committee of Ministers, adopt and implement fully a code of good administration, to be effectively publicised so as to inform the public of their rights and legitimate expectations.

11. The Assembly further recommends that the Committee of Ministers:

i. encourage member states to implement Recommendation No. R (85) 13, whilst also giving effect to the more detailed provisions of the present recommendation;

ii. draft a model text for a basic individual right to good administration;

iii. draft a single, comprehensive, consolidated model code of good administration, deriving in particular from Committee of Ministers Recommendation No. R (80) 2 and Resolution (77) 31 and the European Code of Good Administrative Behaviour, with the involvement of the appropriate organs of the Council of Europe – in particular the Commissioner for Human Rights and the European Commission for Democracy through Law, as well as the Assembly – and in consultation with the European Ombudsman, thus providing elaboration of the basic right to good administration so as to facilitate its effective implementation in practice;

iv. encourage and provide technical assistance to governments of Council of Europe member states in adopting and implementing the above-mentioned right and code;

v. support the Commissioner for Human Rights in his work of co-ordinating the activities of member states' ombudsmen.

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[1]. *Text adopted by the Standing Committee*, acting on behalf of the Assembly, on 8 September 2003 (see Doc. 9878, report of the Committee on Legal Affairs and Human Rights, rapporteur: Mrs Nabholz-Haidegger).