Comparative Administrative Law

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Felix Uhlmann

University of Zurich

Table of Contents

A Introduction (Lecture 1)

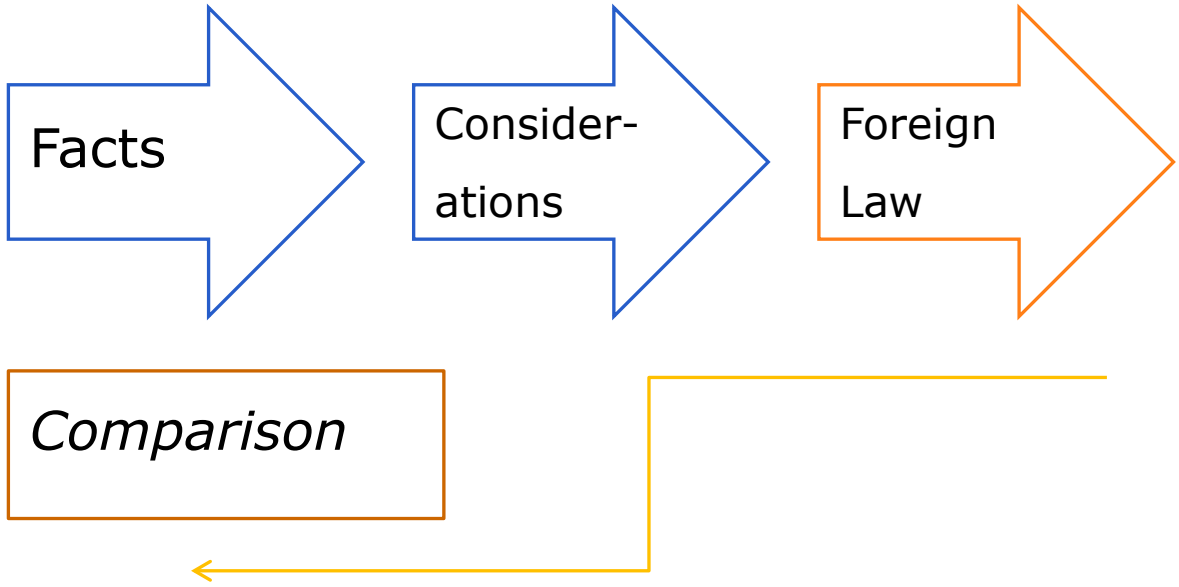
I. Key Questions

1. What are we looking for?

Many countries struggle with the amount of regulation that administrative authorities must implement. Although the subject areas of such regulation are quite diverse, the implementation is usually guided by some general rules, often unwritten. These rules form what is called "Administrative Law" (or "General Administrative Law").

2. What are we looking for?

- Institutions (e.g. regulatory agencies)
- Laws (e.g. administrative procedure)
- General Principles (e.g. rule of law)
- Cases (mostly)



3. How do we compare?

The course looks into these rules from a comparative perspective. Common problems that may arise in the administrative context are illustrated by cases and other materials. Students are asked to comment on these cases and compare them – if possible- to their own legal background.

4. Why do we compare?

- Knowledge of foreign jurisdictions
- New questions
- **Critical Assessment of one‘s own jurisdiction**

- "Best Practices" in Administrative Law?

B Sources (Lecture 1)

I. Codification of General Administrative Law

It has hardly been researched which consequences arise from the different degree of codification of the general administrative law.

- Does codification increase orientation, predictability and legal certainty?
- Does the codification lead to a "petrification" of general administrative law?
- Does codification enhance the legitimacy of administrative law?
- To which degree does the constitution shape administrative law and will there be conflicts in case of codification?
- Can uniformity be achieved only by codification?
- Which areas of general administrative law are suitable for a codification, which are not, and why and why not?

II. General Administrative Law Act (NL)

Below you will find an extract from a translation of the General Administrative Law Act of the Netherlands. Read the extract and ask yourself whether it regulates the issues you consider typical "General Administrative Law". What is missing and what would you not consider “Administrative Law”?

GENERAL ADMINISTRATIVE LAW

ACT

CHAPTER 1 INTRODUCTORY PROVISIONS

Title 1.1 Definitions and scope

Article 1:1

1. 'Administrative authority' means:
(a) an organ of a legal entity which has been established under public law, or
(b) another person or body which is invested with any public authority.
2. The following authorities, persons and bodies are not deemed to be administrative authorities:
(a) the legislature;
(b) the First and Second Chambers and the Joint Session of the States General;
(c) independent authorities established by law and charged with the administration of justice;
(d) the Council of State and its divisions;
(e) the General Chamber of Audit;

(f) the National Ombudsman and Deputy Ombudsmen;

(g) the chairmen, members, registrars and secretaries of the authorities referred to at (b) to (f), the Procurator General, the Deputy Procurator General and the Advocates General to the Supreme Court, and committees composed of members of the authorities referred to at (b) to (f).

3. An authority, person or body excluded under subsection 2 is nonetheless deemed to be an administrative authority in so far as it makes orders or performs acts in relation to a public servant not appointed for life as referred to in 1 of the Central and Local Government Personnel Act, his surviving relatives or his successors in title.

Article 1:2

1. 'Interested party' means a person whose interest is directly affected by an order.

2. As regards administrative authorities, the interests entrusted to them are deemed to be their interests.

3. As regards legal entities, their interests are deemed to include the general and collective interests which they particularly represent in accordance with their objects and as evidenced by their actual activities.

Article 1:3

1. 'Order' means a written decision of an administrative authority constituting a public law act.

2. 'Administrative decision' means an order which is not of a general nature, including rejection of an application for such an order.

3. 'Application' means a request by an interested party for an order.

4. ‘Policy rule’ means an order, not being a generally binding regulation, which lays down a general rule for weighing interests, determining facts or interpreting statutory regulations in the exercise of a power of an administrative authority.

Article 1:4

1. 'Administrative court' means an independent authority established by law charged with the administration of justice in administrative matters.

2. A court forming part of the judicature is deemed to be an administrative court in so far as Chapter 8, the Administrative Justice (Taxes) Act[1] or the Traffic Regulations (Administrative Enforcement) Act - Chapter VIII excluded - applies.

Article 1:5

1. 'Making an objection' means making use of a statutorily conferred power to seek redress against an order from the administrative authority which made the order.

2. 'Lodging an administrative appeal' means making use of a statutorily conferred power to seek redress against an order from an administrative authority other than the one which made the order.

3. 'Lodging an appeal' means lodging an administrative appeal or an appeal to an administrative court.

Article 1:6

This act does not apply to:

(a) the investigation and prosecution of criminal offences or the execution of criminal-law decisions;

(b) the execution of measures depriving persons of their liberty under the Aliens Act;

(c) the execution of other measures depriving persons of their liberty in an institution primarily dedicated to the execution of criminal-law decisions;

(d) orders and acts implementing the Military Disciplinary Law Act.

Title 1.2 Implementation of binding decisions of authorities of the European Communities

Article 1:7

1. If, under any statutory regulation, an opinion must be sought or external consultation held by an administrative authority regarding an order before such order can be made, the provision shall not apply if the sole purpose of the proposed order is to implement a binding decision of the Council of the European Union, the European Parliament and the Council jointly, or the Commission of the European Communities.

2. Subsection 1 shall not apply to requirements to obtain the consultation of the Council of State.

Article 1:8

1. If, under any statutory regulation, a draft order must be communicated by an administrative authority before such order can be made, the provision shall not apply if the sole purpose of the proposed order is to implement a binding decision of the Council of the European Union, the European Parliament and the Council jointly, or the Commission of the European Communities.

2. Subsection 1 shall not apply to the presentation of a draft order in council or ministerial regulation to the States General, if:

(a) an act of Parliament provides that the wish may be expressed by or on behalf of one of the Chambers of the States General, or by a number of members thereof, that the subject or entry into force of such order in council or ministerial regulation be regulated by Act of Parliament, or

(b) article 21.6, subsection 6, of the Environmental Management Act or article 33 of the Pollution of Surface Waters Act applies.

Article 1:9

This title shall apply *mutatis mutandis* to bills.

CHAPTER 2 DEALINGS BETWEEN INDIVIDUALS AND ADMINISTRATIVE AUTHORITIES

Division 2.1 General provisions

Article 2:1

1. In looking after his interests in dealings with administrative authorities, anyone may be assisted or represented by a legal representative.

2. An administrative authority may require a legal representative to produce a written authorisation.

Article 2:2

1. An administrative authority may refuse to allow assistance or representation by a person against whom there are serious objections.

2. The interested party and the person referred to in subsection 1 shall be informed in writing of the refusal without delay.

3. Subsection 1 shall not apply to attorneys-at-law and procurators.

Article 2:3

1. An administrative authority shall send documents which manifestly come within the competence of another administrative authority to such authority without delay, while simultaneously informing the sender.

2. An administrative authority shall return to the sender as soon as possible documents which are not intended for it and are also not passed on to another administrative authority.

Article 2:4

1. An administrative authority shall perform its duties without prejudice.

2. An administrative authority shall ensure that persons belonging to it or working for it who have a personal interest in an order do not influence its decisionmaking on the matter.

Article 2:5

1. Anyone involved in the performance of the duties of an administrative authority who in the process gains access to information which he knows, or should reasonably infer, to be of a confidential nature, and who is not already subject to a duty of secrecy by virtue of his office or profession or any statutory regulation, shall not disclose such information unless he is by statutory regulation obliged to do so or disclosure is necessary in consequence of his duties.

2. Subsection 1 shall also apply to institutions, and persons belonging to them or working for them, involved by an administrative authority in the performance of its duties, and to institutions and persons belonging to them or working for them performing a duty assigned to them by or pursuant to an Act of Parliament.

Division 2.2 Use of Languages in Dealings with Administrative Authorities

Article 2:6

1. Administrative authorities and persons working under their responsibility shall use the Dutch language, unless provided otherwise by statutory regulation.

2. Notwithstanding subsection 1, another language may be used if its use is more effective and the interests of third persons are not disproportionately harmed.

Article 2:7

1. Anyone may use the Frisian language in communications with administrative authorities in so far as the latter have their seat in the Province of Friesland.

2. Subsection 1 shall not apply if the administrative authority asks to use the Dutch language on the grounds that using the Frisian language would lead to a disproportionate burden on administrative communications.

Article 2:8

1. Administrative authorities may use the Frisian language in oral communications within the Province of Friesland.

2. Subsection 1 shall not apply if the other party asked for the Dutch language to be used on the grounds that using the Frisian language would lead to the oral communications taking an unsatisfactory course.

Article 2:9

1. Administrative authorities with their seat in the Province of Friesland that do not form part of central government may lay down rules on the use of the Frisian language in documents.

2. Our Minister whom it may concern may lay down rules on the use of the Frisian language in documents by parts of central government operating in the Province of Friesland or part thereof.

Article 2:10

1. A document in the Frisian language shall also be drawn up in the Dutch language if it:

(a) is meant exclusively or otherwise for use by authorities outside the Province of Friesland or central government authorities;

(b) contains generally binding regulations or policy rules; or

(c) is drawn up in direct preparation of regulations or rules as referred to at (b).

2. The notification , communication or deposit for inspection of the document referred to in subsection 1 shall in any event also be in the Dutch language, unless it can reasonably be assumed that there is no need for this.

Article 2:11

1. If a document is formulated in the Frisian language, the administrative authority shall provide a translation into the Dutch language on request.

2. The administrative authority may levy a charge for the translation not exceeding the cost thereof.

3. No charge shall be levied if the document:

(a) contains the minutes of a representative institution's meeting and the petitioner's interest is directly related to the subject matter, or contains the minutes of a representative institution's meeting and concerns the laying-down of generally binding regulations or policy rules, or

(b) contains an order or other act to which the petitioner is an interested party.

Article 2:12

1. Anyone may use the Frisian language at meetings of the representative institutions having their seat in the Province of Friesland.

2. What is said in the Frisian language shall be minuted in the Frisian language.

CHAPTER 3 GENERAL PROVISIONS CONCERNING ORDERS

Division 3.1 Introductory provisions

Article 3:1

1. Orders containing generally binding regulations:

(a) shall only be subject to the provisions of division 3.2 in so far as they are not incompatible with the nature of the orders;

(b) shall not be subject to the provisions of division 3.6.

2. Divisions 3.2 to 3.5 shall apply *mutatis mutandis* to acts of administrative authorities other than orders in so far as they are not incompatible with the nature of the acts.

Division 3.2 The duty of care and the weighing of interests

Article 3:2

When preparing an order an administrative authority shall gather the necessary information concerning the relevant facts and the interests to be weighed.

Article 3:3

An administrative authority shall not use the power to make an order for a purpose other than that for which it was conferred.

Article 3:4

1. When making an order the administrative authority shall weigh the interests directly involved in so far as no limitation on this duty derives from a statutory regulation or the nature of the power being exercised.

2. The adverse consequences of an order for one or more interested parties may not be disproportionate to the purposes to be served by the order.

Division 3.3 Provision of advice

Article 3:5

1. In this division 'adviser' means a person or body that is charged by or pursuant to a statutory regulation with advising on orders to be made by an administrative authority and that does not work under the responsibility of the administrative authority concerned.

2. This division shall not apply to the consultation of the Council of State.

Article 3.6

1. If no statutory time limit is imposed on the adviser by statutory regulation, the administrative authority may indicate within what time limit an opinion is expected. This time limit may not be so short that the adviser is unable to discharge his duties properly.

2. If the opinion is not delivered on time its absence alone shall not be an obstacle to making the order.

Article 3:7

1. The administrative authority to which the opinion is delivered shall provide the adviser, at his request or otherwise, with the information needed to enable him to discharge his duties properly.

2. Article 10 of the Government Information (Public Access) Act shall apply *mutatis mutandis*.

Article 3:8

The name of the adviser who has delivered the opinion shall be stated in or with the order.

Article 3:9

If an order is based on an investigation carried out by an adviser into facts and actions, the administrative authority shall satisfy itself that the investigation was carried out with due care.

Article 3:9a

This division shall apply *mutatis mutandis* to bills.

Division 3.4 Public preparatory procedure

Article 3:10

1. The procedure for the preparation of orders provided in this division shall be followed if this is required by statutory regulation or by order of the administrative authority.

2. The regulations of division 4.1.1 regarding administrative decisions shall also apply to other orders which are made on application and prepared in accordance with this division.

Article 3:11

1. The administrative authority shall deposit the application for the order, or the draft of an order to be made on its own initiative or on application, together with the documents relating thereto, for inspection for a period of at least four weeks by those persons who are to be given the opportunity under article 3:13 to state their views.

2. Article 10 of the Government Information (Public Access) Act shall apply *mutatis mutandis*. If certain documents are not deposited for inspection under this provision, communication shall be given thereof.

3. A copy of the documents deposited for inspection shall be provided at no more than cost price.

4. In so far as not provided otherwise by statutory regulation, the deposit for inspection shall in any event take place at the offices of the administrative authority.

Article 3:12

1. The communication of the application or the draft shall be given in one or more newspapers or free local papers, or in any other suitable way, prior to the deposit of the application for inspection. Only the substance of the order need be stated.

2. If the order is by an administrative authority forming part of central government the communication shall be placed in the Government Gazette, unless provided otherwise by statutory regulation.

3. The communication shall state where and when the documents are to be deposited for inspection, who is to be given the opportunity to state his views and how this can be done under article 3:13.

Article 3:13

1. Interested parties may state their views on the application or the draft either orally or in writing, at their discretion.

2. It may be provided by statutory regulation or by the administrative authority that other persons are also to be given the opportunity to state their views either orally or in writing, at their discretion.

3. The time limit for stating a view shall not end earlier than the last day of the inspection period.

4. In the case of an order made on application, the applicant shall if necessary be given the opportunity to respond to the views stated.

5. A record shall be kept of views stated orally under the above subsections.

Division 3.5 Extensive public preparatory procedures

Paragraph 3.5.1 Introduction

Article 3:14

The procedures for the preparation of orders provided in paragraphs 3.5.2 to 3.5.5 and shall be followed if this is required by statutory regulation or by order of the administrative authority.

Article 3:15

By or pursuant to the statutory regulation referred to in article 3:14 or the order referred to therein administrative authorities may be designated which:

(a) must be given the opportunity to deliver an opinion on the making of an order, or

(b) must be involved in the preparatory procedures in some other way.

Paragraph 3.5.2 Filing of the application; admissibility

Article 3:16

The provisions of division 4.1.1 regarding administrative decisions shall also apply to other orders which are made on application and prepared in accordance with this division.

Article 3:17

1. The administrative authority shall note without delay the date of receipt on the application.

2. It shall send without delay the applicant an acknowledgement of receipt stating this date.

3. It shall send without delay the other administrative authorities involved a copy of the application and of the accompanying documents, stating the date of receipt.

Article 3:18

1. The power regulated in article 4:5 not to process an application on the grounds that it is incomplete may be exercised only if the applicant has been given the opportunity to amplify the application within eight weeks of the application being received.

2. The other administrative authorities involved shall be informed of requests to amplify an application and orders not to process an application.

3. If an administrative authority processes an application despite its being incomplete, it shall make a note of this on the application. If the applicant has been given the opportunity to amplify the application, the administrative authority shall state in such note the time limit set for this under article 4:5.

Paragraph 3.5.3. The draft order

Article 3:19

1. The administrative authority shall prepare a draft order as soon as possible. Unless article 3:29 has been applied, the administrative authority shall send the draft to the applicant and the other administrative authorities involved within twelve weeks of receiving the application.

2. No later than two weeks after the sending of the draft as referred to in subsection 1, information of the draft shall simultaneously be given by:

(a) deposit for inspection;

(b) a communication in one or more newspapers or free local papers such that the intended object is achieved as far as possible;

(c) a communication in the Government Gazette, in cases where an authority of the central or provincial government is the administrative authority.

Article 3:20

1. In the communications referred to in article 3:19, subsection 2, the administrative authority shall state at least:

(a) the substance of the application and the purport of the draft order;

(b) where and when the documents may be inspected;

(c) who has been given the opportunity to submit reservations concerning the draft, and how and within what time limit this may be done;

(d) that a person who submits reservations in writing may request that his personal particulars are not stated.

2. The administrative authority shall also inform the applicant and the other administrative authorities involved of this information.

Article 3:21

1. The following shall be deposited for inspection with the draft order:

(a) a copy of the application with the accompanying documents;

(b) if there has been prior consultation on the application, a report thereof;

(c) the reports produced and opinions delivered in connection with the draft, in so far as it can reasonably be assumed that they may be necessary for an assessment of the draft;

(d) a list of the reports and opinions not deposited for inspection and, in so far as it can reasonably be assumed that they are necessary for an assessment of the draft, of orders previously made on the same subject which are still in effect, together with a statement of where and when these documents may be inspected.

2. The administrative authority shall supplement the documents deposited for inspection with relevant new documents and information, including in any event the opinions and reservations submitted in accordance with paragraph 3.5.4 and the records of the reservations submitted orally and exchanges of views on the draft.

3. Article 10 of the Government Information (Public Access) Act shall apply *mutatis mutandis* unless provided otherwise by statutory regulation. If certain documents are not deposited for inspection, this shall be stated.

Article 3:22

1. The documents may be inspected during working hours for four weeks from the date on which the draft order is deposited for inspection. During this period the documents may also be inspected on request during at least three consecutive hours per week outside working hours. On request an oral explanation shall be given free of charge within this period.

2. After the period of four weeks the documents shall be deposited for inspection at times determined by the administrative authority until the period for lodging an appeal against the order expires.

3. A copy of the documents deposited for inspection shall be provided at no more than cost price.

Paragraph 3.5.4 Opinions and reservations

Article 3:23

1. The administrative authorities acting as advisers shall send their opinion to the administrative authority within four weeks of the date on which the draft is deposited for inspection.

2. The administrative authority shall send a copy of each opinion to the applicant and the other administrative authorities acting as advisers as soon as possible.

Article 3:24

1. Anyone may submit written reservations to the administrative authority within four weeks of the date on which the draft is deposited for inspection.

2. The date of receipt shall be noted on the document.

3. The administrative authority shall send a copy of each reservation submitted to the applicant and the other administrative authorities acting as advisers as soon as possible.

4. The personal particulars of a person who has submitted written reservations shall not be disclosed if he so requests. The request shall be made in writing to the administrative authority, stating the particulars referred to in the first sentence.

Article 3:25

1. During the period referred to in article 3:24, subsection 1, anyone shall, on request, be given the opportunity to exchange ideas on the draft order and submit reservations orally. The administrative authority shall give the applicant the opportunity to be present on such occasions.

2. A record shall be kept of reservations submitted orally and oral exchanges of ideas, including the substance of each reservation and the name and address of the person submitting it.

3. The record shall be sent to the applicant, the administrative authorities acting as advisers and those who have submitted oral reservations, as soon as possible, in any event within two weeks.

Article 3:26

It may be provided in the statutory regulation or order referred to in article 3:14 that the right to submit reservations and engage in an exchange of ideas on the draft order may be exercised only by a category of persons designated therein, including in any event the interested parties.

Article 3:27

When notifying the order the administrative authority shall state its considerations on the reservations submitted.

Paragraph 3.5.5 Decision on the application

Article 3:28

The administrative authority shall make its order on the application as soon as possible, but at the latest within six months of receiving the application unless article 3:29 has been applied.

Article 3:29

1. If the application concerns a very complicated or controversial subject, the administrative authority may, within eight weeks of receiving the application, extend the periods referred to in article 3:19, subsection 1, second sentence, and article 3:28 for a reasonable period to be determined by the administrative authority in each case. Before taking such a decision, it shall give the applicant the opportunity to state his views on this.

2. The other administrative authorities involved shall be informed of an extending order at the time of its notification.

3. The administrative authority shall give communication of the extending order and of the filed application within, at the latest, ten weeks of receiving the application, article 3:19, subsection 2, article 3:20, subsection 1, (a) en (b), and subsection 2 and articles 3:21 and 3:22 applying *mutatis mutandis*.

Paragraph 3.5.6 Altering or repealing orders and other orders made by the administrative authority on its own initiative

Article 3:30

1. If an administrative authority intends to make on its own initiative an order altering or repealing a previous order, or to make another order, it shall draw up a draft order and give communication thereof, article 3:19, subsection 2, (b) and (c) applying *mutatis mutandis*. It may be provided in the statutory regulation or order referred to in article 3:14 that article 3:19, subsection 2, (a) and article 3:21 shall apply *mutatis mutandis*.

2. Before applying subsection 1, the administrative authority shall give written communication to the other administrative authorities involved and, in the case of an altering or repealing order, to the one to whom the order to be altered or repealed was addressed, unless provided otherwise by statutory regulation or by order as referred to in article 3:14. It shall at the same time give them the opportunity to deliver an opinion or state their views, as the case may be, on the intention, within a time limit to be determined by the authority.

3. If the intention is based on a request, the communication referred to in subsection 2 shall also be given to the petitioner. Article 3:44, subsections 3 and 5 shall apply *mutatis mutandis*.

Article 3:31

1. In the communication referred to in article 3:30, subsection 1, the administrative authority shall at least state:

(a) the substance of the draft order and a brief statement of the reasons for it;

(b) who is to be given the opportunity to submit reservations concerning the draft, and how and within what time limit this may be done;

(c) that a person who submits reservations in writing may request that his personal particulars are not disclosed;

(d) if article 3:30, subsection 1, second sentence, has been applied: where and when the documents may be inspected.

2. In the case of an altering or repealing order, the administrative authority shall also give communication of this information to the one to whom the order to be altered or repealed was addressed, the other administrative authorities involved and, if a request for altering or repealing has been made, to the submittant of the request. Article 3:44, subsections 3 and 5, shall apply *mutatis mutandis*.

Article 3:32

1. Anyone may submit written reservations concerning a draft order to the administrative authority within two weeks of the communication referred to in article 3:30, subsection 1. Article 3:24, subsections 2 and 4 and article 3:26 shall apply *mutatis mutandis*.

2. The administrative authority shall send a copy of every reservation submitted to the administrative authorities acting as advisers as soon as possible and, in the case of an altering or repealing order, to the one to whom the order to be altered or repealed was addressed.

Article 3:33

1. The administrative authority shall make an altering or repealing order, or an order not to alter or repeal, as soon as possible, but at the latest within sixteen weeks of the date on which it gave the communication referred to in article 3:30, subsection 2 to the one to whom the order to be altered or repealed was addressed.

2. Notwithstanding the provisions of subsection 1, an order that is not preceded by a communication as referred to in article 3:30, subsection 2 shall be made within eight weeks of the communication referred to in subsection 1 of that article.

Article 3:40

An order shall not take effect until it has been notified.

Article 3:41

1. Orders which are addressed to one or more interested parties shall be notified by being sent or issued to these, including the applicant.

2. If an order cannot be notified in the manner provided in subsection 1, it shall be notified in any other suitable way.

Article 3:42

1. Orders which are not addressed to one or more interested parties shall be notified by means of a notice of the order, or the substance thereof, placed in an official government publication, newspaper or free local paper, or in any other suitable way.

2. If notice is given only of the substance, the order shall at the same time be deposited for inspection. The notice shall state where and when the order will be deposited for inspection.

Article 3:43

1. When an order is notified, or as soon as possible thereafter, the ones who stated their views on it during the preparation shall be informed. An adviser as referred to in article 3:5 shall in any event be informed if the order departs from the opinion.

2. If division 3.4 has been applied in connection with the preparation of an order, the communication referred to in subsection 1 may be made in the same way as that in which communication is given of the application or draft order in accordance with article 3:12, subsections 1 and 2.

3. When communication is given of an order it shall also be stated when and how the order was notified.

Article 3:44

1. In the case of orders prepared in accordance with the procedures in division 3.5, the other administrative authorities involved shall be informed at the time of notification.

2. Within two weeks of notification the administrative authority shall give communication of the order:

(a) article 3:19, subsection 2 applying *mutatis mutandis*, and

(b) by sending a copy of the order to the ones who submitted reservations concerning the draft order.

3. Notwithstanding subsection 2 (b), the administrative authority may:

(a) if the volume of the order so warrants, merely communicate each of the ones referred to therein of the purport of the order and the considerations on his reservations;

(b) if a reservation has been submitted by more than five persons in the same document, merely send copies to the five persons whose names and addresses are listed first in that document;

(c) if a reservation has been submitted by more than five persons in the same document and the volume of the order so warrants, merely inform the five persons whose names and addresses are listed first in that document of the purport of the order and the considerations on their reservations;

(d) if more than 250 people would have to beinformed, refrain from communication altogether.

4. When making the notification and giving the communications referred to in subsections 1, 2 and 3, the administrative authority shall also state:

(a) when a copy of the order was deposited for inspection and the times and place at which the documents are available for inspection;

(b) whether alterations to the draft are contained in the order;

(c) if subsection 3 has been applied, that this has happened and the reasons for this.

5. If subsection 3 has been applied, the ones who have submitted reservations concerning the draft order may request the administrative authority to send them a copy of the order. This option shall be stated in the communication of the order in accordance with subsections 2 and 3. This request shall be granted within two weeks, unless the administrative authority considers that such sending cannot reasonably be required.

6. The documents may be inspected during working hours for six weeks from the day on which a copy of the order is deposited for inspection. During this period the documents may also be inspected on request during at least three consecutive hours per week outside working hours. On request, an oral explanation shall be given free of charge within this period. A copy of the documents deposited for inspection shall be provided at no more than cost price.

7. Subsection 2 (a) - in so far as it concerns the application of article 3:19, subsection 2, (b) and (c) - and subsection 6, second sentence, shall not be applicable to an order refusing an application for an order as referred to in article 3:30, subsection 1 if the order was not preceded by a communication as referred to in that subsection.

Article 3:45

1. If an objection may be made or an appeal may be lodged against an order, this shall be stated when notifying and giving communication of the order.

2. At the same time it shall be stated by whom, within what time limit and with which authority an objection may be made or an appeal may be lodged.

Division 3.7 Reasons for orders

Article 3:46

An order shall be based on proper reasons.

Article 3:47

1. The reasons shall be stated when the order is notified.

2. If possible, the statutory regulation on which the order is based shall be stated at that same time.

3. If, in the interests of speed, the reasons cannot be stated immediately when the order is published, the administrative authority shall give communication of them as soon as possible thereafter.

4. In such a case, articles 3:41 to 3:43 inclusive shall apply *mutatis mutandis*.

Article 3:48

1. The reasons need not be stated if it can reasonably be assumed that there is no need for this.

2. If, however, an interested party asks within a reasonable period to be informed of the reasons, they shall be communicated to him as quickly as possible.

Article 3:49

To state the reasons of an order or part of an order, it is sufficient to refer to an opinion drawn up in this connection if the opinion itself contains the reasons and communication of the opinion has been or is given.

Article 3:50

If the administrative authority makes an order which derogates from an opinion drawn up for this purpose pursuant to a statutory regulation, this fact and the reasons for it shall be stated in the reasons of the order.

CHAPTER 4 SPECIAL PROVISIONS CONCERNING ORDERS

Title 4.1 Administrative decisions

Division 4.1.1 The application

Article 4:1

Unless provided otherwise by statutory regulation, an application for an administrative decision shall be lodged in writing with the administrative authority which is competent to decide on the application.

Article 4:2

1. The application shall be signed and shall contain at least:
(a) the name and the address of the applicant;
(b) the date;
(c) a description of the administrative decision applied for.
2. The applicant shall also supply such information and documents as required for a decision on the application as it is reasonable to expect him to be able to obtain.

Article 4:3

1. The applicant may refuse to supply information and documents in so far as their importance to the decision of the administrative authority is outweighed by the importance of protecting privacy, including the results of medical and psychological examinations, or by the importance of protecting business and manufacturing data.
2. Subsection 1 shall not apply to information and documents designated by statutory regulation as having to be supplied.

Article 4:4

The administrative authority which is competent to decide on the application may specify a form to be used when lodging applications and supplying information, in so far as this is not provided by statutory regulation.

Article 4:5

1. If the applicant has not complied with any requirement made by statutory regulation for the application to be dealt with, or if the information and documents supplied are insufficient to allow the application to be assessed or the administrative decision to be prepared, the administrative authority may decide not to deal with the application, provided the applicant has been given the opportunity to amplify the application within such time limit as set by the administrative authority.

2. If the application, or any of the information or documents pertaining to it, is in a foreign language, and a translation is necessary for the application to be assessed or the administrative decision to be prepared, the administrative authority may decide not to deal with the application, provided the applicant has been given the opportunity to amplify the application by means of a translation within such time limit as set by the administrative authority.

3. If the application, or any of the information or documents pertaining to it, is sizeable or complicated, and a summary is necessary for the application to be assessed or the administrative decision to be prepared, the administrative authority may decide not to deal with the application, provided the applicant has been given the opportunity to amplify the application by means of a summary within such time limit as set by the administrative authority.

4. An order not to process the application shall be notified to the applicant within four weeks of the application being amplified or the time limit set for this purpose expiring without being used.

Article 4:6

1. If a new application is made after an administrative decision has been made rejecting all or part of an application, the applicant shall state any new facts that have emerged or circumstances that have altered.

2. If no new facts or altered circumstances are stated, the administrative authority may, without applying article 4:5, reject the application by referring to its administrative decision rejecting the previous application.

Division 4.1.2 Preparation

Article 4:7

1. Before an administrative authority rejects all or part of an application for an administrative decision, it shall give the applicant the opportunity to state his views, if:

(a) the rejection is based on information about facts and interests relating to the applicant, and

(b) this information differs from information supplied by the applicant himself in the matter.

2. Subsection 1 shall not apply if the difference from the application can be of only minor importance to the applicant.

Article 4:8

1. Before making an administrative decision about which an interested party who has not applied for the administrative decision may be expected to have reservations, an administrative authority shall give that interested party the opportunity to state his views, if:

(a) the administrative decision is based on information about facts and interests relating to the interested party, and

(b) this information was not supplied in the matter by the interested party himself.

2. Subsection 1 shall not apply if the interested party has not complied with a statutory obligation to supply information.

Article 4:9

For the purposes of articles 4:7 and 4:8, the interested party may state his views either in writing or orally.

Article 4:10

If division 3.4 or 3:5 is applied in implementation of articles 4:7 and 4:8, the administrative authority shall inform the applicant and the person to whom the administrative decision will be addressed.

Article 4.11

The administrative authority may refrain from applying articles 4:7 and 4:8 in so far as:

(a) the need for expedition precludes this;

(b) the interested party has already been given the opportunity to state his views in connection with a previous administrative decision, or to another administrative authority, and no new facts or circumstances have occurred since then, or

(c) the purpose of the administrative decision can be achieved only if the interested party is not informed of it beforehand.

Article 4:12

The administrative authority may also refrain from applying articles 4:7 and 4:8 in the case of an administrative decision laying down a financial obligation or claim, if:

(a) an objection may be made or an administrative appeal may be lodged against that administrative decision, and

(b) the adverse consequences may be completely nullified after an objection or administrative appeal.

2. Subsection 1 shall not apply to an administrative decision:

(a) refusing a subsidy under article 4:35 or in accordance with article 4:51;

(b) fixing a subsidy at a lower amount under article 4:46, subsection 2, or

(c) repealing the granting or fixing of a subsidy or altering it to the detriment of the recipient.

Division 4.1.3 Time limit for decisions

Article 4:13

1. An administrative decision shall be made within the time limit prescribed by statutory regulation, or, in the absence of such time limit, within a reasonable period after receiving the application.

2. The reasonable period referred to in subsection 1 shall in any event be deemed to have expired if the administrative authority has not made an administrative decision or given communication as referred to in article 4:14 within eight weeks of receiving the application.

Article 4:14

If, in the absence of a time limit prescribed by statutory regulation, an administrative decision cannot be made within eight weeks, the administrative authority shall inform the applicant, stating a reasonable time limit for the administrative decision to be made.

Article 4:15

The time limit for making an administrative decision shall be suspended with effect from the day on which the administrative authority requests the applicant to amplify the application pursuant to article 4:5 until the day on which the application has been amplified or the time limit set for this purpose expires without being used.

Title 4.2 Subsidies

[…]

Title 4.3 Policy rules Article 4:81

1. An administrative authority may establish policy rules in respect of a power conferred to it, which is exercised under its responsibility or which has been delegated by it.

2. In other cases an administrative authority may establish policy rules only in so far as this is provided by statutory regulation.

Article 4:82

To explain the reasons for an order it shall only be sufficient to refer to a fixed practice in so far as this practice is contained in a policy rule.

Article 4:83

When a policy rule is notified, the statutory regulation on which the power to which the order containing a policy rule relates, is based, shall, if possible, be stated.

Article 4:84

The administrative authority shall act in accordance with the policy rule unless, due to special circumstances, the consequences for one or more interested parties would be out of proportion to the purposes of the policy rule.

CHAPTER 5 ENFORCEMENT

Division 5.2 Supervision of observance

Article 5:11

'Supervisor' means a person who by or pursuant to statutory regulation has been charged with supervising the observance of the provisions made by or pursuant to any statutory regulation.

Article 5:12

1. When performing his duties a supervisor shall carry an identification card issued by the administrative authority under whose responsibility the supervisor works.

2. A supervisor shall immediately produce his identification card on request.

3. The identification card shall contain a photograph of the supervisor and shall in any event state his name and position. The model of the identification card shall be fixed by the Minister of Justice in a regulation.

Article 5:13

A supervisor shall exercise his powers only in so far as this can reasonably be assumed to be necessary for the performance of his duties.

Article 5:14

The powers to which the supervisor is entitled may be limited by statutory regulation or by order of the administrative authority which designates the supervisor as such.

Article 5:15

1. A supervisor, taking with him the requisite equipment, shall be entitled to enter every place, with the exception of a dwelling without the consent of the occupant.

2. If necessary, he may gain entry with the assistance of the police.

3. He shall be entitled to take with him people designated by him for this purpose.

Article 5:16

A supervisor shall be entitled to require the provision of information.

Article 5:17

1. A supervisor shall be entitled to require inspection of business information and documents.

2. He shall be entitled to make copies of the information and documents.

3. If the copies cannot be made on the spot, he shall be entitled to take the information and documents away for this purpose for a short time in exchange for a written receipt issued by him.

Article 5:18

1. A supervisor shall be entitled to inspect and measure goods and take samples of them.

2. He shall be entitled to open packages for this purpose.

3. At the request of the interested party, the supervisor shall, if possible, take a second sample, unless provided otherwise by or pursuant to statutory regulation.

4. If the things cannot be inspected, measured or sampled on the spot, he shall be entitled to take the things away for this purpose for a short time in exchange for a written receipt issued by him.

5. Wherever possible the samples taken shall be returned.

6. The interested party shall, at his request, be informed as quickly as possible of the results of the inspection, measuring or sampling.

Article 5:19

1. A supervisor shall be entitled to inspect means of transport which are subject to his supervision.

2. He shall be entitled to inspect the cargo of means of transport which are reasonably assumed by him to be used for carrying things which are subject to his supervision.

3. He shall be entitled to require the driver of a means of transport to allow him to inspect the documents statutorily required which are subject to his supervision.

4. For the purpose of exercising these powers, he shall be entitled to require the driver of a vehicle or the master of a vessel to stop his means of transport and take it to a place designated by the supervisor.

5. How the demand to stop a vehicle or vessel is to be made shall be decided by the Minister of Justice in a regulation.

Article 5:20

1. Everyone shall be obliged to cooperate fully with a supervisor, who may reasonably demand this in the exercise of his powers, within such reasonable time limit as he may specify.

2. Any person who is bound by a duty of secrecy by virtue of his office or profession or by statutory regulation may refuse to cooperate in so far as his duty of secrecy makes this necessary.

Division 5.3 Enforcement action

Article 5:21

'Enforcement action' means physical acts taken by or on behalf of an administrative authority against what has been or is being done, kept or omitted in breach of obligations laid down by or pursuant to any statutory regulations.

Article 5:22

The power to take enforcement action exists only if it has been granted by or pursuant to act of Parliament.

Article 5:23

This division does not apply if action is taken for the immediate enforcement of public order.

Article 5:24

1. A decision that enforcement action is to be taken shall be in writing. The written decision constitutes an administrative decision.

2. The administrative decision shall state what regulation has been or is being infringed.

3. It shall be notified to the offender, to the persons entitled to the use of the thing in respect of which enforcement action will be taken and to the applicant.

4. The administrative decision shall contain a time limit within which the interested parties may prevent such action by taking measures themselves. The administrative authority shall specify the measures to be taken.

5. No time limit need be granted if speed is of the essence.

6. If the situation is so urgent that the administrative authority cannot put the decision to take enforcement action in writing beforehand, it shall arrange for it to be recorded in writing and notified as quickly as possible thereafter.

Article 5:25

1. An offender shall owe the costs incurred in connection with the taking of enforcement action, unless it would not be reasonable for these costs or all of these costs to be borne by him.

2. The administrative decision shall state that the enforcement action is taken at the expense of the offender.

3. If, however, all or part of the costs will not be charged to the offender this shall be stated in the administrative decision.

4. The costs referred to in subsection 1 shall include the costs connected with the preparation of enforcement action, in so far as these costs are incurred after the date on which the time limit referred to in article 5:24, subsection 4, expires.

5. The costs shall also be owed if the enforcement action is not taken or not taken in its entirety owing to the termination of the illegal situation.

6. The costs referred to in subsection 1 shall also include the costs resulting from the compensation for damage pursuant to article 5:27, subsection 6.

Article 5:26

1. An administrative authority which has taken enforcement action may collect the costs owed pursuant to article 5:25, plus the costs incurred in connection with the collection, from the offender by writ of execution.

2. The writ of execution shall be served by bailiff's communication at the expense of the offender and shall constitute an enforceable title within the meaning of Book 2 of the Code of Civil Procedure.

3. For six weeks after the day of service may be opposed against the writ of execution by writ of summons served on the legal entity to which the administrative authority belongs.

4. The opposition shall have the effect of staying the writ of execution. At the request of the legal entity the court may end the stay of the writ of execution.

Article 5:27

1. In order to implement a decision to take enforcement action, persons designated for this purpose by the administrative authority taking enforcement action shall have access to every place, in so far as this may reasonably be deemed necessary for the performance of their duties.

2. An administrative authority taking enforcement action shall be entitled to issue an authorization as referred in article 2 of the Entry to Premises Act for gaining entry to a dwelling without the consent of the occupant.

3. A place which is not involved in the infringement shall not be entered until the administrative authority taking enforcement action has given the person entitled at least 48 hours' communication in writing.

4. Subsection 3 shall not apply if timely communication is not possible because speed is of the essence. The communication shall then be given as quickly as possible.

5. The communication shall specify the way in which entry will take place.

6. The legal entity to which the administrative authority belongs shall reimburse the damage which is caused by the entry of a place as referred to in subsection 3, in so far as it would not be reasonable for this to be borne by the person entitled, without prejudice to the right to recover this damage from the offender pursuant to article 5:25, subsection 6.

Article 5:28

The power to take enforcement action shall include the power to seal off buildings and sites and anything which may be in or on them.

Article 5:29

1. The power to take enforcement action shall include the removal and storage of goods suitable for this purpose, in so far as the use of enforcement action requires this.

2. If goods have been removed and stored, the administrative authority that has taken enforcement action shall draw up an official report of this and supply a copy to the person who had the goods under his control.

3. The administrative authority shall arrange for custody of the stored goods and shall return such goods to the person lawfully entitled to them.

4. The administrative authority shall be entitled to defer such return until the costs owed pursuant to article 5:25 have been paid. If the person lawfully entitled is not also the offender, the administrative authority shall be entitled to defer the return until the costs of custody have been paid.

Article 5:30

1. An administrative authority which has taken enforcement action shall be entitled, if goods removed and stored pursuant to article 5:29, subsection 1, cannot be returned within thirteen weeks of the removal, to sell the same or, if sale is not possible in its opinion, to transfer the ownership of the goods free of charge to a third party or to have them destroyed.

2. The administrative authority shall have a similar power within the same period if the costs referred to in article 5:25 together with the costs estimated for the sale, transfer of

ownership free of charge or destruction are so high that they are out of proportion to the value of the goods.

3. Sale, transfer of ownership or destruction shall not take place within two weeks of the provision of the copy referred to in article 5:29, subsection 2, unless it relates to a dangerous substance or a substance likely to perish beforehand.

4. For a period of three years after the date of sale, the one who was the owner at that time shall be entitled to the proceeds of the goods less the costs owed pursuant to article 5:25, subsection 1, and the costs of the sale. After the expiry of this period, any net proceeds of the sale shall pass to the legal entity to which the administrative authority belongs.

Article 5:31

A decision to take enforcement action shall not be taken as long as an administrative decision, already taken in respect of the relevant infringement, to impose a duty backed by an astreinte[2] penalty has not been repealed.

Division 5.4 Astreinte

Article 5:32

1. An administrative authority which is entitled to take enforcement action may instead impose on the offender a duty backed by an astreinte.

2. The aim of a duty backed by an astreinte shall be to remedy the infringement or to prevent a further infringement or a repetition of the infringement.

3. The imposition of a duty backed by an astreinte shall not be chosen if this would be contrary to the interest intended to be protected by the regulation that has been infringed.

4. The administrative authority shall fix the astreinte as a lump sum, as a sum payable by unit of time during which a duty is not performed, or as a sum per infringement of the duty. The administrative authority shall also fix a sum above which no further penalty will be forfeited. The fixed amount shall be in reasonable proportion to the importance of the interest that has been infringed and the intended effect of the imposition of the astreinte.

5. An administrative decision imposing a duty backed by a astreinte which is intended to remedy an infringement or prevent a further infringement shall set a time limit within which the offender can perform the duty without the astreinte being forfeited.

Article 5:33

1. Forfeited astreintes shall accrue to the legal entity to which the administrative authority that has fixed the astreinte belongs. The administrative authority may collect the sum concerned plus the costs incurred in connection with the collection, by writ of execution.

2. Article 5:26, subsections 2 to 4 inclusive, shall apply.

Article 5:34

1. The administrative authority which has imposed a duty backed by an astreinte may, at the request of the offender, lift the astreinte, reduce it or stay its operation for a given period if it has become permanently or temporarily impossible for the offender to perform all or part of his obligations.

2. An administrative authority which has imposed a duty backed by an astreinte may, at the request of the offender, lift the astreinte if the decision has been in effect for a year without the astreinte being forfeited.

Article 5:35

1. The power to collect forfeited sums shall be barred by prescription six months after the date on which they are forfeited.

2. The prescription shall be stayed by bankruptcy, application of the arrangement of purgation of debts of natural persons and every statutory impediment to collection of the astreinte.

Article 5:36

A duty backed by an astreinte shall not be imposed as long as a decision relating to the relevant infringement to take enforcement action has not been repealed.

CHAPTER 6 GENERAL PROVISIONS CONCERNING OBJECTIONS AND APPEALS

[…]

CHAPTER 7 SPECIAL PROVISIONS CONCERNING OBJECTIONS AND ADMINISTRATIVE APPEALS

[…]

CHAPTER 8 SPECIAL PROVISIONS CONCERNING APPEALS TO THE DISTRICT COURT

[…]

PART 10 PROVISIONS ON ADMINISTRATIVE AUTHORITIES

Title 10.1 Mandate and Delegation

Division 10.1.1 Mandate

Article 10:1

'Mandate' means the power to make orders in the name of an administrative authority.

Article 10:2

An order made by a mandatary within the limits of his power is deemed to be an order of the mandator.

Article 10:3

1. An administrative authority may grant a mandate unless provided otherwise by statutory regulation or unless the nature of the power is incompatible with the granting of a mandate.

2. A mandate may in any event not be granted if it concerns a power:

(a) to adopt generally binding regulations, unless provision for the granting of a mandate was made when the power was conferred;

(b) to make an order which must be made by a qualified majority or by means of a prescribed procedure which is otherwise incompatible with the granting of a mandate;

(c) to decide on a notice of appeal;

(d) to annul or refrain from approving an order made by another administrative authority.

3. A mandate to rule on an objection shall not be granted to the person who has made the order, pursuant to a mandate, against which the objection is brought.

Article 10:4

1. If the mandatary does not operate under the responsibility of the mandator, the granting of the mandate shall require the consent of the mandatary and, in appropriate cases, the person under whose responsibility he works.

2. Subsection 1 shall not apply if the power to grant the mandate has been conferred by statutory regulation.

Article 10:5

1. An administrative authority may grant a general mandate or a mandate for a specific case.

2. A general mandate shall be granted in writing**.** A mandate for a specific case shall in any event be granted in writing if the mandatary does not work under the responsibility of the mandator.

Article 10:6

1. The mandator may issue directions regarding the exercise of the mandated power either on a case-by-case basis or generally.

2. The mandatary shall provide the mandator at his request with information about the exercise of the power.

Article 10:7

The mandator shall remain competent to exercise the mandated power.

Article 10:8

1. The mandator may repeal the mandate at all times.

2. A general mandate shall be repealed in writing.

Article 10:9

1. The mandator may allow a sub-mandate to be granted.

2. The other provisions of this division shall apply *mutatis mutandis* to a sub- mandate.

Article 10:10

An order made pursuant to a mandate shall state on behalf of which administrative authority it was made**.**

Article 10:11

1. An administrative authority may determine that orders made by it may be signed on its behalf, unless provided otherwise by statutory regulation or unless this would be incompatible with the nature of the power.

2. In such a case the order shall show that it was made by the administrative authority itself.

Article 10:12

This division shall apply *mutatis mutandis* if an administrative authority grants a power of attorney to another person operating under its responsibility, to perform legal acts under private law, or grants an authorization for the performance of acts which constitute neither an order nor a legal act under private law.

Division 10.1.2 Delegation

Article 10:13

'Delegation' means the transfer by an administrative authority of its power to make orders to another one, who assumes responsibility for the exercise of this power.

Article 10:14

Delegation shall not occur to subordinates.

Article 10:15

Delegation may occur only if the power to delegate has been conferred by statutory regulation.

Article 10:16

1. An administrative authority may issue only policy rules concerning the exercise of a delegated power.

2. The one to whom the power has been delegated shall provide the administrative authority at its request with information about the exercise of the power.

Article 10:17

An administrative authority may no longer exercise a delegated power itself.

Article 10:18

An administrative authority may repeal the delegation of a power at any time.

Article 10:19

An order made pursuant to a delegated power shall cite the delegation order and its source..

Article 10:20

1. This division, with the exception of article 10:16, shall apply *mutatis mutandis* to the transfer by an administrative authority to a third party of the power of another administrative authority to make orders.

2. It may be provided by statutory regulation or by the order for transfer that the administrative authority whose power is transferred may issue policy rules concerning the exercise of the power.

3. The one to whom the power is transferred shall, at their request, provide the transferor and the administrative authority originally empowered, with information about the exercise of the power.

Title 10.2 Supervision of administrative authorities

Division 10.2.1 Approval

Article 10:25

In this act 'approval' means the consent of another administrative authority required for the entry into force of an order of an administrative authority.

Article 10:26

Orders may be made subject to approval only in the cases specified by or pursuant to act of Parliament.

Article 10:27

Approval may be withheld only on account of conflict with the law or on another ground contained in the act of Parliament in or pursuant to which the requirement of approval is prescribed.

Article 10:28

Approval of an order on which a district court has given judgment or which implements the final judgment of a district court may not be withheld on legal grounds that conflict with those on which the judgment was based or partly based.

Article 10:29

1. An order may be partially approved only if partial entry into force is compatible with the nature and substance of the order.

2. Approval may not be granted for a determinate period or conditionally, nor may it be repealed.

Article 10:30

1. Approval shall not be granted partially or withheld until after the administrative authority which made the order has been given the opportunity for consultation.

2. The reasons for the order concerning approval shall refer to what has been dealt with in the consultations.

Article 10:31

1. Unless provided otherwise by statutory regulation, the order concerning approval shall be notified to the administrative authority that has made the order requiring approval within thirteen weeks of the date on which it was forwarded for approval.

2. The making of the order concerning approval may be deferred once for a maximum of thirteen weeks.

3. Notwithstanding subsection 2, the making of the order concerning approval may be deferred once for a maximum of six months if the opinion of an adviser as referred to in article 3:5 is required in respect of the approval.

4. Unless provided otherwise by statutory regulation, the approval shall be deemed to have been granted if no order concerning approval or an order for deferment, or, within the period referred to in subsection 1, an order concerning approval has been notified to the administrative authority that has made the order that is subject to approval.

Article 10:32

1. This division shall apply *mutatis mutandis* if the consent of another administrative authority is required for the making of an order by an administrative authority.

2. The consent may specify a time limit within which the order should be made.

Division 10.2.2 Annulment

Article 10:33

This division shall apply if an administrative authority is competent to annul an order of another administrative authority other than in the course of an administrative appeal.

Article 10:34

The power to annul may be granted only by act of Parliament.

Article 10:35

An order may be annulled only on account of conflict with the law or the public interest.

Article 10:36

An order may be annulled partially only if its partial continuation in force would be consistent with the nature and substance of the order.

Article 10:37

An order which forms the subject of a district court judgment or implements the final judgment of a district court may not be annulled on legal grounds that conflict with those on which the judgment was based or partly based.

Article 10:38

1. An order which still requires approval may not be annulled.
2. An order against which an objection may be made or an appeal may be lodged or is pending may not be annulled.

Article 10:39

1. An order for the performance of a legal act under civil law may not be annulled if thirteen weeks have passed since it has been notified.
2. If a stay has been granted in accordance with article 10:43 within the time limit referred to in subsection 1, the order may still be annulled within the period of the stay.
3. If an order as referred to in subsection 1 is subject to approval, the period referred to in subsection 1 shall start after the approval order has been notified. Subsections 1 and 2 shall apply *mutatis mutandis* to the approval order.

Article 10:40

An order which has been stayed in accordance with article 10:43 may no longer be annulled after the stay has ended.

Article 10:41

1. An order shall not be annulled until after the administrative authority which made the order has been given the opportunity for consultation.
2. The reasons for the annulling order shall refer to what has been dealt with in the consultations.

Article 10:42

1. The annulling of an order shall extend to all the legal consequences intended by the order.

2. The annulling order may provide that all or part of the legal consequences of the annulled order will continue to have effect.

3. If an order for the conclusion of an agreement is annulled, the agreement shall, if it has already been entered into and in so far as the annulling order does not provide otherwise, not be executed or continue to be executed, without prejudice to the other party's right to compensation.

Division 10.2.3 Stay

Article 10:43

Pending the investigation whether there are reasons to annul an order, the order may be stayed by the administrative authority competent to annul it.

Article 10:44

1. A staying order shall determine the duration of the stay.
2. The stay of an order may be extended once.
3. The stay may not exceed a year, even after extension.
4. If an objection is made or an appeal is lodged against a stayed order, the stay shall nonetheless continue until thirteen weeks after the final decision on the objection or appeal.
5. The stay may be lifted.

Article 10:45

Articles 10:36, 10:37, 10:38, subsection 1, 10:39, subsections 1 and 3, and 10:42, subsection 3, shall apply *mutatis mutandis* to a staying order.

CHAPTER 11 FINAL PROVISIONS

[…]

III. Questions to the Act

1. Is the Dutch General Administrative Law (GALA) covering the topics you consider as (General) Administrative Law? What is missing? Which parts of the GALA would you not consider Administrative Law?
2. Which rules are codified in your country?
3. If not codified: what is the source (Constitution, Court practice etc.)?
4. What are the consequences of codification? / What are the consequences of having Administrative Law in other forms?
5. (What differences do you see in substance to your country?)

C Public – Private (Lecture 2)

I. General Questions

1. **What do we qualify** (legal sources, governmental entities, activities, contracts etc.)?

2. **What are the criteria for qualification** (legal basis, public interest or mandate, ownership and control, special powers, interests of the parties etc.)?
3. **What are the consequences of a qualification** (procedure and legal remedies, application of administrative or private law, state liability, constitutional restraints etc.)?
4. (To what extent may government act through private entities, by private law contracts etc.?)

II. Department of Transportation et al. v. Association of American Railroads

Read the extract from the decision below and consider what criteria the Supreme Court uses to assess whether Amtrak is private or public. Do you agree with the criteria they used? Would you use other criteria in your country? Further, consider how the separation of powers relates to the assessment of the Supreme Court of whether Amtrak is private or public. Do you agree?

Summary of the facts

In 2008, Congress gave Amtrak (National Railroad Passenger Corporation) and the Federal Railroad Administration (FRA) the authority to issue "metrics and standards". The Association of American Railroads (AAR) argued that allowing a private entity, like Amtrak, to exercise joint authority in the issuance violated the constitution.

(Slip Opinion) OCTOBER TERM, 2014

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

DEPARTMENT OF TRANSPORTATION ET AL .
v. ASSOCIATION OF AMERICAN RAILROADS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13–1080. Argued December 8, 2014—Decided March 9, 2015

In 1970, Congress created the National Railroad Passenger Corporation (Amtrak). Congress has given Amtrak priority to use track systems owned by the freight railroads for passenger rail travel, at rates agreed to by the parties or, in case of a dispute, set by the Surface Transportation Board. And in 2008, Congress gave Amtrak and the Federal Railroad Administration (FRA) joint authority to issue "metrics and standards" addressing the performance and scheduling of passenger railroad services, see §207(a), 122 Stat. 4907, including Amtrak's on-time performance and train delays caused by host railroads. Respondent, the Association of American Railroads, sued petitioners—the Department of Transportation, the FRA, and two officials—claiming that the metrics and standards must be invalidated because it is unconstitutional for Congress to allow and direct a private entity like Amtrak to exercise joint authority in their issuance. Its argument rested on the Fifth Amendment Due Process Clause and the constitutional provisions regarding separation of powers. The District Court rejected respondent's claims, but the District of Columbia Circuit reversed as to the separation of powers claim, reasoning in central part that Amtrak is a private corporation and thus cannot constitutionally be granted regulatory power under §207.

Held: For purposes of determining the validity of the metrics and standards, Amtrak is a governmental entity. Pp. 6–12. (a) In concluding otherwise, the Court of Appeals relied on the statutory command that Amtrak "is not a department, agency, or instrumentality of the United States Government," 49 U. S. C. §24301(a)(3), and the pronouncement that Amtrak "shall be operated and managed as a for profit corporation," §24301(a)(2). But congressional pronouncements are not dispositive of Amtrak's status as a governmental entity for purposes of separation of powers analysis under the Constitution, and an independent inquiry reveals the Court of Appeals' premise that Amtrak is a private entity was flawed. As Amtrak's ownership and corporate structure show, the political branches control most of Amtrak's stock and its Board of Directors, most of whom are appointed by the President, §24302(a)(1), confirmed by the Senate, *ibid.*, and understood by the Executive Branch to be removable by the President at will. The political branches also exercise substantial, statutorily mandated supervision over Amtrak's priorities and operations. See, *e.g.,* §24315. Also of significance, Amtrak is required by statute to pursue broad public objectives, see, *e.g.*, §§24101(b), 24307(a); certain aspects of Amtrak's day-to-day operations are mandated by Congress, see, *e.g.*, §§24101(c)(6), 24902(b); and Amtrak has been dependent on federal financial support during every year of its existence. Given the combination of these unique features and Amtrak's significant ties to the Government, Amtrak is not an autonomous private enterprise. Amtrak was created by the Government, is controlled by the Government, and operates for the Government's benefit. Thus, in jointly issuing the metrics and standards with the FRA, Amtrak acted as a governmental entity for separation of powers purposes. And that exercise of governmental power must be consistent with the Constitution, including those provisions relating to the separation of powers. Pp. 6–10.

(b) Respondent's reliance on congressional statements about Amtrak's status is misplaced. *Lebron* v. *National Railroad Passenger Corp.*, 513 U. S.

374, teaches that, for purposes of Amtrak's status as a federal actor or instrumentality under the Constitution, the practical reality of federal control and supervision prevails over Congress' disclaimer of Amtrak's governmental status. Treating Amtrak as governmental for these purposes, moreover, is not an unbridled grant of authority to an unaccountable actor, for the political branches created Amtrak, control its Board, define its mission, specify many of its day-to-day operations, have imposed substantial transparency and accountability mechanisms, and, for all practical purposes, set and supervise its annual budget. Pp. 10–11.

(c) The Court of Appeals may address in the first instance any properly preserved issues respecting the lawfulness of the metrics and standards that may remain in this case, including questions implicating the Constitution's structural separation of powers and the Appointments Clause. Pp. 11–12.

721 F. 3d 666, vacated and remanded.

Syllabus

C. J., and SCALIA, GINSBURG, BREYER, ALITO, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed a concurring opinion. THOMAS, J., filed an opinion concurring in the judgment.

SUPREME COURT OF THE UNITED STATES

No. 13–1080

DEPARTMENT OF TRANSPORTATION, ET AL ., PETITIONERS *v.* ASSOCIATION OF AMERICAN RAILROADS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[March 9, 2015]

JUSTICE KENNEDY delivered the opinion of the Court.

In 1970, Congress created the National Railroad Passenger Corporation, most often known as Amtrak. Later, Congress granted Amtrak and the Federal Railroad Administration (FRA) joint authority to issue "metrics and standards" that address the performance and scheduling of passenger railroad services. Alleging that the metrics and standards have substantial and adverse effects upon its members' freight services, respondent—the Association of American

Railroads—filed this suit to challenge their validity. The defendants below, petitioners here, are the Department of Transportation, the FRA, and two individuals sued in their official capacity.

Respondent alleges the metrics and standards must be invalidated on the ground that Amtrak is a private entity and it was therefore unconstitutional for Congress to allow and direct it to exercise joint authority in their issuance. This argument rests on the Fifth Amendment Due Process Clause and the constitutional provisions regarding separation of powers. The District Court rejected both of respondent's claims. The Court of Appeals for the District of Columbia Circuit reversed, finding that, for purposes of this dispute, Amtrak is a private entity and that Congress violated nondelegation principles in its grant of joint authority to Amtrak and the FRA. On that premise the Court of Appeals invalidated the metrics and standards.

Having granted the petition for writ of certiorari, 573 U. S. ___ (2014), this Court now holds that, for purposes of determining the validity of the metrics and standards, Amtrak is a governmental entity. Although Amtrak's actions here were governmental, substantial questions respecting the lawfulness of the metrics and standards— including questions implicating the Constitution's structural separation of powers and the Appointments Clause, U. S. Const., Art. II, §2, cl. 2—may still remain in the case. As those matters have not yet been passed upon by the Court of Appeals, this case is remanded.

I

A

Amtrak is a corporation established and authorized by a detailed federal statute enacted by Congress for no less a purpose than to preserve passenger services and routes on our Nation's railroads. See *Lebron* v. *National Railroad Passenger Corporation*, 513 U. S. 374, 383–384 (1995);

National Railroad Passenger Corporation v. *Atchison, T. & S. F. R. Co.*, 470 U. S. 451, 453–457 (1985); see also Rail Passenger Service Act of 1970, 84 Stat. 1328. Congress recognized that Amtrak, of necessity, must rely for most of its operations on track systems owned by the freight railroads. So, as a condition of relief from their commoncarrier duties, Congress required freight railroads to allow Amtrak to use their tracks and facilities at rates agreed to by the parties—or in the event of disagreement to be set by the Interstate Commerce Commission (ICC). See 45 U. S. C. §§561, 562 (1970 ed.). The Surface Transportation Board (STB) now occupies the dispute-resolution role originally assigned to the ICC. See 49 U. S. C. §24308(a) (2012 ed.). Since 1973, Amtrak has received a statutory preference over freight transportation in using rail lines, junctions, and crossings. See §24308(c).

The metrics and standards at issue here are the result of a further and more recent enactment. Concerned by poor service, unreliability, and delays resulting from freight traffic congestion, Congress passed the Passenger Rail Investment and Improvement Act (PRIIA) in 2008. See 122 Stat. 4907. Section 207(a) of the PRIIA provides for the creation of the metrics and standards:

"Within 180 days after the date of enactment of this Act, the Federal Railroad Administration and Amtrak shall jointly, in consultation with the Surface Transportation Board, rail carriers over whose rail lines Amtrak trains operate, States, Amtrak employees, nonprofit employee organizations representing Amtrak employees, and groups representing Amtrak passengers, as appropriate, develop new or improve existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations, including cost recovery, on-time performance and minutes of delay, ridership, on-board

services, stations, facilities, equipment, and other services." *Id.,* at 4916.

Section 207(d) of the PRIIA further provides:

"If the development of the metrics and standards is not completed within the 180-day period required by subsection (a), any party involved in the development of those standards may petition the Surface Transportation Board to appoint an arbitrator to assist the parties in resolving their disputes through binding arbitration." *Id.,* at 4917.

The PRIIA specifies that the metrics and standards created under §207(a) are to be used for a variety of purposes. Section 207(b) requires the FRA to "publish a quarterly report on the performance and service quality of intercity passenger train operations" addressing the specific elements to be measured by the metrics and standards. *Id.,* at 4916–4917. Section 207(c) provides that, "[t]o the extent practicable, Amtrak and its host rail carriers shall incorporate the metrics and standards developed under subsection (a) into their access and service agreements." *Id.,* at 4917. And §222(a) obliges Amtrak, within one year after the metrics and standards are established, to "develop and implement a plan to improve on-board service pursuant to the metrics and standards for such service developed under [§207(a)]." *Id.,* at 4932.

Under §213(a) of the PRIIA, the metrics and standards also may play a role in prompting investigations by the STB and in subsequent enforcement actions. For instance, "[i]f the on-time performance of any intercity passenger train averages less than 80 percent for any 2 consecutive calendar quarters," the STB may initiate an investigation "to determine whether and to what extent delays . . . are due to causes that could reasonably be addressed . . . by Amtrak or other intercity passenger rail operators." *Id.,* at 4925–4926. While conducting an investigation under §213(a), the STB

"has authority to review the accuracy of the train performance data and the extent to which scheduling and congestion contribute to delays" and shall "obtain information from all parties involved and identify reasonable measures and make recommendations to improve the service, quality, and on-time performance of the train." *Id.,* at 4926. Following an investigation, the STB may award damages if it "determines that delays or failures to achieve minimum standards . . . are attributable to a rail carrier's failure to provide preference to Amtrak over freight transportation." *Ibid.* The STB is further empowered to "order the host rail carrier to remit" damages "to Amtrak or to an entity for which Amtrak operates intercity passenger rail service." *Ibid.*

B

In March 2009, Amtrak and the FRA published a notice in the Federal Register inviting comments on a draft version of the metrics and standards. App. 75–76. The final version of the metrics and standards was issued jointly by Amtrak and the FRA in May 2010. *Id.,* at 129– 144. The metrics and standards address, among other matters, Amtrak's financial performance, its scores on consumer satisfaction surveys, and the percentage of passenger-trips to and from underserved communities. Of most importance for this case, the metrics and standards also address Amtrak's on-time performance and train delays caused by host railroads. The standards associated with the on-time performance metrics require on-time performance by Amtrak trains at least 80% to 95% of the time for each route, depending on the route and year. *Id.,* at 133–135. With respect to "host-responsible delays"— that is to say, delays attributed to the railroads along which Amtrak trains travel—the metrics and standards provide that "[d]elays must not be more than 900 minutes per 10,000 Train-Miles." *Id.,* at 138. Amtrak conductors determine responsibility for particular delays.

Ibid., n. 23. In the District Court for the District of Columbia, respondent alleged injury to its members from being required to modify their rail operations, which mostly involve freight traffic, to satisfy the metrics and standards. Respondent claimed that §207 "violates the nondelegation doctrine and the separation of powers principle by placing legislative and rulemaking authority in the hands of a private entity [Amtrak] that participates in the very industry it is supposed to regulate." *Id.,* at 176–177, Complaint ¶51. Respondent also asserted that §207 violates the Fifth Amendment Due Process Clause by "[v]esting the coercive power of the government" in Amtrak, an "interested private part[y]." *Id.,* at 177, ¶¶53–54. In its prayer for relief respondent sought, among other remedies, a declaration of §207's unconstitutionality and invalidation of the metrics and standards. *Id.,* at 177.

The District Court granted summary judgment to petitioners on both claims. See 865 F. Supp. 2d 22 (DC 2012). Without deciding whether Amtrak must be deemed private or governmental, it rejected respondent's nondelegation argument on the ground that the FRA, the STB, and the political branches exercised sufficient control over promulgation and enforcement of the metrics and standards so that §207 is constitutional. See *id.,* at 35. The Court of Appeals for the District of Columbia Circuit reversed the judgment of the District Court as to the nondelegation and separation of powers claim, reasoning in central part that because "Amtrak is a private corporation with respect to Congress's power to delegate . . . authority," it cannot constitutionally be granted the "regulatory power prescribed in §207." 721 F. 3d 666, 677 (2013). The Court of Appeals did not reach respondent's due process claim. See *ibid.*

II

In holding that Congress may not delegate to Amtrak the joint authority to issue the metrics and standards—

authority it described as "regulatory power," *ibid.*—the Court of Appeals concluded Amtrak is a private entity for purposes of determining its status when considering the constitutionality of its actions in the instant dispute. That court's analysis treated as controlling Congress' statutory command that Amtrak " 'is not a department, agency, or instrumentality of the United States Government.'" *Id.,* at 675 (quoting 49 U. S. C. §24301(a)(3)). The Court of Appeals also relied on Congress' pronouncement that Amtrak "'shall be operated and managed as a for-profit corporation.'" 721 F. 3d, at 675 (quoting §24301(a)(2)); see also *id.,* at 677 ("Though the federal government's involvement in Amtrak is considerable, Congress has both designated it a private corporation and instructed that it be managed so as to maximize profit. In deciding Amtrak's status for purposes of congressional delegations, these declarations are dispositive"). Proceeding from this premise, the Court of Appeals concluded it was impermissible for Congress to "delegate regulatory authority to a private entity." *Id.,* at 670; see also *ibid.* (holding *Carter* v. *Carter Coal Co.*, 298 U. S. 238 (1936), prohibits any such delegation of authority).

That premise, however, was erroneous. Congressional pronouncements, though instructive as to matters within Congress' authority to address, see, *e.g., United States ex rel. Totten* v. *Bombardier Corp.*, 380 F. 3d 488, 491–492 (CADC 2004) (Roberts, J.), are not dispositive of Amtrak's status as a governmental entity for purposes of separation of powers analysis under the Constitution. And an independent inquiry into Amtrak's status under the Constitution reveals the Court of Appeals' premise was flawed.

It is appropriate to begin the analysis with Amtrak's ownership and corporate structure. The Secretary of Transportation holds all of Amtrak's preferred stock and most of its common stock. Amtrak's Board of Directors is composed

of nine members, one of whom is the Secretary of Transportation. Seven other Board members are appointed by the President and confirmed by the Senate. 49 U. S. C. §24302(a)(1). These eight Board members, in turn, select Amtrak's president. §24302(a)(1)(B); §24303(a). Amtrak's Board members are subject to salary limits set by Congress, §24303(b); and the Executive Branch has concluded that all appointed Board members are removable by the President without cause, see 27 Op. Atty. Gen. 163 (2003).

Under further statutory provisions, Amtrak's Board members must possess certain qualifications. Congress has directed that the President make appointments based on an individual's prior experience in the transportation industry, §24302(a)(1)(C), and has provided that not more than five of the seven appointed Board members be from the same political party, §24302(a)(3). In selecting Amtrak's Board members, moreover, the President must consult with leaders of both parties in both Houses of Congress in order to "provide adequate and balanced representation of the major geographic regions of the United States served by Amtrak." §24302(a)(2).

In addition to controlling Amtrak's stock and Board of Directors the political branches exercise substantial, statutorily mandated supervision over Amtrak's priorities and operations. Amtrak must submit numerous annual reports to Congress and the President, detailing such information as route-specific ridership and on-time performance. §24315. The Freedom of Information Act applies to Amtrak in any year in which it receives a federal subsidy, 5 U. S. C. §552, which thus far has been every year of its existence. Pursuant to its status under the Inspector General Act of 1978 as a " 'designated Federal entity,'" 5 U. S. C. App. §8G(a)(2), p. 521, Amtrak must maintain an inspector general, much like governmental agencies such as the Federal Communications Commission and the Securities and Exchange

Commission. Furthermore, Congress conducts frequent oversight hearings into Amtrak's budget, routes, and prices. See, *e.g.,* Hearing on Reviewing Alternatives to Amtrak's Annual Losses in Food and Beverage Service before the Subcommittee on Government Operations of the House Committee on Oversight and Government Reform, 113th Cong., 1st Sess., 5 (2013) (statement of Thomas J. Hall, chief of customer service, Amtrak); Hearing on Amtrak's Fiscal Year 2014 Budget: The Starting Point for Reauthorization before the Subcommittee on Railroads, Pipelines, and Hazardous Materials of the House Committee on Transportation and Infrastructure, 113th Cong., 1st Sess., p. 6 (2013) (statement of Joseph H. Boardman, president and chief executive officer, Amtrak).

It is significant that, rather than advancing its own private economic interests, Amtrak is required to pursue numerous, additional goals defined by statute. To take a few examples: Amtrak must "provide efficient and effective intercity passenger rail mobility," 49 U. S. C. §24101(b); "minimize Government subsidies," §24101(d); provide reduced fares to the disabled and elderly, §24307(a); and ensure mobility in times of national disaster, §24101(c)(9).

In addition to directing Amtrak to serve these broad public objectives, Congress has mandated certain aspects of Amtrak's day-to-day operations. Amtrak must maintain a route between Louisiana and Florida. §24101(c)(6). When making improvements to the Northeast corridor, Amtrak must apply seven considerations in a specified order of priority. §24902(b). And when Amtrak purchases materials worth more than $1 million, these materials must be mined or produced in the United States, or manufactured substantially from components that are mined, produced, or manufactured in the United States, unless the Secretary of Transportation grants an exemption. §24305(f).

Finally, Amtrak is also dependent on federal financial support. In its first 43 years of operation, Amtrak has received more than $41 billion in federal subsidies. In recent years these subsidies have exceeded $1 billion annually. See Brief for Petitioners 5, and n. 2, 46.

Given the combination of these unique features and its significant ties to the Government, Amtrak is not an autonomous private enterprise. Among other important considerations, its priorities, operations, and decisions are extensively supervised and substantially funded by the political branches. A majority of its Board is appointed by the President and confirmed by the Senate and is understood by the Executive to be removable by the President at will. Amtrak was created by the Government, is controlled by the Government, and operates for the Government's benefit. Thus, in its joint issuance of the metrics and standards with the FRA, Amtrak acted as a governmental entity for purposes of the Constitution's separation of powers provisions. And that exercise of governmental power must be consistent with the design and requirements of the Constitution, including those provisions relating to the separation of powers.

Respondent urges that Amtrak cannot be deemed a governmental entity in this respect. Like the Court of Appeals, it relies principally on the statutory directives that Amtrak "shall be operated and managed as a for profit corporation" and "is not a department, agency, or instrumentality of the United States Government." §§24301(a)(2)–(3). In light of that statutory language, respondent asserts, Amtrak cannot exercise the joint authority entrusted to it and the FRA by §207(a). On that point this Court's decision in *Lebron* v. *National Railroad Passenger Corp.*, 513 U. S. 374 (1995), provides necessary instruction. In *Lebron*, Amtrak prohibited an artist from installing a politically controversial display in New York City's Penn Station. The artist

sued Amtrak, alleging a violation of his First Amendment rights. In response Amtrak asserted that it was not a governmental entity, explaining that "its charter's disclaimer of agency status prevent[ed] it from being considered a Government entity." *Id.,* at 392. The Court rejected this contention, holding "it is not for Congress to make the final determination of Amtrak's status as a Government entity for purposes of determining the constitutional rights of citizens affected by its actions." *Ibid.* To hold otherwise would allow the Government "to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form." *Id.,* at 397. Noting that Amtrak "is established and organized under federal law for the very purpose of pursuing federal governmental objectives, under the direction and control of federal governmental appointees," *id.,* at 398, and that the Government exerts its control over Amtrak "not as a creditor but as a policymaker," the Court held Amtrak "is an agency or instrumentality of the United States for the purpose of individual rights guaranteed against the Government by the Constitution." *Id.,* at 394, 399.

Lebron teaches that, for purposes of Amtrak's status as a federal actor or instrumentality under the Constitution, the practical reality of federal control and supervision prevails over Congress' disclaimer of Amtrak's governmental status. *Lebron* involved a First Amendment question, while in this case the challenge is to Amtrak's joint authority to issue the metrics and standards. But "[t]he structural principles secured by the separation of powers protect the individual as well." *Bond* v. *United States*, 564 U. S. ___, ___ (2011) (slip op., at 10). Treating Amtrak as governmental for these purposes, moreover, is not an unbridled grant of authority to an unaccountable actor. The political branches created Amtrak, control its Board, define its mission, specify many of its day-to-day operations, have

imposed substantial transparency and accountability mechanisms, and, for all practical purposes, set and supervise its annual budget. Accordingly, the Court holds that Amtrak is a governmental entity, not a private one, for purposes of determining the constitutional issues presented in this case.

III

Because the Court of Appeals' decision was based on the flawed premise that Amtrak should be treated as a private entity, that opinion is now vacated. On remand, the Court of Appeals, after identifying the issues that are properly preserved and before it, will then have the instruction of the analysis set forth here. Respondent argues that the selection of Amtrak's president, who is appointed "not by the President . . . but by the other eight Board Members," "call[s] into question Amtrak's structure under the Appointments Clause," Brief for Respondent 42; that §207(d)'s arbitrator provision "is a plain violation of the nondelegation principle" and the Appointments Clause requiring invalidation of §207(a), *id.,* at 26; and that Congress violated the Due Process Clause by "giv[ing] a federally chartered, nominally private, for-profit corporation regulatory authority over its own industry," *id.,* at 43. Petitioners, in turn, contend that "the metrics and standards do not reflect the exercise of 'rulemaking' authority or permit Amtrak to 'regulate other private entities,'" and thus do not raise nondelegation concerns. Reply Brief 5 (internal citation omitted). Because "[o]urs is a court of final review and not first view," *Zivotofsky* v. *Clinton*, 566 U. S. ___, ___ (2012) (slip op., at 12) (internal quotation marks omitted), those issues—to the extent they are properly before the Court of Appeals—should be addressed in the first instance on remand.

The judgment of the Court of Appeals for the District of Columbia Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 13–1080

DEPARTMENT OF TRANSPORTATION, ET AL ., PETITIONERS *v.* ASSOCIATION OF AMERICAN RAILROADS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[March 9, 2015]

JUSTICE ALITO, concurring.

[…]

I

This case, on its face, may seem to involve technical issues, but in discussing trains, tracks, metrics, and standards, a vital constitutional principle must not be forgotten: Liberty requires accountability.

When citizens cannot readily identify the source of legislation or regulation that affects their lives, Government officials can wield power without owning up to the consequences. One way the Government can regulate without accountability is by passing off a Government operation as an independent private concern. Given this incentive to regulate without saying so, everyone should pay close attention when Congress "sponsor[s] corporations that it specifically designate[s] *not* to be agencies or establishments of the United States Government." *Lebron* v. *National Railroad Passenger Corporation*, 513 U. S. 374, 390 (1995).

Recognition that Amtrak is part of the Federal Government raises a host of constitutional questions.

[…]

III

I turn next to the Passenger Rail Investment and Improvement Act of 2008's (PRIIA) arbitration provision. 122 Stat. 4907. Section 207(a) of the PRIIA provides that "the Federal Railroad Administration [(FRA)] and Amtrak shall jointly . . . develop new or improve existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations." *Id.,* at 4916. In addition, §207(c) commands that "[t]o the extent practicable, Amtrak and its host rail carriers shall incorporate [those] metrics and standards . . . into their access and service agreements." Under §213(a) of the PRIIA, moreover, "the metrics and standards also may play a role in prompting investigations by the [Surface Transportation Board (STB)] and in subsequent enforcement actions." *Ante*, at 4.

This scheme is obviously regulatory. Section 207 provides that Amtrak and the FRA "shall jointly" create new standards, cf. *e.g.,* 12 U. S. C. §1831m(g)(4)(B) ("The appropriate Federal banking agencies shall jointly issue rules of practice to implement this paragraph"), and that Amtrak and *private rail carriers* "shall incorporate" those standards into their agreements whenever "practicable," cf. *e.g., BP America Production Co.* v. *Burton*, 549 U. S. 84, 88 (2006) (characterizing a command to "'audit and recon cile, to the extent practicable, all current and past lease accounts'" as creating "duties" for the Secretary of the Interior (quoting 30 U. S. C. §1711(c)(1))). The fact that private rail carriers sometimes may be required by federal law to include the metrics and standards in their contracts by itself makes this a regulatory scheme.

"As is often the case in administrative law," moreover, "the metrics and standards lend definite regulatory force to an otherwise broad statutory mandate." 721 F. 3d 666, 672 (CADC 2013). Here, though the nexus between regulation, statutory mandate, and penalty is not direct (for, as the Government explains, there is a pre-existing requirement that railroads give preference to Amtrak, see Brief for Petitioners 31–32 (citing 49 U. S. C. §§24308(c), (f)), the metrics and standards inherently have a "coercive effect," *Bennett* v. *Spear*, 520 U. S. 154, 169 (1997), on private conduct. Even the United States concedes, with understatement, that there is "perhaps some incentivizing effect associated with the metrics and standards." Brief for Petitioners 30. Because obedience to the metrics and standards materially reduces the risk of liability, railroads face powerful incentives to obey. See *Bennett*, *supra,* at 169–171. That is regulatory power.

The language from §207 quoted thus far should raise red flags. In one statute, Congress says Amtrak is not an "agency." 49 U. S. C. §24301(a)(3). But then Congress commands Amtrak to act like an agency, with effects on private rail carriers. No wonder the D. C. Circuit ruled as it did.

[…]

When it comes to private entities, however, there is not even a fig leaf of constitutional justification. Private entities are not vested with "legislative Powers." Art. I, §1. Nor are they vested with the "executive Power," Art. II, §1, cl. 1, which belongs to the President. Indeed, it raises "[d]ifficult and fundamental questions" about "the delegation of Executive power" when Congress authorizes citizen suits. *Friends of the Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U. S. 167, 197 (2000) (KENNEDY, J.,

concurring). A citizen suit to enforce existing law, however, is nothing compared to delegated power to create new law. By any measure, handing off regulatory power to a private entity is "legislative delegation in its most obnoxious form." *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 311 (1936).

For these reasons, it is hard to imagine how delegating "binding" tie-breaking authority to a private arbitrator to resolve a dispute between Amtrak and the FRA could be constitutional. No private arbitrator can promulgate binding metrics and standards for the railroad industry. Thus, if the term "arbitrator" refers to a private arbitrator, or even the *possibility* of a private arbitrator, the Constitution is violated. See 721 F. 3d, at 674 ("[T]hat the recipients of illicitly delegated authority opted not to make use of it is no antidote. It is *Congress's* decision to delegate that is unconstitutional" (citing *Whitman*, *supra,* at 473)). As I read the Government's briefing, it does not dispute any of this (other than my characterization of the PRIIA as regulatory, which it surely is). Rather than trying to defend a private arbitrator, the Government argues that the Court, for reasons of constitutional avoidance, should read the word "arbitrator" to mean "public arbitrator." The Government's argument, however, lurches into a new problem: Constitutional avoidance works only if the statute is susceptible to an alternative reading and that such an alternative reading would itself be constitutional.

Here, the Government's argument that the word "arbitrator" does not mean "private arbitrator" is in some tension with the ordinary meaning of the word. Although Government arbitrators are not unheard of, we usually think of arbitration as a form of "private dispute resolution." See, *e.g., Stolt-Nielsen S. A.* v. *AnimalFeeds Int'l Corp.*, 559 U. S. 662, 685 (2010).

Likewise, the appointment of a public arbitrator here would raise serious questions under the Appointments Clause. Unless an "inferior Office[r]" is at issue, Article II of the Constitution demands that the President appoint all "Officers of the United States" with the Senate's advice and consent. Art. II, §2, cl. 2. This provision ensures that those who exercise the power of the United States are accountable to the President, who himself is accountable to the people. See *Free Enterprise Fund*, 561 U. S., at 497–498 (citing The Federalist No. 72, p. 487 (J. Cooke ed.
1961) (A. Hamilton)). The Court has held that someone "who exercis[es] significant authority pursuant to the laws of the United States" is an "Officer," *Buckley* v. *Valeo*, 424 U. S. 1, 126 (1976) (*per curiam*), and further that an officer who acts without supervision must be a principal officer, see *Edmond* v. *United States*, 520 U. S. 651, 663 (1997) ("[W]e think it evident that 'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate"). While some officers may be principal even if they have a supervisor, it is common ground that an officer without a supervisor must be principal. See *id.,* at 667 (Souter, J., concurring in part and concurring in judgment).

Here, even under the Government's public-arbitrator theory, it looks like the arbitrator would be making law without supervision—again, it is "binding arbitration." Nothing suggests that those words mean anything other than what they say. This means that an arbitrator could set the metrics and standards that "shall" become part of a private railroad's contracts with Amtrak whenever "practicable." As to that "binding" decision, who is the supervisor? Inferior officers can do many things, but nothing final should appear in the Federal Register unless a Presidential appointee has at least signed off on it. See 75 Fed. Reg. 26839 (2010)

(placing the metrics and standards in the Federal Register); *Edmond*, *supra*, at 665.

[…]

In sum, while I entirely agree with the Court that Amtrak must be regarded as a federal actor for constitutional purposes, it does not by any means necessarily follow that the present structure of Amtrak is consistent with the Constitution. The constitutional issues that I have outlined (and perhaps others) all flow from the fact that no matter what Congress may call Amtrak, the Constitution cannot be disregarded.

SUPREME COURT OF THE UNITED STATES

No. 13–1080

DEPARTMENT OF TRANSPORTATION, ET AL ., PETITIONERS *v.* ASSOCIATION OF AMERICAN RAILROADS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[March 9, 2015]

JUSTICE THOMAS, concurring in the judgment.

[…]

A

Until the case arrived in this Court, the parties proceeded on the assumption that Amtrak is a private entity, albeit one subject to an unusual degree of governmental control.[1] The

[1] See Brief for Appellees in No. 12–5204 (DC), pp. 23–29 (defending §207 under cases upholding statutes "assign[ing] an important role to a private party"); *id.,* at 29 ("Amtrak . . . is not a private entity compar- able to the [private parties

Court of Appeals agreed. 721 F. 3d 666, 674–677 (CADC 2013). Because it also concluded that

Congress delegated regulatory power to Amtrak, *id.,* at 670–674, and because this Court has held that delegations of regulatory power to private parties are impermissible, *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 311 (1936), it held the delegation to be unconstitutional, 721 F. 3d, at 677.

Although no provision of the Constitution expressly forbids the exercise of governmental power by a private entity, our so-called "private nondelegation doctrine" flows logically from the three Vesting Clauses. Because a private entity is neither Congress, nor the President or one of his agents, nor the Supreme Court or an inferior court established by Congress, the Vesting Clauses would categorically preclude it from exercising the legislative, executive, or judicial powers of the Federal Government. In short, the "private nondelegation doctrine" is merely one application of the provisions of the Constitution that forbid Congress to allocate power to an ineligible entity, whether governmental or private.

For this reason, a conclusion that Amtrak is private – that is, not part of the Government at all – would necessarily mean that it cannot exercise these three categories of governmental power. But the converse is not true: A determination that Amtrak acts as a governmental entity in crafting the metrics and standards says nothing about whether it properly exercises governmental power when it does so. An entity that "was created by the Government, is controlled by the Government, and operates for the Government's benefit," ante, at 10 (majority opinion), but that is not properly constituted to exercise a power under one of the Vesting Clauses, is no better qualified to be a delegatee of that power than is a purely private one. To its credit, the

in a relevant precedent]. Although the government does not control Amtrak's day-to-day operations, the government exercises significant structural control").

majority does not hold otherwise. It merely refutes the Court of Appeals' premise that Amtrak is private. But this answer could be read to suggest, wrongly, that our conclusion about Amtrak's status has some constitutional significance for "delegation" purposes.

[…]

In this case, Congress has permitted a corporation subject only to limited control by the President to create legally binding rules. These rules give content to private railroads' statutory duty to share their private infrastructure with Amtrak. This arrangement raises serious constitutional questions to which the majority's holding that Amtrak is a governmental entity is all but a non sequitur. These concerns merit close consideration by the courts below and by this Court if the case reaches us again. We have too long abrogated our duty to enforce the separation of powers required by our Constitution. We have overseen and sanctioned the growth of an administrative system that concentrates the power to make laws and the power to enforce them in the hands of a vast and unaccountable administrative apparatus that finds no comfortable home in our constitutional structure. The end result may be trains that run on time (although I doubt it), but the cost is to our Constitution and the individual liberty it protects.

III. Questions to the Decision

1. Which criteria did the Supreme Court use to assess whether Amtrak is private or public?
2. Do you agree with the criteria they used?
3. What other criteria could also have been used? Would you use other criteria in your country?
4. How does the separation of powers relate to the assessment of the Supreme Court of whether Amtrak is private or public?

5. Do you know of other constitutional principles that have different consequences depending on whether something is private or public law?

IV. Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail

Read the extract from the decision and ask yourself what was decisive for the Supreme Court to qualify Queensland Rail. What significance did the court attach to the asserted "intention of the Parliament" or the labelling "is not a body corporate"? Do you agree with the argumentation? What role did profit play in the assessment?

Summary of the facts

In 2013, the Queensland Rail Transit Authority Act 2013 (Qld) established Queensland Rail Ltd to not be by the Fair Work Act (as was previously the case) but rather by the Industrial Relations Act 1999 on the basis that Queensland Rail wasn't a "body corporate". The unions with which Queensland Rail had concluded industrial relations agreements argued that it was in fact a constitutional corporation and that their relations should still be regulated by the Fair Work Act.

HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, KIEFEL, BELL, GAGELER, KEANE AND NETTLE JJ

COMMUNICATIONS, ELECTRICAL,
ELECTRONIC, ENERGY, INFORMATION,
POSTAL, PLUMBING AND ALLIED SERVICES
UNION OF AUSTRALIA & ORS PLAINTIFFS

AND

QUEENSLAND RAIL & ANOR DEFENDANTS

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail
[2015] HCA 11
8 April 2015

B63/2013

ORDER

The questions asked by the parties in the special case dated 6 August 2014 and referred for consideration by the Full Court be answered as follows:

Question 1

Is the first defendant (Queensland Rail) a corporation within the meaning of s 51(xx) of the Commonwealth Constitution?

Answer

It is unnecessary to answer this question.

Question 2

If so, is Queensland Rail a trading corporation within the meaning of s 51(xx) of the Commonwealth Constitution?

Answer

Yes.

Question 3

If so, does the Fair Work Act *2009 (Cth) apply to Queensland Rail and its employees by the operation of s 109 of the Constitution, to the exclusion of the [*Queensland Rail Transit Authority Act *2013 (Q)] or the* Industrial Relations Act *1999 (Q) or both?*

Answer

Except to say that the Fair Work Act *2009 (Cth) applies to Queensland Rail as a "national system employer" for the purposes of that Act and that*

(a) *ss 69, 72 and 73 of the* Queensland Rail Transit Authority Act *2013 (Q) and*

(b) *ss 691A-691D of the* Industrial Relations Act *1999 (Q)*

are to that extent inconsistent with the Fair Work Act *2009 (Cth) and invalid in so far as they apply to Queensland Rail or its employees or the QR Passenger Pty Limited Traincrew Union Collective Workplace Agreement 2009 and Queensland Rail Rollingstock and Operations Enterprise Agreement 2011, it is not necessary to answer this question.*

Question 4

What relief, if any, are the plaintiffs entitled to?

Answer

Questions of relief should be determined by a single Justice.

Question 5

Who should pay the costs of the special case?

Answer

The first defendant.

Representation

J K Kirk SC with H El-Hage for the plaintiffs (instructed by Hall Payne Lawyers)

P J Dunning QC, Solicitor-General of the State of Queensland with S E Brown QC and G J D Del Villar for the first defendant (instructed by Crown Law (Qld))

Submitting appearance for the second defendant

Interveners

J T Gleeson SC, Solicitor-General of the Commonwealth with K E Foley for the Attorney-General of the Commonwealth, intervening (instructed by Australian Government Solicitor)

M G Sexton SC, Solicitor-General for the State of New South Wales with J E Davidson for the Attorney-General for the State of New South Wales, intervening (instructed by Crown Solicitor (NSW))

S G E McLeish SC, Solicitor-General for the State of Victoria with G A Hill for the Attorney-General for the State of Victoria, intervening (instructed by Victorian Government Solicitor)

G R Donaldson SC, Solicitor-General for the State of Western Australia with R Young for the Attorney-General for the State of Western Australia, intervening (instructed by State Solicitor (WA))

M G Evans QC with C Jacobi for the Attorney-General for the State of South Australia, intervening (instructed by Crown Solicitor (SA))

CATCHWORDS

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail

Constitutional law – Constitution, s 51(xx) – "[T]rading or financial corporations formed within the limits of the Commonwealth" – *Queensland Rail Transit Authority Act* 2013 (Q) established right and duty bearing entity which "is not a body corporate" – Functions of entity included provision of labour hire services – Functions to be carried out as a commercial enterprise – Whether entity a trading corporation formed within the limits of the Commonwealth.

Words and phrases – "is not a body corporate", "trading corporation".

Constitution, s 51(xx).
Queensland Rail Transit Authority Act 2013 (Q), s 6.

FRENCH CJ, HAYNE, KIEFEL, BELL, KEANE AND NETTLE JJ.

The issue

1 The *Queensland Rail Transit Authority Act* 2013 (Q) ("the QRTA Act") established[2] the Queensland Rail Transit Authority ("the Authority"). The Authority is now called[3] Queensland Rail. The Authority can create and be made subject to legal rights and duties, which are its rights and its duties[4]. It can sue and be sued in its name[5]. It can own property[6].

2 The QRTA Act provides[7] that the Authority "is not a body corporate". The QRTA Act provides[8] that the Authority does not represent the State, and it follows from this provision, coupled with the provisions which give the Authority separate legal personality, that the Authority is not, and is not a part of, the body politic which is the State of Queensland[9].

3 The Authority operates as a labour hire company, providing labour used by Queensland Rail Limited ("QRL") to operate railway services in Queensland. QRL is a company governed by the *Corporations Act* 2001 (Cth). Pursuant to s 67 of the QRTA Act, the Authority holds all the shares in QRL.

4 Is the Authority a "trading or financial corporation formed within the limits of the Commonwealth" within the meaning of s 51(xx) of the Constitution? If it is, the relations between the Authority and its employees are governed by federal industrial relations legislation. If it is not, State industrial relations legislation applies.

5 The Authority accepts that it is an artificial legal entity formed within the limits of the Commonwealth. It submits that it is not a trading or financial corporation. Rather, it submits, it is an entity which is not a "corporation" and which is not a "trading or financial" corporation. These submissions should be rejected. The Authority is a trading or financial corporation within the meaning of s 51(xx).

The litigation

6 The plaintiffs are all associations or organisations of employees. Some are registered under the *Fair Work (Registered Organisations) Act* 2009 (Cth); some are registered under the

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2 s 6(1).
3 s 63.
4 s 7.
5 s 7(4).
6 s 7(1)(b).
7 s 6(2).
8 s 6(3).
9 No party or intervener, other than the Attorney-General for Victoria, submitted that the Authority is part of the body politic which is the State of Queensland.

Industrial Relations Act 1999 (Q) ("the Queensland Industrial Relations Act"). Members of the State organisations are also members of the federal associations.

7 In a proceeding brought in the original jurisdiction of this Court, the plaintiffs allege that the Authority is a trading corporation within the meaning of s 51(xx) of the Constitution. They allege that it follows that the Authority is a "constitutional corporation" as defined in s 12 of the *Fair Work Act* 2009 (Cth)[10], and a "national system employer"[11] for the purposes of that Act. The plaintiffs allege that provisions of the QRTA Act[12] (which apply the Queensland Industrial Relations Act to the Authority's employees and treat some federal enterprise agreements as certified under the Queensland Industrial Relations Act) are inconsistent with the *Fair Work Act* 2009 and invalid to the extent of that inconsistency by operation of s 109 of the Constitution. The plaintiffs also allege that ss 691A-691D of the Queensland Industrial Relations Act (which apply to certain industrial instruments applying to "the employment of persons in a government entity"[13]) are inconsistent with the *Fair Work Act* 2009, and thus invalid by operation of s 109 of the Constitution so far as they purport to apply to the Authority, its employees or two identified industrial instruments[14].

8 The second defendant to the proceeding (the Queensland Industrial Relations Commission) filed a submitting appearance.

9 The plaintiffs and the Authority (as the active defendant in the proceeding) agreed in stating questions of law for the opinion of the Full Court in the form of a special case based upon certain agreed facts. The first two questions ask whether the Authority is a "corporation" within the meaning of s 51(xx) and, if so, whether it is a "trading corporation". Question 3 asks whether the *Fair Work Act* 2009 applies to the Authority and its employees to the exclusion of the QRTA Act or the Queensland Industrial Relations Act or both. Questions 4 and 5 relate to relief and costs.

Section 51(xx)

10 The questions stated by the parties assume that it is useful to direct separate attention to what is a "corporation" and what is a "trading corporation" within the meaning of s 51(xx). The validity of the assumption was not directly challenged by any party or intervener and it is convenient to proceed without examining that issue. But this must not obscure the obvious importance of recognising that the subject matter of s 51(xx) is not "corporations"; it is "foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth". And neither the word "corporations", where twice appearing, nor the collocation "trading or financial corporations formed within the limits of the Commonwealth" is to be construed without regard to the context within which the expression appears.

The competing submissions

11 The chief point of difference between the plaintiffs and the Authority was whether the Authority is a "corporation" within the meaning of the second limb of s 51(xx). The plaintiffs submitted that "an entity established under law with its own name, and with separate legal personality and perpetual succession, is a corporation within the meaning of s 51(xx)". The

10 "[A] corporation to which paragraph 51(xx) of the Constitution applies".

11 s 14(1)(a).

12 ss 69, 72 and 73.

13 s 691B(1).

14 QR Passenger Pty Limited Traincrew Union Collective Workplace Agreement 2009 and Queensland Rail Rollingstock and Operations Enterprise Agreement 2011.

Attorney-General of the Commonwealth, intervening, proffered a generally similar description of what is a corporation: "any juristic entity with distinct, continuing legal personality (evidenced by, for example, perpetual succession, the right to hold property and the right to sue and be sued) that is not a body politic reflected or recognised in the Constitution".

12 By contrast, the Authority (with the support of the Attorneys-General for New South Wales and Victoria) submitted that not all artificial entities having separate legal personality are corporations. The Authority submitted that "the intention of Parliament is the defining feature of whether an artificial juristic entity is created as a corporation, and that intention is manifested either by express words or by necessary implication". Hence, so the Authority submitted, the express provision, by s 6(2) of the QRTA Act, that the Authority "is not a body corporate" is especially significant because it reveals the intention of the Parliament and requires the conclusion that the Authority is not a "corporation".

13 The Attorney-General for Victoria submitted that a State has broad scope to create bodies which have a separate legal existence as right and duty bearing entities but which are, or are not, corporations. The submission proffered no criterion for identifying the characteristics that are necessary or sufficient to identify the entity as a "corporation", other than to submit that "[i]f Parliament intended to establish a corporation, it may be expected in a modern statute that express terms of incorporation would be used". Hence, the submission appeared to go no further than the Authority's submission that it is the "intention" of the enacting Parliament which is determinative.

14 The Authority further submitted that, even if it is a "corporation", it is not a "trading or financial corporation". No party or intervener suggested that the Authority is a financial corporation and that aspect of the second limb of s 51(xx) may be left aside from further examination. The Authority accepted that, apart from the case where a corporation is dormant or has barely begun to trade, an "activities" test[15] determines whether it is a "trading corporation". But it submitted that its activities do not warrant it being classed as a trading corporation because its only activity is to provide employees to a company not at arm's length (QRL) for an amount which yields no profit for the Authority.

A "corporation"?

15 For the purposes of deciding this case, it is not necessary to attempt to state exhaustively the defining characteristics of a corporation (whether a "foreign corporation" or a "trading or financial corporation"). Whether the Authority is a trading corporation can be answered without attempting that task.

16 The QRTA Act creates the Authority as a distinct entity. The Authority can have rights and duties. It is, therefore, a separate legal entity: one of those "basic units" of the legal system which "possess the capacity of being parties to the claim-duty and power-liability relationships"[16].

17 At the time of federation[17], and for centuries before that time[18], the only artificial persons in English law were corporations, and corporations were either aggregate or sole. The

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15 cf *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190; [1979] HCA 6.

16 Paton, *A Text-Book of Jurisprudence*, 3rd ed (1964) at 351-352.

17 See, for example, Maitland, "The Corporation Sole", (1900) 16 *Law Quarterly Review* 335 at 335.

18 Coke, *The First Part of the Institutes of the Lawes of England, or, A Commentarie upon Littleton*, (1628) at §1, 2a, §413, 250a.

development of the trust in English law had permitted the establishment and maintenance of arrangements about property and its use without the interposition or creation of any separate artificial legal entity. And in this respect English law differed markedly from systems of law such as that provided by the German Civil Code[19] under which "the advantage of corporateness could be acquired by societies of divers sorts and kinds"[20].

18 The Authority is neither a corporation sole nor a corporation aggregate of a kind that existed at the time of federation. It bears no resemblance to any of the ecclesiastical[21] or other forms[22] of corporation sole then known, and it has no corporators who join, or are joined, together to form the separate entity. (The QRTA Act provides[23] expressly that "the Authority is not constituted by the members of the board".)

19 But the Authority expressly disclaimed any argument that "corporation" as used in either limb of s 51(xx) should be read as restricted to corporations of a kind that were known to foreign law or to English or colonial law at the time of federation. And the Authority was right to do so. It is not to be supposed that the only kinds of "foreign corporations" and "trading or financial corporations" with respect to which s 51(xx) gives legislative power are bodies constituted and organised in the way in which corporations of those kinds were constituted and organised in 1900.

20 Foreign corporations are constituted and organised according to the law of another jurisdiction. That law may, and commonly will, differ from Australian law, sometimes markedly. Absent referral of power under s 51(xxxvii), the trading or financial corporations formed within the limits of the Commonwealth to which s 51(xx) refers will typically be constituted and organised according to the laws of a State. (No party or intervener challenged *New South Wales v The Commonwealth* (*The Incorporation Case*)[24].) Hence, often, the entities with which s 51(xx) deals are entities which owe their existence and form to a law other than a law of the federal Parliament.

21 Before and after federation, there were many radical changes to the legislation (both English and colonial) under which corporations could be constituted and were regulated. Relevant nineteenth century developments were described in *New South Wales v The Commonwealth* (*Work Choices Case*)[25] and need not be repeated here. It is enough to observe that issues about corporations and their regulation had been in "legislative and litigious ferment"[26] in the later years of the nineteenth century and, after initial hesitation, were seen as warranting the grant of national legislative power.

22 There is no reason to read s 51(xx) as granting power to deal only with classes of artificial legal entities having characteristics fixed at the time of federation. To read the provision in

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19 Maitland, "Trust and Corporation", in Fisher (ed), *The Collected Papers of Frederic William Maitland*, (1911), vol 3, 321.

20 Maitland, "The Making of the German Civil Code", in Fisher (ed), *The Collected Papers of Frederic William Maitland*, (1911), vol 3, 474 at 482.

21 See Maitland, "The Corporation Sole", (1900) 16 *Law Quarterly Review* 335.

22 See, for example, *Fulwood's Case* (1591) 4 Co Rep 64b [76 ER 1031] (concerning the Chamberlain of the City of London as a corporation sole) and *The Case of Sutton's Hospital* (1612) 10 Co Rep 23a [77 ER 960] (concerning the King as a corporation sole). See also *Financial Administration and Audit Act* 1977 (Q), s 43 and *Financial Accountability Act* 2009 (Q), s 53 (preserving, continuing and constituting the Treasurer of Queensland as a corporation sole for some purposes).

23 s 14(2).

24 (1990) 169 CLR 482; [1990] HCA 2.

25 (2006) 229 CLR 1 at 90-98 [96]-[124]; [2006] HCA 52.

26 *Work Choices Case* (2006) 229 CLR 1 at 95 [113].

that way would hobble its operation. The course of events in the nineteenth century described in the *Work Choices Case* points firmly against reading the provision as so restricted. And there is no textual or contextual reason to conclude that the Parliament's power with respect to trading or financial corporations formed within the limits of the Commonwealth should be frozen in time by limiting the power to entities of a kind that existed at federation. Nor is there any textual or contextual reason to conclude that the Parliament should have legislative power with respect only to those entities constituted and organised under the laws of foreign states which are entities of a kind generally similar to those that existed or could be formed under foreign law as it stood in all its various forms in 1900.

23 Accepting, then, that the Authority was right to disclaim an argument that a "corporation" must be an entity of a kind known in 1900, what is it that marks an artificially created legal entity as a "trading or financial corporation formed within the limits of the Commonwealth"? As has been noted, the Authority sought to answer this question by reference only to whether the Parliament providing for the creation of the entity "intended" to create a "corporation". But this answer gave no fixed content to what is a "corporation". The Authority's submissions proffered no description, let alone definition, of what it means to say that the entity created is or is not a "corporation". Hence the "intention" to which the Authority referred, and upon which it relied as providing the sole criterion for determining what is or is not within the legislative power of the Commonwealth, was an intention of no fixed content. Rather, it was an intention to apply, or in this case not to apply, a particular label. A labelling intention of this kind provides no satisfactory criterion for determining the content of federal legislative power.

Section 6(2)

24 The Authority's submissions about "intention" were closely related to, even dependent upon, s 6(2) of the QRTA Act and its provision that the Authority is not a "body corporate". But how is s 6(2) to be construed, and what is the work that it does?

25 The Authority's submissions treated "body corporate" (in s 6(2)) as synonymous with "corporation" (in the phrase "trading or financial corporations"). But treating the two different expressions in that way assumed rather than demonstrated that a statutorily created artificial legal entity (that is not a body politic) may be a form of right and duty bearing entity which is distinct from entities called (interchangeably) either "corporations" or "bodies corporate". That is, the submissions took as their premise that there is a class of artificial right and duty bearing entities (other than bodies politic) called either "corporations" or "bodies corporate" and a class of those entities which are not, and cannot be, described by either expression.

26 The assumed division of artificial legal entities that are not bodies politic between "corporations" or "bodies corporate" on the one hand, and "other artificial legal entities" on the other, cannot be made. No criteria which would differentiate between the two supposed classes of entities were identified. Neither s 6(2) itself, nor the QRTA Act more generally, supports a division of that kind. The premise for the Authority's submissions is not established.

27 If s 6(2) does not support (or make) a division of artificial legal entities between "corporations" or "bodies corporate" and "other artificial legal entities", what is the purpose or effect of its provision?

28 Taken as a whole, the QRTA Act makes plain that it proceeds on the footing that the Authority's relations with its employees are not governed by the *Fair Work Act* 2009. It may be accepted, therefore, that one purpose of the QRTA Act was to create an entity which would provide labour to QRL in circumstances where the relations between employer and employee

would be governed by State industrial relations law. If s 6(2) were to be understood as intended to do no more than take the Authority outside the federal industrial relations law, by taking the Authority outside the reach of s 51(xx), it would be necessary to observe that a State Parliament cannot determine the limits of federal legislative power. More particularly, it would be necessary to observe that whether an entity is a corporation of a kind referred to in s 51(xx) presents an issue of substance, not mere form or label. But s 6(2) has a larger purpose than simply attaching a label designed to avoid the application of an otherwise applicable federal law.

29 Providing that the Authority "is not a body corporate" engages other Queensland statutory provisions. In particular, although the Authority is what the *Government Owned Corporations Act* 1993 (Q) ("the GOC Act") calls a "government entity"[27], the Authority is not a government entity that is "established as a body corporate under an Act or the Corporations Act"[28]. Because that is so, the Authority cannot be declared[29] by regulation to be a "government owned corporation" for the purposes of the GOC Act. In addition, it may be that the provision that the Authority is not a body corporate could be said to deny the application of s 46 of the *Acts Interpretation Act* 1954 (Q). Section 46 provides that a provision of an Act relating to offences punishable on indictment or summary conviction "applies to bodies corporate as well as individuals". Whether s 6(2) of the QRTA Act does have the effect of denying the operation of s 46 of the *Acts Interpretation Act* need not be decided.

30 The exclusion of the application of the GOC Act by s 6(2) of the QRTA Act providing that the Authority is not a body corporate means that the provision is more than mere labelling. Section 6(2) takes its place, and is to be given its meaning and application, in the context provided by the Queensland statute book generally and the GOC Act in particular. Understood in that context, s 6(2) provides that the entity which the QRTA Act creates is one with which other provisions of Queensland law engage in a particular way. Section 6(2) is not to be understood as providing that the entity created is one of a genus of artificial legal entities distinct from what s 51(xx) refers to as "corporations".

The decided cases

31 Reference was made in argument to a number of decisions which it was suggested throw light on whether the Authority is a "corporation". Particular emphasis was given to this Court's decisions in *Chaff and Hay Acquisition Committee v J A Hemphill and Sons Pty Ltd*[30] and *Williams v Hursey*[31], as well as some of the cases about the status of trade unions in the United Kingdom[32]. But neither of the cases in this Court decided any issue about the reach of the legislative power conferred by s 51(xx) and, of course, the British trade union cases were even further removed from the issues which must be decided in this case. Not only are the British trade union cases about issues far removed from the issues in this case, they are decisions which were very much the product of their times and the legislation which then governed the organisation of labour and liability for trade disputes. They offer no useful guidance to the resolution of the present issues. It is, however, necessary to say something about each of the decisions of

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27 s 4(b).

28 s 5(a).

29 s 5(b).

30 (1947) 74 CLR 375; [1947] HCA 20.

31 (1959) 103 CLR 30; [1959] HCA 51.

32 *Taff Vale Railway v Amalgamated Society of Railway Servants* [1901] AC 426; *National Union of General and Municipal Workers v Gillian* [1946] KB 81; *Bonsor v Musicians' Union* [1956] AC 104.

this Court and the decision of the Supreme Court of the United States in *Liverpool Insurance Company v Massachusetts*[33], which was referred[34] to in *Chaff and Hay Acquisition Committee*.

32 The issue in *Chaff and Hay Acquisition Committee* was whether the committee, a statutory body created under South Australian legislation, was a legal entity which the courts of New South Wales should recognise as competent to sue or be sued in its own name. This Court held that the committee had an independent legal existence which should be recognised. It rejected arguments that recognition should not be given to the committee because it was "to operate as a Crown agent"[35] or that it had but a temporary existence[36]. As the Full Court of the Supreme Court of New South Wales did[37], this Court noted[38] that the statute constituting the committee had not used express words of incorporation[39] and that the committee was not "created a corporation according to the requirements of English law in force in South Australia"[40]. But neither of those observations was treated as determinative of the issue that was before the Court: could the committee sue and be sued in its own name? Understood in the light of that issue, what was said in *Chaff and Hay Acquisition Committee* gives no direct assistance in deciding this case. In particular, and contrary to the tenor of the Authority's submissions, *Chaff and Hay Acquisition Committee* does not support drawing a distinction between corporations of the kind or kinds referred to in s 51(xx) and other forms of artificial legal entity that are not bodies politic.

33 In *Liverpool Insurance Company*, the Supreme Court of the United States decided[41] that, despite declarations in the English statutes constituting the insurance company that it was not a corporation, "[s]uch local policy can have no place here in determining whether an association, whose powers are ascertained and its privileges conferred by law, is an incorporated body". Especially was that so when, as the Supreme Court rightly observed[42], what was said in the relevant English statutes was directed to denying that the members of the insurance company had limited liability and did not detract from what the Court called the "true character" of the company.

34 The decision in *Liverpool Insurance Company* offers no guidance about the reach of the legislative power given by s 51(xx). It does emphasise, however, the need to examine the reasons for, and effect to be given to, a legislative declaration that a body is or is not a "body corporate" or a "corporation".

35 *Williams v Hursey* concerned the liability of an organisation of employees to damages for the tort of conspiracy and directed particular attention to whether the Waterside Workers' Federation and its Hobart "branch" could sue or be sued. The Federation was an organisation registered under the *Conciliation and Arbitration Act* 1904 (Cth); the Hobart branch was not registered under that Act or the *Trade Unions Act* 1889 (Tas), which reproduced the English *Trade Union Acts* of 1871 and 1876. Members of the Hobart branch were also members of the registered organisation.

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33 77 US 566 (1870).
34 (1947) 74 CLR 375 at 388 per Starke J.
35 (1947) 74 CLR 375 at 379.
36 (1947) 74 CLR 375 at 384.
37 *J A Hemphill & Sons Pty Ltd v Chaff and Hay Acquisition Committee* (1946) 47 SR (NSW) 218 at 220.
38 (1947) 74 CLR 375 at 385 per Latham CJ, 388 per Starke J.
39 cf *Mackenzie-Kennedy v Air Council* [1927] 2 KB 517 at 534.
40 (1947) 74 CLR 375 at 388 per Starke J.
41 77 US 566 at 576 (1870).
42 77 US 566 at 576 (1870).

36 Fullagar J, with whose reasons Dixon CJ and Kitto J agreed, made two points of present relevance. First, he said[43] that the *Conciliation and Arbitration Act* 1904 gave the Federation, as a registered organisation, "what I would not hesitate to call a corporate character – an independent existence as a legal person". Second, Fullagar J said[44] that "[t]he notion of qualified legal *capacity* is intelligible, but the notion of qualified legal *personality* is not" (emphasis added). Hence, the section of the *Conciliation and Arbitration Act* 1904 which provided that every registered organisation "shall for the purposes of the Act have perpetual succession and a common seal, and may own possess and deal with any real or personal property"[45] was, without more, "quite enough to give to a registered organization the full character of a corporation"[46]. Neither the particular statutory root of incorporation nor the particular capacities which the body was given were treated as determining whether it had "the full character of a corporation". Rather, independent existence as a legal person, which is to say recognition as a right and duty bearing entity, was the determinative consideration.

37 *Williams v Hursey* points firmly against accepting the Authority's submissions that corporations, or bodies corporate, form a class of statutorily created right and duty bearing entities distinct from another class of statutorily created right and duty bearing entities identified only according to whether the constituting legislation (and legislature) "intended" to create the entity concerned as a corporation. It also points against accepting the submissions of the Attorney-General for Victoria that the power of a State to create artificial legal entities gives it a "broad scope" to create a right and duty bearing entity which is not a corporation for the purposes of s 51(xx).

38 Like the Federation considered in *Williams v Hursey*, the Authority is created as a separate right and duty bearing entity. It may own, possess and deal with real or personal property. It is an entity which is to endure regardless of changes in those natural persons who control its activities and, in that sense, has "perpetual succession". Its constituting Act provides for mechanisms by which its assumption of rights and duties may be formally recorded and signified. The Authority has "the full character of a corporation".

A "trading corporation"?

39 As already noted, the Authority submitted that its activities were not such as to make it a trading corporation. In its written submissions, the Authority submitted that it dealt only with a related entity, QRL, and made no profit from those dealings, and that these "peculiar" activities did not make it a trading corporation. The Authority did not elaborate on these matters in oral argument.

40 By contrast, some of the interveners, especially the Attorney-General of the Commonwealth and the Attorney-General for Victoria, advanced detailed submissions about what test or tests should be applied in deciding whether a corporation is a trading corporation. In order to decide this case, however, it is not necessary to examine those submissions in any detail. Instead, it is enough to conclude that no matter whether attention is directed to the constitution and purposes of the Authority, or what it now does, or some combination of those considerations, the Authority must be found to be a trading corporation.

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43 (1959) 103 CLR 30 at 52.

44 (1959) 103 CLR 30 at 52.

45 (1959) 103 CLR 30 at 52 per Fullagar J, citing s 136 of the *Conciliation and Arbitration Act* 1904.

46 (1959) 103 CLR 30 at 52.

41 The QRTA Act established the Authority as an entity having functions which included "managing railways"[47], "controlling rolling stock on railways"[48], "providing rail transport services, including passenger services"[49] and "providing services relating to rail transport services"[50]. The QRTA Act provides[51] that the Authority is to "carry out its functions as a commercial enterprise". Provision is made[52] for the Authority to pay dividends to the State and, to that end, the Authority is obliged[53] to give the responsible Ministers in May each year an estimate of its profit for the financial year. Not only that, the Authority is liable[54] to pay to the Treasurer, for payment into the consolidated fund of the State, amounts equivalent to the amounts for which the Authority would have been liable if it had been liable to pay tax imposed under a Commonwealth Act. In light of these provisions, the conclusions that the Authority was constituted with a view to engaging in trading and doing so with a view to profit are irresistible.

42 Even if the Authority is treated as now doing nothing more than supplying labour to QRL (a related entity) for the purposes of QRL providing rail services and even if, as the Authority submitted, the Authority chooses to supply that labour at a price which yields it no profit, those features of its activities neither permit nor require the conclusion that the Authority is not a trading corporation. Labour hire companies are now a common form of enterprise. The engagement of personnel by one enterprise for supply of their labour to another enterprise is a trading activity. That the parties to the particular supply arrangement are related entities does not deny that characterisation of the activity. That the prices for supply are struck at a level which yields no profit to the supplier likewise does not deny that the supplier is engaged in a trading activity.

43 In combination, these considerations require the conclusion that the Authority is a trading corporation. It is not necessary to consider which of them is or are necessary or sufficient to support the conclusion.

Inconsistency of laws

44 Little attention was given in oral argument to the question asked in the special case about inconsistency between the QRTA Act and the *Fair Work Act* 2009 or between the Queensland Industrial Relations Act and the *Fair Work Act* 2009. Instead, argument proceeded on the footing that, if the Authority is held to be a trading corporation, the inconsistency consequences urged by the plaintiffs would follow. The answer which is given to the question about inconsistency of laws follows from the conclusion that the Authority is a trading corporation but should be framed by reference to the particular provisions which were the focus of the litigation.

Conclusion and orders

45 The plaintiffs are entitled to have the questions asked in the special case answered substantially in their favour. Having regard, however, to what has been said about the parties' assumption that it is useful to ask a separate question about whether the Authority is a "corporation" within the meaning of s 51(xx), it is better to provide no answer to that question and,

47 s 9(1)(a).
48 s 9(1)(b).
49 s 9(1)(c).
50 s 9(1)(d).
51 s 10(1).
52 s 55.
53 s 56(1)(a).
54 s 62.

instead, answer the second question, which directs attention to whether the Authority is a "trading corporation". What relief the plaintiffs should have in the proceedings is a matter better dealt with by a single Justice.

The questions in the special case should be answered as follows:

1 Is the first defendant (Queensland Rail) a corporation within the meaning of s 51(xx) of the Commonwealth Constitution?

Answer: It is unnecessary to answer this question.

2 If so, is Queensland Rail a trading corporation within the meaning of s 51(xx) of the Commonwealth Constitution?

Answer: Yes.

3 If so, does the *Fair Work Act* 2009 (Cth) apply to Queensland Rail and its employees by the operation of s 109 of the Constitution, to the exclusion of the [*Queensland Rail Transit Authority Act* 2013 (Q)] or the *Industrial Relations Act* 1999 (Q) or both?

Answer: Except to say that the *Fair Work Act* 2009 (Cth) applies to Queensland Rail as a "national system employer" for the purposes of that Act and that

(a) ss 69, 72 and 73 of the *Queensland Rail Transit Authority Act* 2013 (Q) and

(b) ss 691A-691D of the *Industrial Relations Act* 1999 (Q)

are to that extent inconsistent with the *Fair Work Act* 2009 (Cth) and invalid in so far as they apply to Queensland Rail or its employees or the QR Passenger Pty Limited Traincrew Union Collective Workplace Agreement 2009 and Queensland Rail Rollingstock and Operations Enterprise Agreement 2011, it is not necessary to answer this question.

4 What relief, if any, are the plaintiffs entitled to?

Answer: Questions of relief should be determined by a single Justice.

5 Who should pay the costs of the special case?

Answer: The first defendant.

V. Questions to the Decision

1. What was decisive for the Supreme Court to qualify Queensland Rail?
2. What significance did the court attach to the asserted “intention of the Parliament” or the labelling “is not a body corporate”?
3. Do you agree with the argumentation?

4. What role did profit play in the assessment?

D Administrative Action (Lecture 3)

I. General Questions

1. Why does the form of administrative action matter? (legal protection, due process, administrative prerogatives etc.)?
2. Possible challenges of administrative acts (informal governmental actions etc.)
3. What are the particularities if an agency stipulates rules and regulations? (legal basis, legal effects, procedure etc.)?

II. ECHR, Decision Yöyler v. Turkey (Nr. 26973/95) of 24 July 2003

Read the extract from the decision and ask yourself what impact the form of administrative action has when the court applies Article 13 of the European Convention of Human Rights. What are the reasons for this court practice? Which problems in administrative law may arise because of this court practice?

Summary of the facts

Mr Yöyler had been imprisoned several times due to his involvement with several political organisations. He alleged that State security forces destroyed his house after he left his village. The State denied these allegations.

CONSEIL DE L'EUROPE — COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FOURTH SECTION

[*In its composition before 1 November 2001*]

CASE OF YÖYLER v. TURKEY

(Application no. 26973/95)

JUDGMENT

STRASBOURG,

24 July 2003

FINAL

24/10/2003

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

[…]

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

1. The applicant, Mr Celalettin Yöyler, is a Turkish citizen who was born in 1941 and is at present living in Istanbul (Turkey). Until June 1994 the applicant lived in the village of Dirimpınar, attached to the Malazgirt district in the province of Muş. Between 1966 and 1994 the applicant was the *imam* (religious leader) of the village. As a result of his involvement with a number of political organisations, including the Social Democratic Populist Party (SHP), the People's Labour Party (HEP) and the Democracy Party (DEP), of which he became the local leader, he was imprisoned on a number of occasions. The applicant left and had never returned to his village prior to the alleged events in question, since he had been threatened with death. The application concerns the applicant's allegations that State security forces destroyed his house.

A. The facts

2. The facts surrounding the destruction of the applicant's house are in dispute between the parties.

1. Facts as presented by the applicant

3. In 1994 three young women from the village, all of whom were related to the applicant's extended family, decided to join the PKK.

4. On 15 September 1994 the gendarme unit commander of Malazgirt came to the village and threatened to burn the village to the ground if the women were not brought to him within three days.

5. The applicant's family and the families of the young women, frightened by this threat, loaded up their possessions and fled. However, the gendarmes, accompanied by special teams, forced them to return to the village and to unload their possessions. They gathered the families into a house by force, where they assaulted certain of them, including the applicant's wife. They withdrew from the village telling the villagers to take good photographs of their houses, as that was all they would have to remember them by.

6. On 18 September 1994, at 8 p.m., special gendarme teams and village guards came to the village. Villagers were ordered to go into their homes and to turn off their lamps. The security forces then took diesel oil from the villagers' tractors and barrels and set fire to the houses of the applicant and his family. The applicant was out of the village, in İzmir, when his house was burned down.

7. On 23 September 1994 the applicant filed a criminal complaint with the Karşıyaka public prosecutor in İzmir for submission to the Malazgirt public prosecutor, calling for an on-site investigation and the institution of proceedings against the perpetrators. This document was registered as no. 35798 by the Karşıyaka public prosecutor's office.

8. On 24 September 1994 the applicant made a press statement through a human rights body, the Human Rights Association, which was carried the same day in the pro-Kurdish newspaper *Özgür Ülke*.

9. On 8 November 1994 the public prosecutor (no. 31583) sent a letter to the Gendarme Command in Malazgirt requesting a report on the matters raised in the applicant's allegations. He repeated his request in letters of 8 December 1994 (no. 30965) and 2 February 1995 (no. 31583).

10. By letter of 2 March 1995, the Gendarme Central Command in Malazgirt replied to the prosecutor's letter of 8 December 1994 by submitting the records of the statements they had taken. The prosecutor took further statements in May 1995, and the gendarme commander M.A. in June and November 1995. Since November 1995, there has been no development in the investigation.

2. Facts as presented by the Government

11. The applicant left the village of Dirimpinar of his own free will, together with his spouse and children. He settled first in Adapazarı and then in Istanbul or Izmir. The Government submitted various records of the statements taken by the authorities in relation to the burning of the applicant's house.

(a) Statements taken on 29 May 1995

12. Mr Muhsettin Yöyler, the mayor (*muhtar*) of the village of Dirimpinar, stated to the public prosecutor that on the night of the incident, he had seen some persons setting fire to the applicant's house but as they had their faces covered, he had not been able to recognise them. He did, however, recognise one of them, Ahmet (A.K.), a village guard from the village of Nurettin.

The statement by the applicant's fellow villager, Mr Abdulcebbar Sezen, revealed that the applicant had not been in the village during the incident, but that his family had been.

(b) Statements dated 19 June 1995 before the gendarme commander M.A.

13. Mr Muhsettin Yöyler claimed that although he had seen the applicant's house burning, he had not seen who had set fire to it, as it was dark.

Mr Süleyman Yılmaz and Mr Ömer Sezen from the same village made identical statements.

(c) Statements of 22 November 1995 given by the applicant's fellow villagers to the gendarme commander M.A.

14. Mr Aydın Sezen declared before the same gendarme commander that the applicant had always acted in a subversive manner towards the State, that his house had indeed been burned, that he had not seen who had set fire to it, but it had definitely not been the security forces. He also added that all the villagers were pleased that the applicant had left the village. In a further statement, Mr Muhsettin Yöyler told M.A. that the applicant had always been a PKK supporter,

that the applicant and his family had not been in the village on the night of the incident, that he had not seen who had set fire to the house, but that he was sure that it was not the security forces. He also stated that the applicant himself might perhaps have done it.

15. Mr Abdulcebbar Sezen was recorded as having declared to the police officer that the applicant was a member of the PKK, that he used to be a source of trouble in the village and that the villagers were pleased that he had left the village. He also stated that the applicant's house had definitely not been burned by the security forces or the gendarmes and that the security forces had always helped the villagers.

16. Mr Muhlis Umulgan recalled having declared that the applicant was collaborating with the PKK, that on the night of the incident he had seen the applicant's house burning but had been afraid to go out, as he knew that the PKK were in the region at the time. He added that the security forces had not set fire to the applicant's house.

17. As to Süleyman Yılmaz, he declared that the applicant had not been in the village when the incident had occurred, that three days before the fire his spouse and children had left the village as well, taking the furniture, and that although some days before the incident security forces had been in the village, they had not been there during the incident. He finally stated that he did not know who had set fire to the applicant's house but was sure that it had not been the gendarmes.

18. The investigation could not continue in the applicant's absence. According to a letter of 2 April 1995 from the Gendarme Central Command in Malazgirt, the applicant had left Dirimpınar for an unknown place, probably Adapazarı.

[…]

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

19. The applicant, referring to the circumstances of the destruction of his home and eviction of his family from their village, maintained that there had been a breach of Article 3 of the Convention, which reads:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

20. The Government rejected this complaint as being without any basis.

21. The Court reiterates that Article 3 of the Convention enshrines one of the fundamental values of a democratic society. Even in the most difficult of circumstances, such as the fight against organised terrorism and crime, the Convention prohibits in absolute terms treatment contrary to this provision. Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the duration of the treatment, its physical and/or mental effects and, in some cases, the sex, age and state of health of the victim (see *Selçuk and Asker v. Turkey,* judgment of 24 April 1998, *Reports of Judgments and Decisions* 1998-II, p. 909, §§ 75-76).

22. The Court notes that the applicant's home was burned before the eyes of members of his family, depriving them of shelter and support and obliging them to leave the place where they lived and their family friends. In the Court's opinion, even assuming that the motive behind this impugned act was to punish the applicant and his relatives for their alleged involvement in the PKK, that would not provide a justification for such ill-treatment.

23. The Court considers that the destruction of the applicant's home and possessions, as well as the anguish and distress suffered by members of his family, must have caused him suffering

of sufficient severity for the acts of the security forces to be categorised as inhuman treatment within the meaning of Article 3 (see *Selçuk and Asker,* cited above, p. 910, §§ 77-78).

24. The Court concludes that there has been a violation of Article 3 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION AND ARTICLE 1 OF PROTOCOL NO. 1

25. The applicant complained of the deliberate destruction of his home and property. He relied on Article 8 of the Convention, which reads:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

and Article 1 of Protocol No. 1, which provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

26. The Government denied the factual basis of the applicant's complaints and averred that his allegations were unsubstantiated.

27. The Court has found it established that the security forces deliberately destroyed the applicant's house and property, obliging his family to leave their village (see paragraph 64 above). There is no doubt that these acts, in addition to giving rise to a violation of Article 3, constituted grave and unjustified interference with the applicant's rights to respect for his private and family life and home, and to the peaceful enjoyment of his possessions (see *Menteş and Others v. Turkey,* judgment of 28 November 1997, *Reports* 1997-VIII, p. 2711, § 73, and *Dulaş v. Turkey*, no. 25801/94, § 60, 30 January 2001, unreported).

28. The Court therefore concludes that there has been a violation of Article 8 of the Convention and of Article 1 of Protocol No. 1.

IV. ALLEGED VIOLATIONS OF ARTICLES 6 AND 13 OF THE CONVENTION

29. The applicant complained that he had been denied an effective remedy by which to challenge the destruction of his home and possessions by the security forces, and to had been denied access to court to assert his civil rights. He relied on Article 6 § 1 of the Convention, which provides, in so far as relevant:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal..."

and Article 13 of the Convention, which provides:

> "Everyone whose rights and freedoms as set forth in [the] 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."

A. Article 6 § 1 of the Convention

30. The applicant submitted that his right to access to court to assert his civil rights had been denied on account of the failure of the authorities to conduct an effective investigation into his allegations. In his opinion, without such an investigation he had no chance of succeeding in obtaining compensation in civil proceedings.

31. The Government maintained that the applicant had failed to pursue the remedies available in domestic law. Had the applicant filed a civil action, he would have enjoyed effective access to a court.

32. The Court notes that the applicant did not bring an action before the civil courts for the reasons given in the admissibility decision of 13 January 1997. It is therefore impossible to determine whether the national courts would have been able to adjudicate on the applicant's claims had he initiated proceedings. In the Court's view, however, the applicant's complaints mainly pertain to the lack of an effective investigation into the deliberate destruction of his family home and possessions by the security forces. It will therefore examine this complaint from the standpoint of Article 13, which imposes a more general obligation on States to provide an effective remedy in respect of alleged violations of the Convention (see *Selçuk and Asker,* cited above, p. 912, § 92).

The Court therefore finds it unnecessary to determine whether there has been a violation of Article 6 § 1 of the Convention.

B. Article 13 of the Convention

33. The applicant submitted that he had no effective remedy available in respect of his Convention grievances. With reference to previous cases concerning the destruction of villages, the applicant asserted that there was an administrative practice of violating Article 13 of the Convention in south-east Turkey and that he was a victim of that practice.

34. The Government argued that the applicant had deliberately ceased to pursue remedies in domestic law. In this connection, they pointed out that after filing a criminal complaint with the Public Prosecutor's office in İzmir, the applicant had disappeared without leaving any address to the judicial authorities. Despite this omission, the judicial authorities had carried out an effective investigation into the applicant's allegations by taking statements from his fellow villagers and committing a suspect for trial on charges of setting the applicant's house on fire.

35. The Court reiterates that Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an “arguable complaint” under the Convention and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their Convention obligations under this provision. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be “effective” in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State (see *Dulaş*, cited above, § 65).

36. Where an individual has an arguable claim that his or her home and possessions have been purposely destroyed by agents of the State, Article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigation procedure (see *Menteş and Others,* cited above, pp. 2715-16, § 89).

37. The Court points out that it has already found that the applicant's home and possessions were destroyed in violation of Articles 3 and 8 of the Convention and Article 1 of Protocol No. 1. The applicant's complaints in this regard are therefore “arguable” for the purposes of Article 13 (see *Boyle and Rice v. the United Kingdom* judgment of 27 April 1988, Series A no. 131, p. 23, § 52, and *Dulaş*, cited above, § 67).

38. The Court has previously held that the implementation of the criminal law in respect of unlawful acts allegedly carried out with the involvement of the security forces discloses particular characteristics in south-east Turkey in the first half of the 1990s and that the defects found in the investigatory system in force in that region undermined the effectiveness of criminal law protection during this period. This practice permitted or fostered a lack of accountability of members of the security forces for their actions which was not compatible with the rule of law in a democratic society respecting the fundamental rights and freedoms guaranteed under the Convention (see *Bilgin v. Turkey*, no. 23819/94, § 119, 16 November 2000, unreported).

39. Turning to the particular circumstances of the case, the Court notes that the applicant filed a petition of complaint with the Karşıyaka public prosecutor's office shortly after the destruction of his house. On receipt of this petition, the Malazgirt Public Prosecutor's office instigated an investigation into the applicant's allegations. However, there were striking defects and omissions in the investigation. The Court would observe that the applicant's fellow villagers denied the content and veracity of the statements taken by the gendarmes, stating that they had been asked to sign blank sheets of paper and statements which had been written in advance and which had not been read out to them (see paragraph 57 above). The Court, having found these three witnesses' evidence credible, considers this practice totally incompatible with the notion of an investigation required by Article 13 of the Convention. The Court also points to its earlier finding that the statements taken from fifteen village guards were of a stereotyped nature - giving the impression that they had been prepared by the public prosecutor - and that therefore no particular weight can be attached to them (see paragraph 63 above).

40. Furthermore, the Court notes that the public prosecutors did not make any attempt to interview members of the security forces during the course of the investigation, despite the fact that the applicant had clearly named gendarmes as the perpetrators of the burning of his house and possessions. The Court finds it striking that there seemed to be a general reluctance on the part of the public prosecutors to admit that members of the security forces might have been involved in the destruction of property (see paragraph 62 above). Moreover, the prosecuting authorities visited the scene of the incident more than two years and three months after they had received the applicant's criminal complaint (see paragraph 33 (xvi) above).

41. On 9 September 1996 jurisdiction over the investigation was transferred to the Malazgirt Administrative Council, which decided to discontinue the criminal proceedings against the gendarmes (see paragraph 33 (xv) above). However, the Court has already found in a number of cases that the investigation carried out by this body cannot be regarded as independent since it is composed of civil servants, who are hierarchically dependent on the governor, and an executive officer is linked to the security forces under investigation, (see *Güleç v. Turkey*, judgment of 27 July 1998, Reports 1998-IV, pp. 1732-1733, § 80).

42. Finally, the Court considers it regrettable that the judicial authorities prosecuted and detained Ahmet Kınay, although he was not the perpetrator of the crime and no criminal complaint had been lodged against him. It notes that apparently this was due to a statement dated 20 June 1995, prepared by the gendarmes and bearing the name and the signature of Muhsettin Yöyler, who denied that he had ever made such a statement and told the Court's delegates that the signature on the document was a fake. In the Court's opinion, this is a significant fact, which demonstrates that no serious investigation was conducted into the

applicant's Convention grievances and that the involvement of the gendarmes in the investigation resulted in the cover-up of certain facts.

43. As to the Government's assertion that the investigation was undermined by the applicant's failure to leave an address with the authorities, the Court notes that it is true that attempts were made to locate the applicant with a view to obtaining his statements in regard to his allegations. However, it should be borne in mind that, following the destruction of his family home, the applicant had no permanent address to give to the authorities since he was moving from one city to another in order to find a shelter for himself and his family. His feelings of vulnerability and insecurity are also of some relevance in this connection (see *Menteş and Others*, cited above, p. 2707, § 59). Accordingly, the Court considers that the personal circumstances of the applicant and the omissions and the defects in the domestic investigation outweigh his failure to provide his address to the authorities.

44. In the light of the foregoing, the Court concludes that the authorities failed to conduct a thorough and effective investigation into the applicant's allegations and that access to any other available remedy, including a claim for compensation, has thus also been denied him.

45. There has therefore been a breach of Article 13 of the Convention.

[…]

III. Questions to the Decision

1. What impact has the form of administrative action when the court applies Article 13 of the European Convention of Human Rights?
2. What are the reasons for this court practice?
3. Which problems in administrative law may arise because of this court practice?

IV. General Administrative Law Act (NL)

Below you will find an extract from a translation of the General Administrative Law Act of the Netherlands. Read the extract and ask yourself what procedural rights are guaranteed in case of an "order" (in Switzerland an administrative decision). Is something missing? What advantages or disadvantages do you see in codifying them in an act?

GENERAL ADMINISTRATIVE LAW ACT

[…]

CHAPTER 7 SPECIAL PROVISIONS CONCERNING OBJECTIONS AND ADMINISTRATIVE APPEALS

Division 7.1 Notice of objection preceding appeal to an administrative court

Article 7:1

1. The one who has the right to appeal against an order to an administrative court shall lodge an objection against the order before lodging an appeal, unless the order:

(a) has been made in respect of an objection or an administrative appeal;
(b) is subject to approval;
(c) is one approving another order or refusing such approval; or
(d) was prepared in accordance with one of the procedures provided in division 3.5.

2. An appeal may be lodged against the decision on the objection in accordance with the regulations which govern the lodging of an appeal against the order against which the objection was made.

Division 7.2 Special provisions on objections

Article 7:2

1. Before an administrative authority decides on an objection, it shall give the interested parties the opportunity to be heard.
2. For this purpose the administrative authority shall in any event inform the petitioner and the interested parties who stated their views when the order was being prepared.

Article 7:3

Interested parties need not be heard, if:
(a) the objection is manifestly inadmissible,
(b) the objection is manifestly unfounded,
(c) the interested parties have stated that they do not wish to exercise their right to be heard, or
(d) the objection is completely satisfied and the interests of other interested parties cannot be prejudiced as a result.

Article 7:4

1. Interested parties may submit further documents until ten days before the hearing.
2. The administrative authority shall deposit the notice of objection and all other documents relating to the case for inspection by interested parties for at least one week prior to the hearing.
3. The communication to attend the hearing shall draw the attention of interested parties to subsection 1 and state when and where the documents will be deposited for inspection.
4. Interested parties may obtain copies of these documents at no more than cost price.
5. Subsection 2 need not be applied in so far as the interested parties agree to this.
6. The administrative authority may also refrain from applying subsection 2, either at the request of an interested party or otherwise, in so far as there are compelling reasons for secrecy. Communication shall be given of the application of this provision.
7. Compelling reasons shall in any event be deemed not to exist in so far as there is an obligation under the Government Information (Public Access) Act to grant a request for information contained in such documents.
8. If the compelling reason is fear of damage to the physical or mental health of an interested party, inspection of the documents in question may be restricted to a legal representative who is either an attorney-at-law or a physician.

Article 7:5

1. Unless the hearing is conducted wholly or partly by the administrative authority itself or by the chairman or a member thereof, the hearing shall be conducted by: (a) a person who was not involved in the preparation of the disputed order, or (b) two or more persons of whom the majority, including the person chairing the hearing, were not involved in the preparation of the disputed order.

2. Unless provided otherwise by statutory regulation, the administrative authority shall decide whether the hearing takes place in public.

Article 7:6

1. Interested parties shall be heard in one anther's presence.
2. Interested parties may be heard separately, either on the initiative of the administrative authority or on request, if it is reasonable to assume that a joint hearing would prejudice the proper conduct of the proceedings, or that facts or circumstances will become known during the hearing which should be kept secret for compelling reasons.
3. If interested parties are heard separately, each of them shall be informed of the matters dealt with during the hearing when he was not present.
4. The administrative authority may also refrain from applying subsection 3, either at the request of an interested party or otherwise, in so far as there are compelling reasons for secrecy. Article 7:4, subsection 6, second sentence, and subsections 7 and 8 shall apply mutatis mutandis.

Article 7:7

A record shall be kept of the hearing.

Article 7:8

1. At the request of the interested party witnesses and experts whom he has brought with him may be heard.
2. The costs of witnesses and experts shall be borne by the interested party who has brought them with him.

Article 7:9

If, after the hearing, facts or circumstances which may be of substantial importance to the decision to be made on the objection become known to the administrative authority, the interested parties shall be informed and given the opportunity to be heard on the subject.

Article 7:10

1. The administrative authority shall decide within six weeks of receiving the notice of objection, or within ten weeks if a committee as referred to in article 7:13 has been established.
2. The time limit shall be suspended with effect from the day on which the petitioner is requested to remedy an omission as referred to in article 6:6 until the day on which the omission is remedied or the time limit set for this purpose expires without being used.
3. The administrative authority may defer the decision for a maximum of four weeks. Written communication shall be given of the deferral.
4. Further postponement shall be possible in so far as the petitioner agrees to this and the interests of other interested parties cannot be prejudiced by this or these parties have agreed to this.

Article 7:11

1. If the objection is admissible, the disputed order shall be reviewed on the basis thereof.
2. In so far as the review provides grounds for so doing, the administrative authority shall rescind the disputed order and, in so far as necessary, make a new order replacing it.

Article 7:12

1. The decision on the objection shall be based on proper reasons, which shall be stated when the decision is notified. If it has been decided not to have a hearing under article 7:3, it shall also be stated on what grounds.
2. The decision shall be notified by being sent or issued to the persons to whom it is addressed. If it concerns an order which is not addressed to one or more interested parties, the decision shall be notified in the same way as the order was notified.
3. As soon as possible after the decision is notified, the interested parties who stated their views in the objection procedure or when the disputed order was being prepared, shall beinformed.
4. Article 6:23 shall apply mutatis mutandis to the communication referred to in subsection 3, which shall also state, with a view to the start of the time limit for appeal, as clearly as possible when the decision was notified in accordance with subsection 2.

Article 7:13

1. This article shall apply if an advisory committee has been established for the decision on the objection:
(a) which consists of a chairman and at least two members,
(b) whose chairman is not part of, and not employed under the responsibility of, the administrative authority, and
(c) which complies with any other requirements which may be prescribed by statutory regulation.
2. The acknowledgement of receipt referred to in article 6:14 shall state that a committee will advise on the objection.
3. The hearing shall be conducted by the committee. The committee may direct that the hearing is to be conducted by the chairman or a member who is not part of, and not employed under the responsibility of, the administrative authority.
4. The committee shall decide on the application of article 7:4, subsection 6, article 7:5, subsection 2, and, in so far as not provided otherwise by statutory regulation, article 7:3.
5. 5. A representative of the administrative authority shall be invited to attend the hearing and shall be given the opportunity to explain the authority's position.
6. The opinion of the committee shall be made in writing and shall include a report of the hearing.
7. If the decision on the objection departs from the opinion of the committee, the reasons why the opinion was not followed shall be stated in the decision, and the opinion shall be sent with the decision.

Article 7:14

Article 3:6, subsection 2, divisions 3.4 and 3.5, articles 3:41 to 3:45 inclusive, division 3.7, with the exception of article 3:49, and Chapter 4 shall not apply.

Article 7:15

No fee shall be payable for the processing of the objection.

Division 7.3 Special provisions on administrative appeals

Article 7:16

1. Before an appeals authority decides on an appeal it shall give the interested parties the opportunity to be heard.

2. The appeals authority shall in any event inform thesubmittant of the notice of appeal, as well as the administrative authority which made the order and the interested parties who stated their views when the order was being prepared or in the objection procedure.

Article 7:17

Interested parties need not be heard, if:

(a) the appeal is manifestly inadmissible, or

(b) the appeal is manifestly unfounded, or

(c) the interested parties have stated that they do not wish to exercise their right to be heard.

Article 7:18

1. Interested parties may submit further documents until ten days before the hearing.
2. The appeals authority shall deposit the notice of appeal and all other documents relating to the case for inspection by interested parties for at least one week prior to the hearing.
3. The communication to attend the hearing shall draw the attention of interested parties to subsection 1 and shall state when and where the documents will be deposited for inspection.
4. Interested parties may obtain copies of these documents at no more than cost price.
5. Subsection 2 need not be applied in so far as the interested parties agree to this.
6. The appeals authority may also refrain from applying subsection 2, either at the request of an interested party or otherwise, in so far as there are compelling reasons for secrecy. Communication shall be given of the application of this provision.
7. Compelling reasons shall in any event be deemed not to exist in so far as there is an obligation under the Government Information (Public Access) Act to grant a request for information contained in such documents.
8. If the compelling reason is fear of damage to the physical or mental health of an interested party, inspection of the documents in question may be restricted to a legal representative who is either an attorney-at-law or a physician.

Article 7:19

1. The hearing shall be conducted by the appeals authority.
2. The conduct of the hearing may be assigned by or pursuant to act of Parliament to an advisory committee consisting of one or more members who are not part of, and not employed under the responsibility of, the appeals authority.
3. The hearing shall take place in public, unless the appeals authority decides otherwise at the request of an interested party or, if there are compelling reasons, on its own initiative.

Article 7:20

1. Interested parties shall be heard in one anther's presence.
2. Interested parties may be heard separately, either on the initiative of the administrative authority or on request, if it is reasonable to assume that a joint hearing would prejudice the proper conduct of the proceedings or that facts or circumstances will become known during the hearing which should be kept secret for compelling reasons.
3. If interested parties are heard separately, each of them shall be informed of the matters dealt with during the hearing when he was not present.
4. The appeals authority may also refrain from applying subsection 3, either at the request of an interested party or otherwise, in so far as there are compelling reasons for secrecy. Article 7:18, subsection 6, second sentence, and subsections 7 and 8, shall apply mutatis mutandis.

Article 7:21

A record shall be kept of the hearing.

Article 7:22

1. At the request of the interested party, witnesses and experts whom he has brought with him may be heard.
2. The costs of witnesses and experts shall be borne by the interested party who has brought them with him.

Article 7:23

If, after the hearing, facts or circumstances which may be of substantial importance to the decision to be made on the appeal become known to the appeals authority, the interested parties shall be informed and given the opportunity to be heard on the subject.

Article 7:24

1. The appeals authority shall decide within sixteen weeks of receiving the notice of appeal.
2. If, however, the appeals authority is part of the same legal entity as the administrative authority against whose order the appeal is brought, it shall decide within six weeks of receiving the appeal or, if a committee as referred to in article 7:19, subsection 2 is established, within ten weeks.
3. The time limit shall be suspended with effect from the day on which the submittant of the notice of appeal is requested to remedy an omission as referred to in article 6:6 until the day on which the omission is remedied or the time limit set for this purpose expires without being used.
4. The appeals authority may defer the decision for a maximum of eight weeks.
5. In the case referred to in subsection 2, however, the appeals authority may defer the decision for a maximum of four weeks.
6. Written communication shall be given of the deferral.
7. Further postponement shall be possible in so far as the submittant agrees to this and the interests of other interested parties cannot be prejudiced by this or these parties have agreed to this.

Article 7:25

In so far as the appeals authority considers that the appeal is admissible and well-founded, it shall annul the disputed order and, in so far as necessary, make a new order replacing it.

Article 7:26

1. The decision on the appeal shall be based on proper reasons, which shall be stated when the decision is notified. If it has been decided not to have a hearing under article 7:17, it shall also be stated on what grounds.
2. If the decision departs from the opinion of a committee as referred to in article 7:19, subsection 2, the reasons why the opinion was not followed shall be stated in the decision and the opinion shall be sent with the decision.
3. The decision shall be notified by being sent or issued to the persons to whom it is addressed. If it concerns an order which is not addressed to one or more interested parties, the decision shall be notified in the same way as the order was notified.

4. As soon as possible after the decision is notified, the administrative authority against whose order the appeal was brought, the ones to whom the disputed order was addressed and the interested parties who have stated their views in the appeal procedure shall beinformed.
5. Article 6:23 shall apply mutatis mutandis to the communication referred to in subsection 4, which shall also state, with a view to the start of the time limit for appeal, as clearly as possible, when the decision was notified in accordance with subsection 3.

Article 7:27

Article 3:6, subsection 2, divisions 3.4 and 3.5, articles 3:41 to 3:45 inclusive, division 3.7, with the exception of article 3:49, and Chapter 4 shall not apply.

Article 7:28

No fee shall be payable for the processing of the appeal.

CHAPTER 8 SPECIAL PROVISIONS CONCERNING APPEALS TO THE DISTRICT COURT

Title 8.1 General provisions ¨

[…]

Division 8.1.4. Challenge and excusal

Article 8:15

At the request of a party, any of the judges dealing with a case may be challenged on the ground of facts or circumstances which could prejudice the judicial impartiality.

Article 8:16

1. The request shall be made as soon as the facts or circumstances become known to thepetitioner.
2. The request shall be made in writing, stating the grounds. After the start of the hearing, or after the start of the hearing of parties or witnesses in the preliminary inquiry, the request may also be made orally.
3. All the facts and circumstances must be presented together.
4. A subsequent challenge to the same judge shall not be dealt with unless facts or circumstances are adduced which did not become known to the petitioner until after the previous request.
5. If the request is made , the hearing shall be adjourned.

Article 8:17

A judge who has been challenged may acquiesce in the challenge.

Article 8:18

1. The challenge shall be dealt with as soon as possible by a three-judge section of which the judge who has been challenged is not a member.
2. The petitioner and the judge who has been challenged shall be given the opportunity to be heard. The district court may determine, on its own initiative or at the request of the petitioner or the judge who has been challenged, that they will not be heard in each other's presence.

3. The district court shall decide as soon as possible. The decision shall state the reasons and shall be communicated without delay to the petitioner , the other parties and the judge who has been challenged.
4. In the event of abuse, the district court may order that no subsequent requests shall be dealt with. This shall be stated in the decision.
5. The decision is final.

Article 8:19

1. Any of the judges dealing with a case may ask to be excused from dealing with it on the ground of facts or circumstances as referred to in article 8:15.
2. The request shall be in writing, stating the reasons. After the start of the hearing, or after the start of the hearing of parties or witnesses in the preliminary inquiry, the request may also be made orally.
3. If the request is made in court, the hearing shall be adjourned.

Article 8:20

1. The request to be excused from dealing with the case shall be heard as soon as possible by a three-judge section of which the judge who has asked to be excused is not a member.
2. The district court shall decide as soon as possible. The decision shall state the reasons and shall be communicated without delay to the parties and the judge who asked to be excused.
3. The decision is final.

Division 8.1.5 The parties

Article 8:21

1. Natural persons who are not competent to be parties to litigation shall be represented in the proceedings by their civil-law representatives. For a statutory representative the authorisation of the subdistrict court as referred to in article 349 of Book 1 of the Civil Code is not required.
2. The persons referred to in subsection 1 may represent themselves in the action if they may be deemed to have a reasonable understanding of their interests.
3. If no statutory representative is present, or he is not available and the case is urgent, the district court may appoint a provisional representative. The appointment shall cease to have effect as soon as a statutory representative is present or the statutory representative is available once again.

Article 8:22

1. In the event of bankruptcy or suspension of payment of debts or application of the arrangement of purgation of debts, articles 25, 27 and 31 of the Bankruptcy Act shall apply mutatis mutandis.
2. Article 25, subsection 2 and article 27 shall not apply if the parties are invited to appear in court before the declaration of bankruptcy.

Article 8:23

1. An administrative authority which is a body shall be represented in the action by one or more members designated by the administrative authority.
2. The Crown shall be represented in the proceedings by Our Minister whom it may concern or one or more of Our Ministers whom it may concern, as the case may be.

Article 8:24

1. The parties may be assisted or represented by a legal representative.
2. The district court may require a legal representative to produce a written authorisation.
3. Subsection 2 shall not apply to attorneys-at-law and procurators.

Article 8:25

1. The district court may refuse to allow assistance or representation by a person against whom there are serious objections.
2. The party concerned and the person referred to in subsection 1 shall be informed without delay of the refusal and the reason for it.
3. Subsection 1 shall not apply to attorneys-at-law and procurators.

Article 8:26

1. Until the end of the hearing the district court may allow interested parties to be joined as parties in the proceedings on its own initiative, at the request of a party or at their own request.
2. If the district court suspects that there are unknown interested parties, it may announce in the Government Gazette that a case is pending before it. The announcement may also be made by other means in addition to the announcement in the Government Gazette.

Article 8:27

1. Parties who have been summoned by the district court to appear in person, or to appear in person or represented by a legal representative, whether or not to provide information, are obliged to appear and provide the information required. The attention of the parties shall be drawn to this and to article 8:31.
2. In the case of a legal entity or an administrative authority which is a body the district court may summon one or more specified administrators or members.

Article 8:28

Parties who have been requested by the district court to provide written information shall provide the information required. The attention of the parties shall be drawn to this and to article 8:31.

Article 8:29

1. Parties who are obliged to provide information or submit documents may, if there are compelling reasons, refuse to provide such information or submit such documents, or inform the district court that it alone may take cognizance of the information or documents concerned.
2. Compelling reasons shall in any event be deemed not to exist for an administrative authority in so far as there is an obligation under the Government Information (Public Access) Act to grant a request for information contained in the documents to be submitted.
3. The district court shall decide whether the refusal or restriction on the cognizance referred to in subsection 1 is justified.
4. If the district court decides that the refusal is justified, the obligation shall cease to have effect.
5. If the district court decides that the restriction on the cognizance of the information is justified, it may not give judgment based wholly or partly on the information or documents without the consent of the other parties.

Article 8:30

The parties shall cooperate in an investigation as referred to in article 8:47, subsection 1. The attention of the parties shall be drawn to this and to article 8:31.

Article 8:31

If a party fails to comply with the obligation to appear, provide information, submit documents or cooperate in an investigation as referred to in article 8:47, subsection 1, the district court may draw such conclusions from this as it sees fit.

Article 8:32

1. The district court may, if it is feared that the physical or mental health of a party would be damaged if he or she were to take cognizance of documents, direct that this may be done only by a legal representative who is an attorney-at-law or physician or has been given special permission by the district court.
2. The district court may, if the privacy of a person would be disproportionately invaded by a party taking cognizance of the documents, determine that this may be done only by a legal representative who is an attorney-at-law or physician or has been given special permission by the district court.

[…]

V. Questions to the General Administrative Law Act (NL)

1. What procedural rights are guaranteed in case of an "order" (in Switzerland an administrative decision)?
2. Is something missing?
3. What advantages or disadvantages do you see in codifying them in an act?

VI. Perez, Secretary of Labour, et al. v. Mortgage Bankers Association et al.

Summary of the facts

The Fair Labor Standards Act (FLSA) requires employers to pay overtime wages to employees who work more than 40 hours per week. However there exist exemptions to this rule. Since 2006, mortgage loan officers (people who assist prospective buyers in finding and applying for mortgage offers) qualified for the exemption. In 2010, however, the Deputy Administrator issued a new pronouncement declaring that mortgage loan officers did not qualify for the exemption. Mortgage Bankers Association (MBA), in representing mortgage loan officers, argued that the agency could not change its interpretation without first going through a notice-and-comment period required by the Administrative Procedure Act.

(Slip Opinion) OCTOBER TERM, 2014 1

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

PEREZ, SECRETARY OF LABOR, ET AL . *v.*
MORTGAGE BANKERS ASSOCIATION ET AL .

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

No. 13–1041. Argued December 1, 2014—Decided March 9, 2015*

The Administrative Procedure Act (APA) establishes the procedures federal administrative agencies use for "rule making," defined as the process of "formulating, amending, or repealing a rule." 5 U. S. C. §551(5). The APA distinguishes between two types of rules: So-called "legislative rules" are issued through notice-and-comment rulemaking, see §§553(b), (c), and have the "force and effect of law," *Chrysler Corp.* v. *Brown*, 441 U. S. 281, 302–303. "Interpretive rules," by contrast, are "issued . . . to advise the public of the agency's construction of the statutes and rules which it administers," *Shalala* v. *Guernsey Memorial Hospital*, 514 U. S. 87, 99, do not require notice-andcomment rulemaking, and "do not have the force and effect of law," *ibid.*

In 1999 and 2001, the Department of Labor's Wage and Hour Division issued letters opining that mortgage-loan officers do not qualify for the administrative exemption to overtime pay requirements under the Fair Labor Standards Act of 1938. In 2004, the Department issued new regulations regarding the exemption. Respondent Mortgage Bankers Association (MBA) requested a new interpretation of the revised regulations as they applied to mortgage-loan officers, and in 2006, the Wage and Hour Division issued an opinion letter finding that mortgage-loan officers fell within the administrative exemption under the 2004 regulations. In 2010, the Department again altered its interpretation of the administrative exemption. Without notice or an opportunity for comment, the Department withdrew the 2006

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* Together with No. 13–1052, *Nickols et al.* v. *Mortgage Bankers Association*, also on certiorari to the same court.

2 PEREZ *v.* MORTGAGE BANKERS ASSN. opinion letter and issued an Administrator's Interpretation concluding that mortgage-loan officers do not qualify for the administrative exemption.

MBA filed suit contending, as relevant here, that the Administrator's Interpretation was procedurally invalid under the D. C. Circuit's decision in *Paralyzed Veterans of Am.* v. *D. C. Arena L. P.*, 117 F. 3d 579. The *Paralyzed Veterans* doctrine holds that an agency must use the APA's notice-and-comment procedures when it wishes to issue a new interpretation of a regulation that deviates significantly from a previously adopted interpretation. The District Court granted summary judgment to the Department, but the D. C. Circuit applied *Paralyzed Veterans* and reversed.

Held: The *Paralyzed Veterans* doctrine is contrary to the clear text of the APA's rulemaking provisions and improperly imposes on agencies an obligation beyond the APA's maximum procedural requirements.

Pp. 6–14.

(a) The APA's categorical exemption of interpretive rules from the notice-and-comment process is fatal to the *Paralyzed Veterans* doctrine. The D. C. Circuit's reading of the APA conflates the differing purposes of §§1 and 4 of the Act. Section 1 requires agencies to use the same procedures when they amend or repeal a rule as they used to issue the rule, see 5 U. S. C. §551(5), but it does not say what procedures an agency must use when it engages in rulemaking. That is the purpose of §4. And §4 specifically exempts interpretive rules from notice-and-comment requirements. Because an agency is not required to use notice-and-comment procedures to issue an initial interpretive rule, it is also not required to use those procedures to amend or repeal that rule. Pp. 7–8.

(b) This straightforward reading of the APA harmonizes with longstanding principles of this Court's administrative law jurisprudence, which has consistently held that the APA "sets forth the full extent of judicial authority to review executive agency action for procedural correctness," *FCC* v. *Fox Television Stations, Inc*., 556 U. S. 502, 513. The APA's rulemaking provisions are no exception: §4 establishes "the maximum procedural requirements" that courts may impose upon agencies engaged in rulemaking. *Vermont Yankee Nuclear Power Corp*. v. *Natural Resources Defense Council, Inc*., 435 U. S. 519, 524. By mandating notice-and-comment procedures when an agency changes its interpretation of one of the regulations it enforces, *Paralyzed Veterans* creates a judge-made procedural right that is inconsistent with Congress' standards. Pp. 8–9.

(c) MBA's reasons for upholding the *Paralyzed Veterans* doctrine are unpersuasive. Pp. 9–14.

(1) MBA asserts that an agency interpretation of a regulation

that significantly alters the agency's prior interpretation effectively amends the underlying regulation. That assertion conflicts with the ordinary meaning of the words "amend" and "interpret," and it is impossible to reconcile with the longstanding recognition that interpretive rules do not have the force and effect of law. MBA's theory is particularly odd in light of the limitations of the *Paralyzed Veterans* doctrine, which applies only when an agency has previously adopted an interpretation of its regulation. MBA fails to explain why its argument regarding revised interpretations should not also extend to the agency's first interpretation. *Christensen* v. *Harris County*, 529 U. S. 576, and *Shalala* v. *Guernsey Memorial Hospital*, 514 U. S. 87, distinguished. Pp. 9–12.

(2) MBA also contends that the *Paralyzed Veterans* doctrine reinforces the APA's goal of procedural fairness. But the APA already provides recourse to regulated entities from agency decisions that skirt notice-and-comment provisions by placing a variety of constraints on agency decisionmaking, *e.g.*, the arbitrary and capricious standard. In addition, Congress may include safe-harbor provisions in legislation to shelter regulated entities from liability when they rely on previous agency interpretations. See, *e.g.*, 29 U. S. C. §§259(a), (b)(1). Pp. 12–13.

(3) MBA has waived its argument that the 2010 Administrator's Interpretation should be classified as a legislative rule. From the beginning, this suit has been litigated on the understanding that the Administrator's Interpretation is an interpretive rule. Neither the District Court nor the Court of Appeals addressed this argument below, and MBA did not raise it here in opposing certiorari. P. 14. 720 F. 3d 966, reversed.

SOTOMAYOR, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, GINSBURG, BREYER, and KAGAN, JJ., joined, and in which ALITO, J., joined except for Part III–B. ALITO, J., filed an opinion concurring in part and concurring in the judgment. SCALIA, J., and

THOMAS, J., filed opinions concurring in the judgment.

SUPREME COURT OF THE UNITED STATES

Nos. 13–1041 and 13–1052

THOMAS E. PEREZ, SECRETARY OF LABOR, ET AL., PETITIONERS

13–1041 *v.*

MORTGAGE BANKERS ASSOCIATION ET AL.

JEROME NICKOLS, ET AL., PETITIONERS

13–1052 *v.*

MORTGAGE BANKERS ASSOCIATION

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[March 9, 2015]

JUSTICE SOTOMAYOR delivered the opinion of the Court.

When a federal administrative agency first issues a rule interpreting one of its regulations, it is generally not required to follow the notice-and-comment rulemaking procedures of the Administrative Procedure Act (APA or Act). See 5 U. S. C. §553(b)(A). The United States Court of Appeals for the District of Columbia Circuit has nevertheless held, in a line of cases beginning with *Paralyzed Veterans of Am.* v. *D. C. Arena L. P.*, 117 F. 3d 579 (1997), that an agency must use the APA's notice-and-comment procedures when it wishes to issue a new interpretation of a regulation that deviates significantly from one the agency has previously adopted. The question in these cases is whether the rule announced in *Paralyzed Veterans* is consistent with the APA. We hold that it is not.

I

A

The APA establishes the procedures federal administrative agencies use for "rule making," defined as the process of "formulating, amending, or repealing a rule." §551(5). "Rule," in turn, is defined broadly to include "statement[s] of general or particular applicability and future effect" that

are designed to "implement, interpret, or prescribe law or policy." §551(4).

Section 4 of the APA, 5 U. S. C. §553, prescribes a threestep procedure for so-called "notice-and-comment rulemaking." First, the agency must issue a "[g]eneral notice of proposed rule making," ordinarily by publication in the Federal Register. §553(b). Second, if "notice [is] required," the agency must "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." §553(c). An agency must consider and respond to significant comments received during the period for public comment. See *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U. S. 402, 416 (1971); *Thompson* v. *Clark*, 741 F. 2d 401, 408 (CADC 1984). Third, when the agency promulgates the final rule, it must include in the rule's text "a concise general statement of [its] basis and purpose." §553(c). Rules issued through the notice-and-comment process are often referred to as "legislative rules" because they have the "force and effect of law." *Chrysler Corp.* v. *Brown*, 441 U. S. 281, 302–303 (1979) (internal quotation marks omitted).

Not all "rules" must be issued through the notice-andcomment process. Section 4(b)(A) of the APA provides that, unless another statute states otherwise, the noticeand-comment requirement "does not apply" to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U. S. C. §553(b)(A). The term "interpretative rule," or "interpretive rule,"[55] is not further defined by the APA, and its precise meaning is the source of much scholarly and judicial debate. See generally Pierce, Distinguishing Legislative Rules From Interpretative Rules, 52 Admin. L. Rev. 547 (2000); Manning, Nonlegislative Rules, 72 Geo. Wash. L. Rev. 893 (2004). We need not, and do not, wade into that debate here. For our purposes, it suffices to say that the critical feature of interpretive rules is that they are "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *Shalala* v. *Guernsey Memorial Hospital*, 514 U. S. 87, 99 (1995) (internal quotation marks omitted). The absence of a notice-and-comment obligation makes the process of issuing interpretive rules comparatively easier for agencies than issuing legislative rules. But that convenience comes at a price: Interpretive rules "do not have the force and effect of law and are not accorded that weight in the adjudicatory process." *Ibid.*

B

These cases began as a dispute over efforts by the Department of Labor to determine whether mortgage-loan officers are covered by the Fair Labor Standards Act of 1938 (FLSA), 52 Stat. 1060, as amended, 29 U. S. C. §201 *et seq.* The FLSA "establishe[s] a minimum wage and overtime compensation for each hour worked in excess of 40 hours

[55] The latter is the more common phrasing today, and the one we use throughout this opinion.

in each workweek" for many employees. *Integrity Staffing Solutions, Inc.* v. *Busk*, 574 U. S. ___, ___ (2014) (slip op., at 3). Certain classes of employees, however, are exempt from these provisions. Among these exempt individuals are those "employed in a bona fide executive, administrative, or professional capacity . . . or in the capacity of outside salesman . . . ." §213(a)(1). The

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exemption for such employees is known as the "administrative" exemption.

The FLSA grants the Secretary of Labor authority to "defin[e]" and "delimi[t]" the categories of exempt administrative employees. *Ibid.* The Secretary's current regu- lations regarding the administrative exemption were promulgated in 2004 through a notice-and-comment rulemaking. As relevant here, the 2004 regulations differed from the previous regulations in that they contained a new section providing several examples of exempt administrative employees. See 29 CFR §541.203. One of the examples is "[e]mployees in the financial services industry," who, depending on the nature of their day-to-day work, "generally meet the duties requirements for the administrative exception." §541.203(b). The financial services example ends with a caveat, noting that "an employee whose primary duty is selling financial products does not qualify for the administrative exemption." *Ibid.* In 1999 and again in 2001, the Department's Wage and Hour Division issued letters opining that mortgage-loan officers do not qualify for the administrative exemption. See Opinion Letter, Loan Officers/Exempt Status, 6A LRR, Wages and Hours Manual 99:8351 (Feb. 16, 2001); Opinion Letter, Mortgage Loan Officers/Exempt Status, *id.,* at 99:8249. (May 17, 1999). In other words, the Department concluded that the FLSA's minimum wage and maximum hour requirements applied to mortgage-loan officers. When the Department promulgated its current FLSA regulations in 2004, respondent Mortgage Bankers Association (MBA), a national trade association representing real estate finance companies, requested a new opinion interpreting the revised regulations. In 2006, the Department issued an opinion letter finding that mortgageloan officers fell within the administrative exemption under the 2004 regulations. See App. to Pet. for Cert. in No. 13–1041, pp. 70a–84a. Four years later, however, the Wage and Hour Division again altered its interpretation of the FLSA's administrative exemption as it applied to mortgage-loan officers. *Id.,* at 49a–69a. Reviewing the provisions of the 2004 regulations and judicial decisions addressing the administrative exemption, the Department's 2010 Administrator's Interpretation concluded that mortgage-loan officers "have a primary duty of making sales for their employers, and, therefore, do not qualify" for the administrative exemption. *Id.,* at 49a, 69a. The Department accordingly withdrew its 2006 opinion letter, which it now viewed as relying on "misleading assumption[s] and selective and narrow analysis" of the exemption

example in §541.203(b). *Id.,* at 68a. Like the 1999, 2001, and 2006 opinion letters, the 2010 Administrator's Interpretation was issued without notice or an opportunity for comment.

C

MBA filed a complaint in Federal District Court challenging the Administrator's Interpretation. MBA contended that the document was inconsistent with the 2004 regulation it purported to interpret, and thus arbitrary and capricious in violation of §10 of the APA, 5 U. S. C. §706. More pertinent to this case, MBA also argued that the Administrator's Interpretation was procedurally in- valid in light of the D. C. Circuit's decision in *Paralyzed Veterans*, 117 F. 3d 579. Under the *Paralyzed Veterans* doctrine, if "an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish" under the APA "without notice and comment." *Alaska Professional Hunters Assn., Inc.* v. *FAA*, 177 F. 3d 1030, 1034 (CADC 1999). Three former mortgage-loan officers—Beverly Buck, Ryan Henry, and Jerome Nickols—subsequently intervened in the case to defend the Administrator's Interpretation.[56]

The District Court granted summary judgment to the Department. *Mortgage Bankers Assn.* v. *Solis*, 864 F. Supp. 2d 193 (DC 2012). Though it accepted the parties' characterization of the Administrator's Interpretation as an interpretive rule, *id.,* at 203, n. 7, the District Court determined that the *Paralyzed Veterans* doctrine was inapplicable because MBA had failed to establish its reliance on the contrary interpretation expressed in the Department's 2006 opinion letter. The Administrator's Interpretation, the District Court further determined, was fully supported by the text of the 2004 FLSA regulations. The court accordingly held that the 2010 interpretation was not arbitrary or capricious.[57]

The D. C. Circuit reversed. *Mortgage Bankers Assn.* v. *Harris*, 720 F. 3d 966 (2013). Bound to the rule of *Paralyzed Veterans* by precedent, the Court of Appeals rejected the Government's call to abandon the doctrine. 720 F. 3d., at 967, n. 1. In the court's view, "[t]he only question" properly before it was whether the District Court had erred in requiring MBA to prove that it relied on the Department's prior interpretation. *Id.,* at 967. Explaining that reliance was not a required element of the *Paralyzed Veterans* doctrine, and noting the Department's concession that a prior, conflicting interpretation of the 2004 regulations existed, the D. C. Circuit concluded that the 2010 Administrator's Interpretation had to be vacated. We granted certiorari, 573 U. S. __ (2014), and now reverse.

[56] Buck, Henry, and Nickols are petitioners in No. 13–1052 and respondents in No. 13–1041.

[57] MBA did not challenge this aspect of the District Court's decision on appeal.

II

The *Paralyzed Veterans* doctrine is contrary to the clear

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text of the APA's rulemaking provisions, and it improperly imposes on agencies an obligation beyond the "maximum procedural requirements" specified in the APA, *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U. S. 519, 524 (1978).

A

The text of the APA answers the question presented. Section 4 of the APA provides that "notice of proposed rule making shall be published in the Federal Register." 5 U. S. C. §553(b). When such notice is required by the APA, "the agency shall give interested persons an opportunity to participate in the rule making." §553(c). But §4 further states that unless "notice or hearing is required by statute," the Act's notice-and-comment requirement "does not apply . . . to interpretative rules." §553(b)(A). This exemption of interpretive rules from the notice-andcomment process is categorical, and it is fatal to the rule announced in *Paralyzed Veterans*.

Rather than examining the exemption for interpretive rules contained in §4(b)(A) of the APA, the D. C. Circuit in *Paralyzed Veterans* focused its attention on §1 of the Act. That section defines "rule making" to include not only the initial issuance of new rules, but also "repeal[s]" or "amend[ments]" of existing rules. See §551(5). Because notice-and-comment requirements may apply even to these later agency actions, the court reasoned, "allow[ing] an agency to make a fundamental change in its interpretation of a substantive regulation without notice and comment" would undermine the APA's procedural framework. 117 F. 3d, at 586.

This reading of the APA conflates the differing purposes of §§1 and 4 of the Act. Section 1 defines what a rulemaking is. It does not, however, say what procedures an agency must use when it engages in rulemaking. That is the purpose of §4. And §4 specifically exempts interpretive rules from the notice-and-comment requirements that apply to legislative rules. So, the D. C. Circuit correctly read §1 of the APA to mandate that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance. See *FCC* v. *Fox Television Stations, Inc.*, 556 U. S. 502, 515 (2009) (the APA "make[s] no distinction . . . between initial agency action and subsequent agency action undoing or revising that action"). Where the court went wrong was in failing to apply that accurate understanding of §1 to the exemption for interpretive rules contained in §4: Because an agency is not required to use notice-and-comment procedures to issue an initial interpretive rule, it is also not required to use those procedures when it amends or repeals that interpretive rule.

B

The straightforward reading of the APA we now adopt harmonizes with longstanding principles of our administrative law jurisprudence. Time and again, we have reiterated that the APA "sets forth the full extent of judicial authority to review executive agency action for procedural correctness." *Fox Television Stations, Inc.*, 556 U. S., at 513. Beyond the APA's minimum requirements, courts lack authority "to impose upon [an] agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good." *Vermont Yankee*, 435 U. S., at 549. To do otherwise would violate "the very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure." *Id.,* at 544. These foundational principles apply with equal force to the APA's procedures for rulemaking. We explained in *Vermont Yankee* that §4 of the Act "established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures." *Id.,* at 524. "Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them." *Ibid.*

The *Paralyzed Veterans* doctrine creates just such a judge-made procedural right: the right to notice and an opportunity to comment when an agency changes its interpretation of one of the regulations it enforces. That requirement may be wise policy. Or it may not. Regard less, imposing such an obligation is the responsibility of Congress or the administrative agencies, not the courts. We trust that Congress weighed the costs and benefits of placing more rigorous procedural restrictions on the issuance of interpretive rules. See *id.,* at 523 (when Congress enacted the APA, it "settled long-continued and hardfought contentions, and enact[ed] a formula upon which opposing social and political forces have come to rest" (internal quotation marks omitted)). In the end, Congress decided to adopt standards that permit agencies to promulgate freely such rules—whether or not they are consistent with earlier interpretations. That the D. C. Circuit would have struck the balance differently does not permit that court or this one to overturn Congress' contrary judgment. Cf. *Law* v. *Siegel*, 571 U. S. ___, ___ (2014) (slip op., at 11).

III

MBA offers several reasons why the *Paralyzed Veterans* doctrine should be upheld. They are not persuasive.

A

MBA begins its defense of the *Paralyzed Veterans* doctrine by attempting to bolster the D. C. Circuit's reading of the APA. " *Paralyzed Veterans*," MBA contends, "simply acknowledges the reality that where an agency significantly alters a prior, definitive interpretation of a regulation, it has effectively amended the regulation itself,"

something that under the APA requires use of notice-and-comment procedures. Brief for Respondent 20–21.

The act of "amending," however, in both ordinary parlance and legal usage, has its own meaning separate and apart from the act of "interpreting." Compare Black's Law Dictionary 98 (10th ed. 2014) (defining "amend" as "[t]o change the wording of " or "formally alter . . . by striking out, inserting, or substituting words"), with *id.,* at 943 (defining "interpret" as "[t]o ascertain the meaning and significance of thoughts expressed in words"). One would not normally say that a court "amends" a statute when it interprets its text. So too can an agency "interpret" a regulation without "effectively amend[ing]" the underlying source of law. MBA does not explain *how*, precisely, an interpretive rule changes the regulation it interprets, and its assertion is impossible to reconcile with the longstanding recognition that interpretive rules do not have the force and effect of law. See *Chrysler Corp.*, 441 U. S., at 302, n. 31 (citing Attorney General's Manual on the Administrative Procedure Act 30, n. 3 (1947)); *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944).

MBA's "interpretation-as-amendment" theory is particularly odd in light of the limitations of the *Paralyzed Veterans* doctrine. Recall that the rule of *Paralyzed Veterans* applies only when an agency has previously adopted an interpretation of its regulation. Yet in that initial interpretation as much as all that come after, the agency is giving a definite meaning to an ambiguous text—the very act MBA insists requires notice and comment. MBA is unable to say why its arguments regarding revised interpretations should not also extend to the agency's first interpretation.[58]

Next, MBA argues that the *Paralyzed Veterans* doctrine is more consistent with this Court's "functional" approach to interpreting the APA. Relying on *Christensen* v. *Harris County*, 529 U. S. 576 (2000), and *Shalala* v. *Guernsey Memorial Hospital*, 514 U. S. 87, MBA contends that we have already recognized that an agency may not "avoid notice-and-comment procedures by cloaking its actions in the mantle of mere 'interpretation.'" Brief for Respondent 23–24.

Neither of the cases MBA cites supports its argument. Our decision in *Christensen* did not address a change in agency interpretation. Instead, we there refused to give deference to an agency's interpretation of an unambiguous regulation, observing that to defer in such a case would allow the agency "to create *de facto* a new regulation." 529 U. S., at 588. Put differently, *Christensen* held that the agency interpretation at issue was substantively invalid because it conflicted with the text of the regulation the agency purported to interpret. That holding is irrelevant to this suit

[58] MBA alternatively suggests that interpretive rules have the force of law because an agency's interpretation of its own regulations may be

and to the *Paralyzed Veterans* rule, which assesses whether an agency interpretation is *procedurally* invalid.

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entitled to deference under *Auer* v. *Robbins*, 519 U. S. 452 (1997), and *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410 (1945). Even in cases where an agency's interpretation receives *Auer* deference, how- ever, it is the court that ultimately decides whether a given regulation means what the agency says. Moreover, *Auer* deference is not an inexorable command in all cases. See *Christopher* v. *SmithKline Beecham Corp.*, 567 U. S. ___, ___ (2012) (slip op., at 10) (*Auer* deference is inappropriate "when the agency's interpretation is plainly erroneous or inconsistent with the regulation" or "when there is reason to suspect that the agency's interpretation does not reflect the agency's fair and considered judgment" (internal quotation marks omitted)); *Thomas Jefferson Univ.* v. *Shalala*, 512 U. S. 504, 515 (1994) ("[A]n agency's interpretation of a . . . regulation that conflicts with a prior interpretation is entitled to considerably less deference than a consistently held agency view" (internal quotation marks omitted)).

As for *Guernsey*, that case is fully consistent with— indeed, confirms—what the text of the APA makes plain: "Interpretive rules do not require notice and comment." 514 U. S., at 99. Sidestepping this inconvenient language, MBA instead quotes a portion of the Court's opinion stating that "APA rulemaking would still be required if [an agency] adopted a new position inconsistent with . . . existing regulations." *Id.,* at 100. But the statement on which MBA relies is dictum. Worse, it is dictum taken out of context. The "regulations" to which the Court referred were two provisions of the Medicare reimbursement scheme. And it is apparent from the Court's description of these regulations in Part II of the opinion that they were legislative rules, issued through the notice-and-comment process. See *id.,* at 91–92 (noting that the disputed regulations were codified in the Code of Federal Regulations). Read properly, then, the cited passage from *Guernsey* merely means that "an agency may only change its interpretation if the revised interpretation is consistent with the underlying regulations." Brief for Petitioners in No. 13–1052, p. 44.

B

In the main, MBA attempts to justify the *Paralyzed Veterans* doctrine on practical and policy grounds. MBA contends that the doctrine reinforces the APA's goal of "procedural fairness" by preventing agencies from unilaterally and unexpectedly altering their interpretation of important regulations. Brief for Respondent 16. There may be times when an agency's decision to issue an interpretive rule, rather than a legislative rule, is driven primarily by a desire to skirt notice-and-comment provisions. But regulated entities are not without recourse in such situations. Quite the opposite. The APA contains a variety of constraints on agency decisionmaking—the arbitrary and capricious standard being among the most notable. As we held in *Fox Television Stations*, and underscore again today, the APA requires an agency to provide more

substantial justification when "its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account. It would be arbitrary and capricious to ignore such matters." 556 U. S., at 515 (citation omitted); see also *id.,* at 535 (KENNEDY, J., concurring in part and concurring in judgment).

In addition, Congress is aware that agencies sometimes alter their views in ways that upset settled reliance interests. For that reason, Congress sometimes includes in the statutes it drafts safe-harbor provisions that shelter regulated entities from liability when they act in conformance with previous agency interpretations. The FLSA includes one such provision: As amended by the Portal-to-Portal Act of 1947, 29 U. S. C. §251 *et seq.,* the FLSA provides that "no employer shall be subject to any liability" for failing "to pay minimum wages or overtime compensation" if it demonstrates that the "act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation" of the Administrator of the Department's Wage and Hour Division, even when the
guidance is later "modified or rescinded." §§259(a), (b)(1). These safe harbors will often protect parties from liability when an agency adopts an interpretation that conflicts with its previous position.[59]

C

MBA changes direction in the second half of its brief, contending that if the Court overturns the *Paralyzed Veterans* rule, the D. C. Circuit's judgment should nonetheless be affirmed. That is so, MBA says, because the agency interpretation at issue—the 2010 Administrator's Interpretation—should in fact be classified as a legislative rule.

We will not address this argument. From the beginning, the parties litigated this suit on the understanding that the Administrator's Interpretation was—as its name suggests—an interpretive rule. Indeed, if MBA did not think the Administrator's Interpretation was an interpretive rule, then its decision to invoke the *Paralyzed Veterans* doctrine in attacking the rule is passing strange. After all, *Paralyzed Veterans* applied only to interpretive rules. Consequently, neither the District Court nor the D. C. Circuit considered MBA's current claim that the Administrator's Interpretation is actually a legislative rule. Beyond that, and more important still, MBA's brief in opposition to certiorari did not dispute petitioners' assertions—in their framing of the question presented and in the substance of their petitions—that the Administrator's Interpretation is

[59] The United States acknowledged at argument that even in situations where a statute does not contain a safe-harbor provision similar to the one included in the FLSA, an agency's ability to pursue enforcement actions against regulated entities for conduct in conformance with prior agency interpretations may be limited by principles of retroactiv- ity. See Tr. of Oral Arg. 44–45. We have no occasion to consider how such principles might apply here.

an interpretive rule. Thus, even assuming MBA did not waive the argument below, it has done so in this Court. See this Court's Rule 15.2; *Carcieri* v. *Salazar*, 555 U. S. 379, 395–396 (2009).

* * *

For the foregoing reasons, the judgment of the United States Court of Appeals for the District of Columbia Circuit is reversed.

It is so ordered.

[…]

E Administrative Discretion (Lecture 3)

I. General Questions

1. What is the role of courts in the administrative system? (What is "applying" the law?)
2. What is the idea of administrative discretion?
3. What is the role of the legislator in framing judicial review and administrative discretion?

II. Associated Provincial Picture Houses Ltd vs. Wednesbury Corporation

Summary of the facts

The Sunday Entertainments Act 1932 allows local licensing authorities to open cinemas on Sundays. Associated Provincial Picture Houses was granted a licence by the Wednesbury Corporation to operate a cinema on the condition that no children under 15, whether accompanied by an adult or not, were admitted on Sundays. Associated Provincial Picture Houses argued that Wednesbury's condition was unacceptable and outside the power of the corporation to impose.

IN THE SUPREME COURT OF JUDICATURE
KING'S BENCH

Royal Courts of Justice

10 November 1947

B e f o r e :

MASTER OF THE ROLLS
(Lord Greene)

LORD JUSTICE SOMERVELL and
JUSTICE SINGLETON

ASSOCIATED PROVINCIAL PICTURE HOUSES LTD **Plaintiffs (Appellant)**

WEDNESBURY CORPORATION **Defandants (Respondents)**

MR GALLOP K.C. and MR S. LAMB (instructed by Messrs. Norman, Hart & Mitchell) appeared on behalf of the Plaintiffs (Appellants).
MR FITZGERALD K.C. and MR V. GATTIE (instructed by Messrs. Pritchard & Co.) appeared on behalf of the Defendants (Respondents).

MASTER OF THE ROLLS: In the action out of which this appeal arises, the plaintiffs, who are the proprietors of a cinema theatre in Wednesbury, sought to obtain from the court a declaration that a certain condition imposed by the defendants, the corporation of Wednesbury, on the grant of a licence for Sunday performances in that cinema was ultra vires. The action was dismissed by Mr Justice Henn Collins and, in my opinion, his decision was clearly right. The powers and duties of the Local Authority are to be found in the Sunday Entertainments Act, 1932. That Act legalized the opening of cinemas on Sundays, subject to certain specified conditions and subject to such conditions as the licensing authority think fit to impose. The licensing authority are the licensing authority set up under the Cinematograph Act, 1909, and in this case are the council of the borough of Wednesbury. Before the Act of 1932, the opening of cinematograph theatres on Sundays was, in fact, illegal. Local authorities had purported in some cases to allow Sunday opening under the licences which they granted, but that permission was strictly irregular. The position under the Act now with regard to licensing is stated conveniently by Mr Justice Atkinson in *Harman v. Butt* [1944] Kings Bench at page 493. He there says:
"It is apparent that there are at least three totally different occasions on which licensing justices may be called on to exercise their discretion to issue a licence and to determine on what conditions the licence shall be issued. The application may be under the Cinematograph Act, 1909,

relating to six days of the week, excluding Sundays. It may be one relating solely to Sundays under the Sunday Entertainments Act, 1932, where in the case of a borough the majority of the local government electors have expressed a desire for Sunday performances. Thirdly, it may be one where the local government electors have expressed no such wish, but where the application is made for the benefit of those members of the forces who are stationed in the neighbourhood for the time being."

Under a regulation, the commanding officer of forces stationed in the neighbourhood had power to make a representation to the licensing authority and the case of *Harman v. Butt* [1944] Kings Bench 491, was, in fact, a case where that had taken place.

The actual words in question here are to be found in s.1, sub-s.1, of the Sunday Entertainments Act of 1932:

SUNDAY ENTERTAINMENTS ACT 1932 CHAPTER 51.

An Act *to permit and regulate the opening and use of places on Sundays for certain entertainments and for debates, and for purposes connected with the matters aforesaid. [13th July 1932.]*

BE *it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—*

1.—(1) The authority having power, in any area to which this section extends, to grant licences under the Cinematograph Act, 1909, may, notwithstanding anything in any enactment relating to Sunday observance, allow places in that area licensed under the said Act to be opened and used on Sundays for the purpose of cinematograph, entertainments, subject to such conditions as the authority think fit to impose :
Provided that no place shall be allowed to be so opened and used unless among the conditions subject to which it is allowed to be so opened and used there are included conditions for securing—

(a) that no person will be employed by any employer on any Sunday in connection with a cinematograph entertainment or any other entertainment or exhibition given therewith who has been employed on each of the six previous days either by that employer in any occupation or by any other employer in connection with similar entertainments or exhibitions; and

(b) that such sums as may be specified by the authority not exceeding the amount estimated by the authority as the amount of the profits which will be received from cinematograph entertainments given while the place is open on Sundays, and from any other entertainment or exhibition given therewith, and calculated by reference to such estimated profits or to such proportion of them as the authority think fit, will be paid as to the prescribed percentage thereof, if any, to the authority for the purpose of being transmitted to the Cinematograph Fund constituted in accordance with the provisions of this Act, and as to the remainder thereof to such persons as may be specified by the authority for the purpose of being applied to charitable objects;
and for the purpose of any conditions imposed by an authority as to the payment of sums calculated by reference to such estimated profits as aforesaid, the profits shall be computed in such manner as the authority may direct.

The power to impose conditions is expressed in quite general terms. The sub-section goes on to refer to certain conditions which must be imposed, but with those we are not concerned. In the present case, the defendants imposed the following condition in their licence:

"No children under the age of fifteen years shall be admitted to any entertainment, whether accompanied by an adult or not."

Mr. Gallop, for the plaintiffs, argued that it was not competent for the Wednesbury Corporation to impose any such condition and he said that if they were entitled to impose a condition prohibiting the admission of children, they should at least have limited it to cases where the children were not accompanied by their parents or a guardian or some adult. His argument was that the imposition of that condition was unreasonable and that in consequence it was ultra vires the corporation. The plaintiffs' contention is based, in my opinion, on a misconception as to the effect of this Act in granting this discretionary power to local authorities. The courts must always, I think, remember this: first, we are dealing with not a judicial act, but an executive act; secondly, the conditions which, under the exercise of that executive act, may be imposed are in terms, so far as language goes, put within the discretion of the local authority without limitation. Thirdly, the statute provides no appeal from the decision of the local authority.

What, then, is the power of the courts? They can only interfere with an act of executive authority if it be shown that the authority has contravened the law. It is for those who assert that the local authority has contravened the law to establish that proposition. On the face of it, a condition of the kind imposed in this case is perfectly lawful. It is not to be assumed prima facie that responsible bodies like the local authority in this case will exceed their powers; but the court, whenever it is alleged that the local authority have contravened the law, must not substitute itself for that authority. It is only concerned with seeing whether or not the proposition is made good. When an executive discretion is entrusted by Parliament to a body such as the local authority in this case, what appears to be an exercise of that discretion can only be challenged in the courts in a strictly limited class of case. As I have said, it must always be remembered that the court is not a court of appeal. When discretion of this kind is granted the law recognizes certain principles upon which that discretion must be exercised, but within the four corners of those principles the discretion, in my opinion, is an absolute one and cannot be questioned in any court of law. What then are those principles? They are well understood. They are principles which the court looks to in considering any question of discretion of this kind. The exercise of such a discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters. Conversely, if the nature of the subject matter and the general interpretation of the Act make it clear

that certain matters would not be germane to the matter in question, the authority must disregard those irrelevant collateral matters. There have been in the cases expressions used relating to the sort of things that authorities must not do, not merely in cases under the Cinematograph Act but, generally speaking, under other cases where the powers of local authorities came to be considered. I am not sure myself whether the permissible grounds of attack cannot be defined under a single head. It has been perhaps a little bit confusing to find a series of grounds set out. Bad faith, dishonesty - those of course, stand by themselves - unreasonableness, attention given to extraneous circumstances, disregard of public policy and things like that have all been referred to, according to the facts of individual cases, as being matters which are relevant to the question. If they cannot all be confined under one head, they at any rate, I think, overlap to a very great extent. For instance, we have heard in this case a great deal about the meaning of the word "unreasonable."

It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Lord Justice Warrington in *Short v. Poole Corporation* [1926] Chancery 66 at pages 90 and 91, gave the example of the redhaired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another.

In the present case, it is said by Mr. Gallop that the authority acted unreasonably in imposing this condition. It appears to me quite clear that the matter dealt with by this condition was a matter which a reasonable authority would be justified in considering when they were making up their mind what condition should be attached to the grant of this licence. Nobody, at this time of day, could say that the well-being and the physical and moral health of children is not a matter which a local authority, in exercising their powers, can properly have in mind when those questions are germane to what they have to consider. Here Mr. Gallop did not, I think, suggest that the council were directing their mind to a purely extraneous and irrelevant matter, but he based his argument on the word "unreasonable," which he treated as an independent

ground for attacking the decision of the authority; but once it is conceded, as it must be conceded in this case, that the particular subject-matter dealt with by this condition was one which it was competent for the authority to consider, there, in my opinion, is an end of the case. Once that is granted, Mr. Gallop is bound to say that the decision of the authority is wrong because it is unreasonable, and in saying that he is really saying that the ultimate arbiter of what is and is not reasonable is the court and not the local authority. It is just there, it seems to me, that the argument breaks down. It is clear that the local authority are entrusted by Parliament with the decision on a matter which the knowledge and experience of that authority can best be trusted to deal with. The subject-matter with which the condition deals is one relevant for its consideration. They have considered it and come to a decision upon it. It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere. That, I think, is quite right; but to prove a case of that kind would require something overwhelming, and, in this case, the facts do not come anywhere near anything of that kind. I think Mr. Gallop in the end agreed that his proposition that the decision of the local authority can be upset if it is proved to be unreasonable, really meant that it must be proved to be unreasonable in the sense that the court considers it to be a decision that no reasonable body could have come to. It is not what the court considers unreasonable, a different thing altogether. If it is what the court considers unreasonable, the court may very well have different views to that of a local authority on matters of high public policy of this kind. Some courts might think that no children ought to be admitted on Sundays at all, some courts might think the reverse, and all over the country I have no doubt on a thing of that sort honest and sincere people hold different views. The effect of the legislation is not to set up the court as an arbiter of the correctness of one view over another. It is the local authority that are set in that position and, provided they act, as they have acted, within the four corners of their jurisdiction, this court, in my opinion, cannot interfere.

This case, in my opinion, does not really require reference to authority when once the simple and well known principles are understood on which alone a court can interfere with something prima facie within the powers of the executive authority, but reference has been made to a number of cases. I can deal, I think, quite shortly with them. First, Mr Justice Henn Collins followed a decision of Mr Justice Atkinson in the case I have mentioned of *Harman v. Butt* [1944] Kings Bench 491. In that case a condition of this character had been imposed and I think the only difference between the two cases is that in *Harman v. Butt* [1944] Kings Bench 491. the licence to open on Sundays originated in a representation by the commanding officer of forces stationed in the neighbourhood. Mr Justice Atkinson dealt with the matter thus [1944] Kings Bench 491 at page 499:

"I am satisfied that the defendants were entitled to consider matters relating to the welfare, including the spiritual well-being, of the community and of any section of it, and I hold that this condition that no child under the age of sixteen should be admitted to this cinematograph theatre on Sunday is not ultra vires on the ground that it is not confined to the user of the premises by the licensee, but relates to the interest of a section of the community."

Then he goes on to deal with the question of reasonableness. That was a case in which the decision, in my opinion, is unassailable. There are two other cases relied upon. One is *R. v Burnley Justices* 85 Law Journal Reports, King's Bench 1565, and another not dissimilar case on one point, *Ellis v. Dubowski* [1921] 3 Kings Bench 621. Those were cases where the illegal element which the authority had imported into the conditions imposed consisted of a delegation of their powers to some outside body. It was not that the delegation was a thing which no reasonable person could have thought was a sensible thing to do. It was outside their powers altogether to pass on this discretion which the legislature had confided to them to some outside body. Another case on which Mr. Gallop relied is *Roberts v. Hopwood* [1925] AC 578. That was a totally different class of case. The district auditor had surcharged the members of a council who had made payments of a minimum wage of 4l. a week to their lowest grade of workers. That particular sum had been fixed by the local authority not by reference to any of the factors which go to determine a scale of wages, but by reference to some other principle altogether, and the substance of the decision was that they had not fixed 4l. a week as wages at all and that they had acted unreasonably. When the case is examined, the word "unreasonable" is found to be used rather in the sense that I mentioned a short while ago, namely, that in fixing 4l. they had fixed it by reference to a matter which they ought not to have taken into account and to the exclusion of those elements which they ought to have taken into consideration in fixing a sum which could fairly be called a wage. That is no authority whatsoever to support the proposition that the court has power, a sort of overriding power, to decide what is reasonable and what is unreasonable. The court has nothing of the kind.

I do not think I need take up time by referring to other authorities, but I might say this in conclusion. An early case under the Cinematograph Act, 1909, much discussed before us, was *Theatre de Luxe (Halifax) Ltd v. Gledhill* [1915] 2 Kings Bench 49. That was a decision of a Divisional Court as to the legality or a condition imposed under the Act to the following effect: "Children under fourteen years of age shall not be allowed to enter into or be in the licensed premises after the hour of 9 p.m. unaccompanied by a parent or guardian. No child under the age of ten years shall be allowed in the licensed premises under any circumstances after 9 p.m." That case was heard by a Divisional Court of the King's Bench Division, consisting of Lush, Rowlatt and Mr Justice Atkin . The majority, consisting of Justice Lush and Mr Justice Rowlatt

held that the condition was ultra vires as there was no connexion, as the headnote says, "between the ground upon which the condition was imposed, namely, regard for the health and welfare of young children generally, and the subject-matter of the licence, namely, the use of the premises for the giving of cinematograph exhibitions." That case is one which, I think, I am right in saying has never been referred to with approval, but often referred to with disapproval, though it has never been expressly overruled. I myself take the view that the decision of the majority in that case puts much too narrow a construction upon the licensing power given by that Act, which, of course, is not the same Act as we have to consider here. Mr Justice Atkin on the other hand, delivered a dissenting judgment in which he expressed the opinion that the power to impose conditions was nothing like so restricted as the majority had thought. Quoting again from the headnote, his opinion was "that the conditions must be (1.) reasonable; (2.) in respect of the use of the licensed premises; (3.) in the public interest. Subject to that restriction there is no fetter upon the power of the licensing authority." If I may venture to express my own opinion about that, I think that Mr Justice Atkin was right in considering that the restrictions on the power of imposing conditions were nothing like so broad as the majority thought, but I am not sure that his language may not perhaps be read in rather a different sense from that which I think he must have intended. I do not find in the language that he used any justification for thinking that it is for the court to decide on the question of reasonable-ness rather than the local authority. I do not read him as in any way dissenting from the view which I have ventured to express, that the task of the court is not to decide what it thinks is reasonable, but to decide whether what is prima facie within the power of the local authority is a condition which no reasonable authority, acting within the four corners of their jurisdiction, could have decided to impose. Similarly, when he refers to the public interest, I do not read him as saying more than that the public interest is a proper and legitimate thing which the council or the licensing authority can and ought to have in mind. He certainly does not suggest anywhere that the court is entitled to set up its view of the public interest against the view of the local authority. Once the local authority have properly taken into consideration a matter of public interest such as, in the present case, the moral and physical health of children, there is, it seems to me, nothing in what Mr Justice Atkin says to suggest that the court could interfere with a decision because it took a different view as to what was in the public interest. It is obviously a subject on which different minds may have different views. I do not read him as saying any more than that the local authority can and should take that matter into account in coming to their decision.

In the result, this appeal must be dismissed. I do not wish to repeat myself but I will summarize once again the principle applicable. The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought

not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may be still possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere. The power of the court to interfere in each case is not as an appellate authority to override a decision of the local authority, but as a judicial authority which is concerned, and concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in them. The appeal must be dismissed with costs.

LORD JUSTICE SOMERVELL: I agree that the appeal must be dismissed for the reasons which have been given by the Master of the Rolls, and I do not desire to add anything.

JUSTICE SINGLETON: I agree.

Order: Appeal dismissed with costs.

III. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.

Summary of the facts

The Clean Air Act addresses states that had failed to attain the air quality standards established by the Environmental Protection Agency (EPA). The Act required the establishment of rules regarding "the source of air pollution". Firstly, the EPA defined a source as any device in a manufacturing plant that produced pollution. In 1981, the EPA adopted a new definition that didn't consider the environmental impact of each device of the plant as long as the total emissions from the plant itself did not increase. The Natural Resources Defense Council, an environmental protection group, challenged the EPA regulation.

CHEVRON U.S.A. INC.
v.
NATURAL RESOURCES DEFENSE COUNCIL, INC.

SUPREME COURT OF THE UNITED STATES

467 U.S. 837

February 29, 1984, Argued
June 25, 1984, Decided *

* Together with No. 82-1247, American Iron & Steel Institute et al. v. Natural Resources Defense Council, Inc., et al.; and No. 82-1591, Ruckelshaus, Administrator, Environmental Protection Agency v. Natural Resources Defense Council, Inc., et al., also on certiorari to the same court.

SUBSEQUENT HISTORY: As Amended.

PRIOR HISTORY: CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

DISPOSITION: 222 U. S. App. D. C. 268, 685 F.2d 718, reversed.

JUDGES: STEVENS, J., delivered the opinion of the Court, in which all other Members joined, except MARSHALL and REHNQUIST, JJ., who took no part in the consideration or decision of the cases, and O'CONNOR, J., who took no part in the decision of the cases.

OPINION BY: STEVENS

OPINION

[*839] JUSTICE STEVENS delivered the opinion of the Court.

In the Clean Air Act Amendments of 1977, Pub. L. 95-95, 91 Stat. 685, Congress enacted certain requirements applicable **[*840]** to States that had not achieved the national air quality standards established by the Environmental Protection Agency (EPA) pursuant to earlier legislation. The amended Clean Air Act required these "nonattainment" States to establish a permit program regulating "new or modified major stationary sources" of air pollution. Generally, a permit may not be issued for a new or modified major stationary source unless several stringent conditions are met. [1] The EPA regulation promulgated to implement this permit requirement allows a State to adopt a plantwide definition of the term "stationary source." [2] Under this definition, an existing plant that contains several pollution-emitting devices may install or modify one piece of equipment without meeting the permit conditions if the alteration will not increase the total emissions from the plant. The question presented by these cases is whether EPA's decision to allow States to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single "bubble" is based on a reasonable construction of the statutory term "stationary source."

1 Section 172(b)(6), 42 U. S. C. § 7502(b)(6), provides:

"The plan provisions required by subsection (a) shall --

. . . . .

"(6) require permits for the construction and operation of new or modified major stationary sources in accordance with section 173 (relating to permit requirements)." 91 Stat. 747.

2 "(i) 'Stationary source' means any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act.

"(ii) 'Building, structure, facility, or installation' means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control) except the activities of any vessel." 40 CFR §§ 51.18(j)(1)(i) and (ii) (1983).

I

The EPA regulations containing the plantwide definition of the term stationary source were promulgated on October **[*841]** 14, 1981. 46 Fed. Reg. 50766. Respondents [3] filed a timely petition for review in the United States Court of Appeals for the District of Columbia Circuit pursuant to 42 U. S. C. § 7607(b)(1). [4] The Court of Appeals set aside the regulations. *National Resources Defense Council, Inc.* v. *Gorsuch*, 222 U. S. App. D. C. 268, 685 F.2d 718 (1982).

3 National Resources Defense Council, Inc., Citizens for a Better Environment, Inc., and North Western Ohio Lung Association, Inc.

4 Petitioners, Chevron U. S. A. Inc., American Iron and Steel Institute, American Petroleum Institute, Chemical Manufacturers Association, Inc., General Motors Corp., and Rubber Manufacturers Association were granted leave to intervene and argue in support of the regulation.

The court observed that the relevant part of the amended Clean Air Act "does not explicitly define what Congress envisioned as a 'stationary source, to which the permit program . . . should apply," and further stated that the precise issue was not "squarely addressed in the legislative history." *Id.*, at 273, 685 F.2d, at 723. In light of its conclusion that the legislative history bearing on the question was "at best contradictory," it reasoned that "the purposes of the non-attainment program should guide our decision here." *Id.*, at 276, n. 39, 685 F.2d, at 726, n. 39. [5] Based on two of its precedents concerning the applicability of the bubble concept to certain Clean Air Act programs, [6] the court stated that the bubble concept was "mandatory" in programs designed merely to maintain existing air quality, but held that it was "inappropriate" in programs enacted to improve air quality. *Id.*, at 276, 685 F.2d, at 726. Since the purpose of the permit **[*842]** program -- its *"raison d'etre,"* in the court's view -- was to improve air quality, the court held that the bubble concept was inapplicable in these cases under its prior precedents. *Ibid.* It therefore set aside the regulations embodying the bubble concept as contrary to law. We granted certiorari to review that judgment, 461 U.S. 956 (1983), and we now reverse.

5 The court remarked in this regard:

"We regret, of course, that Congress did not advert specifically to the bubble concept's application to various Clean Air Act programs, and note that a further clarifying statutory directive would facilitate the work of the agency and of the court in their endeavors to serve the legislators' will." 222 U. S. App. D. C., at 276, n. 39, 685 F.2d, at 726, n. 39.

6 *Alabama Power Co.* v. *Costle*, 204 U. S. App. D. C. 51, 636 F.2d 323 (1979); *ASARCO Inc.* v. *EPA*, 188 U. S. App. D. C. 77, 578 F.2d 319 (1978).

The basic legal error of the Court of Appeals was to adopt a static judicial definition of the term "stationary source" when it had decided that Congress itself had not commanded that definition. Respondents do not defend the legal reasoning of the Court of Appeals. [7] Nevertheless, since this Court reviews judgments, not opinions, [8] we must determine whether the Court of Appeals' legal error resulted in an erroneous judgment on the validity of the regulations.

7 Respondents argued below that EPA's plantwide definition of "stationary source" is contrary to the terms, legislative history, and purposes of the amended Clear Air Act. The court below rejected respondents' arguments based on the language and legislative history of the Act. It did

agree with respondents contention that the regulations were inconsistent with the purposes of the Act, but did not adopt the construction of the statute advanced by respondents here. Respondents rely on the arguments rejected by the Court of Appeals in support of the judgment, and may rely on any ground that finds support in the record. See *Ryerson* v. *United States*, 312 U.S. 405, 408 (1941); *LeTulle* v. *Scofield*, 308 U.S. 415, 421 (1940); *Langnes* v. *Green*, 282 U.S. 531, 533-539 (1931).

8 *E. g., Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956); *J. E. Riley Investment Co.* v. *Commissioner*, 311 U.S. 55, 59 (1940); *Williams* v. *Norris*, 12 Wheat. 117, 120 (1827); *McClung* v. *Silliman*, 6 Wheat. 598, 603 (1821).

II

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, **[*843]** as well as the agency, must give effect to the unambiguously expressed intent of Congress. [9] If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, [10] as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. [11]

9 The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. See, *e. g., FEC* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981); *SEC* v. *Sloan*, 436 U.S. 103, 117-118 (1978); *FMC* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 745-746 (1973); *Volkswagenwerk* v. *FMC*, 390 U.S. 261, 272 (1968); *NLRB* v. *Brown*, 380 U.S. 278, 291 (1965); *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965); *Social Security Board* v. *Nierotko*, 327 U.S. 358, 369 (1946); *Burnet* v. *Chicago Portrait Co.*, 285 U.S. 1, 16 (1932); *Webster* v. *Luther*, 163 U.S. 331, 342 (1896). If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.

10 See generally, R. Pound, The Spirit of the Common Law 174-175 (1921).

11 The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding. *FEC* v. *Democratic Senatorial Campaign Committee*, 454 U.S., at 39; *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450 (1978); *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 75 (1975); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *Unemployment Compensation Comm'n* v. *Aragon*, 329 U.S. 143, 153 (1946); *McLaren* v. *Fleischer*, 256 U.S. 477, 480-481 (1921).

"The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Morton* v. *Ruiz*, 415 U.S. 199, 231 (1974). If Congress has explicitly left a gap for the agency to fill, there is an express delegation **[*844]** of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. [12] Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency. [13]

12 See, *e. g., United States* v. *Morton, ante*, at 834; *Schweiker* v. *Gray Panthers*, 453 U.S. 34, 44 (1981); *Batterton* v. *Francis*, 432 U.S. 416, 424-426 (1977); *American Telephone & Tele-*

graph Co. v. *United States*, 299 U.S. 232, 235-237 (1936).

13 *E. g., INS* v. *Jong Ha Wang*, 450 U.S. 139, 144 (1981); *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S., at 87.

We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, [14] and the principle of deference to administrative interpretations

"has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations. See, *e. g., National Broadcasting Co.* v. *United States*, 319 U.S. 190; *Labor Board* v. *Hearst Publications, Inc.*, 322 U.S. 111; *Republic Aviation Corp.* v. **[*845]** *Labor Board*, 324 U.S. 793; *Securities & Exchange Comm'n* v. *Chenery Corp.*, 332 U.S. 194; *Labor Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344.

". . . If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *United States* v. *Shimer*, 367 U.S. 374, 382, 383 (1961).

Accord, *Capital Cities Cable, Inc.* v. *Crisp, ante*, at 699-700.

14 *Aluminum Co. of America* v. *Central Lincoln Peoples' Util. Dist., ante*, at 389; *Blum* v. *Bacon*, 457 U.S. 132, 141 (1982); *Union Electric Co.* v. *EPA*, 427 U.S. 246, 256 (1976); *Investment Company Institute* v. *Camp*, 401 U.S. 617, 626-627 (1971); *Unemployment Compensation Comm'n* v. *Aragon*, 329 U.S., at 153-154; *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111, 131 (1944); *McLaren* v. *Fleischer*, 256 U.S., at 480-481; *Webster* v. *Luther*, 163 U.S., at 342; *Brown* v. *United States*, 113 U.S. 568, 570-571 (1885); *United States* v. *Moore*, 95 U.S. 760, 763 (1878); *Edwards' Lessee* v. *Darby*, 12 Wheat. 206, 210 (1827).

In light of these well-settled principles it is clear that the Court of Appeals misconceived the nature of its role in reviewing the regulations at issue. Once it determined, after its own examination of the legislation, that Congress did not actually have an intent regarding the applicability of the bubble concept to the permit program, the question before it was not whether in its view the concept is "inappropriate" in the general context of a program designed to improve air quality, but whether the Administrator's view that it is appropriate in the context of this particular program is a reasonable one. Based on the examination of the legislation and its history which follows, we agree with the Court of Appeals that Congress did not have a specific intention on the applicability of the bubble concept in these cases, and conclude that the EPA's use of that concept here is a reasonable policy choice for the agency to make.

III

In the 1950's and the 1960's Congress enacted a series of statutes designed to encourage and to assist the States in curtailing air pollution. See generally *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 63-64 (1975). The Clean Air Amendments of 1970, Pub. L. 91-604, 84 Stat. 1676, "sharply increased federal authority and responsibility **[*846]** in the continuing effort to combat air pollution," 421 U.S., at 64, but continued to assign "primary responsibility for assuring air quality" to the several States, 84 Stat. 1678. Section 109 of the 1970 Amendments directed the EPA to promulgate National Ambient Air Quality Standards (NAAQS's) [15] and § 110

directed the States to develop plans (SIP's) to implement the standards within specified deadlines. In addition, § 111 provided that major new sources of pollution would be required to conform to technology-based performance standards; the EPA was directed to publish a list of categories of sources of pollution and to establish new source performance standards (NSPS) for each. Section 111(e) prohibited the operation of any new source in violation of a performance standard.

15 Primary standards were defined as those whose attainment and maintenance were necessary to protect the public health, and secondary standards were intended to specify a level of air quality that would protect the public welfare.

Section 111(a) defined the terms that are to be used in setting and enforcing standards of performance for new stationary sources. It provided:

"For purposes of this section:

. . . . .

"(3) The term 'stationary source' means any building, structure, facility, or installation which emits or may emit any air pollutant." 84 Stat. 1683.

In the 1970 Amendments that definition was not only applicable to the NSPS program required by § 111, but also was made applicable to a requirement of § 110 that each state implementation plan contain a procedure for reviewing the location of any proposed new source and preventing its construction if it would preclude the attainment or maintenance of national air quality standards. [16]

16 See §§ 110(a)(2)(D) and 110(a)(4).

In due course, the EPA promulgated NAAQS's, approved SIP's, and adopted detailed regulations governing NSPS's **[*847]** for various categories of equipment. In one of its programs, the EPA used a plantwide definition of the term "stationary source." In 1974, it issued NSPS's for the nonferrous smelting industry that provided that the standards would not apply to the modification of major smelting units if their increased emissions were offset by reductions in other portions of the same plant. [17]

17 The Court of Appeals ultimately held that this plantwide approach was prohibited by the 1970 Act, see *ASARCO Inc.*, 188 U. S. App. D. C., at 83-84, 578 F.2d, at 325-327. This decision was rendered after enactment of the 1977 Amendments, and hence the standard was in effect when Congress enacted the 1977 Amendments.

Nonattainment

The 1970 legislation provided for the attainment of primary NAAQS's by 1975. In many areas of the country, particularly the most industrialized States, the statutory goals were not attained. [18] In 1976, the 94th Congress was confronted with this fundamental problem, as well as many others respecting pollution control. As always in this area, the legislative struggle was basically between interests seeking strict schemes to reduce pollution rapidly to eliminate its social costs and interests advancing the economic concern that strict schemes would retard industrial development with attendant social costs. The 94th Congress, confronting these competing interests, was unable to agree on what response was in the public interest: legislative proposals to deal with nonattainment failed to command the necessary consensus. [19]

18 See Report of the National Commission on Air Quality, To Breathe Clean Air, 3.3-20 through 3.3-33 (1981).

19 Comprehensive bills did pass both Chambers of Congress; the Conference Report was rejected in the Senate. 122 Cong. Rec. 34375-34403, 34405-34418 (1976).

In light of this situation, the EPA published an Emissions Offset Interpretative Ruling in December 1976, see 41 Fed. Reg. 55524, to "fill the gap," as respondents put it, until Congress acted. The Ruling stated that it was intended to **[*848]** address "the issue of whether and to what extent national air quality standards established under the Clean Air Act may restrict or prohibit growth of major new or expanded stationary air pollution sources." *Id.*, at 55524-55525. In general, the Ruling provided that "a major new source may locate in an area with air quality worse than a national standard only if stringent conditions can be met." *Id.*, at 55525. The Ruling gave primary emphasis to the rapid attainment of the statute's environmental goals. [20] Consistent with that emphasis, the construction of every new source in nonattainment areas had to meet the "lowest achievable emission rate" under the current state of the art for that type of facility. See *Ibid.* The 1976 Ruling did not, however, explicitly adopt or reject the "bubble concept."[21]

20 For example, it stated:

"Particularly with regard to the primary NAAQS's, Congress and the Courts have made clear that economic considerations must be subordinated to NAAQS achievement and maintenance. While the ruling allows for some growth in areas violating a NAAQS if the net effect is to insure further progress toward NAAQS achievement, the Act does not allow economic growth to be accommodated at the expense of the public health." 41 Fed. Reg. 55527 (1976).

21 In January 1979, the EPA noted that the 1976 Ruling was ambiguous concerning this issue:

"A number of commenters indicated the need for a more explicit definition of 'source.' Some readers found that it was unclear under the 1976 Ruling whether a plant with a number of different processes and emission points would be considered a single source. The changes set forth below define a source as 'any structure, building, facility, equipment, installation, or operation (or combination thereof) which is located on one or more contiguous or adjacent properties and which is owned or operated by the same person (or by persons under common control).' This definition precludes a large plant from being separated into individual production lines for purposes of determining applicability of the offset requirements." 44 Fed. Reg. 3276.

IV

The Clean Air Act Amendments of 1977 are a lengthy, detailed, technical, complex, and comprehensive response to a major social issue. A small portion of the statute -- 91 Stat. **[*849]** 745-751 (Part D of Title I of the amended Act, 42 U. S. C. §§ 7501-7508) -- expressly deals with nonattainment areas. The focal point of this controversy is one phrase in that portion of the Amendments. [22]

22 Specifically, the controversy in these cases involves the meaning of the term "major stationary sources" in § 172(b)(6) of the Act, 42 U. S. C. § 7502(b)(6). The meaning of the term "proposed source" in § 173(2) of the Act, 42 U. S. C. § 7503(2), is not at issue.

Basically, the statute required each State in a nonattainment area to prepare and obtain approval of a new SIP by July 1, 1979. In the interim those States were required to comply with the EPA's interpretative Ruling of December 21, 1976. 91 Stat. 745. The deadline for attainment of the primary NAAQS's was extended until December 31, 1982, and in some cases until December 31, 1987, but the SIP's were required to contain a number of provisions designed to achieve the goals as expeditiously as possible. [23]

23 Thus, among other requirements, § 172(b) provided that the SIP's shall --

"(3) require, in the interim, reasonable further progress (as defined in section 171(1)) including such reduction in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology;

"(4) include a comprehensive, accurate, current inventory of actual emissions from all sources (as provided by rule of the Administrator) of

each such pollutant for each such area which is revised and resubmitted as frequently as may be necessary to assure that the requirements of paragraph (3) are met and to assess the need for additional reductions to assure attainment of each standard by the date required under paragraph (1);

"(5) expressly identify and quantify the emissions, if any, of any such pollutant which will be allowed to result from the construction and operation of major new or modified stationary sources for each such area; . . .

. . . . .

"(8) contain emission limitations, schedules of compliance and such other measures as may be necessary to meet the requirements of this section." 91 Stat. 747.

Section 171(1) provided:

"(1) The term 'reasonable further progress' means annual incremental reductions in emissions of the applicable air pollutant (including substantial reductions in the early years following approval or promulgation of plan provisions under this part and section 110(a)(2)(I) and regular reductions thereafter) which are sufficient in the judgment of the Administrator, to provide for attainment of the applicable national ambient air quality standard by the date required in section 172(a)." *Id.*, at 746.

[*850] Most significantly for our purposes, the statute provided that each plan shall

"(6) require permits for the construction and operation of new or modified major stationary sources in accordance with section 173. . . ." *Id.*, at 747.

Before issuing a permit, § 173 requires (1) the state agency to determine that there will be sufficient emissions reductions in the region to offset the emissions from the new source and also to allow for reasonable further progress toward attainment, or that the increased emissions will not exceed an allowance for growth established pursuant to § 172(b)(5); (2) the applicant to certify that his other sources in the State are in compliance with the SIP, (3) the agency to determine that the applicable SIP is otherwise being implemented, and (4) the proposed source to comply with the lowest achievable emission rate (LAER). [24]

24 Section 171(3) provides:

"(3) The term 'lowest achievable emission rate' means for any source, that rate of emissions which reflects --

"(A) the most stringent emission limitation which is contained in the implementation plan of any State for such class or category of source, unless the owner or operator of the proposed source demonstrates that such limitations are not achievable, or

"(B) the most stringent emission limitation which is achieved in practice by such class or category of source, whichever is more stringent.

"In no event shall the application of this term permit a proposed new or modified source to emit any pollutant in excess of the amount allowable under applicable new source standards of performance."

The LAER requirement is defined in terms that make it even more stringent than the applicable new source performance standard developed under § 111 of the Act, as amended by the 1970 statute.

[*851] The 1977 Amendments contain no specific reference to the "bubble concept." Nor do they contain a specific definition of the term "stationary source," though they did not disturb the definition of "stationary source" contained in § 111(a)(3), applicable by the terms of the Act to the NSPS program. Section 302(j), however, defines the term "major stationary source" as follows:

"(j) Except as otherwise expressly provided, the terms 'major stationary source' and 'major emitting facility' mean any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant (including any major emitting facility or source of fugitive emissions of any such pollutant, as determined by rule by the Administrator)." 91 Stat. 770.

V

The legislative history of the portion of the 1977 Amendments dealing with nonattainment areas does not contain any specific comment on the "bubble concept" or the question whether a plantwide definition of a stationary source is permissible under the permit program. It does, however, plainly disclose that in the permit program Congress sought to accommodate the conflict between the economic interest in permitting capital improvements to continue and the environmental interest in improving air quality. Indeed, the House Committee Report identified the economic interest as one of the "two main purposes" of this section of the bill. It stated:

"Section 117 of the bill, adopted during full committee markup establishes a new section 127 of the Clean Air Act. The section has two main purposes: (1) to allow reasonable economic growth to continue in an area while making reasonable further progress to assure attainment of the standards by a fixed date; and (2) to allow **[*852]** States greater flexibility for the former purpose than EPA's present interpretative regulations afford.

"The new provision allows States with nonattainment areas to pursue one of two options. First, the State may proceed under EPA's present 'tradeoff' or 'offset' ruling. The Administrator is authorized, moreover, to modify or amend that ruling in accordance with the intent and purposes of this section.

"The State's second option would be to revise its implementation plan in accordance with this new provision." H. R. Rep. No. 95-294, p. 211 (1977). [25]

> 25 During the floor debates Congressman Waxman remarked that the legislation struck
>
> "a proper balance between environmental controls and economic growth in the dirty air areas of America. . . . There is no other single issue which more clearly poses the conflict between pollution control and new jobs. We have determined that neither need be compromised. . . .
>
> "This is a fair and balanced approach, which will not undermine our economic vitality, or impede achievement of our ultimate environmental objectives." 123 Cong. Rec. 27076 (1977).
>
> The second "main purpose" of the provision -- allowing the States "greater flexibility" than the EPA's interpretative Ruling -- as well as the reference to the EPA's authority to amend its Ruling in accordance with the intent of the section, is entirely consistent with the view that Congress did not intend to freeze the definition of "source" contained in the existing regulation into a rigid statutory requirement.

The portion of the Senate Committee Report dealing with nonattainment areas states generally that it was intended to "supersede the EPA administrative approach," and that expansion should be permitted if a State could "demonstrate that these facilities can be accommodated within its overall plan to provide for attainment of air quality standards." S. Rep. No. 95-127, p. 55 (1977). The Senate Report notes the value of "case-by-case review of each new or modified major source of pollution that seeks to locate in a region exceeding an ambient standard," explaining that such a review "requires matching reductions from existing sources against **[*853]** emissions expected from the new source in order to assure that introduction of the new source will not prevent attainment of the applicable standard by the statutory deadline." *Ibid.* This description of a case-by-case approach to plant additions, which emphasizes the net consequences of the construction or modification of a new source, as well as its impact on the overall achievement of the national standards, was not, however, addressed to the precise issue raised by these cases.

Senator Muskie made the following remarks:

"I should note that the test for determining whether a new or modified source is subject to the EPA interpretative regulation [the Offset

Ruling] -- and to the permit requirements of the revised implementation plans under the conference bill -- is whether the source will emit a pollutant into an area which is exceeding a national ambient air quality standard for that pollutant -- or precursor. Thus, a new source is still subject to such requirements as 'lowest achievable emission rate' even if it is constructed as a replacement for an older facility resulting in a net reduction from previous emission levels.

"A source -- including an existing facility ordered to convert to coal -- is subject to all the nonattainment requirements as a modified source if it makes any physical change which increases the amount of any air pollutant for which the standards in the area are exceeded." 123 Cong. Rec. 26847 (1977).

VI

As previously noted, prior to the 1977 Amendments, the EPA had adhered to a plantwide definition of the term "source" under a NSPS program. After adoption of the 1977 Amendments, proposals for a plantwide definition were considered in at least three formal proceedings.

In January 1979, the EPA considered the question whether the same restriction on new construction in nonattainment areas that had been included in its December 1976 Ruling **[*854]** should be required in the revised SIP's that were scheduled to go into effect in July 1979. After noting that the 1976 Ruling was ambiguous on the question "whether a plant with a number of different processes and emission points would be considered a single source," 44 Fed. Reg. 3276 (1979), the EPA, in effect, provided a bifurcated answer to that question. In those areas that did not have a revised SIP in effect by July 1979, the EPA rejected the plantwide definition; on the other hand, it expressly concluded that the plantwide approach would be permissible in certain circumstances if authorized by an approved SIP. It stated:

"Where a state implementation plan is revised and implemented to satisfy the requirements of Part D, including the reasonable further progress requirement, the plan requirements for major modifications may exempt modifications of existing facilities that are accompanied by intrasource offsets so that there is no net increase in emissions. The agency endorses such exemptions, which would provide greater flexibility to sources to effectively manage their air emissions at least cost." *Ibid.* [26]

26 In the same Ruling, the EPA added:

"The above exemption is permitted under the SIP because, to be approved under Part D, plan revisions due by January 1979 must contain adopted measures assuring that reasonable further progress will be made. Furthermore, in most circumstances, the measures adopted by January 1979 must be sufficient to actually provide for attainment of the standards by the dates required under the Act, and in all circumstances measures adopted by 1982 must provide for attainment. See Section 172 of the Act and 43 F R 21673-21677 (May 19, 1978). Also, Congress intended under Section 173 of the Act that States would have some latitude to depart from the strict requirements of this Ruling when the State plan is revised and is being carried out in accordance with Part D. Under a Part D plan, therefore, there is less need to subject a modification of an existing facility to LAER and other stringent requirements if the modification is accompanied by sufficient intrasource offsets so that there is no net increase in emissions." 44 Fed. Reg. 3277 (1979).

[*855] In April, and again in September 1979, the EPA published additional comments in which it indicated that revised SIP's could adopt the plantwide definition of source in nonattainment areas in certain circumstances. See *id.*, at 20372, 20379, 51924, 51951, 51958. On the latter occasion, the EPA made a formal rulemaking proposal that would have permitted the use of the "bubble concept" for new

installations within a plant as well as for modifications of existing units. It explained:

"'Bubble' Exemption: The use of offsets inside the same source is called the 'bubble.' EPA proposes use of the definition of 'source' (see above) to limit the use of the bubble under nonattainment requirements in the following respects:

"i. Part D SIPs that include all requirements needed to assure reasonable further progress and attainment by the deadline under section 172 and that are being carried out need not restrict the use of a plantwide bubble, the same as under the PSD proposal.

"ii. Part D SIPs that do not meet the requirements specified must limit use of the bubble by including a definition of 'installation' as an identifiable piece of process equipment. " [27]

[*856] Significantly, the EPA expressly noted that the word "source" might be given a plantwide definition for some purposes and a narrower definition for other purposes. It wrote:

"Source means any building structure, facility, or installation which emits or may emit any regulated pollutant. 'Building, structure, facility or installation' means plant in PSD areas and in nonattainment areas except where the growth prohibitions would apply or where no adequate SIP exists or is being carried out." *Id.*, at 51925. [28]

The EPA's summary of its proposed Ruling discloses a flexible rather than rigid definition of the term "source" to implement various policies and programs:

"In summary, EPA is proposing two different ways to define source for different kinds of NSR programs:

"(1) For PSD and complete Part D SIPs, review would apply only to plants, with an unrestricted plant-wide bubble.

"(2) For the offset ruling, restrictions on construction, and incomplete Part D SIPs, review would apply to both plants and individual pieces of process equipment, causing the plant-wide bubble not to apply for new and modified major pieces of equipment.

"In addition, for the restrictions on construction, EPA is proposing to define 'major modification' so as to prohibit the bubble entirely. Finally, an alternative discussed but not favored is to have only pieces of process equipment reviewed, resulting in no plant-wide bubble and allowing minor pieces of equipment to escape NSR **[*857]** regardless of whether they are within a major plant." *Id.*, at 51934.

27 *Id.*, at 51926. Later in that Ruling, the EPA added:

"However, EPA believes that complete Part D SIPs, which contain adopted and enforceable requirements sufficient to assure attainment, may apply the approach proposed above for PSD, with plant-wide review but no review of individual pieces of equipment. Use of only a plant-wide definition of source will permit plant-wide offsets for avoiding NSR of new or modified pieces of equipment. However, this is only appropriate once a SIP is adopted that will assure the reductions in existing emissions necessary for attainment. *See* 44 FR 3276 col. 3 (January 16, 1979). If the level of emissions allowed in the SIP is low enough to assure reasonable further progress and attainment, new construction or modifications with enough offset credit to prevent an emission increase should not jeopardize attainment." *Id.*, at 51933.

28 In its explanation of why the use of the "bubble concept" was especially appropriate in preventing significant deterioration (PSD) in clean air areas, the EPA stated: "In addition, application of the bubble on a plant-wide basis encourages voluntary upgrading of equipment, and growth in productive capacity." *Id.*, at 51932.

In August 1980, however, the EPA adopted a regulation that, in essence, applied the basic reasoning of the Court of Appeals in these

cases. The EPA took particular note of the two then-recent Court of Appeals decisions, which had created the bright-line rule that the "bubble concept" should be employed in a program designed to maintain air quality but not in one designed to enhance air quality. Relying heavily on those cases, [29] EPA adopted a dual definition of "source" for nonattainment areas that required a permit whenever a change in either the entire plant, or one of its components, would result in a significant increase in emissions even if the increase was completely offset by reductions elsewhere in the plant. The EPA expressed the opinion that this interpretation was "more consistent with congressional intent" than the plantwide definition because it "would bring in more sources or modifications for review," 45 Fed. Reg. 52697 (1980), but its primary legal analysis was predicated on the two Court of Appeals decisions.

> 29 "The dual definition also is consistent with *Alabama Power* and *ASARCO*. *Alabama Power* held that EPA had broad discretion to define the constituent terms of 'source' so as best to effectuate the purposes of the statute. Different definitions of 'source' can therefore be used for different sections of the statute. . . .
>
> "Moreover, *Alabama Power* and *ASARCO* taken together suggest that there is a distinction between Clean Air Act programs designed to *enhance* air quality and those designed only to *maintain* air quality. . . .
>
> . . . . .
>
> "Promulgation of the dual definition follows the mandate of *Alabama Power*, which held that, while EPA could not define 'source' as a combination of sources, EPA had broad discretion to define 'building,' 'structure,' 'facility,' and 'installation' so as to best accomplish the purposes of the Act." 45 Fed. Reg. 52697 (1980).

In 1981 a new administration took office and initiated a "Government-wide reexamination of regulatory burdens and complexities." 46 Fed. Reg. 16281. In the context of that **[*858]** review, the EPA reevaluated the various arguments that had been advanced in connection with the proper definition of the term "source" and concluded that the term should be given the same definition in both nonattainment areas and PSD areas.

In explaining its conclusion, the EPA first noted that the definitional issue was not squarely addressed in either the statute or its legislative history and therefore that the issue involved an agency "judgment as how to best carry out the Act." *Ibid.* It then set forth several reasons for concluding that the plantwide definition was more appropriate. It pointed out that the dual definition "can act as a disincentive to new investment and modernization by discouraging modifications to existing facilities" and "can actually retard progress in air pollution control by discouraging replacement of older, dirtier processes or pieces of equipment with new, cleaner ones." *Ibid.* Moreover, the new definition "would simplify EPA's rules by using the same definition of 'source' for PSD, nonattainment new source review and the construction moratorium. This reduces confusion and inconsistency." *Ibid.* Finally, the agency explained that additional requirements that remained in place would accomplish the fundamental purposes of achieving attainment with NAAQS's as expeditiously as possible. [30] These conclusions were expressed **[*859]** in a proposed rulemaking in August 1981 that was formally promulgated in October. See *id.*, at 50766.

> 30 It stated:
>
> "5. States will remain subject to the requirement that for all nonattainment areas they demonstrate attainment of NAAQS as expeditiously as practicable and show reasonable further progress toward such attainment. Thus, the proposed change in the mandatory scope of nonattainment new source review should not interfere with the fundamental purpose of Part D of the Act.
>
> "6. New Source Performance Standards (NSPS) will continue to apply to many new or modified facilities and will assure use of the most up-to-date pollution control techniques regard-

less of the applicability of nonattainment area new source review.

"7. In order to avoid nonattainment area new source review, a major plant undergoing modification must show that it will not experience a significant net increase in emissions. Where overall emissions increase significantly, review will continue to be required." 46 Fed. Reg. 16281 (1981).

VII

In this Court respondents expressly reject the basic rationale of the Court of Appeals' decision. That court viewed the statutory definition of the term "source" as sufficiently flexible to cover either a plantwide definition, a narrower definition covering each unit within a plant, or a dual definition that could apply to both the entire "bubble" and its components. It interpreted the policies of the statute, however, to mandate the plantwide definition in programs designed to maintain clean air and to forbid it in programs designed to improve air quality. Respondents place a fundamentally different construction on the statute. They contend that the text of the Act requires the EPA to use a dual definition -- if either a component of a plant, or the plant as a whole, emits over 100 tons of pollutant, it is a major stationary source. They thus contend that the EPA rules adopted in 1980, insofar as they apply to the maintenance of the quality of clean air, as well as the 1981 rules which apply to nonattainment areas, violate the statute. [31]

31 "What EPA may not do, however, is define all four terms to mean *only* plants. In the 1980 PSD rules, EPA did just that. EPA compounded the mistake in the 1981 rules here under review, in which it abandoned the dual definition." Brief for Respondents 29, n. 56.

Statutory Language

The definition of the term "stationary source" in § 111(a)(3) refers to "any building, structure, facility, or installation" which emits air pollution. See *supra*, at 846. This definition is applicable only to the NSPS program by the express terms of the statute; the text of the statute does not make this definition **[*860]** applicable to the permit program. Petitioners therefore maintain that there is no statutory language even relevant to ascertaining the meaning of stationary source in the permit program aside from § 302(j), which defines the term "major stationary source." See *supra*, at 851. We disagree with petitioners on this point.

The definition in § 302(j) tells us what the word "major" means -- a source must emit at least 100 tons of pollution to qualify -- but it sheds virtually no light on the meaning of the term "stationary source." It does equate a source with a facility -- a "major emitting facility" and a "major stationary source" are synonymous under § 302(j). The ordinary meaning of the term "facility" is some collection of integrated elements which has been designed and constructed to achieve some purpose. Moreover, it is certainly no affront to common English usage to take a reference to a major facility or a major source to connote an entire plant as opposed to its constituent parts. Basically, however, the language of § 302(j) simply does not compel any given interpretation of the term "source."

Respondents recognize that, and hence point to § 111(a)(3). Although the definition in that section is not literally applicable to the permit program, it sheds as much light on the meaning of the word "source" as anything in the statute. [32] As respondents point out, use of the words "building, structure, facility, or installation," as the definition of source, could be read to impose the permit conditions on an individual building that is a part of a plant. [33] A "word may have a character of its own not to be submerged by its association." *Russell Motor Car Co.* v. *United States*, 261 U.S. 514, 519 **[*861]** (1923). On the other hand, the meaning of a word must be ascertained in the context of

achieving particular objectives, and the words associated with it may indicate that the true meaning of the series is to convey a common idea. The language may reasonably be interpreted to impose the requirement on any discrete, but integrated, operation which pollutes. This gives meaning to all of the terms -- a single building, not part of a larger operation, would be covered if it emits more than 100 tons of pollution, as would any facility, structure, or installation. Indeed, the language itself implies a "bubble concept" of sorts: each enumerated item would seem to be treated as if it were encased in a bubble. While respondents insist that each of these terms must be given a discrete meaning, they also argue that § 111(a)(3) defines "source" as that term is used in § 302(j). The latter section, however, equates a source with a facility, whereas the former defines "source" as a facility, among other items.

32 We note that the EPA in fact adopted the language of that definition in its regulations under the permit program. 40 CFR §§ 51.18(j)(1)(i), (ii) (1983).

33 Since the regulations give the States the option to define an individual unit as a source, see 40 CFR § 51.18(j)(1) (1983), petitioners do not dispute that the terms can be read as respondents suggest.

We are not persuaded that parsing of general terms in the text of the statute will reveal an actual intent of Congress.[34] **[*862]** We know full well that this language is not dispositive; the terms are overlapping and the language is not precisely directed to the question of the applicability of a given term in the context of a larger operation. To the extent any congressional "intent" can be discerned from this language, it would appear that the listing of overlapping, illustrative terms was intended to enlarge, rather than to confine, the scope of the agency's power to regulate particular sources in order to effectuate the policies of the Act.

34 The argument based on the text of § 173, which defines the permit requirements for nonattainment areas, is a classic example of circular reasoning. One of the permit requirements is that "the proposed source is required to comply with the lowest achievable emission rate" (LAER). Although a State may submit a revised SIP that provides for the waiver of another requirement -- the "offset condition" -- the SIP may not provide for a waiver of the LAER condition for any proposed source. Respondents argue that the plantwide definition of the term "source" makes it unnecessary for newly constructed units within the plant to satisfy the LAER requirement if their emissions are offset by the reductions achieved by the retirement of older equipment. Thus, according to respondents, the plantwide definition allows what the statute explicitly prohibits -- the waiver of the LAER requirement for the newly constructed units. But this argument proves nothing because the statute does not prohibit the waiver unless the proposed new unit is indeed subject to the permit program. If it is not, the statute does not impose the LAER requirement at all and there is no need to reach any waiver question. In other words, § 173 of the statute merely deals with the consequences of the definition of the term "source" and does not define the term.

Legislative History

In addition, respondents argue that the legislative history and policies of the Act foreclose the plantwide definition, and that the EPA's interpretation is not entitled to deference because it represents a sharp break with prior interpretations of the Act.

Based on our examination of the legislative history, we agree with the Court of Appeals that it is unilluminating. The general remarks pointed to by respondents "were obviously not made with this narrow issue in mind and they cannot be said to demonstrate a Congressional desire. . . ." *Jewell Ridge Coal Corp.* v. *Mine Workers*, 325 U.S. 161, 168-169 (1945). Respondents' argument based on the legislative history relies heavily on Senator Muskie's observation that a new source is subject to the LAER requirement. [35] But the full statement is

ambiguous and like the text of § 173 itself, this comment does not tell us what a new source is, much less that it is to have an inflexible definition. We find that the legislative history as a whole is silent on the precise issue before us. It is, however, consistent with the view that the EPA should have broad discretion in implementing the policies of the 1977 Amendments.

35 See *supra*, at 853. We note that Senator Muskie was not critical of the EPA's use of the "bubble concept" in one NSPS program prior to the 1977 amendments. See *ibid.*

[*863] More importantly, that history plainly identifies the policy concerns that motivated the enactment; the plantwide definition is fully consistent with one of those concerns -- the allowance of reasonable economic growth -- and, whether or not we believe it most effectively implements the other, we must recognize that the EPA has advanced a reasonable explanation for its conclusion that the regulations serve the environmental objectives as well. See *supra*, at 857-859, and n. 29; see also *supra*, at 855, n. 27. Indeed, its reasoning is supported by the public record developed in the rulemaking process, [36] as well as by certain private studies. [37]

36 See, for example, the statement of the New York State Department of Environmental Conservation, pointing out that denying a source owner flexibility in selecting options made it "simpler and cheaper to operate old, more polluting sources than to trade up. . . ." App. 128-129.

37 "Economists have proposed that economic incentives be substituted for the cumbersome administrative-legal framework. The objective is to make the profit and cost incentives that work so well in the marketplace work for pollution control. . . . [The 'bubble' or 'netting' concept] is a first attempt in this direction. By giving a plant manager flexibility to find the places and processes within a plant that control emissions most cheaply, pollution control can be achieved more quickly and cheaply." L. Lave & G. Omenn, Cleaning the Air: Reforming the Clean Air Act 28 (1981) (footnote omitted).

Our review of the EPA's varying interpretations of the word "source" -- both before and after the 1977 Amendments -- convinces us that the agency primarily responsible for administering this important legislation has consistently interpreted it flexibly -- not in a sterile textual vacuum, but in the context of implementing policy decisions in a technical and complex arena. The fact that the agency has from time to time changed its interpretation of the term "source" does not, as respondents argue, lead us to conclude that no deference should be accorded the agency's interpretation of the statute. An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations **[*864]** and the wisdom of its policy on a continuing basis. Moreover, the fact that the agency has adopted different definitions in different contexts adds force to the argument that the definition itself is flexible, particularly since Congress has never indicated any disapproval of a flexible reading of the statute.

Significantly, it was not the agency in 1980, but rather the Court of Appeals that read the statute inflexibly to command a plantwide definition for programs designed to maintain clean air and to forbid such a definition for programs designed to improve air quality. The distinction the court drew may well be a sensible one, but our labored review of the problem has surely disclosed that it is not a distinction that Congress ever articulated itself, or one that the EPA found in the statute before the courts began to review the legislative work product. We conclude that it was the Court of Appeals, rather than Congress or any of the decisionmakers who are authorized by Congress to administer this legislation, that was primarily responsible for the 1980 position taken by the agency.

Policy

The arguments over policy that are advanced in the parties' briefs create the impression that respondents are now waging in a judicial forum a specific policy battle which they ultimately lost in the agency and in the 32 jurisdictions opting for the "bubble concept," but one which was never waged in the Congress. Such policy arguments are more properly addressed to legislators or administrators, not to judges. [38]

> 38 Respondents point out if a brand new factory that will emit over 100 tons of pollutants is constructed in a nonattainment area, that plant must obtain a permit pursuant to § 172(b)(6) and in order to do so, it must satisfy the § 173 conditions, including the LAER requirement. Respondents argue if an old plant containing several large emitting units is to be modernized by the replacement of one or more units emitting over 100 tons of pollutant with a new unit emitting less -- but still more than 100 tons -- the result should be no different simply because "it happens to be built not at a new site, but within a *pre-existing plant.*" Brief for Respondents 4.

[*865] In these cases the Administrator's interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, [39] the agency considered the matter in a detailed and reasoned fashion, [40] and the decision involves reconciling conflicting policies. [41] Congress intended to accommodate both interests, but did not do so itself on the level of specificity presented by these cases. Perhaps that body consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency. For judicial purposes, it matters not which of these things occurred.

> 39 See, *e. g., Aluminum Co. of America* v. *Central Lincoln Peoples' Util. Dist., ante*, at 390.
>
> 40 See *SEC* v. *Sloan*, 436 U.S., at 117; *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 287, n. 5 (1978); *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944).
>
> 41 See *Capital Cities Cable, Inc.* v. *Crisp, ante*, at 699-700; *United States* v. *Shimer*, 367 U.S. 374, 382 (1961).

Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices -- resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the **[*866]** agency charged with the administration of the statute in light of everyday realities.

When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges -- who have no constituency -- have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial

ones: "Our Constitution vests such responsibilities in the political branches." *TVA* v. *Hill*, 437 U.S. 153, 195 (1978).

We hold that the EPA's definition of the term "source" is a permissible construction of the statute which seeks to accommodate progress in reducing air pollution with economic growth. "The Regulations which the Administrator has adopted provide what the agency could allowably view as . . . [an] effective reconciliation of these twofold ends. . . ." *United States* v. *Shimer*, 367 U.S., at 383.

The judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE MARSHALL and JUSTICE REHNQUIST took no part in the consideration or decision of these cases.

JUSTICE O'CONNOR took no part in the decision of these cases.

REFERENCES

[omitted]

F Principles (Lecture 4)

I. Article 5 of the Swiss Constitution

Below you will find article 5 of the Swiss Federal Constitution. What principles are stated in this article? Do you think that some principles are missing? At what level (parliamentary act, constitution) are these principles regulated in your country?

Art. 5 Rule of law

1 All activities of the state are based on and limited by law.

2 State activities must be conducted in the public interest and be proportionate to the ends sought.

3 State institutions and private persons shall act in good faith.

4 The Confederation and the Cantons shall respect international law.

II. General Questions

1. What do we understand by the principle of legality?
2. What do we understand by the principle of proportionality?
3. How do these principles affect our understanding of the role of courts and administration?

III. Bank Mellat v Her Majesty's Treasury (No. 1)

Read the extract from the decision and ask yourself what principles are behind the court's arguments. Would you agree with the argumentation? Are there other principles you would consider in your country?

Summary of the facts

The Treasury identified the Bank Mellat as having provided banking and financial services to entities involved in Iran's nuclear weapons program. Therefore, it ordered all persons to not enter into or continue commercial dealings with Bank Mellat or any of its UK subsidiaries. The Bank applied to have the order set aside. In addition to this substantive appeal, some of the evidence relied upon by the Treasury was of a sensitive nature and had resulted in a closed session at first instance and the subsequent production of a closed judgment.

This judgment concerned the use of a closed material procedure in the Supreme Court.

Trinity Term [2013] UKSC 38
On appeal from: [2011] EWCA Civ 1

JUDGMENT

Bank Mellat (Appellant) *v* Her Majesty's Treasury (Respondent) (No. 1)

before

Lord Neuberger, President
Lord Hope, Deputy President
Lady Hale
Lord Kerr Lord Clarke Lord Dyson Lord Sumption Lord Reed Lord Carnwath

JUDGMENT GIVEN ON

19 June 2013

Heard on 19, 20 and 21 March 2013

Appellant	*Respondent*
Michael Brindle QC Amy Rogers Dr Gunnar Beck (Instructed by Zaiwalla ury and Co)	Jonathan Swift QC Tim Eicke QC Robert Wastell (Instructed by Treas- Solicitors)
Special Advocates	*Advocate to the Court*
Martin Chamberlain QC QC Melanie Plimmer (Instructed by the Special ury Advocates Support Office)	Robin Tam (Instructed by Treas- Solicitors)
Intervener	*Intervener*
Nicholas Vineall QC (Instructed by Zaiwalla erty) and Co)	Dinah Rose QC Charlotte Kilroy (Instructed by Lib-

LORD NEUBERGER (with whom Lady Hale, Lord Clarke, Lord Sumption and Lord Carnwath agree)

1. This judgment is concerned with two connected questions:

   (i) Is it possible in principle for the Supreme Court to adopt a closed material procedure on an appeal? If so,

   (ii) Is it appropriate to adopt a closed material procedure on this particular appeal?

A closed material procedure involves the production of material which is so confidential and sensitive that it requires the court not only to sit in private, but to sit in a closed hearing (ie a hearing at which the court considers the material and hears submissions about it without one of the parties to the appeal seeing the material or being present), and to contemplate giving a partly closed judgment (ie a judgment part of which will not be seen by one of the parties).

Open justice and natural justice

2. The idea of a court hearing evidence or argument in private is contrary to the principle of open justice, which is fundamental to the dispensation of justice in a modern, democratic society. However, it has long been accepted that, in rare cases, a court has inherent power to receive evidence and argument in a hearing from which the public and the press are excluded, and that it can even give a judgment which is only available to the parties. Such a course may only be taken (i) if it is strictly necessary to have a private hearing in order to achieve justice between the parties, and, (ii) if the degree of privacy is kept to an absolute minimum – see, for instance *A v Independent News & Media Ltd* [2010] EWCA Civ 343, [2010] 1 WLR 2262, and *JIH v News Group Newspapers Ltd* [2011] EWCA Civ 42, [2011] 1 WLR 1645. Examples of such cases include litigation where children are involved, where threatened breaches of privacy are being alleged, and where commercially valuable secret information is in issue.

3. Even more fundamental to any justice system in a modern, democratic society is the principle of natural justice, whose most important aspect is that every party has a right to know the full case against him, and the right to test and challenge that case fully. A closed hearing is therefore even more offensive to fundamental principle than a private hearing. At least a private hearing cannot be said, of itself, to give rise to inequality or even unfairness as between the parties. But that cannot be said of an arrangement where the court can look at evidence or hear arguments on behalf of one party without the other party ("the excluded party") knowing, or being able to test, the contents of that evidence and those arguments ("the closed material"), or even being able to see all the reasons why the court reached its conclusions.

4. In *Al Rawi v Security Service* [2012] 1 AC 531, Lord Dyson made it clear that, although "the open justice principle may be abrogated if justice cannot otherwise be achieved" (para 27), the common law would in no circumstances permit a closed material procedure. As he went on to say at [2012] 1 AC 531, para 35, having explained that, in this connection, there was no difference between civil and criminal proceedings:

> "[T]he right to be confronted by one's accusers is such a fundamental element of the common law right to a fair trial that the court cannot abrogate it in the exercise of its inherent power. Only Parliament can do that".

5. The effect of the Strasbourg Court's decisions in *Chahal v United Kingdom* (1996) 23 EHRR 413 and *A and others v United Kingdom* [2009] ECHR 301 is that Article 6 of the European Convention on Human Rights ("Article 6", which confers the right of access to the courts) is not infringed by a closed material procedure, provided that appropriate conditions are met. Those conditions, in very summary terms, would normally include the court being satisfied that (i) for weighty reasons, such as national security, the material has to be kept secret from the excluded party as well as the public, (ii) a hearing to determine the issues between the parties could not fairly go ahead without the material being shown to the judge, (iii) a summary, which is

both sufficiently informative and as full as the circumstances permit, of all the closed material has been made available to the excluded party, and (iv) an independent advocate, who has seen all the material, is able to challenge the need for the procedure, and, if there is a closed hearing, is present throughout to test the accuracy and relevance of the material and to make submissions about it.

6. The importance of the requirement that a proper summary, or gist, of the closed material be provided is apparent from the decision of the House of Lords in *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28, [2010] 2 AC 269. At para 59, Lord Phillips said that an excluded party "must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations", and that this need not include "the detail or the sources of the evidence forming the basis of the allegations". As he went on to explain:

> "Where, however, the open material consists purely of general assertions and the case against the [excluded party] is based solely or to a decisive degree on closed materials the requirements of a fair trial will not be satisfied, however cogent the case based on the closed materials may be."

7. The nature and functions of a special advocate are discussed in *Al Rawi* [2012] 1 AC 531, by Lord Dyson, paras 36-37, and by Lord Kerr, para 94. As Lord Dyson said, the use of special advocates has "limitations", despite the fact that the rule- makers and the judges have done their best to ensure that they are given all the facilities that they need, and despite the fact that the Treasury Solicitor has ensured (to the credit of the Government) that they are of consistently high quality.

8. In a number of statutes, Parliament has stipulated that, in certain limited and specified circumstances, a closed material procedure may, indeed must, be adopted by the courts. Of course, it is open to any party affected by such legislation to contend that, in one respect or another, its provisions, or the ways in which they are being applied, infringe Article 6. However, subject to that, and save maybe in an extreme case, the courts are obliged to apply the law in this area, as in any other area, as laid down in statute by Parliament.

The statutory and factual background to this appeal

9. The statute in question in this case is the Counter-Terrorism Act 2008 ("the 2008 Act"), which, as its name suggests, is concerned with enabling steps to be taken to prevent terrorist financing and the proliferation of nuclear weapons, and thereby to improve the security of citizens of the United Kingdom. The particular provisions which apply in the present case are in Parts 5 and 6 of the 2008 Act. The first relevant provision is section 62, which is in Part 5 and "confer[s] powers on the Treasury to act against terrorist financing, money laundering and certain other activities" in accordance with Schedule 7.

10. Paragraphs 1(4), 3(1) and 4(1) of Schedule 7 to the 2008 Act permit the Treasury to "give a direction" to any "credit or financial institution", if "the Treasury reasonably believes" that "the development or production of nuclear …. weapons in [a] country … poses a significant risk to the national interests of the United Kingdom". According to paras 9 and 13 of the schedule, such a direction may "require" the person on whom it is served "not to enter into or to continue to participate in … a specified description of transactions or business relationships with a designated person". Paragraph 14 requires any such direction to be approved by affirmative resolution of Parliament.

11. Pursuant to these provisions, on 9 October 2009, the Treasury made the order the subject of these proceedings, the Financial Restrictions (Iran) Order 2009 ("the 2009 Order"), which, three days later, was laid before Parliament, where it was approved. The 2009 Order, which was in force for a year, directed "all persons operating in the financial sector" not to "enter into, or … continue to participate in, any transaction or business relationship" with two companies, one of which was Bank Mellat ("the Bank"), or any branch of either of those two companies.

12. The Bank is a large Iranian bank, with some 1800 branches and nearly 20 million customers, mostly in Iran, but also in other countries, including the United Kingdom. In 2009, prior to the 2009 Order, it was issuing letters of credit in an aggregate sum of over US$11bn, of which around 25% arose out of business transacted in this country. It has a 60% owned subsidiary bank incorporated and carrying on business here, which was at all material times regulated by the Financial Services Authority. The Order effectively shut down the United Kingdom operations of the Bank and its subsidiary, and it is said to have damaged the Bank's reputation and goodwill both in this country and abroad.

13. The first section of Part 6 of the 2008 Act is section 63, of which subsection (2) gives any person affected by a direction the right to apply to the High Court (or the Court of Session) to set it aside, and any such application is defined by section 65 as "financial restrictions proceedings". The Bank issued such proceedings to set aside the Order on 20 November 2009. The Government took the view that some of the evidence relied on by the Treasury to justify the 2009 Order was of such sensitivity that it could not be shown to the Bank or its representatives. Mitting J accepted the Government's case that justice required that the evidence in question be put before the court and that it had to be dealt with by a closed material procedure. Accordingly, he gave appropriate directions as to how the hearing should proceed.

14. The two day hearing before him was partly in open court and partly a closed hearing. The open hearing involved all evidence and arguments (save the closed material) being produced at a public hearing, with both parties, the Bank and the Treasury, seeing the evidence and addressing the court through their respective counsel, in

the normal way. The closed hearing was conducted in private, in the absence of the Bank, its counsel, and the public, and involved the Treasury producing the closed material and making submissions on it through counsel. The interests of the Bank were protected, at least to an extent, by (i) the Treasury providing the Bank with a document which gave the gist of the closed material, and (ii) the presence at the closed hearing of special advocates, who had been cleared to see the material, and who made such submissions as they could on behalf of the Bank about the closed material.

15. Following the two-day hearing, Mitting J handed down two judgments on 11 June 2010. The first judgment was an open judgment, in which the Judge dismissed the Bank's application for the reasons which he explained - [2010] EWHC 1332 (QB). The second judgment was a closed judgment, which was seen by the Treasury, but not by the Bank, and is, of course, not publicly available. The closed judgment was much shorter than the open judgment, although it should be added that the open judgment is not particularly long.

16. In his open judgment, Mitting J referred to his closed judgment in two passages. At [2010] EWHC 1332 (QB), para 16, the Judge considered, inter alia, the activities of one of the Bank's former customers, Novin. Having referred to the fact that Novin had been "designated by the [UN] Security Council … as a company which 'operates within … and has transferred funds on behalf of" the Atomic Energy Organisation of Iran ("AEOI"), he said that "[b]y reason of the designation and for reasons set out in the closed judgment I accept that Novin was an AEOI financial conduit and did facilitate Iran's nuclear weapons programme". At [2010] EWHC 1332 (QB), para 18, the Judge considered the activities of another of the Bank's former customers, Doostan International and its managing director, Mr Shabani. He said that "[f]or reasons which are set out in the closed judgment, I am not satisfied that Mr Shabani has made a full disclosure … and am satisfied that he and Doostan have played a part in the Iranian nuclear weapons programme".

17. The Bank appealed, and the appeal was heard by the Court of Appeal largely by way of an ordinary, open, hearing. However, there was a short closed hearing at which they considered the closed judgment of Mitting J, and at which the special advocates, but not representatives of the Bank, were present. The Bank's appeal was dismissed by the Court of Appeal (Maurice Kay and Pitchford LJJ, Elias LJ dissenting in part) in an open judgment, which was handed down on 13 January 2011 – [2011] EWCA Civ 1. In the last paragraph of his judgment, [2011] EWCA Civ 1, para 83, Maurice Kay LJ said that although the Court "held a brief closed hearing in the course of the appeal", he did not "find it necessary to refer to it or to the closed judgment of Mitting J".

18. The Bank then appealed to this Court. Before the hearing of the appeal, it was clear that the Treasury would ask this Court to look at the closed judgment of Mitting J. Therefore, it was agreed between the parties that the first day of the three day appeal should be given over to the question of whether the Supreme Court could conduct a

closed hearing. At the end of that day's argument, we announced that, by a majority, we had decided that we could do so and that we would give our reasons later.

19. The second day and most of the third day of the hearing were given over to submissions made in open court by counsel for the Bank (and counsel for certain interested parties, shareholders in the Bank) in support of the appeal, and to submissions in reply on behalf of the Treasury. We were then asked by counsel for the Treasury to go into closed session in order to consider the closed judgment of MittingJ. This was opposed by counsel for the Bank and by the special advocates. While we were openly sceptical about the necessity of acceding to the application, by a bare majority we decided to do so. Accordingly, the Court had a closed hearing which lasted about 20 minutes, at which we heard brief submissions on behalf of the Treasury and counter-submissions from the special advocates. We then resumed the open hearing for the purpose of counsel for the Bank making his closing submissions.

20. Contemporaneously with this judgment, we are giving our judgment on the substantive issue, namely whether the 2009 Order should be quashed. The purpose of this judgment is (i) to explain why we decided that we had power to have a closed material hearing, and (ii) to consider the closed material procedure we adopted on this appeal, and to give some guidance for the future in relation to the closed material hearing procedure on appeals.

The closed material procedure in the courts of England and Wales

21. The practice and procedure of the civil courts of England and Wales (the County Court, the High Court and the Court of Appeal) are governed by the Civil Procedure Act 1997 ("the 1997 Act"). Section 1(1) of the 1997 Act provides for the practice and procedure to be set out in the Civil Procedure Rules ("CPR"), and states that they are to be made, and modified, by the negative statutory instrument procedure. Section 1(3) of the 1997 Act states that the power to make the CPR "is to be exercised with a view to securing that the civil justice system is accessible, fair and efficient".

22. The underlying purpose of the CPR is enshrined in the so-called "overriding objective" in CPR 1(1), which requires every case to be dealt with "justly". By CPR 1(2), this expression is stipulated to include "so far as is practicable …ensuring that the parties are on an equal footing [and] ensuring that [every case] is dealt with … fairly". The CPR contain detailed rules with regard to procedures before, during and after trial, which seek to ensure that all civil proceedings are conducted in a way which is fair and effective, and, in particular for present purposes, in a way which achieves, as far as is possible in this imperfect, complex and unequal world, openness and equality of treatment as between the parties.

23. In a series of provisions in Part 6 of the 2008 Act, Parliament has recognised that financial restrictions proceedings may require the rules of general application in the CPR to be changed or adapted if a closed material procedure is to be permitted. The first of those provisions is section 66(1), which explains that:

"The following provisions apply to rules of court relating to—

(a) financial restrictions proceedings, or

(b) proceedings on an appeal relating to financial restrictions proceedings."

Section 66(2) requires the "rules of court" to have regard to "the need to secure that" both (a) directions made under schedule 7 to the 2008 Act "are properly reviewed", and (b) that information is not disclosed "when [it] would be contrary to the public interest".

24. Section 66(3) of the 2008 Act states that "rules of court" may make provision for various aspects of financial restrictions proceedings, including (a) "the mode of proof and about evidence" and (c) "about legal representation". Section 66(4) states that "[r]ules of court" may (a) enable "the proceedings to take place without full particulars of the [direction] being given to a party …", (b) enable "the court to conduct proceedings in the absence of any person, including a party …", (c) deal with "the functions of … a special advocate", (d) empower the court "to give [an excluded] party … a summary of evidence taken in the party's absence."

25. Section 67 of the 2008 Act is concerned with rules about disclosure in cases covered by section 66(1). Section 67(2) provides that, subject to the ensuing subsections, "[r]ules of court" must secure that the Treasury give disclosure on the normal principles - ie that they must disclose material which (i) they rely on, (ii) adversely affects their case, and (iii) supports the case of another party. Section 67(3) states that "[r]ules of court" must secure that (a) the Treasury can apply not to disclose material, (b) they can do so under a closed material procedure, with a special advocate present, and (c) the court should accede to the application "if it considers that the disclosure of the material would be contrary to the public interest", in which case (d) the court must "consider requiring the Treasury to provide a summary of the material to every party", provided that (e) the summary should not include material "the disclosure of which would be contrary to the public interest". Section 67(6) emphasises that nothing in the section should require the court to act in such a way as to contravene Article 6.

26. Section 68 of the 2008 Act is concerned with the appointment of special advocates for the purpose of financial restrictions proceedings. Section 72 of the 2008 Act enabled the Lord Chancellor to make the original rules referred to in the preceding sections. Section 72(4) provides that (a) any such rules should be laid before both Houses of Parliament, and (b) if they are not approved within forty days, any such rules will "cease to have effect".

27. The final provision in Part 6 of the 2008 Act is section 73, the interpretation section, which states that, for the purposes of Part 6 of the 2008 Act:

> "'rules of court' means rules for regulating the practice and procedure to be followed in the High Court or the Court of Appeal or in the Court of Session".

28. Pursuant to sections 66 and 67 of the 2008 Act, the Civil Procedure (Amendment No 2) Rules (SI 2008/3085) were made by the Lord Chancellor on 2 December 2008, laid before Parliament the next day, and came into force on 4 December 2008. As a result, the CPR now include a new rule 79, which applies to "Proceedings under the Counter-Terrorism Act 2008". CPR 79.2 (1) modifies the overriding objective "and so far as relevant any other rule", to accommodate (2) the court's duty to "ensure that information is not disclosed contrary to the public interest".

29. CPR 79 then goes on to modify, disapply or replace many of the generally applicable provisions of the CPR in relation to proceedings under the 2008 Act. Most of these variations arise from the provision for a closed material procedure in some such proceedings. Thus, the CPR are amended to take into account the potential need for (i) involvement of special advocates (in e.g. CPR 79.8, CPR 79.18-21), (ii) an application for a closed material procedure (dealt with in CPR 79.11 and CPR 79.25), (iii) directions if such a procedure is ordered (in CPR 79.26), (iv) modification of the rules in relation to evidence and disclosure, including disapplication of CPR 31 relating to public interest immunity (in CPR 79.22), and (v) the possibility of a closed judgment (in CPR 79.28).

The statutory provisions and procedural rules of the Supreme Court

30. The Supreme Court was created by the Constitutional Reform Act 2005 ("the 2005 Act"). Section 40(2) of the 2005 Act states that "[a]n appeal lies to the Court from any order or judgment of the Court of Appeal in England and Wales in civil proceedings". The effect of section 40(3) is that the right of appeal to the Supreme Court from any Scottish court remains the same as it was in relation to appeals to the House of Lords. Section 40(5) states that the Supreme Court "has power to determine any question necessary to be determined for the purposes of doing justice in an appeal to it under any enactment". Section 40(6) provides that "[a]n appeal under subsection (2) lies only with the permission of the Court of Appeal or the Supreme Court…".

31. Section 45(1) of the 2005 Act provides that the President of the Supreme Court "may make rules (to be known as 'Supreme Court Rules') governing the practice and procedure to be followed in the Court". Section 45(3) states that this power must be exercised so as to ensure that "(a) the Court is accessible, fair and efficient", and "(b) the rules are both simple and simply expressed". Section 46 of the 2005 Act states that these rules (1) must be submitted to the Lord Chancellor by the President of the Supreme Court (or, in the case of the initial rules, the senior Lord of Appeal in Ordinary), and then (2) must be laid before Parliament by the Lord Chancellor, and (3) are then subject to the negative resolution procedure.

32. Pursuant to sections 45 and 46 of the 2005 Act, the Supreme Court Rules 2009 (SI 2009/1603) were duly made and laid before Parliament, and came into force on 1 October 2009, the day on which the Supreme Court opened. These rules ("SCR") now govern the procedure of this Court. They are far simpler than the CPR (unsurprisingly, as they are only concerned with appeals, indeed appeals which are almost always second, or even third, appeals).

33. SCR 2 is headed "Scope and objective", and SCR 2(2) states that "the overriding objective" of the SCR is "to secure that the Court is accessible, fair and efficient". The SCR contain no provisions which enable public interest immunity to be avoided, and no express provisions for closed procedures other than SCR 27(2), as set out in the next paragraph. Thus, SCR 22(1)(b) provides for the service by the appellant of "an appendix … of the essential documents which were in evidence before, or which record the proceedings in, the courts below", and SCR 28 states that a Supreme Court judgment "may be … delivered in open court; or … promulgated by the Registrar". However, it is to be noted that SCR 29(1) begins by stating that "In relation to an appeal …, the Supreme Court has all the powers of the court below".

34. SCR 27 is headed "Hearing in open court", and it provides:

> "(1) Every contested appeal shall be heard in open court except where it is necessary in the interests of justice or in the public interest to sit in private for part of an appeal hearing.
>
> (2) Where the Court considers it necessary for a party … to be excluded from a hearing or part of a hearing in order to secure that information is not disclosed contrary to the public interest, the Court must conduct the hearing, or that part of it from which the party [is] excluded, in private but the Court may exclude a party … only if a person who has been appointed as a special advocate to represent the interests of that party is present when the party [is] excluded.
>
> (3) Where the Court decides it is necessary for the Court to sit in private, it shall announce its reasons for so doing publicly before the hearing begins.
>
> ….. "

Can the Supreme Court conduct a closed material procedure: introductory

35. If a closed material procedure was lawfully conducted at the first instance hearing, it would seem a little surprising if an appellate court was precluded from adopting such a procedure on an appeal from the first instance judgment. As the advocate to the Court said in the course of his full and balanced argument, one would normally expect an appeal court to be entitled to have access to all the material available to the court below and to see all the reasoning of the court below. Otherwise, it is hard to see how an appeal process could be conducted fairly or even sensibly. And, if that involves the appellate court seeing and considering closed material, it would seem to follow that that court would have to adopt a closed material procedure.

36. However, particularly in the light of the fundamental principle established in *Al Rawi* [2012] 1 AC 531, the question needs to be looked at with great care. In particular, it is necessary to enquire whether statute requires the Supreme Court to adopt a closed material procedure, at least in some circumstances, on an appeal from the Court of Appeal upholding (or reversing) a first instance decision on an application under section 63(2) of the 2008 Act. As was said by counsel for Liberty (interveners on this appeal), supported by counsel for the Bank, any contention that a closed material procedure in a particular court in particular circumstances is sanctioned by a statute must be closely and critically scrutinised.

The case for saying that this Court can conduct a closed material procedure

37. The contention that this court has the power to have a closed material procedure is based on section 40(2) of the 2005 Act, supported by section 40(5). The argument proceeds as follows. (i) Section 40(2) provides that an appeal lies to the Supreme Court against "any" judgment of the Court of Appeal; (ii) that must extend to a judgment which is wholly or partially closed; (iii) in order for an appeal against a wholly or partially closed judgment to be effective, the hearing would have to involve, normally only in part, a closed material procedure; (iv) such a conclusion is reinforced by the power accorded to the Court by section 40(5) to "determine any question necessary … for the purposes of doing justice", as justice will not be able to be done in some such cases if the appellate court cannot consider the closed material.

38. The strength of this argument is reinforced when one considers the possible outcomes if the Supreme Court cannot consider a closed judgment (or the closed part of the judgment) under a closed material procedure. If that were the case, then, as I see it, there would be five possible consequences.

39. The first possibility would be that the appeal could not be entertained: that cannot be right, because it would conflict with section 40(2), which simply and unambiguously confers on the Supreme Court the power to hear appeals from "any" judgment of the Court of Appeal. The Supreme Court frequently refuses permission to bring an appeal from the Court of Appeal, but that is covered by section 40(6) of the 2005 Act, which expressly provides for such permission. It is one thing to cut down section 40(2) by providing that permission to appeal can be refused on a case by case basis expressly catered for in section 40(6); it is quite another to suggest that a whole class of appeals is impliedly excluded from the wide and general words of section 40(2).

40. The second possibility would be that the Supreme Court could consider the whole judgment, with the closed part being considered in open court. While it can be said that such a course would not involve a breach of any specific provision of Part 6 of the 2008 Act, if construed on a strictly semantic basis, it would wholly undermine its purpose, and the procedural structure it has set up. Unsurprisingly, this second possibility was not canvassed in argument.

41. The third possibility would be that the appeal could be entertained, but only on the basis that the Supreme Court could not look at the closed material. In an extreme case, where the whole judgment of the Court of Appeal was closed, this would be impossible, and would run into the same difficulty under section 40(2) as identified in para 39 above. Even in a case where the Court of Appeal judgment was only closed in part, such a course would be self-evidently unsatisfactory and would seriously risk injustice, and in some cases it would be absurd.

42. The fourth possibility would be that the Court was bound to allow the appeal; the fifth possibility would be that, conversely, the Court was bound to dismiss the appeal. There are clearly theoretical arguments in favour of either course, but it is unnecessary to consider them, because each of those courses is self-evidently equally unsatisfactory. If either of them was correct, it would mean that, when exercising its power to give permission under section 40(6) of the 2005 Act, the Supreme Court would effectively be deciding the appeal, and, indeed, would be doing so without seeing the whole of the judgment below, and without hearing oral argument.

43. In my view, subject to any arguments to the contrary, this analysis establishes that the Supreme Court can conduct a closed material procedure where it is satisfied that it may be necessary to do so in order to dispose of an appeal. This conclusion is reinforced by section 40(5) of the 2005 Act. An appeal under section 40(2) is "an appeal … under any enactment". Accordingly, where an appeal is brought against a decision under the 2008 Act, the Supreme Court has "power to determine any question necessary to be determined for the purposes of doing justice in" such an appeal. On any appeal where the judgment is wholly or partly closed, it seems to me that this court could not do justice, or at least would run a very serious risk of not doing justice, if it could not consider the closed material, and it could only do that if it adopted a closed material procedure.

44. It might, I suppose, be said that adopting a closed material procedure on any appeal would involve the antithesis of "doing justice in" that appeal. In a case where Parliament and the CPR have lawfully provided for a closed material procedure at first instance and in the Court of Appeal, I am of the view that, on the contrary, for this Court to entertain an appeal without considering the closed material would, at least in many cases, not be doing justice, either in the sense of fairly determining the appeal or in the sense of being seen fairly to determine the appeal, notwithstanding that the material will be considered in a closed hearing.

45. The view that the Supreme Court can conduct a closed material procedure also derives some support from the provisions of SCR 27(2), and from SCR 29(1). However, if the Supreme Court would not otherwise have the power to conduct a closed material procedure, it could not, in my view, derive such a power solely from its rules.

Accordingly those two rules can fairly be said to do no more than to give comfort to my conclusion.

46. It is right to mention that on this appeal, we are not being invited to consider a closed judgment of the Court of Appeal, as they did not find it necessary to give a closed judgment or even to include a closed paragraph in their open judgment. However, the trial judge gave a closed judgment, and, if it is open to this Court to consider, in a closed material procedure, a closed Court of Appeal judgment for the reasons just discussed, it must follow that we can consider, in a closed material procedure, a closed judgment given by the trial judge.

47. Accordingly, I conclude that, unless there are stronger arguments to the contrary, the Supreme Court has power to entertain a closed material procedure on appeals against decisions of the courts of England and Wales on applications brought under section 63(2) of the 2008 Act.

The arguments that we cannot conduct a closed material procedure

48. Having reached this provisional conclusion, it is right to acknowledge and consider the contrary arguments. Those arguments are:

i. A closed material procedure is such a serious inroad into natural justice that it can only be justified by clear and unambiguous statutory words, such as are found in Part 6 of the 2008 Act, but not in the 2005 Act;
ii. Parliament has plainly limited the closed material procedure under the 2008 Act to the High Court, the Court of Appeal and the Court of Session;
iii. It is appropriate to exclude the Supreme Court from the courts which can have a closed material procedure, given its role as a constitutional court and ultimate guardian of the common law;
iv. A closed material procedure requires a set of rules such as CPR 79 which are detailed and appropriately modify the generally applicable rules, and there is no such set of rules for the Supreme Court.

49. None of these points meets the basic argument which persuades me that it is open to the Supreme Court to undertake a closed material procedure, but they nonetheless merit careful attention. Before discussing them, however, it is right to address Liberty's understandable reliance on the fact that, in *Al Rawi* [2012] 1 AC 531, this Court uncompromisingly set its face against introducing a closed material procedure.

50. The stand taken by this Court in *Al Rawi* [2012] 1 AC 531 remains unquestioned, but it does not amount to any sort of indication that there could be no circumstances in which those concerned with the administration of justice could reasonably introduce a closed material procedure. Indeed, at the end of the short passage quoted in para 4 above from Lord Dyson's judgment, he acknowledged that Parliament can do so.

51. Having said that, any judge, indeed anybody concerned about the dispensation of justice, must regard the prospect of a closed material procedure, whenever it is mooted and however understandable the reasons it is proposed, with distaste and concern. However, such distaste and concern do not dictate the outcome in a case where a statute provides for such a procedure; rather, they serve to emphasise the care with which the courts must consider the ambit and effect of the statute in question.

52. At a relatively high level, in terms of constitutional principle and governmental functions, it seems to me that the following propositions apply. (i) The executive has a duty to maintain national security, which includes both stopping the financing of terrorism and nuclear proliferation and ensuring that some of the information relating to the financing of terrorism remains confidential; (ii) the rule of law requires that any steps aimed at preventing financing of terrorism which damage a person should be reviewable by the courts, and, as far as possible in open court and in accordance with natural justice; (iii) given that such reviews will often involve the executive relying on confidential material, it is for the legislature to decide and to prescribe in general how the tension between the need for natural justice and the need to maintain confidentiality is to be resolved in the national interest; (iv) in the absence of a written constitution, it is the European Convention, through Article 6, as signed up to by the executive and interpreted by the courts, which operates as a principled control mechanism on what the legislature can prescribe in this connection; (v) it is for the courts to decide, within the parameters laid down by the legislature, how the tension between the two needs of natural justice and confidentiality is to be resolved in any particular case.

53. In the more specific context of the issues with which the 2008 Act is concerned, it would be unreasonable not to accept that (i) the Act's aims of fighting the spread of terrorist activity and nuclear proliferation, and improving the security of UK citizens, are important aspects of the most fundamental duties of the executive, and (ii) those aims would be at real risk of being severely hampered if the courts hearing financial restrictions proceedings could not adopt a closed material procedure. Point (i) is self-evident: the two most fundamental functions of the executive are the maintenance of the defence of the realm and of the rule of law, and the 2008 Act appears to me to be within the scope of both those functions. In relation to point (ii), if there can be no closed material procedure, either (a) sensitive material would be seen by a person who may be supporting terrorism or nuclear proliferation, which might advance the very activities which the 2008 Act is designed to deter, or (b) such material would not be put in evidence, in which case a direction under that Act, which was appropriate and in the public interest, may be discharged for lack of evidential support.

54. The legislature has laid down in Part 6 of the 2008 Act, as expanded by CPR 79, how challenges to a direction under schedule 7 to the 2008 Act should be dealt with by the courts, and this includes a closed material procedure, which aims to strike a balance between two competing public interests, and it is a balance which has been held by the Strasbourg Court to be compatible in principle with Article 6. Whether or not one agrees with it, the justification for the way in which the balance has been

struck by the legislature in Part 6 of the 2008 Act is clear, lawful and rational. It is against that background that the issue of principle raised on this appeal must be judged.

55. Turning now to the four arguments raised by the intervener and the Bank, there is a basic principle that fundamental rights cannot be taken away by a generally or ambiguously expressed provision in a statute – see eg per Lord Hoffmann in *R v*

Secretary of State, Ex p Simms [2000] 2 AC 115, 132. There is also a basic principle that fundamental rights can only be overridden by a statutory provision through express words or by necessary implication, not merely by reasonable implication – see eg per Lord Hobhouse in *R (Morgan Grenfell) v Special Commissioners* [2003] 1 AC 563, para 45.

56. While these two basic principles are of fundamental importance, they should not be applied without regard to the purpose and context of the statutory provision in issue. Section 40(2) is plainly intended to render every decision of the Court of Appeal to be capable of being appealed to the Supreme Court (unless specifically precluded by another statute), and, as explained, where it is necessary for this court to consider closed material in order to dispose of the appeal justly, this would only be achievable if a closed material procedure could be adopted. In any event, I am unconvinced that the wording of section 40(2) of the 2005 Act could be fairly described as "general" in the sense that that word is used in *Simms* [2000] 2 AC 115, 132: it would be more accurate to describe it as being broad, indeed as broad as possible, in its intended application. Further, if section 40(2) is to be given its full natural meaning, then, for the reasons discussed in the preceding section of this judgment, it necessarily means that the Supreme Court can adopt a closed material procedure.

57. It is true that section 67, read together with section 73, of the 2008 Act only extends to the rules of the Court of Appeal, High Court and Court of Session, but there were no Supreme Court Rules when that Act was passed. Indeed, there was no Supreme Court at that time: the Judicial Committee of the House of Lords, the Law Lords, were still in place, although they had a very short life expectancy (as an institution). They sat as a committee of the House of Lords, and could have been expected to look after their own procedure. It is true that the 2005 Act had been enacted by the time that the Bill which became the 2008 Act was being considered, but those drafting and debating the Bill would have known that the 2005 Act contained sections 40(2) and (5); they would also have known that the SCR had yet to be promulgated, and could have assumed that they would provide for a closed material procedure – as indeed they do in SCR 27(2), and, indirectly, in SCR 29(1).

58. In any event, rules governing what should be done before and during a trial have to be far more detailed than those governing what should be done before and during an appeal. Given that there were to be very detailed procedures prescribed for a closed material procedure at first instance (and on the first appeal), Parliament could

fairly have assumed that there would be no need for very detailed provisions for a closed material procedure in this Court: again, in the light of SCR 27(2) and 29(1), such a view would have been prescient. It is true that sections 66-73 of the 2008 Act apply to the Court of Appeal as well as to the High Court, but that is because the CPR apply to both courts.

59. I am unimpressed by the argument that the Supreme Court was intentionally excluded from the ambit of closed material procedures in sections 66-73 of the 2008 Act, because of the Court's status. If that was the legislative intention, one would have expected it not only to have been spelt out, but to have been catered for, especially in the light of section 40(2) of the 2005 Act. It seems most unlikely that Parliament would have left section 40(2) unamended, while intending the Supreme Court to be unable to adopt a closed material procedure. If it had had such an intention, Parliament would, in my view, have provided that, in relation to cases where the courts below had adopted a closed material procedure, appeals to the Supreme Court were excluded, or could only proceed on a certain specified procedural basis. Otherwise, on this hypothesis, Parliament would have intended to leave this Court with the series of unsatisfactory options considered in paras 39-42 above.

60. The notion that the Supreme Court's constitutional role is so important that it cannot conduct a closed material procedure has a certain appeal (particularly perhaps to a Supreme Court Justice), but I am unimpressed by it. The Supreme Court is not a special constitutional court, but it generally limits the appeals it considers to those that raise points of general public importance. If the Supreme Court were to adopt a closed material procedure on an appeal, it would be most unlikely to result in a judgment which contained any statements of general public importance, or even of general significance, which were in closed form. Almost by definition, the closed evidence will be factual (including, possibly, expert) in nature, and it will normally be specific to the particular case. It is hard to believe that there could be circumstances in which it would be impossible for the Court to provide an open judgment which dealt clearly and comprehensively with all the points of any general legal significance in the appeal, even if some of the discussion of the details of the evidence and arguments has to remain closed. And if such circumstances did arise, then the problem would be a measure of the extraordinary sensitivity of the material concerned, which would make it all the more important that it remained closed. Having read in draft the judgment of Lord Hope, I would like to record my agreement with what he says in paras 98-100 in connection with this Court giving a closed judgment.

61. We were taken to other statutes which provide for a closed material procedure, but all that they establish, in my view, is that there is more than one drafting technique available to prescribe for such procedures.

62. All in all, therefore, I am unpersuaded by the various arguments raised against my provisional view that it is open to this Court to adopt a closed material procedure in an appeal under the 2008 Act if justice requires it.

[…]

(a) LORD HOPE (dissenting)

75. This case raises some fundamental issues about the effect of provisions in Parts 5 and 6 of the Counter-Terrorism Act 2008. Part 5 of the Act, which gives effect to Schedule 7, confers far-reaching powers on the Treasury to deal with terrorist financing and money laundering. Part 6 creates a scheme for appeals against financial restrictions decisions by the Treasury. In a nutshell these issues can be summarised in a single sentence: how much attention should this court pay to what Parliament has, or has not, actually said as to how financial restriction proceedings are to be conducted in the courts?

76. Parliament has set out in Part 6 of the 2008 Act provisions for the use in appeals against financial restrictions decisions of the Treasury of material that the Treasury refuse to disclose to appellants or their legal representatives, commonly referred to as "closed material". Chapter 2 of Part 6 is closely modelled on the Schedule to the Prevention of Terrorism Act 2005. Section 67(3), which appears in that Chapter, requires that rules of court must provide the Treasury with the opportunity to apply to the court for permission not to disclose material otherwise than to the court and to any person appointed as a special advocate. Section 73 provides that in that Chapter the expression "rules of court" means "rules for regulating the practice and procedure to be followed in the High Court or the Court of Appeal or in the Court of Session".

77. But no mention is made here, or anywhere else in the 2008 Act, of the use of closed material in the court of last resort in the United Kingdom – the appellate committee of the House of Lords as it then was, or the Supreme Court of the United Kingdom as it was to become. The 2008 Act received the Royal Assent on 26 November 2008. The bulk of Part 3 of the Constitutional Reform Act 2005, which made provision for the Supreme Court, was not brought into force until 1 October 2009: Constitutional Reform Act 2005 (Commencement No 11) Order 2009 (SI 2009/1604). But sections 45 and 46, which provide for the making of the Rules of the Supreme Court, were brought into force on 27 February 2006: Constitutional Reform Act 2005 (Commencement No 4) Order (SI 2006/228). These rules were already in draft and had been circulated to consultees for their comments by 28 November 2008. Yet the Treasury, by which the legislation in Parts 5 and 6 of the 2008 Act was being promoted, did not seek the views of Parliament as to whether the Rules of the Supreme Court should, like those of the other courts mentioned in section 73, make provision for the use of closed material in proceedings brought under Part 6 of the 2008 Act.

78. In the light of this background, which leaves the issue for decision by this court uninstructed by Parliament, I am unable, with respect, to agree with the conclusions reached on it by the majority.

Closed material

79. The issue as to the use of closed material, as I see it, raises three distinct questions, although they are all interconnected. The first is an issue of principle: when, if ever, will it be open to the Supreme Court to adopt a closed material procedure? The second is whether it is necessary, in the interests of justice or in the public interest, for the closed material to be seen and considered by the court in this case. The third is whether, having done so, the court should issue a closed judgment, bearing in mind that the effect of doing this will be that the party to whom the material has not been disclosed will be unable to see the court's reasons for the conclusions that it has reached on a consideration of that material.

(a) the issue of principle

80. The issue of principle as to the use of closed material was examined by Lord Dyson in *Al Rawi v Security Service* [2011] UKSC 43, [2012] 1 AC 531. He concluded that a closed material procedure should only be introduced in ordinary civil procedure if Parliament saw fit to do so. I said that I agreed with the reasons that he gave, as did Lord Kerr. But we both added some further reasons of our own. It is worth noting too the width of the issue to which the argument both in the Court of Appeal and in this court was addressed: see para 71. I thought that the view which we took would resolve the issue in a case of this kind too.

81. The crucial points that we all made can be summarised, quite briefly, in this way. The right to know and effectively challenge the opposing party's case is a fundamental feature of the judicial process. The right to a fair trial includes the right to be confronted by one's accusers and the right to know the reasons for the outcome. It is fundamental to our system of justice that, subject to certain established and limited exceptions, trials should be conducted and judgments given in public. There may come a point where a line must be drawn when procedural choices of one kind or another have to be made. A distinction may be drawn between choices which do not raise issues of principle and choices that affect the very substance of a fair trial. There is no room for compromise where the choices are of the latter kind. The court cannot abrogate the fundamental common law right by the exercise of any inherent power. Any weakening of the law's defences would be bound to lead to state of uncertainty and, sooner or later, to attempts to widen the breach still further. The court has for centuries been the guardian of these fundamental principles. The rule of law depends on its continuing to fulfil that role.

82. Acknowledging that closed material procedures and the use of special advocates were controversial, Lord Dyson said in para 47 of his judgment in *Al Rawi* that it was not for the courts to extend the procedure beyond the boundaries which had been drawn for its use by Parliament. I said in para 74 of my judgment that fundamental issues as to where the balance lay between the principles of open justice and of fairness and the demands of national security were best left for determination through the democratic process by Parliament. Lord Brown and Lord Kerr were

doubtful whether it would be possible as a matter of principle for the court to be invested with jurisdiction in this way: paras 86, 99.

83. I would, for my part, be content to agree with the way Lord Dyson put it in para 48 of *Al Rawi*, where he said:

> "The common law principles to which I have referred are extremely important and should not be eroded unless there is a compelling case for doing so. If this is to be done at all, it is better done by Parliament after full consultation and proper consideration of the sensitive issues involved. It is not surprising that Parliament has seen fit to make provision for a closed material procedure in certain carefully defined
>
> situations and has required the making of detailed procedural rules to give effect to the legislation."

In para 69 he agreed with the Court of Appeal that the issues of principle raised by the closed material procedure were so fundamental that a closed material procedure should only be introduced in ordinary civil litigation if Parliament saw fit to do so. He then added these words:

> "No doubt, if Parliament did decide on such a course, it would do so in a carefully defined way and would require detailed procedural rules to be made (such as CPR Pts 76and 79) to regulate the procedure."

84. The answer which I would give to the first of the three questions which I have identified in para 79, above, is that it will be open to the Supreme Court to adopt a closed material procedure if, but only if and only to the extent that, the use of that procedure has been expressly sanctioned by Parliament. The fact that this procedure has been sanctioned for use in the lower courts does not meet Lord Dyson's point that the procedure nevertheless erodes fundamental common law principles. And the fact that it has been used in the lower courts leaves open the question whether it would be consistent with fundamental principle for it to be used in the court of last resort. It leaves open the question whether it can ever be right for the Supreme Court, of all courts, without the sanction of Parliament to hear argument on points of which one of the parties has had no notice and is unable to address in argument, and whether it can ever be right for it to have to give its reasons, in whole or in part, in a closed judgment.

85. The word "fundamental", which appears so often in Lord Dyson's judgment in *Al Rawi*, and appears again in my own judgment in paras 72-74 and Lord Kerr's judgment in para 94, serves to emphasise the enormity of the issues that are at stake if the objections to such a procedure are to be overcome. If the procedure is to be used in this court, the issues of principle require that its use should always be carefully provided for and defined by Parliament and never be left to implication. Only then can one be confident that Parliament really has squarely confronted what it is doing.

Otherwise, as Lord Hoffmann said in *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 132, there is too great a risk that the full implications may have passed unnoticed in the democratic process.

86. The absence of a direction in Part 6 of the 2008 Act that the provisions about rules of court relating to proceedings on an appeal relating to financial restrictions proceedings extend to the Supreme Court is, therefore, especially significant. This makes it plain that Parliament was not asked to address its mind to this issue at all. Nor was the Supreme Court, for its part, put on notice that the President when making the Supreme Court Rules, the provisions about which were already in force (see para 77, above), was to have regard to the matters set out in sections 63(2)-(4) of the Act. The fact that rule 27(2) of the Supreme Court Rules contemplates that the court might consider it necessary for a party and that party's representative to be excluded from a hearing in order to secure that information is not disclosed contrary to the public interest does not answer this point. It was, no doubt, a wise precaution to make provision for a variety of situations of that kind that might arise. But it does not address directly the use of a closed material procedure with all the consequences that might then follow, including the possibility of having to issue a closed judgment. The question whether the Supreme Court had power to adopt such a procedure had not yet been tested in argument when the rules were made, and it was not open to the President in the exercise of his rule-making function to confer on the court a power that it did not have.

87. The argument that the provisions of sections 40(2) and (5) of the 2005 Act show that this court can conduct such a procedure to dispose of an appeal where the judgment appealed against was wholly or partly closed does not meet my point that the issue is so fundamental that it must be left to an express and carefully defined provision by Parliament. I do not think that a point of such fundamental importance can be left to implication. It is plain that the issue was not brought before Parliament when it enacted Part 3 of the 2005 Act. There is nothing in the express language of section 40 which shows that the statute must have given authority to the Supreme Court for the use of this procedure: see *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] UKHL 21, [2003] 1 AC 563, para 45 per Lord Hobhouse.

88. For these reasons I was of the opinion at the end of the hearing on the first day's argument that it was not open to the Supreme Court to adopt a closed material procedure in this case, as it had not been expressly authorised by Parliament. I remain of that opinion. The effect of the decision of the majority, however, is that there is now no way back on this issue. The Rubicon has been crossed.

(b) should the closed material be seen and considered in this case?

[…]

(b) LORD KERR (dissenting)

101. Two principles of absolute clarity govern the law in relation to the manner in which trials should be conducted. The first is that a party to proceedings should be informed of the case against him and should have full opportunity to answer that case in open court. The second principle is that the first principle may not be derogated from except by clear parliamentary authority.

102. These principles received emphatic endorsement by the Supreme Court in *Al-Rawi v Security Service* [2012] 1 AC 531. In delivering the leading judgment, Lord Dyson said this:

> "10. There are certain features of a common law trial which are fundamental to our system of justice (both criminal and civil). First, subject to certain established and limited exceptions, trials should be conducted and judgments given in public. The importance of the open justice principle has been emphasised many times: see, for example, *R v Sussex Justices, Ex p McCarthy* [1924] r KB 256, 259, per Lord Hewart CJ, *Attorney General v Leveller Magazine Ltd* [1979] AC 440, 449H- 450B, per Lord Diplock, and recently *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2) (Guardian News and Media Ltd intervening)* QB 218, paras 38-39, per Lord Judge CJ.
>
> 11. The open justice principle is not a mere procedural rule. It is a fundamental common law principle. In *Scott v Scott* [1913] AC 417, Lord Shaw of Dunfermline (p 476) criticised the decision of the lower court to hold a hearing in camera as constituting 'a violation of that publicity in the administration of justice which is one of the surest guarantees of our liberties, and an attack upon the very foundations of public and private security'. Viscount Haldane LC (p 438) said that any judge faced with a demand to depart from the general rule must treat the question 'as one of principle, and as turning, not on convenience, but on necessity'.
>
> 12. Secondly, trials are conducted on the basis of the principle of natural justice. There are a number of strands to this. A party has a right to know the case against him and the evidence on which it is based. He is entitled to have the opportunity to respond to any such evidence and to any submissions made by the other side. The other side may not advance contentions or adduce evidence of which he is kept in ignorance. The Privy Council said in the civil case of *Kanda v Government of Malaya* [1962] AC 322,337:
>
> 'If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is

made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them.'

13. Another aspect of the principle of natural justice is that the parties should be given an opportunity to call their own witnesses and to cross-examine the opposing witnesses. As was said by the High Court of Australia in *Lee v The Queen* (I998) I95 CLR 594, para 32: 'Confrontation and the opportunity for cross-examination is of central significance to the common law adversarial system of trial.'"

103. The essential ratio of *Al-Rawi*, so far as concerns the present appeal, was neatly expressed by Lord Dyson in para 35 where he said, "… the right to be confronted by one's accusers is such a fundamental element of the common law right to a fair trial that the court cannot abrogate it in the exercise of its inherent power. Only Parliament can do that." The simple question which lies at the heart of this appeal is whether Parliament has done that for hearings before the Supreme Court.

104. It was suggested that the decision in *Al-Rawi* can be distinguished or that it has no application to the present appeal because it was concerned with a trial and not with an appeal from a decision in proceedings where there was statutory authority to conduct a closed hearing. I do not accept this argument. The principle recognised in *Al-Rawi* is both fundamental and general. Its effect is straightforward. Courts do not have power to authorise a closed material procedure unless they has been given that power by Parliament. If Parliament has not conferred the power on this court, it matters not that those courts from which an appeal lies to this court have been empowered to conduct such a hearing.

105. Representing as it does such a radical departure from the conventional mode of trial and, more importantly, such a drastic infringement on a centuries old right, it is to be expected that a closed materials procedure would be provided for in the most unambiguous and forthright terms or by unmistakably necessary implication. On that basis alone, section 40(5) of the Constitutional Reform Act is hardly a promising candidate. But before looking more closely at that provision, I should say something about the relevant provisions in the Counter-Terrorism Act 2008, principally to examine how Parliament has in fact set about making explicit provision for closed material procedures in other courts and to point up the contrast with the route that the respondent in this case would have us take to arrive at the same destination.

106. The first and most obvious thing to say about the Counter-Terrorism Act is, of course, that it was enacted three years after the Constitutional Reform Act. We now know (not least by reason of *Al-Rawi*) that the High Court and the Court of Appeal could not have ordered a closed material procedure in a case such as the present by recourse to an inherent power. This required the authorisation of the 2008 Act. It appears to me, therefore, that an argument that the Supreme Court did have power to hold such a hearing before 2008, when the High Court and the Court

of Appeal did not, would be utterly implausible. But if section 40(5) did not empower the Supreme Court before 2008 to hold a closed material procedure hearing, how can it be said to have done so after the enactment of the Counter-Terrorism Act and Rules made thereunder, all of which conspicuously make no reference whatever to this court? I shall return to this question briefly below.

107. Bank Mellat's proceedings before the High Court were brought under section 63 of the 2008 Act. Section 63(2) gives a person affected by a decision taken by the Treasury in connection with a range of asset freezing and other financial powers the right to apply to the High Court to have that decision set aside. These are known as "financial restrictions proceedings" - section 65. Provisions as to how they are to be conducted are made in sections 66 to 72.

108. Section 66 contains general provisions about rules of court to be made in relation to financial restrictions proceedings. Subsection (2) enjoins the person making the rules to have regard to (a) the need to secure that the decisions that are the subject of the proceedings are properly reviewed; and (b) the need to secure that disclosures of information are not made where they would be contrary to the public interest. Subsection (3) states that rules of court may make provision (a) about the mode of proof and about evidence in the proceedings; (b) enabling or requiring the proceedings to be determined without a hearing; and (c) about legal representation in the proceedings.

109. Section 66(4) is an important provision which foreshadows rules of court authorising significant differences from the conventional mode of trial in the way that financial restrictions proceedings may be conducted. It provides:

> "Rules of court may make provision-
>
> (a) enabling the proceedings to take place without full particulars of the reasons for the decisions to which the proceedings relate being given to a party to the proceedings (or to any legal representative of that party);
>
> (b) enabling the court to conduct proceedings in the absence of any person, including a party to the proceedings (or any legal representative of that party);
>
> (c) about the functions of a person appointed as a special advocate;
>
> (d) enabling the court to give a party to the proceedings a summary of evidence taken in the party's absence."

110. Section 67(2) provides that rules of court must secure that the Treasury is required to disclose material on which they rely; material which adversely affects its case; and material which supports the case of a party to the proceedings. This subsection is made subject to the succeeding provisions of the section, however.

These include subsection (3) which introduces significant qualifications on the duties imposed in subsection (2). It provides:

> "(3) Rules of court must secure-
>
> (a) that the Treasury have the opportunity to make an application to the court for permission not to disclose material otherwise than to-
>
> (i) the court, and
>
> (ii) any person appointed as a special advocate;
>
> (b) that such an application is always considered in the absence of every party to the proceedings (and every party's legal representative);
>
> (c) that the court is required to give permission for material not to be disclosed if it considers that the disclosure of the material would be contrary to the public interest;
>
> (d) that, if permission is given by the court not to disclose material, it must consider requiring the Treasury to provide a summary of the material to every party to the proceedings (and every party's legal representative);
>
> (e) that the court is required to ensure that such a summary does not contain material the disclosure of which would be contrary to the public interest."

111. As the interveners, Liberty, have pointed out, section 67(3) heralded the effective disapplication of the law relating to public interest immunity. Simply stated, that law required a court, faced with a request by a party to authorise the withholding of relevant evidence, to balance the public interest which the application was said to protect against those public interests which favoured its production, including the fair administration of justice. No such weighing of competing interests could take place after the enactment of the rules which section 67(3) stipulated should secure, among other things, that the court *must* give permission for material not to be disclosed if it considered that its disclosure would be contrary to the public interest. That outcome was inevitable as soon as the conclusion that revelation of the material was contrary to the public interest. Countervailing interests such as the due and fair administration of justice were to be of no consequence.

112. The effective abolition of public interest immunity in financial restrictions proceedings and the requirement that applications be entertained for evidence to be withheld from all except the court and special advocates clearly called for the protection, in some other guise, of the interests of the litigant who had been denied access to the withheld material. This was provided for in section 68. Subsection (1) of that section provides:

"(1) The relevant law officer may appoint a person to represent the interests of a party to-

(c) financial restrictions proceedings, or

b) proceedings on an appeal, or further appeal, relating to financial restrictions proceedings, in any of those proceedings from which the party (and any legal representative of the party) is excluded.

This is referred to in this Chapter as appointment as 'a special advocate'."

113. The 2008 Act had therefore set up a reasonably elaborate structure for the making of rules which would authorise, in financial restrictions proceedings, a significant departure from the system of trial that would normally obtain in most other forms of civil disputes. But section 73 of the Act made it clear that this system of trial was intended only for the High Court, the Court of Appeal and the Court of Session for it provided that "rules of court", where that expression had been used in the legislation, meant rules for regulating the practice and procedure to be followed in the High Court or the Court of Appeal or in the Court of Session.

114. The principal rules in the Civil Procedure Rules are made pursuant to section 1 of the Civil Procedure Act 1997. Section 1(3) of this Act provides that the power to make Civil Procedure Rules shall be exercised with a view to securing that the civil justice system is accessible fair and efficient. Part 79 of the Civil Procedure Rules (which was designed to implement the rules which Part 6 of the 2008 Act, dealing with financial restrictions proceedings, contemplated) was inserted in the Civil Procedure Rules by the Civil Procedure (Amendment No 2) Rules 2008/308517. As well as making detailed rules to fulfil the provisions of sections 66 and 67, Parts 79.2 and 79.13 modified the overriding objective which otherwise applies to proceedings in both the High Court and the Court of Appeal. That objective is stated in CPR Part 1.1, to be to deal with cases justly. Rule 1.1 (2) (a) provides that dealing with cases justly includes, so far as is practicable, ensuring that parties are on an equal footing. But by Parts 79.2 and 79.13 this overall objective (in so far as it related to financial restrictions proceedings) was to be read and given effect to compatibly with the court's statutory duty (in section 66(2) of the 2008 Act) to ensure that information was not disclosed contrary to the public interest. Part 79.22 disapplied in its entirety Part 31 of the CPR which had contained the procedural rules relating to public interest immunity. Again it can be seen that, in relation to financial restrictions proceedings a fairly radical re-ordering of the rules that governed most forms of civil litigation was introduced.

115. All of this is in stark contrast to the position as regards the Supreme Court. Section 40(5) of the Constitutional Reform Act 2005 provides:

> "(5) The Court has power to determine any question necessary to be determined for the purposes of doing justice in an appeal to it under any enactment."

116. As I have said, there cannot be any plausible argument that this provision gave the Supreme Court power to conduct a closed procedures hearing before the enactment of the Counter-Terrorism Act in November 2008. Is it possible that the power of the court to conduct such a hearing has been animated by the 2008 Act? One can recognise a theoretical argument that in order to determine any question in an appeal against a finding made by a lower court in a closed material procedures hearing, it is necessary for the Supreme Court to be able to conduct such a hearing. That argument must, however, immediately confront the fact that nothing in the 2008 Act refers to the Supreme Court. Notwithstanding the elaborate structure that has been put in place to govern the conduct of such a hearing in the High Court, the Court of Appeal and the Court of Session, no provision has been made as to how a closed material procedure hearing in the Supreme Court might take place. For my part, I find it inconceivable that it was intended that the Supreme Court should have power to carry out a closed materials procedure while leaving it bereft of the structure and safeguards which were deemed essential for the other courts in which such a hearing is expressly permitted.

117. Moreover, the use of a closed materials procedure involves the suspension of the law relating to public interest immunity. Thus, for the Supreme Court to recognise that it has power to conduct a closed materials procedure hearing necessarily involves an acceptance that its power to conduct an inquiry into whether public interest immunity requires the withholding of the material is no longer available. That this should be the effect of section 40(5) would be surprising enough. But that it should have that effect for the first time three years after the Constitutional Reform Act 2005 was passed is surely wholly improbable.

118. Section 40(5) gives the Supreme Court power to determine questions which need to be determined for the purposes of doing justice in an appeal. But the conferring of that power should not be confused with authorising the use of a wholly different procedure for the manner in which those questions are to be determined. This is particularly so when that different procedure was not in contemplation at the time the section was enacted.

119. It is significant that the subsection confers the power for the express purpose of doing justice in an appeal. The doing of justice is conventionally understood to mean that all parties to litigation will have equal access to material which is liable to influence the outcome of the dispute. This is echoed in section 45 of the Constitutional Reform Act – the provision which deals with rule making powers. Section 45(1) invests the President of the Court with the power to make rules governing the practice and the procedure to be followed in the court. Subsection (3)(a) requires that the President must exercise that power with a view to securing that the court is accessible, fair

and efficient. This mirrors section 1(3) of the Civil Procedure Act 1997. And Rule 2 of the Supreme Court Rules 2009 sets out the overriding objective as being to secure that the court is accessible, fair and efficient, terms which are not dissimilar to the overall objective in CPR 1.1. There has been no modification of this overall objective such as was introduced by Part 79 of the CPR, however. Indeed, nothing in the 2009 Rules intimates an intention to accommodate a closed material procedure in any way.

120. Rule 27(1) states that every contested appeal shall be heard in open court except where it is necessary in the interests of justice or the public interest to sit in private for part of an appeal hearing. Rule 27(2) provides:

> "(2) Where the Court considers it necessary for a party and that party's representative to be excluded from a hearing or part of a hearing in order to secure that information is not disclosed contrary to the public interest, the Court must conduct the hearing, or that part of it from which the party and the representative are excluded, in private but the Court may exclude a party and any representative only if a person who has been appointed as a special advocate to represent the interests of that party is present when the party and the representative are excluded."

121. In my view, it is clear that this rule was made to allow an ex parte application to be made for the withholding of material as part of a public interest immunity exercise. To suggest that it was designed to cover the holding of a closed material procedure would be farfetched, given that there is no mention in any other part of the rules of such a procedure. Indeed, the very next rule, rule 28 states that a judgment of the court may be delivered in open court or, if the court directs, be promulgated by the Registrar.

122. But for the circumstance that the 2008 Act introduced a closed material procedure for the High Court, the Court of Appeal and the Court of Session and that appeals lie from those courts to the Supreme Court, there would be no argument that the Constitutional Reform Act and the Supreme Court rules even address, much less contemplate, the possibility of such a hearing taking place before this court. It is only by a process of ex post facto rationalisation that section 40(5) is said to permit a closed materials procedure in the Supreme Court. That cannot be said to have been its original purpose. In my view, the revised and expanded purpose which the respondent seeks to ascribe to it cannot be accepted. The contended for modification of the court's powers and procedures involves simply too important, not to say too fundamental, a transformation to be countenanced.

123. It can be submitted that a steadfast refusal to allow some softening of the *Al-Rawi* line in relation to appeals is unrealistic; that the failure to admit closed material in an appeal before the Supreme Court when the same material had been before the courts against whose decisions the appeal is brought creates an asymmetrical

anomaly. And indeed, it has been suggested by the advocate to the court, Mr Tam QC, that advantages in recognising at least the power of the Supreme Court to receive closed material can be detected. The primary advantage he identified was the assistance which such an exercise provided in enabling the court to arrive at the "correct" result. For the reasons that I gave in *Al-Rawi* and the associated case of *Tariq v Home Office* [2012] 1 AC 452, I consider that the assumption that a court, presented with all of what is claimed to be "relevant" material, will be in a better position to arrive at the right conclusion when some of that material is untested is, at least, misplaced and may prove in some cases to be palpably wrong. But I do not consider it profitable to renew the debate on that particular topic in the present case. For the sake of examining the claim that this court should recognise a power to examine closed material, let us assume that there is force in the argument that a court is, as a matter of principle and common experience, better placed to reach a more correct result if it receives all the material which one of the parties says is relevant to its decision, even though the other party is denied knowledge of its content. Does that circumstance warrant recognition of the power? In my view it does not.

124. Pragmatic considerations can – and, where appropriate, should – play their part in influencing the correct interpretation to be placed on a particular statutory provision. But pragmatism has its limits in this context and we do well to recognise them. As a driver for the interpretation of section 40(5) for which the respondent contends, pragmatism might seem, at first blush, to have much to commend it. After all, this is an appeal from courts where closed material procedures took place. How, it is asked, can justice be done to an appeal if the court hearing the appeal does not have equal access to a closed material procedure as was available to the courts whose decision is under challenge? And if one proceeds on the premise that the court will be more fully informed and better placed to make a more reliable decision, why should the Supreme Court not give a purposive interpretation to section 40(5)?

125. The answer to this deceptively attractive presentation is that this was never the purpose of section 40(5). It was not even a possible, theoretical purpose at the time that it was enacted. It was never considered that it would be put to this use. The plain fact is that Parliament introduced a closed material procedure for the High Court, the Court of Session and the Court of Appeal and did not introduce such a procedure for the Supreme Court. This court has said in *Al-Rawi* that it does not have the inherent power to introduce a closed material procedure. Only Parliament could do that. Parliament has not done that. And to attempt to graft on to a statutory provision a purpose which Parliament plainly never had in order to achieve what is considered to be a satisfactory pragmatic outcome is as objectionable as expanding the concept of inherent power beyond its proper limits.

126. A majority of this court has held that it does have power to hold a closed material procedure, however, and it is therefore necessary for me to address the question of whether it was right to hold a closed material procedure on this appeal.

127. It was not in dispute between the parties, the interveners and the advocate to the court that, as Mr Chamberlain on behalf of the special advocates put it, if section

40(5) confers on the court power to consider closed material, it does so only if, and to the extent that, closed material is relevant to a question whose determination is *necessary* for the purposes of doing justice in the appeal. Equally, it was not disputed that the obligation to show that the closed material was relevant and the extent to which it was relevant rested with the party so asserting, in this instance the respondent.

128. But the circumstances of this case immediately exemplified the inherent difficulty in applying that principle. In seeking to persuade the court that it was necessary to look at the closed judgment, the respondent felt unable to state what the closed judgment contained. This is, of course, a problem which will beset every application for a closed material procedure. And, ultimately, counsel for the respondent was driven to utter warnings couched in the most general terms of the danger of this court reaching a conclusion on the appeal in the appellant's favour when it *might* have been influenced to a different view had it seen the closed material. If the principle that the closed material procedure has to be shown to be necessary is to be something more than an empty aspiration, then the party asking for a closed material procedure must surely do more than merely assert that this is necessary. Here, however, the respondent did not even do that. The Treasury's final position was that, in a certain eventuality (the appellant's appeal succeeding), the material *might* cause the court to take a different view. That seems to me to be an impossibly far cry from showing that it was necessary that we should look at the closed judgment.

129. The difficulty is enhanced where, as here, article 6 of the European Convention on Human Rights and Fundamental Freedoms governed the proceedings. Where that is the case, nothing in the closed material, or the judge's conclusion on it, may be determinative of the outcome unless the gist of the material has been relayed to the appellant. So one must start the examination of whether it is necessary to examine the closed judgment on the basis that nothing in that judgment can have been determinative of the case against the bank. The examination of whether the necessity test has been satisfied then must include acknowledgment of Mitting J's single reference to his closed judgment in para 16 of his open judgment to the effect that there were closed reasons as well as those expressed in his open judgment for his finding that one of the bank's customers, Novin Energy Company, had imported materials which could be used to produce or facilitate the production of nuclear weapons. In the first place, the fact that open reasons for that finding had been given certainly does not help the case that it was necessary to look at the closed judgment. But that case was weakened further by the judge's statement that this was common ground between the parties and, in my view, it was demolished by the fact that this finding was not challenged by Bank Mellat before this court.

130. In truth, this court's decision to look at the closed judgment depended on nothing more than the plea of counsel for the Treasury that, against the possibility that we might be inclined to find for the appellant, we should look at the closed material just in case it might persuade us to a different view. That, in my opinion, comes nowhere near to showing that it was necessary to look at the closed judgment and sadly, but all too predictably, when the closed judgment was considered in the course of a closed

material procedure, it became abundantly clear that it was quite unnecessary for us to have done so.

(d) LORD REED (dissenting)

131. This appeal has raised several points of constitutional importance. The present judgment is concerned with the questions whether this court can adopt a closed material procedure in a case of this nature, and, if so, whether it ought to do so in this particular case. I agree with the judgments` of Lord Hope and Kerr, and add some observations only in view of the importance of these issues and the division in the court.

The issue of principle

132. The first question raised is whether this court has the power, when hearing an appeal relating to financial restrictions proceedings under Part 6 of the Counter- Terrorism Act 2008 ("the 2008 Act"), to exclude from the hearing the party challenging the Treasury's exercise of its powers, to consider a "closed judgment" which has not been disclosed to that party, and to give a closed judgment, containing part or all of the reasons for its decision, which is not disclosed to that party or to the public. I was of the opinion, when the issue arose at the end of the first day of the hearing, that the court has no such power. I remain of that opinion.

133. It is a fundamental principle of justice under the common law that a party is entitled to the disclosure of all materials which may be taken into account by the court when reaching a decision adverse to that party (see for example *In re D (Minors) (Adoption Reports: Confidentiality)* [1996] AC 593, 615 per Lord Mustill, and the other authorities cited in *R (Roberts) v Parole Board* [2005] UKHL 45; [2005] 2 AC 738, para 16 per Lord Bingham of Cornhill). That principle can only be qualified or overridden by statute. It is also a basic principle of justice that a party is entitled to be present during the hearing of his case by the court (subject to a number of established exceptions, none of which is germane to the present case), and to know the reasons for the court's decision.

134. Section 66 of the 2008 Act, read with section 73, makes special provision for rules of court regulating the practice and procedure to be followed in appeals relating to financial restrictions proceedings in the High Court, the Court of Appeal and the Court of Session. Section 66(4) permits such rules of court to make provision for a closed material procedure. Section 67 imposes specific duties in relation to disclosure upon persons making rules of court in respect of those courts alone. The law relating to public interest immunity is by implication disapplied. It is plain beyond argument that Parliament did not apply those provisions to the court of last resort. If

Parliament had intended the same procedures to be applied in this court, it would surely have said so.

135. The general powers conferred upon this court by the Constitutional Reform Act 2005 ("the 2005 Act") are silent on the matter. It is argued that they are to be construed as conferring the necessary powers, since the court cannot decide an appeal in a case where a "closed judgment" has been issued without knowing, and hearing argument upon, all the reasons for the decisions of the courts below, and must therefore hear argument upon the closed judgment, necessarily in a hearing from which the party challenging the Treasury's exercise of its powers is excluded. There is however a strong presumption that Parliament does not intend to interfere with the exercise of fundamental rights. It will be understood as doing so only if it does so expressly or by necessary implication (*R v Secretary of State for the Home Department, Ex p Pierson* [1998] AC 539, 574 per Lord Browne-Wilkinson; *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 131 per Lord Hoffmann). The common law rights of a party to an appeal to be present throughout the hearing of the appeal, to see the material before the court, and to know the reasons for the court's decision of the appeal, are undoubtedly fundamental rights to which that principle applies. The argument advanced on behalf of the Treasury is directly contrary to that principle: reliance is placed upon general words to override a fundamental right. I find it particularly difficult to accept the argument against the background of the specific provision made by Parliament in respect of other courts in the 2008 Act. In so far as the argument seeks to rely upon the Supreme Court Rules made under the 2005 Act, it begs the anterior question as to the effect of the 2005 Act itself.

136. I accept of course, as a general proposition, that it is desirable that an appellate court should be able to consider all the reasoning of the courts below, and all the material which was before them. This court has not however in the past found it either necessary or appropriate to consider closed judgments of the courts below: *RB (Algeria) v Secretary of State for the Home Department* [2009] UKHL 10; [2010] 2 AC 110, para 3. I do not in any event regard these pragmatic considerations as conclusive.

137. It has to be borne in mind in the first place that it is a matter of great importance that proceedings in the highest court in the land should be conducted in accordance with the highest standards of justice: in particular, that the court should sit in public, and that all parties should be equally able to participate in the hearing. There is to my mind a very serious question whether secret justice at this level is acceptable. It also has to be borne in mind that there are other possible means of protecting national security in court proceedings besides the adoption of a closed material procedure, and that some of those means enable the court to sit in public and the parties to attend the whole of the hearing. One possibility, where a closed judgment has been issued by a lower court, is to determine the appeal on the basis of the material which that court, exercising its judgment, has set out in its open judgment. That was the procedure followed in *RB (Algeria)*. Another is to apply the law relating to public interest immunity, as the House of Lords did in the past. Another is to follow the approach adopted in a number of European courts, such as the German courts, where the court can

examine the material for itself, without its being canvassed during the hearing. A comparative analysis might disclose other possibilities. That is not to say that the alternatives to closed material procedure are necessarily preferable: they may cause equal or greater concern for other reasons. The point of these considerations, however, is that there are choices to be made. Those choices are appropriately made by Parliament after full consideration and debate. They are too important to be left to judges.

138. The most serious difficulty with the Treasury's argument, however, is that for the court to conduct a closed hearing is contrary to a fundamental principle of the common law, and therefore requires clear statutory authority. Even interpreted as generously as possible, the 2005 Act cannot in my opinion be said to provide clear authority.

[…]

IV. Questions to the Decision

1. What principles are behind the court's arguments?
2. Would you agree with the argumentation?
3. Are there other principles you would consider in your country?

V. Bank Mellat v Her Majesty's Treasury (No. 2)

Read the extract from the decision below. What other principle(s) does the Supreme Court consider to be related to the principle of proportionality? How does the principle of proportionality differ from the principle of proportionality as understood in your country? Do you agree with the application of the principle of proportionality in the matter?

Summary of the facts

This judgment concerned the Bank's appeal against the Court of Appeal's decision to approve of the 2009 Order.

Trinity Term [2013] UKSC 39
On appeal from: [2011] EWCA Civ 1

JUDGMENT

Bank Mellat (Appellant) *v* Her Majesty's Treasury (Respondent) (No. 2)

before

Lord Neuberger, President
Lord Hope, Deputy President
Lady Hale
Lord Kerr
Lord Clarke
Lord Dyson
Lord Sump-
tion Lord Reed
Lord
Carnwath

JUDGMENT GIVEN ON

19 June 2013

Heard on 19, 20 and 21 March 2013

Appellant
Michael Brindle QC
Amy Rogers
Dr Gunnar Beck
(Instructed by Zaiwalla and Co)

Respondent
Jonathan Swift QC
Tim Eicke QC
Robert Wastell
(Instructed by Treasury Solicitors)

Special Advocates
Martin Chamberlain QC
QC Melanie Plimmer
(Instructed by Special Advocates Support Office)

Advocate to the Court
Robin Tam

(Instructed by Treasury Solicitors)

Intervener
Nicholas Vineall QC

(Instructed by Zaiwalla and Co)

1. LORD SUMPTION (with whom Lady Hale, Lord Kerr, and Lord Clarke agree in whole; Lord Neuberger and Lord Dyson agree only on the procedural grounds, Lord Carnwath only on the substantive grounds)

Introduction

2. This appeal is about measures taken by H.M. Treasury to restrict access to the United Kingdom's financial markets by a major Iranian commercial bank, Bank Mellat, on the account of its alleged connection with Iran's nuclear weapons and ballistic missile programmes.

3. The proliferation of nuclear weapons is an international issue of great importance to the security of the United Kingdom and the international community. For a number of years, Iran has had a major industrial programme which the United Kingdom, along with the rest of the international community, believes to be directed to the development of the technical capability to produce nuclear weapons and to the improvement of its ballistic missile capabilities. Between 2006 and 2008 the United Nations Security Council adopted a number of resolutions under Article 41 of the United Nations Charter, which deals with threats to international peace and security. Security Council Resolution 1737 (2006) called on Iran to suspend various proliferation-sensitive nuclear activities, and called on states to take measures to control the trade in certain critical materials, components, equipment and services. Paragraph 12 of this Resolution also required states to freeze the assets in their national territory of a number of persons or organisations identified in Annex I as being involved in Iran's nuclear and ballistic missile programmes. Resolution 1747 (2007) extended these provisions to a number of additional persons and organisations identified in Annex I to the new resolution. These included entities providing ancillary services to Iran's nuclear and armaments industries, among them two banks. Security Council Resolution 1803 (2008) strengthened the measures required by Resolutions 1737 and 1747. In relation to the provision of banking and other financial services to support Iran's weapons programmes, the new resolution called upon all states to

> "exercise vigilance over the activities of financial institutions in their territories with all banks domiciled in Iran, in particular with Bank Melli and Bank Saderat, and their branches and subsidiaries abroad, in order to avoid such activities contributing to the proliferation sensitive nuclear activities, or to the development of nuclear weapon delivery systems."

[…]

5. If the conditions in paragraph 1 as to the existence of a relevant risk are satisfied, the Treasury may give a direction to one or more persons "operating in the financial sector" (essentially credit and financial institutions) regulating their dealings with any "designated person". A "designated person" includes any person carrying on business in or resident or incorporated in the foreign country in question: see paragraph 9(1). The direction may require the financial institutions to whom it is addressed to exercise an

enhanced customer due diligence so as to obtain information about the designated person and those of its activities which contribute to the risk (paragraph 10). It may require enhanced monitoring (paragraph 11) or systematic reporting (paragraph 12) to the same end. But the most draconian provision is paragraph 13, which provides that the direction may require those to whom it is addressed "not to enter into or continue to participate in... any transaction or business relationship with a designated person." Under paragraph 16(4), any direction made in the exercise of these powers expires a year after it is made. A direction made under Schedule 7 must be contained in an order: see paragraph 14(1). By section 96, any order under the Act must be made by statutory instrument.

6. It will be apparent that for designated persons with a substantial business in the United Kingdom, especially if they are banks, the exercise of the power conferred by paragraph 13 will have extremely serious and possibly irreversible consequences. The Act provides three relevant safeguards against the unwarranted use of this power. First, under Schedule 7, paragraph 14(2), if the direction contains requirements of a kind mentioned in paragraph 13 of Schedule 7 (limiting or ceasing business with a designated person) it must be laid before Parliament after being made and unless approved by affirmative resolution within 28 days will cease to have effect at the end of that period. Second, Schedule 7, paragraph 9(6) provides that the requirements imposed by a direction must be proportionate having regard, in the case within paragraph 1(4) to the risk referred to in that paragraph. This means the risk to the national interests of the United Kingdom presented by the development of nuclear weapons, radiological, biological or chemical weapons in the foreign country. Third, section 63 of the Act provides a special procedure by which a person affected by any "decision" of the Treasury, including a decision under Schedule 7, may apply to the High Court to set it aside, applying the principles applicable on an application for judicial review.

7. On 9 October 2009 the Treasury made an order, the Financial Restrictions (Iran) Order 2009 SI 2009/2725, which came into force three days later on 12 October. It was made under Schedule 7, paragraph 13 of the Act and required all persons operating in the financial sector not to enter into or to continue to participate in any transaction or business relationship with Bank Mellat or any of its branches or with a shipping line called IRISL. The direction was laid before Parliament on 12 October 2009. It was approved by the Delegated Legislation Committee of the House of Commons on 28 October and by the Grand Committee of the House of Lords on 2 November.

[…]

15. In his open judgment Mitting J made the following findings, which represent at best a very partial acceptance of the Treasury's case on the facts:

a. Bank Mellat "has in place a mechanism, which it operates conscientiously, to ensure that it does not provide banking services to Security Council designated entities and individuals." This finding reflected the Bank's evidence, which described its due diligence procedures.

b. Novin Energy Company was a "financial conduit" for AEOI and did facilitate Iran's nuclear weapons programme. But once it was designated in Security

Council Resolution 1747, the Bank ran down and eventually terminated its relationship with it.

c. Doostan International had played a part in the Iranian nuclear weapons programme. The Bank holds accounts for Doostan and for its managing director Mr Shabani, but the Bank had investigated the position in good faith and found nothing unusual or suspicious. Mitting J considered that the position with regard to Doostan "does not greatly matter".

d. Mitting J was not satisfied on the information available to him that the Bank had provided banking services to the two individuals said to be senior officials of the AIO. Their names are very common in Iran and it had not proved possible to identify them in the Bank's records.

e. Bank Mellat is not controlled by the Iranian government, which exercises voting rights only in respect of the 20% of the shares which it owns. Nonetheless some pressure would be brought to bear on the Iranian government by the direction.

16. In substance, therefore, Mitting J found that while the Bank had provided banking services to two entities, Novin and Doostan, which were involved in the Iranian nuclear weapons and ballistic missiles programmes, this had happened without their knowledge and in spite of their conscientiously operated procedures to avoid doing so. The judge nevertheless dismissed the Bank's substantive grounds of application because these very facts demonstrated "the risk that is in any event obvious, that however careful the bank may be, the bank's facilities are open to use by entities participating in Iran's nuclear weapons programme." The judge put the point in this way at para 16:

> "The Treasury's case is not that the bank has knowingly assisted Security Council designated entities after designation, or even that it has knowingly assisted entities liable to be designated, but which have not yet been, by providing banking facilities to them, but that it has the capacity to do so, has in one instance done so and is likely to do so in the future. The fundamental justification for the Order *is* that, even as an unknowing and unwilling actor, the bank is, by reason of its international reach, well placed to assist entities to facilitate the development of nuclear weapons, by providing them with banking facilities, in particular trade finance. Concealment of the true nature of imported goods paid for by a letter of credit is straight forward: all that an issuing bank sees are documents. On presentation of compliant documents describing innocent goods, the bank must pay, whatever the nature of the goods in fact imported. Access to the international financial system is, as the Financial Action Task Force reported on 18 June 2008, essential for what it describes as "proliferators". I accept Mr Robertson's conclusion, in paragraph 57 of his statement, that Iran's banking system provides many of the financial services which underpin procurement of the raw materials and components needed for its nuclear and ballistic missile programmes."

[…]

The Bank's substantive grounds

19. The bank now accepts, at least for the purpose of this litigation, that the statutory prerequisites in Schedule 1, paragraph 1 of the Act for the making of the direction were satisfied. In other words, the Treasury reasonably believed that Iran's nuclear and ballistic missiles programmes posed a significant risk to the national interests of the United Kingdom. But that is not enough to justify the order. This is because unlike the Iran (Financial Sanctions) Order 2007, a Schedule
7 direction is not a sanctions regime. Its purpose is directly to restrict the availability of financial services which contribute to the relevant risk. Directions made under it are essentially preventative and remedial rather than punitive or deterrent. Thus Schedule 7 applies in the same way to the risk of terrorist financing and money-laundering associated with a foreign country as it does to the risk of nuclear proliferation. All of the specific directions for which Schedule 7 provides are addressed to the particular risks whose existence has given rise to the direction. They require things to be done by the financial institutions to whom they are addressed with a view to directly restricting the contribution which the designated person may make to that risk, whether it be by gathering or reporting of information relating to its activities or, as in the present case, by wholly ceasing business dealings with him. Critically, paragraph 9(6) of Schedule 7 posits a functional relationship between the conduct which may be required by the direction and the particular risk which justified the making of it in the first place. It follows that the essential question raised by the Bank's substantive objections to the direction is whether the interruption of commercial dealings with Bank Mellat in the United Kingdom's financial markets bore some rational and proportionate relationship to the statutory purpose of hindering the pursuit by Iran of its weapons programmes.

20. The requirements of rationality and proportionality, as applied to decisions engaging the human rights of applicants, inevitably overlap. The classic formulation of the test is to be found in the advice of the Privy Council, delivered by Lord Clyde, in *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 at 80. But this decision, although it was a milestone in the development of the law, is now more important for the way in which it has been adapted and applied in the subsequent case-law, notably *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 (in particular the speech of Lord Steyn), *R v Shayler* [2003] 1 AC 247 at paras 57-59 (Lord Hope of Craighead), *Huang v Secretary of State for the Home Department* [2007] 2 AC 167 at para 19 (Lord Bingham of Cornhill) and *R (Quila) v Secretary of State for the Home Department* [2012] 1 AC 621 at para 45. Their effect can be sufficiently summarised for present purposes by saying that the question dependsmon an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them. Before us, the only issue about them concerned (iii), since it was suggested that a measure would be disproportionate if any more limited measure was capable of achieving the objective. For my part, I agree with the view expressed in this case by Maurice Kay LJ that this debate is sterile in the normal case where the effectiveness of the measure and the degree of interference are not absolute values but questions of degree, inversely related to each other. The question is

whether a less intrusive measure could have been used without unacceptably compromising the objective. Lord Reed, whose judgment I have had the advantage of seeing in draft, takes a different view on the application of the test, but there is nothing in his formulation of the concept of proportionality (see his paras 68-76) which I would disagree with.

21. None of this means that the court is to take over the function of the decision-maker, least of all in a case like this one. As Maurice Kay LJ observed in the Court of Appeal, this case lies in the area of foreign policy and national security which would once have been regarded as unsuitable for judicial scrutiny. The measures have been opened up to judicial scrutiny by the express terms of the Act because they may engage the rights of designated persons or others under the European Human Rights Convention. Even so, any assessment of the rationality and proportionality of a Schedule 7 direction must recognise that the nature of the issue requires the Treasury to be allowed a large margin of judgment. It is difficult to think of a public interest as important as nuclear non-proliferation. The potential consequences of nuclear proliferation are quite serious enough to justify a precautionary approach. In addition, the question whether some measure is apt to limit the risk posed for the national interest by nuclear proliferation in a foreign country, depends on an experienced judgment of the international implications of a wide range of information, some of which may be secret. This is pre-eminently a matter for the executive. For my part, I wholly endorse the view of Lord Reed that "the making of government and legislative policy cannot be turned into a judicial process."

22. Nonetheless there are, as it seems to me, two serious difficulties about the conclusion which both Mitting J and the Court of Appeal reached in the present case. The first is that it does not explain, let alone justify, the singling out of Bank Mellat, if as both courts below agreed the problem is a general problem of international banking. The second is that the justification for the direction which they have found was not the one which ministers advanced when laying the direction before Parliament, and was in some respects inconsistent with it.

23. As I have pointed out, by reference to the various statements of Treasury ministers, the justification for the measure which was given to Parliament was that there was a particular problem about Bank Mellat which did not apply to the generality of Iranian banks. As the Exchequer Secretary pointed out on 17 December 2009, the direction was a targeted measure which did not apply to transactions with other banks. That must mean, and would certainly have conveyed to Parliament, either (i) that Bank Mellat was knowingly collaborating in transactions related to the Iranian programmes, or at least turning a blind eye to them, or else (ii) that Bank Mellat, even on the footing that it was acting in good faith had unacceptably low standards of customer due diligence, which made it especially liable to let through such transactions. The existence of special problems at Bank Mellat was also a substantial part of the justification put forward in the more detailed explanation given in Mr Robertson in his witness statement. Unfortunately, it was the part which the judge did not accept. The judge has found that Bank Mellat had a conscientiously applied policy of not providing banking facilities and banking services to entities identified in the United Nations list as being connected to the Iranian weapons programmes. He has found that it wound down and then terminated its relationship with Novin once it had been added to the list, and that an investigation into Doostan had thrown up nothing unusual or suspicious. When (after the hearing before Mitting J) Doostan was added to the list of entities connected with the Iranian weapons programmes by the United Nations Security Council, the relationship with them was terminated as it

had been in Novin's case. The judge made no finding about the inadequacy of Bank Mellat's controls. Neither the Treasury ministers when justifying the measure to Parliament nor Mr Robertson when explaining it to the court suggested that they were particularly lax. Mr Robertson did say that in general Iranian standards of due diligence were low. This, he said, made them vulnerable to being used to channel illicit finance, and meant that UK financial institutions dealing with them could not assume that they would necessarily have procedures in place to screen out transactions of concern. Mr Robertson did not, however, suggest that Bank Mellat was especially deficient in this respect and the judge's finding about their procedures suggests that they were satisfactory, at any rate in relation to the weapons programmes. Against this background, the emphasis of the Treasury's argument underwent a radical shift after the order was challenged towards a justification based on the risk that Bank Mellat might be the "unwitting and unwilling" channel by which the entities directly involved in the Iranian weapons programmes financed their importation of materials, services and equipment.

24. Mitting J and the Court of Appeal accepted this argument. They considered that the justification for the direction was to be found not in any problem specific to Bank Mellat but in the general problem for the banking industry of preventing their facilities from being used for purposes connected with the Iranian weapons programmes. As the judge pointed out, concealment of the true nature of the imported goods paid for by letters of credit is straightforward. "However careful a bank may be," he said, "the bank's facilities are open to use by entities participating in Iran's nuclear weapons programme." For this reason, he thought that the direction represented the only "reasonably practicable means of ensuring reliably that the facilities of an Iranian bank with international reach will not be used for the purpose of facilitating the development of nuclear weapons by Iran." However, the direction made no attempt to prevent every Iranian bank with an international reach from facilitating Iran's weapons programmes, but only one of them. Indeed, by emphasising that it remained open to international traders to use other banks, the Exchequer Secretary apparently invited them to use instead channels of trade finance many, perhaps all of which would be affected by precisely the same inherent problems as Bank Mellat.

25. A measure may respond to a real problem but nevertheless be irrational or disproportionate by reason of its being discriminatory in some respect that is incapable of objective justification. The classic illustration is *A v Secretary of State for the Home Department* [2005] 2 AC 68, another case in which the executive was entitled to a wide margin of judgment for reasons very similar to those which I have acknowledged apply in the present case. The House of Lords was concerned with a derogation from the Convention permitting the detention of non-nationals whose presence in the United Kingdom was considered by the Home Secretary to be a risk to national security and who could not be deported. The House held that this was not a proportionate response to the terrorist threat which provoked it: see in particular paras 31, 43-44 (Lord Bingham of Cornhill), 132 (Lord Hope of Craighead), and 228 (Baroness Hale of Richmond). No one disputed that the executive had been entitled to regard the applicants as a threat to national security. Plainly, therefore, the legislation in question contributed something to the statutory purpose of protecting the United Kingdom against terrorism, if only by keeping some potential terrorists in prison. It was nevertheless disproportionate, principally because it applied only to foreign nationals. That was relevant for two reasons. One was that the distinction was arbitrary, because the threat posed by comparable UK nationals, to whom the legislation did not apply, was qualitatively similar, although quantitatively smaller. The other was that it substantially reduced the contribution which the legislation could

make to the control of terrorism, and made it difficult to suggest that the measure was necessary. This was because if (as the Committee assumed) the threat from UK nationals could be adequately addressed without depriving them of their liberty, no reason was shown why the same should not be true of foreign nationals. As Lord Hope put it at para 132, "the distinction raises an issue of discrimination, ... but as the distinction is irrational, it goes to the heart of the issue about proportionality also."

26. Every case turns on its own facts, and analogies with other decided cases can be misleading. The suppression of terrorism and the prevention of nuclear proliferation are comparable public interests, but the individual right to liberty engaged in *A v Secretary of State for the Home Department* can fairly be regarded as the most fundamental of all human rights other than the right to life and limb. The right to the peaceful enjoyment of business assets protected by article 1 of the First Protocol, is not in the same category of human values. But the principle is not fundamentally different.

27. I would not go so far as to say that the Schedule 7 direction in this case had no rational connection with the objective of frustrating as far as possible Iran's weapons programmes. On the footing that a precautionary approach is justified, the elimination of any Iranian bank from the United Kingdom's financial markets may well have added something to Iran's practical problem in financing transactions associated with those programmes, just as the incarceration of some potential terrorists under Part IV of the Crime and Security Act 2001 may have made some difference to the reduction of terrorism. But I think that the distinction between Bank Mellat and other Iranian banks which was at the heart of the case put to Parliament by ministers was an arbitrary and irrational distinction and that the measure as a whole was disproportionate. This is because once it is found that the problem is not specific to Bank Mellat but an inherent risk of banking, the risk posed by Bank Mellat's access to those markets is no different from that posed by the access which comparable banks continued to enjoy. Moreover, the discriminatory character of the direction must drastically reduce its effectiveness as a means of impeding the Iranian weapons programmes. As the Exchequer Secretary herself pointed out, "as long as all financial sanctions and relevant risk warnings are complied with, alternative banks may be used." Nothing in the Treasury's case explains why we should accept that it is necessary to eliminate Bank Mellat's business in London in order to achieve the objective of the statute, if the same objective can be sufficiently achieved in the case of comparable banks by requiring them to observe financial sanctions and relevant risk warnings. It may well be that other Iranian banks have not been found to number among their clients entities involved in Iran's nuclear and ballistic missile programmes. But it follows from the fact that this is a problem inherent in the conduct of international banking business that they are as likely to do so as Bank Mellat. The direction was irrational in its incidence and disproportionate to any contribution which it could rationally be expected to make to its objective. I conclude that that it was unlawful.

The Bank's procedural grounds

28. I also consider that the Bank is entitled to succeed on the ground that it received no notice of the Treasury's intention to make the direction, and therefore had no opportunity to make representations.

29. The duty to give advance notice and an opportunity to be heard to a person against whom a draconian statutory power is to be exercised is one of the oldest principles

of what would now be called public law. In *Cooper v Board of Works for the Wandsworth District* (1863) 14 CB (NS) 180, the Defendant local authority exercised without warning a statutory power to demolish any building erected without complying with certain pre-conditions laid down by the Act. "I apprehend", said Willes J at 190, "that a tribunal which is by law invested with power to affect the property of one Her Majesty's subjects is bound to give such subject an opportunity of being heard before it proceeds, and that rule is of universal application an founded upon the plainest principles of justice."

30. In *R v Secretary of State for the Home Department Ex p Doody* [1994] 1 AC 531, 560, Lord Mustill, with the agreement of the rest of the Committee of the House of Lords, summarised the case-law as follows:

> "My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both.
> (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

31. It follows that, unless the statute deals with the point, the question whether there is a duty of prior consultation cannot be answered in wholly general terms. It depends on the particular circumstances in which each direction is made. Some directions that might be made under Schedule 7 of the Act could not reasonably give rise to an obligation on the Treasury's part to consult the targeted entity, for example because there was a real problem about the implicit or explicit disclosure of secret intelligence or because prior consultation might frustrate the object of the direction by enabling the targeted entity to evade its operation, notably in a case involving money-laundering or terrorism. In this case, the Treasury has raised only two practical difficulties about consulting the Bank in advance of the direction. The first was the difficulty raised by Mr Robertson that "it would not have been appropriate to have notified Bank Mellat of the Treasury's intention to make the direction contained in the 2009 Order before 12 October 2009, because this would have provided it with the opportunity to rearrange business relationships or transactions with the UK financial sector to ensure (for example) that they were indirect and so not caught by the prohibitions." The judge rejected this, pointing out that the Bank

could just as easily do that after the direction as before. That conclusion, which seems inescapable, has not been challenged on appeal. The second practical difficulty was raised by way of submission in the Court of Appeal and dealt with in the judgment of Maurice Kay LJ, who thought that it had "some force". This was the supposed practical difficulty of permitting representations in a situation where there is closed material. I have to say that for my part I am not impressed by this difficulty. In justifying the direction in the course of these proceedings, the Treasury disclosed the gist of the closed material including the provision of banking facilities to Novin and Doostan and their alleged provision to Mr Taghizadeh and Mr Esbati. I cannot see why they should have had any greater difficulty in disclosing before the making of the direction the material that they were quite properly required to disclose afterwards.

32. In my opinion, unless the Act expressly or impliedly excluded any relevant duty of consultation, it is obvious that fairness in this case required that Bank Mellat should have had an opportunity to make representations before the direction was made. In the first place, although in point of form directed to other financial institutions in the United Kingdom, this was in fact a targeted measure directed at two specific companies, Bank Mellat and IRISL. It deprived Bank Mellat of the effective use of the goodwill of their English business and of the free disposal of substantial deposits in London. It had, and was intended to have, a serious effect on their business, which might well be irreversible at any rate for a considerable period of time. Secondly, it came into effect almost immediately. The direction was made on a Friday and came into force at 10.30 a.m. on the following Monday. It had effect for up to 28 days before being approved by Parliament. Third, for the reasons which I have given, there were no practical difficulties in the way of an effective consultation exercise. While the courts will not usually require decision-makers to consult substantial categories of people liable to be affected by a proposed measure, the number of people to be consulted in this case was just one, Bank Mellat, and possibly also IRISL depending on the circumstances of their case. I cannot agree with the view of Maurice Kay LJ that it might have been difficult to deny the same advance consultation to the generality of financial institutions in the United Kingdom, who were required to cease dealings with Bank Mellat. They were the addressees of the direction, but not its targets. Their interests were not engaged in the same way or to the same extent as Bank Mellat's. Fourth, the direction was not based on general policy considerations, but on specific factual allegations of a kind plainly capable of being refuted, being for the most part within the special knowledge of the Bank. For these reasons, I think that consultation was required as a matter of fairness. But the principle which required it is more than a principle of fairness. It is also a principle of good administration. The Treasury made some significant factual mistakes in the course of deciding whether to make the direction, and subsequently in justifying it to Parliament. They believed that Bank Mellat was controlled by the Iranian state, which it was not. They were aware of a number of cases in which Bank Mellat had provided banking services to entities involved in the Iranian weapons programmes, but did not know the circumstances, which became apparent only when the Bank began these proceedings and served their evidence. The quality of the decision-making processes at every stage would have been higher if the Treasury had had the opportunity before making the direction to consider the facts which Mitting J ultimately found.

33. In these circumstances, the only ground on which it could be said that the Treasury was not obliged to consult Bank Mellat in advance, was that such a duty, although it would otherwise have arisen at common law in the particular circumstances of this case, was excluded by the Act in cases such as the present one. It was certainly not expressly

excluded. But the submission is that it was impliedly excluded on two overlapping grounds: (i) that the statutory right of recourse to the courts after the making of the direction, which is provided by section 63 of the Act, is enough to satisfy any duty of fairness, or at least must have been intended by Parliament to be enough; and (ii) that consultation is not in law required before the making of subordinate legislation, especially when it is subject to the affirmative resolution procedure. Mitting J and the majority of the Court of Appeal rejected the Bank's procedural case on both grounds.

34. I shall deal first with the implications of the statutory right of recourse to the courts.

35. The duty of fairness governing the exercise of a statutory power is a limitation on the discretion of the decision-maker which is implied into the statute. But the fact that the statute makes some provision for the procedure to be followed before or after the exercise of a statutory power does not of itself impliedly exclude either the duty of fairness in general or the duty of prior consultation in particular, where they would otherwise arise. As Byles J observed in *Cooper v Board of Works for the Wandsworth District* (1863) 14 CB(NS) 190, 194, "the justice of the common law will supply the omission of the legislature." In *Lloyd v McMahon* 1987] 1 AC 625, 702-3, Lord Bridge of Harwich regarded it as

> "well established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness."

Like Lord Bingham in *R (West) v Parole Board* [2005] 1 WLR 350 at para 29, I find it hard to envisage cases in which the maximum *expressio unius exclusio alterius* could suffice to exclude so basic a right as that of fairness.

36. It does not of course follow that a duty of prior consultation will arise in every case. The basic principle was stated by Lord Reid forty years ago in *Wiseman v Borneman* [1971] AC 297, 308, in terms which are consistent with the ordinary rules for the construction of statutes and remain good law:

> "Natural justice requires that the procedure before any tribunal which is acting judicially shall be fair in all the circumstances, and I would be sorry to see this fundamental general principle degenerate into a series of hard-and-fast rules. For a long time the courts have, without objection from Parliament, supplemented procedure laid down in legislation where they have found that to be necessary for this purpose. But before this unusual kind of power is exercised it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation."
> Cf. Lord Morris of Borth-y-Gest at 309B-C.

37. Leaving aside, for a moment, the fact that the direction was required to be made by statutory instrument subject to Parliamentary approval, it is not in my view implicit in

section 63 that the right of recourse to the courts is the sole guarantee of fairness. Nor is it implicit that what the common law would otherwise require to achieve fairness is excluded. I say this for three reasons. The first is that section 63 largely reproduces the rights which a person affected by the direction would have anyway. It confers on him the right to apply to the High Court for an adjudication based on the principles of judicial review, and on the court such powers as could be made on judicial review. The only difference which section 63 makes is that permission is not required for such an application. The express provision of a right of recourse to the courts is essentially a peg on which to hang the various procedural provisions in sections 66-72. It would I think be surprising if the mere fact that the right of persons affected to apply for judicial review had been superseded by a statutory application with substantially the same ambit, were to make all the difference to the content of the Treasury's common law duty of fairness. Whatever else Parliament may have intended by enacting section 63, it cannot in my view have intended to reduce the procedural rights of those affected by the Treasury's orders. Second, the statutory right of recourse will not be sufficient to achieve fairness in every case and is certainly not enough to achieve it in cases like this one, falling under Schedule 7, paragraph 13. This is because a direction may take effect, as it did in this case, immediately or almost immediately and, subject to Parliamentary scrutiny, will remain in effect unless and until it is set aside by the Court. An application under section 63 is likely to require evidence on both sides. With the best will in the world it is unlikely to be determined in less than three months and may take considerably longer even without allowing for appeals. In this case, some seven months elapsed before Mitting J gave judgment. This may not matter much in the case of a direction to exercise heightened customer due diligence or to monitor or report. But it matters a great deal when the direction is in the draconian terms permitted by paragraph 13. A direction to financial institutions to cease business with a designated person is apt to achieve serious and immediate damage while it remains in effect, extending well beyond transactions related to nuclear proliferation. Even if it is set aside, the impact on the designated person's goodwill may be substantial and in some cases irreversible. In some cases, where the decision impugned infringed the applicants' Convention rights, damages will be recoverable after the event. Claims for damages are, however, far from straightforward, and loss can be difficult to prove to the standard which the courts have traditionally required. Third, the recognition of a duty of prior consultation would not frustrate the purpose of the statutory scheme, nor would it cut across its practical operation. Schedule 7 directions made in circumstances like these are not the kind of directions whose effectiveness depends on the ability to strike without warning. As the judge pointed out, the kind of avoiding action which a designated person might be minded to take could equally be taken after the direction had been made.

38. I turn, therefore, to the implications of the fact that the direction is required to be made in subordinate legislation, subject to Parliamentary approval.

39. The Treasury submit that the legislative form of a Schedule 7 direction takes it out of the area in which the courts can imply a duty of fairness or prior consultation. This is self-evident in the case of primary legislation. There is not yet a statute into which such a duty of consultation can be implied. Parliament is not in any event required to be fair. Even if a legitimate expectation has been created, the courts cannot, consistently with the constitutional function of Parliament, control the right of a minister, in his capacity as a member of Parliament, to introduce a bill in either house: *R (on the application of Wheeler) v Office of the Prime Minister* [2008] EWHC 1409 (Admin.) at para 49; *R (on the application of UNISON) v Secretary of State for Health* [2010] EWHC 2655 (Admin).

40. The position in relation to secondary legislation is necessarily different, because a statutory instrument is made under powers conferred by statute. These powers are accordingly subject to whatever express or implied limitations or conditions can be derived from the parent Act as a matter of construction. In *R v Electricity Commissioners Ex p London Electricity Joint Committee Company (1920) Limited* [1924] 1 KB 171, 208, Lord Atkin observed at a very early stage in the development of public law that he knew of "no authority which compels me to hold that a proceeding cannot be a judicial proceeding subject to prohibition or certiorari because it is subject to confirmation or approval, even where the approval has to be that of the Houses of Parliament." It has sometimes been suggested that this applies only where the ground of objection to a statutory instrument is that it is wholly outside the power conferred by the Act. This was the view expressed by Lord Jauncey and affirmed by the Inner House in *City of Edinburgh District Council v Secretary of State for Scotland* 1985 SC 261. He considered that where Parliament had reserved the right to consider the merits (as opposed to the *vires*) of a statutory instrument, it was not open to the courts to review their rationality or their procedural fairness.

41. I do not think that this distinction is sustainable. In *F. Hoffman La Roche and Co v Secretary of State for Trade and Industry* [1975] AC 295, the applicants objected to a statutory instrument under the Monopolies and Mergers Act 1965 regulating the prices of their medicines, which had been approved by Parliament under the affirmative resolution procedure. The relevant power was to make orders giving effect to a report of the Monopolies Commission, which the applicants alleged was vitiated by a failure to observe the rules of natural justice. The issue was about the availability of an injunction enforcing the order in circumstances where the Secretary of State was not prepared to give an undertaking in damages. Moreover, it is fair to say that the applicants' case was that the Commission's report was invalid for procedural reasons, and therefore that there was no report on which the Secretary of State could found any power to make the order. But Lord Diplock considered the status of the order generally, at 365:

> "In constitutional law a clear distinction can be drawn between an Act of Parliament and subordinate legislation, even though the latter is contained in an order made by statutory instrument approved by resolutions of both Houses of Parliament. Despite this indication that the majority of members of both Houses of the contemporary Parliament regard the order as being for the common weal, I entertain no doubt that the courts have jurisdiction to declare it to be invalid if they are satisfied that in making it the Minister who did so acted outwith the legislative powers conferred upon him by the previous Act of Parliament under which the order is ultra vires by reason of its contents (patent defects) or by reason of defects in the procedure followed prior to its being made (latent defects)."

42. In *R (Asif Javed) v Secretary of State for the Home Department* [2002] QB 129, the Court of Appeal held that it was entitled to review the rationality of a minister's exercise of a statutory power to designate Pakistan by order as a country in which there was "in general no serious risk of persecution", notwithstanding that the order had been laid before Parliament in draft under the affirmative resolution procedure and the position in Pakistan to some extent discussed. Lord Phillips of Worth Matravers MR, echoing the

language of Atkin LJ, said at para 51 that there was no "principle of law that circumscribes the extent to which the court can review an order that has been approved by both Houses of Parliament under the affirmative resolution procedure." The order was declared to be unlawful.

43. These statements seem to me to be correct in principle. If a statutory power to make delegated legislation is subject to limitations, the question whether those limitations have been observed goes to the lawfulness of the exercise of the power. It is therefore reviewable by the courts. In principle, this applies as much to an implied limitation as to an express one, and as much to a limitation on the manner in which the power may be exercised as it does to a limitation on the matters which are within the scope of the power. The reason why this does not intrude upon the constitutional primacy of Parliament is not simply that delegated legislation, however approved, does not have the status of primary legislation. It is that a statutory instrument is the instrument of the minister (or other decision-maker) who is empowered by the enabling Act to make it. The fact that it requires the approval of Parliament does not alter that. The focus of the court is therefore on his decision to make it, and not on Parliament's decision to approve it. If that is true (as I think it is) as a matter of general principle, it is particularly true of the statutory judicial review for which section 63 of the Counter-Terrorism Act provides. Under section 63(2) the application is to set aside a "decision of the Treasury". The relevant decision of the Treasury is the decision under Schedule 7, paragraph 1 to "give a direction". If the court sets aside that decision, it is then required by section 63(4) to quash the resulting order.

44. Where the courts have declined to review the procedural fairness of statutory orders on the ground that they have been subject to Parliamentary scrutiny, they have not generally done so on the ground that Parliamentary scrutiny excludes the duty of fairness in general or the duty of prior consultation in particular. These decisions have generally been justified by reference to three closely related concepts which for my part I would not wish to challenge or undermine in any way. First, when a statutory instrument has been reviewed by Parliament, respect for Parliament's constitutional function calls for considerable caution before the courts will hold it to be unlawful on some ground (such as irrationality) which is within the ambit of Parliament's review. This applies with special force to legislative instruments founded on considerations of general policy. Second, there is a very significant difference between statutory instruments which alter or supplement the operation of the Act generally, and those which are targeted at particular persons. The courts originally developed the implied duty to consult those affected by the exercise of statutory powers and receive their representations as a tool for limiting the arbitrary exercise of statutory powers for oppressive objects, normally involving the invasion of the property or personal rights of identifiable persons. *Cooper v Board of Works for the Wandsworth District* (1863) 14 CB (NS) 180 was a case of this kind, and when Willes J (at 190) described the duty to give the subject an opportunity to be heard as a rule of "universal application", he was clearly thinking of this kind of case. Otherwise the proposition would be far too wide. While the principle is not necessarily confined to such cases, they remain the core of it. By comparison, the courts have been reluctant to impose a duty of fairness or consultation on general legislative orders which impact on the population at large or substantial parts of it, in the absence of a legitimate expectation, generally based on a promise or established practice. Third, a court may conclude in the case of some statutory powers that Parliamentary review was enough to satisfy the requirement of fairness, or that in the circumstances Parliament must have intended that it should be. It is particularly likely to take this view where the measure impugned is a

general legislative measure. The reason is that when we speak of a duty of fairness, we are speaking not of the substantive fairness of the measure itself but of the fairness of the procedure by which it was adopted. Parliamentary scrutiny of general legislative measures made by ministers under statutory powers will often be enough to satisfy any requirement of procedural fairness. The same does not necessarily apply to targeted measures against individuals.

45. These considerations lie behind the judgments in the Court of Appeal in *R on the application of BAPIO Action Limited v Secretary of State for the Home Department* [2007] EWCA Civ. 1139, which both Mitting J and Maurice Kay LJ in the Court of Appeal placed at the forefront of their reasoning. *BAPIO* was a judicial review of the decision of the Home Secretary to amend the Immigration Rules without prior consultation so as to abolish permit-free training for doctors without a right of abode in the United Kingdom. There were transitional provisions for those who had already begun their training under the old rules, which protected almost all those who might have claimed to have a legitimate expectation based on the old rules. Sedley LJ, who delivered the leading judgment, began by referring to a dictum of Lord Scarman in *Nottinghamshire County Council v Secretary of State for the Environment* [1986] AC 240. This was a judicial review of the Secretary of State's assessment of the proper level of expenditure by a local authority. It was a classic issue of general policy, involving decisions about the use of resources and the level of taxation, potentially affecting every householder in Britain, and quite obviously exceptionally difficult to challenge on rationality grounds. Lord Scarman said, at 250, in a passage that is not always quoted in full:

> "To sum it up, the levels of public expenditure and the incidence and distribution of taxation are matters for Parliament, and, within Parliament, especially for the House of Commons... If a statute, as in this case, requires the House of Commons to approve a minister's decision before he can lawfully enforce it, and if the action proposed complies with the terms of the statute..., it is not for the judges to say that the action has such unreasonable consequences that the guidance upon which the action is based and of which the House of Commons had notice was perverse and must be set aside. For that is a question of policy for the minister and the Commons, unless there has been bad faith or misconduct by the minister. Where Parliament has legislated that the action to be taken by the Secretary of State must, before it is taken, be approved by the House of Commons, it is no part of the judges' role to declare that the action proposed is unfair, unless it constitutes an abuse of power in the sense which I have explained."

Sedley LJ rightly pointed out in *BAPIO* that this reasoning was "predicated on the inapt nature of the subject-matter – public finance – for judicial scrutiny, not upon a quasi-immunity from judicial review of delegated legislation or rules which have been laid before Parliament." He pointed out that there was no such immunity, and that the Immigration Rules would be reviewable for want of power to make them or for irrationality. Turning to the question whether they were reviewable for procedural unfairness he said this:

> "The real obstacle which I think stands in the appellants' way is the difficulty of propounding a principle which reconciles fairness to an adversely

> affected class with the principles of public administration that are also part of the common law. These are not based on administrative convenience or potential embarrassment. They arise from the separation of powers and the entitlement of executive government to formulate and reformulate policy, albeit subject to such constraints as the law places upon the process and the product. One set of such constraints in modern public law are the doctrines of legitimate expectation, both procedural and substantive."

I agree with this in the cases to which Sedley LJ was referring, namely those in which delegated legislation was an expression of legislative policy. I think that it represents a more nuanced and accurate statement of the law than the more hard- edged formulations of Maurice Kay LJ and Rimer LJ in the same case.

46. The present case, however, is entirely different. In point of form, a statutory instrument embodying a Schedule 7 direction is legislation. But, as Megarry J observed in *Bates v Lord Hailsham of St. Marylebone* [1972] 1 WLR 1373, the fact that an order takes the form of a statutory instrument is not decisive: "what is important is not its form but its nature, which is plainly legislative" (page 1378). The Treasury direction designating Bank Mellat under Schedule 7, paragraph 13, was not legislative in nature. There is a difference between the sovereign's legislation and his commands. The one speaks generally and impersonally, the other specifically and to nominate persons. As David Hume pointed out in his *Treatise of Human Nature* (Book III, Part ii, sec 2-6), "all civil laws are general, and regard alone some essential circumstances of the case, without taking into consideration the characters, situations and connexions of the person concerned." The Treasury direction in this case was a command. The relevant legislation and the whole legislative policy on which it was based, were contained in the Act itself. The direction, although made by statutory instrument, involved the application of a discretionary legislative power to Bank Mellat and IRISL and nothing else. It was as good an example as one could find of a measure targeted against identifiable individuals. Moreover, as I have pointed out in dealing with the Bank's substantive complaints, it singled out Bank Mellat from other Iranian banks on account of the Bank's conduct or, in Hume's words, its "characteristics, situations and connexions". It directly affected the Bank's property and business assets. If the direction had not been required to be made by statutory instrument, there would have been every reason in the absence of any practical difficulties to say that the Treasury had a duty to give prior notice to the Bank and to hear what they had to say. In a case like this, is the position any different because a statutory instrument was involved? I think not. That was simply the form which the specific application of this particular legislation was required to take.

47. With a measure such as this one, targeted against "designated persons", it is not possible to say that procedural fairness is sufficiently guaranteed by Parliamentary scrutiny or to suppose that Parliament in enacting the Counter- Terrorism Act ever thought it was. The justification for the direction depends on the particular character and conduct of the designated person, about which Parliament cannot have the same plenitude of information as it is assumed to have about matters of general legislative policy. Many of the essential facts about the particular target will be peculiarly within the designated person's knowledge, and even those known to the Treasury will not necessarily be publicly disclosed.

48. In some cases, the procedure might be regarded as fair even in the case of a targeted measure, and even if the target did not have an opportunity to be heard before the order was made, if he was in a position to make effective representations in the course of the passage of the affirmative resolutions through Parliament. But this was hardly a realistic alternative to prior consultation in the present case. In the first place, the Bank was not in a position to defend itself against the Treasury's allegation that they had had dealings with entities involved in the Iranian weapons programmes until the Treasury identified the entities that they were referring to. They did not identify them in the course of justifying the order in Parliament. They were first identified in correspondence with the Bank's solicitors on 3 December 2009, after the present proceedings had been begun and a month after the Parliamentary processes were complete. Second, unlike other statutory instruments made under the Counter-Terrorism Act, an order giving effect to a Schedule 7 direction is not laid before Parliament in draft before taking effect. It may and in this case did take effect upon being made and was capable of continuing in effect for up to 28 days in advance of an affirmative resolution. This is quite long enough to achieve substantial damage to the interests of the designated person. Third, Schedule 7, paragraph 14(5), expressly excludes the application of the hybrid instrument procedure to such an order. The hybrid instrument procedure is a procedure under the standing orders of the House of Lords which applies to certain instruments directly affecting private or local interests in a manner different from other persons or interests in the same category. Its effect is to allow the House to receive petitions from parties affected. The result is to exclude any right which a designated person might otherwise have had to make representations by petition as part of the formal Parliamentary process. In my view, these factors underline the value and the importance in the interests of fairness of the Treasury giving the Bank an opportunity to be heard before the order was made.

49. I conclude that the Treasury's direction designating Bank Mellat was unlawful for want of prior notice to them or any procedure enabling them to be heard in advance of the order being made. This makes it unnecessary to consider the more difficult question whether a duty of prior consultation arose by virtue of Article 6 of the European Convention on Human Rights or Article 1 of the First Protocol.

Conclusion

50. I would allow the appeal, set aside the decision of the Treasury to make the direction and quash the order giving effect to it.

4. LORD REED (dissenting)

[…]

The substantive grounds of challenge

64. I also have the misfortune to differ from the majority of the court in relation to the substantive grounds on which the decision is challenged. I set out the reasons for my dissent more fully than I might otherwise have done in view of the importance of the issues, and the fact that my conclusion on this aspect of the case was also reached by all the judges of the lower courts.

The relevant legal principles

65. I am largely in agreement with Lord Sumption as to the relevant legal principles: other than in relation to the ratio of *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68, and the issue discussed in paras 123-124, we differ only in relation to the application of the law to the facts. I wish first however to consider two issues which appear to me to be important and which affect the structure of the analysis to be carried out.

66. The first issue, which caused difficulty in the courts below and remains in dispute before this court, is what the principle of proportionality involves: in particular, whether it is aptly expressed in the well-known dictum of Lord Clyde in *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Land and Housing* [1999] 1 AC 69, 80. It is evident from the difficulties experienced by the lower courts in the present case, and from the differing approaches which they adopted, that some clarification is desirable.

67. The second issue concerns the meaning of paragraph 9(6) of Schedule 7 to the 2008 Act. This issue also caused difficulty in the courts below and was in dispute before this court. The provision stipulates that the requirements imposed by a direction under Schedule 7 must be proportionate having regard to the advice received from the FATF under paragraph 1(2) of Schedule 7 or, as the case may be, the risk mentioned in paragraph 1(3) or (4) to the national interests of the United Kingdom. The question is whether the requirement imposed by paragraph 9(6) is the same as the principle of proportionality as understood in the context of Convention rights. The latter principle is of course relevant to the question whether the decision of the Treasury was incompatible with A1P1 and therefore unlawful by virtue of section 6(1) of the Human Rights Act.

The concept of proportionality

68. The idea that proportionality is an aspect of justice can be traced back via Aquinas to the *Nicomachean Ethics* and beyond. The development of the concept in modern times as a standard in public law derives from the Enlightenment, when the relationship between citizens and their rulers came to be considered in a new way, reflected in the concepts of the social contract and of natural rights. As Blackstone wrote in his *Commentaries on the Laws of England,* 9th ed (1783), Vol 1, p 125, the concept of civil liberty comprises "natural liberty so far restrained by human laws (and not farther) as is necessary and expedient for the general advantage of the public". The idea that the state should limit natural rights only to the minimum extent necessary developed in Germany into a public law standard known as *Verhältnismäßigkeit,* or proportionality. From its origins in German administrative law, where it forms the basis of a rigorously structured analysis of the validity of legislative and administrative acts, the concept of proportionality came to be adopted in the case law of the European Court of Justice and the European Court of Human Rights. From the latter, it migrated to Canada, where it has received a particularly careful and influential analysis, and from Canada it spread to a number of other common law jurisdictions.

69. Proportionality has become one of the general principles of EU law, and appears in article 5(4) of the Treaty on European Union ("TEU"). The test is expressed in more

compressed and general terms than in German or Canadian law, and the relevant jurisprudence is not always clear, at least to a reader from a common law tradition. In *R v Ministry of Agriculture, Fisheries and Food, ex p Fedesa and others* (Case C-331/88) [1990] ECR I-4023, the European Court of Justice stated (para 13):

> "The Court has consistently held that the principle of proportionality is one of the general principles of Community law. By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued."

The intensity with which the test is applied – that is to say, the degree of weight or respect given to the assessment of the primary decision-maker - depends upon the context.

70. As I have mentioned, proportionality is also a concept applied by the European Court of Human Rights. As the court has often stated, inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (see eg *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35, para 69). The court has described its approach to striking such a balance in different ways in different contexts, and in practice often approaches the matter in a relatively broad-brush way. In cases concerned with A1P1, for example, the court has often asked whether the person concerned had to bear an individual and excessive burden (see eg *James v United Kingdom* (1986) 8 EHRR 123, para 50). The intensity of review varies considerably according to the right in issue and the context in which the question arises. Unsurprisingly, given that it is an international court, its approach to proportionality does not correspond precisely to the various approaches adopted in contracting states.

71. An assessment of proportionality inevitably involves a value judgment at the stage at which a balance has to be struck between the importance of the objective pursued and the value of the right intruded upon. The principle does not however entitle the courts simply to substitute their own assessment for that of the decision-maker. As I have noted, the intensity of review under EU law and the Convention varies according to the nature of the right at stake and the context in which the interference occurs. Those are not however the only relevant factors. One important factor in relation to the Convention is that the Strasbourg court recognises that it may be less well placed than a national court to decide whether an appropriate balance has been struck in the particular national context. For that reason, in the Convention case law the principle of proportionality is indissolubly linked to the concept of the margin of appreciation. That concept does not apply in the same way at the national level, where the degree of restraint practised by courts in applying the principle of proportionality, and the extent to which they will respect the judgment of the primary decision maker, will depend upon the context, and will in part reflect national traditions and institutional culture. For these reasons, the approach adopted to proportionality at the national level cannot simply mirror that of the Strasbourg court.

72. The approach to proportionality adopted in our domestic case law under the Human Rights Act has not generally mirrored that of the Strasbourg court. In accordance with

the analytical approach to legal reasoning characteristic of the common law, a more clearly structured approach has generally been adopted, derived from case law under Commonwealth constitutions and Bills of Rights, including in particular the Canadian Charter of Fundamental Rights and Freedoms of 1982. The three-limb test set out by Lord Clyde in *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 80 has been influential:

> "whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."

De Freitas was a Privy Council case concerned with fundamental rights under the constitution of Antigua and Barbuda, and the dictum drew on South African, Canadian and Zimbabwean authority. The three criteria have however an affinity to those formulated by the Strasbourg court in cases concerned with the requirement under articles 8 to 11 that an interference with the protected right should be necessary in a democratic society (eg *Jersild v Denmark* (1994) Publications of the ECtHR Series A No 298, para 31), provided the third limb of the test is understood as permitting the primary decision-maker an area within which its judgment will be respected.

73. The *De Freitas* formulation has been applied by the House of Lords and the Supreme Court as a test of proportionality in a number of cases under the Human Rights Act. It was however observed in *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 AC 167, para 19 that the formulation was derived from the judgment of Dickson CJ in *R v Oakes* [1986] 1 SCR 103, and that a further element mentioned in that judgment was the need to balance the interests of society with those of individuals and groups. That, it was said, was an aspect which should never be overlooked or discounted. That this aspect constituted a fourth criterion was noted by Lord Wilson, with whom Lord Phillips and Lord Clarke agreed, in *R (Aguilar Quila) v Secretary of State for the Home Department* [2011] UKSC 45; [2012] 1 AC 621, para 45.

74. The judgment of Dickson CJ in *Oakes* provides the clearest and most influential judicial analysis of proportionality within the common law tradition of legal reasoning. Its attraction as a heuristic tool is that, by breaking down an assessment of proportionality into distinct elements, it can clarify different aspects of such an assessment, and make value judgments more explicit. The approach adopted in *Oakes* can be summarised by saying that it is necessary to determine (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter. The first three of these are the criteria listed by Lord Clyde in *De Freitas,* and the fourth reflects the additional observation made in *Huang.* I have formulated the fourth criterion in greater detail than Lord Sumption, but there is no difference of substance. In essence, the question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure.

75. In relation to the third of these criteria, Dickson CJ made clear in *R v Edwards Books and Art Ltd* [1986] 2 SCR 713, 781-782 that the limitation of the protected right must be "one that it was reasonable for the legislature to impose", and that the courts were "not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line". This approach is unavoidable, if there is to be any real prospect of a limitation on rights being justified: as Blackmun J once observed, a judge would be unimaginative indeed if he could not come up with something a little less drastic or a little less restrictive in almost any situation, and thereby enable himself to vote to strike legislation down (*Illinois Elections Bd v Socialist Workers Party* (1979) 440 US 173, 188- 189); especially, one might add, if he is unaware of the relevant practicalities and indifferent to considerations of cost. To allow the legislature a margin of appreciation is also essential if a federal system such as that of Canada, or a devolved system such as that of the United Kingdom, is to work, since a strict application of a "least restrictive means" test would allow only one legislative response to an objective that involved limiting a protected right.

76. In relation to the fourth criterion, there is a meaningful distinction to be drawn (as was explained by McLachlin CJ in *Alberta v Hutterian Brethren of Wilson Colony* [2009] 2 SCR 567, para 76) between the question whether a particular objective is in principle sufficiently important to justify limiting a particular right (step one), and the question whether, having determined that no less drastic means of achieving the objective are available, the impact of the rights infringement is disproportionate to the likely benefits of the impugned measure (step four).

[…]

Applying the proportionality test

83. There is no doubt that the objective of the order – to reduce access by entities involved in Iran's nuclear weapons programme to the UK financial sector, and thereby inhibit the development of nuclear weapons by Iran and the consequent risk to the national interests of this country – is sufficiently important to justify an interference with Bank Mellat's enjoyment of its possessions. The question under paragraph 9(6) of Schedule 7, and under the Human Rights Act, is whether the remaining three criteria of proportionality are satisfied. Lord Sumption identifies the central issue as being whether the singling out of Bank Mellat has been justified, and considers that issue in the context of the second and, more briefly, the third and fourth criteria: whether the measure is rationally connected to its objective, whether a less intrusive measure would have been equally effective, and whether the measure is proportionate having regard to its effects upon Bank Mellat's rights. I shall proceed on the same basis. Before considering these issues, it may however be helpful to recall some aspects of the relevant background.

[…]

Rational connection

92. In *Lavigne v Ontario Public Service Employees Union* [1991] 2 SCR 211, 291 Wilson J observed:

> "The *Oakes* inquiry into 'rational connection' between objectives and means to attain them requires nothing more than showing that the legitimate and important goals of the legislature are logically furthered by the means government has chosen to adopt."

The words "furthered by" point towards a causal test: a measure is rationally connected to its objective if its implementation can reasonably be expected to contribute towards the achievement of that objective. The manner in which the courts should determine whether that test is satisfied requires careful consideration.

93. Legislation may be based on an evaluation of complex facts, or considerations (for example, of economic or social policy, or national security) which are contestable and may be controversial. In such situations, the court has to allow room for the exercise of judgment by the executive and legislative branches of government, which bear democratic responsibility for these decisions. The making of government and legislative policy cannot be turned into a judicial process. In the Canadian case of *RJR-MacDonald Inc v Canada* [1995] 3 SCR 199, for example, concerned with a legislative ban on tobacco advertising, expert evidence was led at a lengthy trial, following which the trial judge concluded that there was no reliable evidence to support the policy of banning advertising, and that there was therefore no rational connection between the ban and its objective. That conclusion was however overturned by the Supreme Court. McLachlin J, giving the judgment of the majority, stated (at para 153) that in order to establish a rational connection, the government "must show a causal connection between the infringement and the benefit sought on the basis of reason or logic." She added (at para 154) that, where legislation was directed at changing human behaviour, the court had been prepared to find a causal connection on the basis of reason or logic, without insisting on proof of a relationship between the infringing measure and the legislative objective. La Forest J, giving the other principal judgment, considered that a common sense connection was sufficient to satisfy the requirement that there be a rational connection (para 86).

94. These observations found an echo, in a not dissimilar context, in *R (Sinclair Collis Ltd) v Secretary of State for Health* [2011] EWCA Civ 437; [2012] QB 394, concerned with a ban on the sale of tobacco from vending machines. It was argued, in the context of the proportionality of the restriction on the free movement of goods under EU law, that the ban was not suitable to achieve the objective of reducing tobacco consumption, since tobacco products could still be bought over the counter. All the members of the Court of Appeal emphasised the responsibility of elected government for the protection of public health, and the consequent need to allow a broad margin of appreciation to the decision-maker. Lord Neuberger of Abbotsbury MR observed that, in considering whether the aim of the ban was achieved, "at least arguably and to some extent", the court should be careful to avoid substituting itself for the decision-maker or being over-particular about the reasoning or evidence relied on by the decision-maker (paras 232-233). He commented that the evidence and analysis in the explanatory memorandum and impact assessment which had been laid before Parliament with the draft regulations were neither very convincing nor very telling, not least because of the absence of any evidence to suggest that the ban would have any effect (para 236). Nevertheless, the Secretary of

State's assessment or belief that the ban would lead to some reduction in smoking did not seem unreasonable:

> "The unsatisfactory basis for the figures and analysis in the [impact assessment] does not, in the absence of any other factor, justify concluding that the ban is disproportionate, given the wide margin of appreciation to be accorded. If one takes away one source of cigarettes, particularly one that involves no control over the identity of the purchaser, it is scarcely unreasonable to conclude that it will reduce consumption of cigarettes to some extent, although … that conclusion is not one which necessarily follows ineluctably."

Like La Forest and McLachlin JJ in the *RJR-MacDonald* case, Lord Neuberger MR treated "common sense" and "logic" (paras 238, 242 and 244) as a sufficient basis for finding that the ban was rational. In the parallel litigation in the Court of Session, the court also referred to common sense as a basis for concluding that the legislation was apt to achieve its objective (*Sinclair Collis Ltd v Lord Advocate* 2013 SLT 100, para 62).

95. A more problematical case is that of *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68: a case which is particularly relevant to the decision of the majority in the present case, as appears from Lord Sumption's judgment. The issue was whether a derogation from article 5(1) of the Convention, so as to permit legislation providing for the indefinite detention without trial of foreign terrorist suspects, was "strictly required" by the public emergency represented by the threat of terrorist attacks in the United Kingdom. A majority of the House of Lords found that the derogation was not strictly required, since the legislation was disproportionate and was in addition discriminatory, contrary to article 14 of the Convention. The latter finding need not be considered in the present context, but the finding in relation to proportionality is of importance.

96. Lord Bingham of Cornhill identified the central problem (at para 43) as being:

> "that the choice of an immigration measure to address a security problem had the inevitable result of failing adequately to address that problem (by allowing non-UK suspected terrorists to leave the country with impunity and leaving British suspected terrorists at large) while imposing the severe penalty of indefinite detention on persons who, even if reasonably suspected of having links with Al- Qaeda, may harbour no hostile intentions towards the United Kingdom."

Lord Bingham did not explicitly apply the three *De Freitas* criteria or the fuller *Oakes* analysis (to which he referred at para 30), but in the passage cited appears to balance the severity of the effects on the rights of the persons detained against the importance of the objective: that is to say, step four in the analysis. Lord Hope of Craighead focused on the question whether there was some other way of dealing with the emergency which would not be incompatible with the Convention rights (para 124): in other words, a test of necessity. Lord Scott of Foscote also considered that the legislation failed to meet the necessity test, since it had not been shown that monitoring arrangements or movement

restrictions would not suffice (para 155). That was also the approach adopted by Lord Rodger of Earlsferry, who stated that, proceeding on the same basis as the Government and Parliament, that detention of the British suspects was not strictly required to meet the threat that they posed to the life of the nation, the detention of the foreign suspects could not be strictly required either to meet the comparable threat that they posed (para 189). Baroness Hale of Richmond also focused on the question of necessity, observing that if it was not necessary to lock up the nationals it could not be necessary to lock up the foreigners (para 231). Lord Carswell agreed with Lord Bingham.

97. I have spent some time considering the basis of the decision in *A v Secretary of State for the Home Department* in order to clarify what the case did not decide. First, it did not decide that the legislation lacked a rational connection to its objective because it would be only partially effective. As in *Sinclair Collis,* the legislation would have made a contribution to the achievement of its objective. Secondly, the case did not decide that the legislation lacked a rational connection to its objective because it was discriminatory. The difference in treatment of British and foreign suspects was relevant to proportionality because it bore on the question whether the interference with the rights of the foreign suspects had been shown to be necessary.

98. In the present case, it is apparent that any judicial assessment of the rationality of a direction under Schedule 7 must recognise the need to allow the Treasury a wide margin of appreciation, for the reasons explained by Lord Sumption at para 21.

[…]

110. Lord Sumption's statement that Mitting J found that Bank Mellat's provision of banking services to entities involved in the Iranian nuclear weapons and ballistic missile programmes, namely Novin and Doostan, had happened "in spite of their conscientiously operated procedures to avoid doing so", appears to me, with respect, to convey a different impression from Mitting J's judgment. It was no answer to the Treasury's concerns in relation to Novin that procedures were initiated after it had been designated by the Security Council: procedures triggered by a Security Council Resolution did not sufficiently address the risk, since they operated long after objectionable banking activities had already taken place. In relation to Doostan, it was only in the course of the proceedings that Bank Mellat carried out the investigations referred to. The value of those investigations can be judged from the fact that on 9 June 2010, after the hearing before Mitting J, Doostan was designated by Security Council Resolution 1929 as an entity involved in Iranian ballistic missile activities, and was subjected to the asset freezing regime established by Resolution 1737. It was only following that designation that Bank Mellat's procedures would have been applicable. In the circumstances, I am unable to agree with Lord Sumption's statement that Mitting J's finding about Bank Mellat's procedures "suggests that they were satisfactory, at any rate in relation to the weapons programmes".

111. Far from regarding the foregoing matters as undermining the Treasury's case, Mitting J treated them as being essentially beside the point:

> "The Treasury's case is not that the bank has knowingly assisted Security Council designated entities after designation, or even that it has knowingly assisted entities liable to be designated, but which have not yet been, by providing banking facilities to them, but that it has the capacity to do so,

> has in one instance done so and is likely to do so in the future. The fundamental justification for the order is that, even as an unknowing and unwilling actor, the bank is, by reason of its international reach, well placed to assist entities to facilitate the development of nuclear weapons, by providing them with banking facilities, in particular trade finance."

It was on that basis that Mitting J commented that Bank Mellat's dealings with Doostan and Mr Shabani did not greatly matter.

112. Lord Sumption's criticism of the rationality of the connection between the direction and its objective is that "the direction made no attempt to prevent every Iranian bank with an international reach from facilitating Iran's weapons programme, but only one of them". It is said that "the distinction [drawn] between Bank Mellat and other Iranian banks … was an arbitrary and irrational distinction".

113. I am unable to agree with this criticism. It is true that the problems in relation to the lack of adequate controls within Iran's banking system, identified by the FATF and mentioned by Mr Robertson in his statement, were not unique to Bank Mellat. It followed that UK financial institutions were at risk when dealing with Iranian entities in general, as Mr Robertson explained. The response of the UN Security Council and the EC Council had not however been to impose restrictions in respect of all Iranian banks, but in respect of particular banks where there was evidence of their involvement in the financing of Iran's nuclear weapons programme: notably Bank Sepah, Bank Sepah International, Bank Melli, Bank Saderat and their subsidiaries. The Treasury followed the same approach when it obtained evidence of Bank Mellat's involvement.

114. Lord Sumption states that other Iranian banks were as likely as Bank Mellat to number entities involved in Iran's nuclear and ballistic missile programmes amongst their clients. As I have explained, Mr Robertson acknowledged at para 74 of his statement that entities involved in Iran's nuclear weapons programme could in principle use other Iranian banks. He pointed out however that the order might lead the UK banking sector to wind down business with Iran generally, and that

> the order would in any event make transactions involving the UK more difficult. That was because it was difficult for Iranian banks to access UK financial markets directly, since UK banks were reluctant to deal with them. The exceptions were the small number of Iranian banks which had UK subsidiaries. Those were Bank Melli, Bank Sepah, Bank Saderat and Bank Mellat. As I have explained, the UK subsidiaries of Bank Melli and Bank Sepah were already subject to asset freezing orders. The order under challenge applied to Persia International Bank plc ("PIB"), which was the UK subsidiary of Bank Mellat. The UK subsidiary of the remaining Iranian bank with such a subsidiary, Bank Saderat, was subject at the time to systematic reporting requirements under Regulation 1110/2008, as I have explained. Subsequent to the making of the order under challenge, it was subjected to an asset freeze.

115. In these circumstances, an order directed specifically against Bank Mellat and its UK subsidiary was far from being pointless or arbitrary. One effect of the order was to prevent the only UK subsidiary of an Iranian bank which was not already subject to controls, namely PIB, from dealing with its parent, Bank Mellat. Lord Sumption notes that

PIB was not prevented from dealing with its minority shareholder, Bank Tejarat. There is however nothing to indicate that Bank Tejarat had any involvement with entities involved in the Iranian nuclear weapons programme. If information indicating such involvement were to emerge, no doubt action would be taken. In the event, PIB's assets were subsequently frozen by Council Regulation (EU) 668/2010, made on 26 July 2010. Although Iranian banks, or Iranian entities involved in the nuclear weapons programme, could in principle seek to use non-Iranian international banks, those could be expected to have compliance mechanisms in place: it was only in relation to Iran that the absence of such mechanisms had caused the FATF to call for preventive measures.

116. It is of course true that the direction would not of itself prevent the development of nuclear weapons in Iran. It could however reasonably be expected to realise the objective of hindering their development at least to some extent (to adopt the phrase used by Lord Neuberger MR in *R (Sinclair Collis Ltd) v Secretary of State for Health* [2011] EWCA Civ 437; [2012] QB 394). That is sufficient to establish a rational connection between the direction and its objective.

117. In the light of the foregoing, Mitting J was entitled to accept that there was a rational connection between the requirements imposed by the order and its objective, on the basis that, as he found, "a direction to cease business with Bank Mellat would restrict the financial services available to entities involved in [Iran's nuclear and ballistic missile] programme by denying them access to the UK financial sector through the bank"; "suspect entities would find it difficult to replace existing arrangements through the bank"; and "some pressure would be brought to bear on the Iranian Government" to comply with its international obligations. Mitting J was therefore entitled to hold that he was "satisfied that the

requirements imposed by the order are rationally connected to the objective of inhibiting the development of nuclear weapons in Iran and, so, the risk to the national interests of the United Kingdom". Those findings were affirmed by the Court of Appeal, which commented that "a contrary conclusion would resonate with naïveté".

[…]

Less intrusive means

125. Lord Sumption concludes that the direction also fails the proportionality test at the third stage of the analysis, on the basis that it cannot be necessary to require UK financial institutions to cease dealing with Bank Mellat if less drastic measures are considered to provide sufficient protection in relation to other Iranian banks. For the reasons I have given, I do not consider that the Iranian banks in question (that is to say, the smaller banks without UK subsidiaries) are truly in a comparable position to Bank Mellat. Like the Court of Appeal, I attach importance to the evidence of Mr Robertson that the Treasury considered but rejected less intrusive measures, for reasons which he explained. In a matter of this kind, great weight must be given to the considered judgment of the Treasury. Against that background, I accept Mitting J's conclusion that there is no other reasonably practicable means of ensuring that the facilities of an Iranian bank with international reach will not be used in the UK for the purpose of facilitating the development of nuclear weapons by Iran.

Proportionate effect

126. If, as I would hold, (1) the Government's objective was sufficiently important to justify limiting the rights of Bank Mellat, (2) the requirements imposed by the direction were rationally connected to that objective and (3) no less intrusive measure would have been equally effective in achieving the objective, the question remains whether (4) having regard to the severity of its effect on Bank Mellat's rights, the direction was justified by the importance of the objective. Lord Sumption concludes that it was not, given that, in his view, the direction would make little if any contribution to the achievement of its objective. For the reasons I have explained, I do not agree with that assessment. On the basis that the direction would make a worthwhile contribution to the achievement of the Government's objective, I agree with Mitting J that its impact upon the rights of Bank Mellat is proportionate.

127. In that connection, I would make three observations. The first is that the effects upon Bank Mellat's business cannot in my opinion be considered disproportionate to a significant reduction in the risk of very great harm to the UK's vital national interests. The Bank claims that it has suffered a revenue loss of US$25m a year, that it was prevented for the duration of the order from drawing on deposits of €183m, and that its reputation and goodwill have been damaged. The severity of those effects has however to be considered in the context of the very substantial scale of the business conducted by the Bank, illustrated by its evidence that it holds some 33 million accounts for over 19 million customers, has almost 2000 branches, and issued letters of credit in 2009 to the value of $11bn. If the contribution made by the direction towards the achievement of the Government's objective was limited, the impact upon the Bank was also limited.

128. The second is that the right in issue, under A1P1, is not of the most sensitive character; the person affected, a major international bank, does not fall into a vulnerable or marginalised category; and the order is temporary in nature.

129. The third is that the court does not possess expertise or experience in international relations, national security or financial regulation. The risks to our national interests, if the wrong judgment is made in relation to nuclear proliferation, could hardly be more serious. Democratic responsibility and accountability for protecting the citizens of this country from those risks rest upon the Government, not upon the courts. In a complex situation of this kind, where the stakes are so high, the court has to attach considerable weight to the Government's assessment that the requirements are necessary and proportionate to the risk.

Conclusion

130. For these reasons, and those given by Lord Hope in relation to procedural fairness, I would dismiss the appeal.

[…]

5. LORD NEUBERGER (dissenting in part)

[…]

168. The explanation for the fact that Lord Sumption and Lord Reed have reached opposing conclusions on Bank Mellat's substantive challenge to the Direction largely lies in the difference between their respective analyses of the facts. Essentially, Lord Sumption concludes that the Treasury's decision to make the Direction was legally flawed for two main reasons, which he summarises in para 22. First, that there was no reason to single out Bank Mellat, as "the problem [which the Treasury relies on] is a general problem of international banking"; secondly, that the ground now advanced by the Treasury for the Direction is different from that advanced by Government ministers when the Order was placed before Parliament.

169. I have concluded that, while those two points each have some force in a qualified form, neither of them amounts to a sufficiently justified criticism of the Direction to justify quashing the Order. I agree with Lord Reed's analysis in relation to the first point in paras 105-117, and, in relation to the second point, paras 119-124. However, because the issue is finely balanced, as evidenced by the division of opinion in this Court, I will briefly summarise my reasons.

170. As to the first point, it seems to me that the Treasury considered that it was appropriate to make a direction under Schedule 7 against Bank Mellat for a combination of grounds. In summary, those grounds were (i) Bank Mellat was an Iranian bank, and Iran's banking system lacked the controls to prevent the funding of proliferation, which most other countries had, (ii) Bank Mellat had, as a matter of fact, provided banking services to businesses connected with Iran's nuclear weapons programme ("the programme"), (iii) other Iranian banks with branches or subsidiaries in London, who had helped finance the programme, were subject to asset-freezing orders or to a systematic reporting requirement, and (iv) although other Iranian banks could be used for the purpose, the Order would represent a severe constraint on Iran's ability to obtain banking services for the purpose of funding the programme. Ground (iii) and, to some extent, ground (iv) are defensive rather than inherently justificatory.

171. Ground (i) is, I accept, weakened by the fact that it is very difficult for any bank or national banking system to identify the ultimate purpose for which facilities are being provided, especially where the customer wishes to conceal that purpose. Nonetheless, that does not wholly undermine ground (i), especially in relation to an Iranian bank which has supported entities connected with the programme. As to ground (ii), it is true that Bank Mellat conscientiously took steps to sever its relationship with the entities which had been involved with the programme, but that was only after UN Security Council resolution 1747 in 2007, and, even then, facilities were being provided to one such entity even after these proceedings had been initiated. Despite ground (iii), there may have been some Iranian banks which had access to the London market, but they were few and small, and there was no evidence that they were funding entities which supported the programme. Ground (iv) on its own would not be impressive, but it is, in my view, a reasonable additional factor which helps underpin the decision to give the Direction.

172. I do not find it easy to resolve the question of whether Bank Mellat's substantive challenge to the Direction should succeed. As the brief summary in the preceding two paragraphs suggests, and as is also apparent from the much fuller analysis proffered by Lord Reed, the arguments raised by the Treasury to justify the Direction are not particularly strong, and the financial consequences of the Direction and subsequent Order against the Bank, which is not suggested to have intentionally supported the programme, are very grave. The Treasury's case is further weakened by the fact that, when it gave the Direction and promulgated the Order, it believed that the great majority of the shares in Bank Mellat were owned by the Iranian government, which is, and at all material times, was not the case. It is not a major point, but it does have a little traction, given that the grounds for the Direction are not particularly strong, and that this mistake does have some bearing on the Treasury's ground (iv) in para 10.

173. All in all, while the four grounds summarised in para 170 above, even when taken together, are not overwhelming, I have reached the conclusion that they are strong enough to justify the Treasury's contention that, despite the very serious financial consequences for Bank Mellat, the Direction was given on grounds which were unassailable as a matter of law. The Direction was in an area, and related to an issue, in respect of which the courts should accord the executive a wide margin of appreciation, and, while the grounds advanced by the Treasury for giving the Direction do not appear very strong on examination, they are rational and they have some force. In those circumstances, were it not for the grave effect of the Direction on the Bank, I would fairly readily have concluded that the Treasury had acted lawfully in giving it.

174. However, I entertain real doubt as to whether the Direction was justifiable once one weighs the benefits it was likely to achieve, in the light of the relative weakness of the grounds, against the inevitable and substantial harm it would cause to Bank Mellat. However, in the end, I am not persuaded that a court can properly conclude that the benefit of the Direction must have been so slight that the Treasury could not reasonably have concluded that it was right to give it, notwithstanding the harm the Bank would thereby suffer..

175. On my view of the facts on the second reason identified in para 168 above, it is unnecessary to decide the further question of principle which divides Lord Sumption and Lord Reed, which the latter discusses in paras 123-124. I prefer to leave that question open.

176. If the Treasury's justification for giving the Direction, and Ministers' explanation for it to Parliament, had been that Bank Mellat knew that it was funding entities which supported the programme, which the Treasury now accepts would not have been right, a not unfamiliar question would arise. That question is the extent to which the court should uphold a decision of the executive which was justified by one reason when it was made, but when the matter comes to court, the reason is abandoned and the decision is sought to be justified by a different reason. It is an issue on which there are a number of judicial observations in a domestic judicial review context, most famously perhaps that of Megarry J in an oft-quoted passage in *John v Rees* [1970] Ch 345, at p 402, cited with qualified approval on a number of occasions, eg in *Secretary of State for the Home Department v AF* [2010] 2 AC 269, paras 61-2 and 73.

177. I would have thought that there was room for argument as to how such a question should be approached in the present context, following the introduction of the European Convention on Human Rights into UK law, especially as this is a case where the Convention is engaged (through Article 1 of the First Protocol), where proportionality is referred to in the empowering statute, and where the decision has been put before, and approved by, Parliament.

[…]

VI. Questions to the Decision

1. What other principle(s) does the Supreme Court consider to be related to the principle of proportionality?
2. How does the principle of proportionality differ from the principle of proportionality as understood in your country?
3. Do you agree with the application of the principle of proportionality in the matter?

G Legitimate Expectations (Lecture 5)

I. General Questions

1. What are "legitimate expectations" (categories, e.g. formal in substance; prerequisites, e.g. basis, good faith, action, damage etc.)?
2. How do legitimate expectations differ from other administrative law principles (reasonableness, proportionality etc.)?
3. Should legitimate expectations be accepted as an administrative law principle? If so to what extent? What are the likely consequences (and dangers) of such a doctrine?

II. Chiu Teng @ Kallang Pte Ltd v Singapore Land Authority

Summary of the facts

The applicant was a property developer which had acquired state land for redevelopment. In Singapore, to ensure that land is used according to land usage policy, it is common for state leases to specify, as a condition of the lease, the permitted uses of the land and the maximum gross floor area for these permissible uses of the land. However, a payment, known as the “differential premium” is payable for lifting these restrictions. The Singapore Land Authority is responsible for assessing the differential premium payable. The applicant argued that they had a legitimate expectation in the way the differential premium would be calculated because of information available from the Singapore Land Authority’s circulars to developers and from its website. The circulars and website stated

that the differential premium would be calculated based on a Table of Development Charge Rates (DC Table) published by the Urban Redevelopment Authority.

Chiu Teng @ Kallang Pte Ltd *v* Singapore Land Authority [2013] SGHC 262

Case Number	: Originating Summons No 457 of 2013
Decision Date	: 27 November 2013
Tribunal/Court	: High Court
Coram	: Tay Yong Kwang J
Counsel Name(s)	: Alvin Yeo SC, Lim Wei Lee, Lionel Leo and Edmund Koh (WongPartnership LLP) for the applicant; Edwin Tong, Kristy Tan and Peh Aik Hin (Allen & Gledhill LLP) for the respondent; Aurill Kam, Lim Wei Shin, Terence Ang and Leon Ryan (Attorney- General's Chambers) for the Attorney-General.
Parties	: Chiu Teng @ Kallang Pte Ltd — Singapore Land Authority

Administrative Law – Judicial review

27 November 2013 Judgment reserved

Tay Yong Kwang J:

1 This case concerns the judicial review of the Singapore Land Authority's ("the SLA") assessment of the differential premium ("DP") payable for the lifting of title restrictions for two particular plots of land. The applicant alleges that the assessment of the DP was done without reference to the Development Charge Table of Rates ("the DC Table") published by the Urban Redevelopment Authority ("the URA"). The applicant thus seeks a quashing order against the assessed DP and a mandatory order to direct the SLA to assess the DP in accordance with the DC Table. The Attorney-General, a non-party to the action, also made submissions during the hearing before me.

The facts leading to the application

2 The applicant is a company in the business of property development. It is currently the lessee of adjoining plots of land identified as Lot Nos 1338M TS 17 ("Lot 1338M") and 2818V TS 17 ("Lot 2818V") (collectively referred to as "the Land").

3 The applicant acquired Lots 1338M and 2818V on 15 January 2010 and 25 March 2010 respectively through competitive tenders for the purpose of redevelopment. The SLA's consent for the sale of both lots was needed and this was duly obtained.

4 The lease documents for both lots contained two references to the payment of a differential premium. The first, which will henceforth be referred to as the DP Clause, states thus:

> The demised land shall not be used for other than the abovementioned development except with the prior permission of the Lessor. The lessee shall be required to pay a differential premium, as appropriate, in respect of any increase in floor area or change of use from a lower use category to higher use category from the existing use which will result in an enhanced value.

The second clause, henceforth referred to as the Land Return Clause, reads:

> The Lessee shall notify the Lessor in writing of such portions of the demised land which are not used for the purposes specified. If directed by the Lessor, the Lessee shall surrender to the Lessor such land not used for the purposes specified at rates equivalent to the compensation payable for such land if it had been acquired under the Land Acquisition Act on the date of the direction.
>
> Provided that if the Lessor does not issue a direction for the surrender of such land within 1 year from the said notification by the Lessee under this clause or within such other period as may otherwise be mutually agreed between the Lessor and the Lessee, the Lessor shall, at the request of the Lessee, lift the restrictions in the Lease under [the DP Clause] in relation only to such land; subject to the Lessee obtaining the necessary approvals from the relevant authorities regarding the proposed use of such lands and the payment of a differential premium under [the DP Clause].

5 Generally, state land is sold at a price based on the proposed use and intensity at the time of sale. State leases usually specify, as a condition in the lease, the permissible use of the land under the lease and the maximum gross floor area for the said permissible use. This ensures that the land is used in line with prevailing land policy, as evinced in the Master Plan (which is the statutory land use plan guiding Singapore's development in the medium term over the next 10 to 15 years). The Master Plan shows the permissible land use and intensity for developments in Singapore. Each parcel of land is zoned for different categories of land use, which include commercial, residential and industrial use. Thus, state leases generally include a DP clause which stipulates that a DP shall be payable if there is a change in the use or an increase in the intensity of use beyond the permissible amount.

6 The SLA published two circulars and maintained a website to provide the public with information on how the payable DP is computed. The material portions of the first circular, which was published sometime in 2000 ("the 2000 SLA Circular"), stated (with "PP" meaning Provisional Planning Permission):

> 1. With effect from 31 July 2000, the Singapore Land Authority has implemented a transparent system of determination of differential premium (DP) for the lifting of State title restrictions involving change of use and/or increase in intensity. This is to encourage optimisation of land use and to facilitate the overall pace of redevelopment in Singapore. It will also provide greater certainty to landowners who will now be able to compute the DP payable themselves.
>
> 2. The determination of DP will be based on the published Table of Development Charge (DC) rates. …
>
> …
>
> 4. Where the use as spelt out in a particular title restriction does not fit into any of the Use Groups in the Table of DC Rates, the DP payable will be determined by the Chief Valuer on a case-by-case basis.

…

6. As the material date for determination of DP is pegged to the PP date, all applications for lifting of title restriction must have a valid PP. Applications without a valid PP will be rejected. The Singapore Land Authority reserves the discretion on whether to grant an application for lifting of title restriction and/or topping up of lease in accordance with its policies.

…

8. The new system for determining DP does not apply to the computation of premium payable for the upgrading of lease tenure (i.e. the topping-up of lease tenure). Such premium will still be assessed by the Chief Valuer on a case-by-case basis.

9. If you have any queries concerning this circular, please feel free to contact us at SLA. We will be pleased to answer queries on this matter.

7 The second circular, published sometime in 2007 ("the 2007 SLA Circular"), is substantially similar to the 2000 SLA Circular:

1. With effect from 18 July 2007, in line with the revision of the Development Charge (DC) system whereby Government will peg the amount of DC based on 70% of the enhancement in land value, the differential premium (DP) system will similarly be adjusted for the lifting of State title restrictions involving change of use and/or increase in intensity.

2. The determination of DP will still be based on the published Table of Development Charge (DC) rates. The material date of determination of DP will be pegged to the date of Provisional Planning Permission (PP) or the start date of the validity of the second and subsequent PP extensions, similar to DC. The prevailing Table of DC rates at the grant of PP will be used.

…

4. Where the use as spelt out in a particular title restriction does not fit into any of the Use Groups in the Table of DC Rates, the DP payable will be determined by the Chief Valuer on a case-by-case basis.

5. As the material date for determination of DP is pegged to the PP date, all applications for lifting of title restriction must have a valid PP. Applications without a valid PP will be rejected. The Singapore Land Authority reserves the right on whether to grant an application for lifting of title restriction in accordance with its prevailing policies.

…

7. The basis of charging 50% of the full value for remnant State land will remained unchanged notwithstanding the revision of the Development Charge (DC) system and correspondingly, the Table of DC Rates. Accordingly, SLA will apply a factor of 5/7 to the new revised Table of DC Rates (i.e. Table of DC Rate x 5/7 x size of remnant State land x plot ratio) when computing the premium for remnant State land.

8. If you have any queries concerning this circular, please feel free to contact us at SLA. We will be pleased to answer queries on this matter.

8 The material portions of the SLA website (as assessed on 20 January 2011) are reproduced below:

> …
>
> Differential Premium
>
> A payment, known as differential premium (DP), will be charged for lifting the title restriction. The DP is the difference in value between the use and/or intensity stated in the State title and the approved use and/or intensity in the provisional planning permission.
>
> DP is computed based on the Development Charge (DC) Table of Rates. The material date of determination of DP is pegged to the date of Provisional Permission (PP) or the date of the second and subsequent PP extensions. …
>
> Where the use stipulated in the title restriction does not fit into any of the Use Groups in the DC Table, the DP payable will be determined by the Chief Valuer on a case-by-case basis.
>
> …
>
> Option for Spot Valuation
>
> Landowners/developers who are not satisfied with the differential premium (DP) payable based on the Development Charge (DC) Table of Rates can write in to SLA to appeal against the differential premium amount. SLA will then consult Chief Valuer (CV) for a spot valuation. …
>
> If the new DP payable upon appeal turns out to be higher than the initial DP based on the DC Table of Rates, the appellant is not allowed to fall back on the initial DP amount.
>
> If the appellant is still not satisfied with Chief Valuer's spot valuation, another appeal can be made. However, before the second appeal is processed, the appellant must pay up the DP (based on CV's valuation) first and an appeal fee of $10,000. If the revised DP on the second appeal is lower than the first appeal, the excess amount collected will be returned.

9 The SLA website had a section entitled "Terms of Use". Two clauses are relevant to this application:

> 1. … By accessing and using any part of this Site, you shall be deemed to have accepted, and agreed to be bound by, these Terms of Use. …
>
> Disclaimer of Warranties and Liability
>
> 8. The Contents of this Site are provided on an "as is" basis. **SLA does not make any representations or warranties whatsoever and hereby disclaims all express, implied and statutory warranties of any kind to you or any third party**, whether arising from usage or custom or trade or by operation of law or otherwise, including but not limited to the following:
>
> a . **any representations or warranties as to the accuracy**, completeness, reliability, timeliness, currentness, quality or fitness for any particular purpose of the Contents of this Site; and

b . **any representations or warranties that the Contents and functions available on this Site shall be error-free** or shall be available without interruption or delay, or that any defects on the Site shall be rectified or corrected, or that this Site, the Contents and the hosting servers are and will be free of all viruses and other harmful elements.

9. . **SLA shall not be liable to you or any third party for any damage or loss whatsoever**, including but not limited to direct, indirect, punitive, special or consequential damages, loss of income, revenue or profits, lost or damage data, or damage to your computer, software, modem, telephone or other property, arising directly or indirectly from:

a. your access to or use of this Site;

b. any loss of access to or use of this Site, howsoever caused;

c . **any inaccuracy** or incompleteness in, or errors or omissions in the transmission of, the Contents;

d. any delay or interruption in the transmission of the Contents on this Site, whether caused by delay or interruption in transmission over the internet or otherwise; or

e . any decision made or action taken by you or any third party in reliance upon the Contents, regardless of whether SLA has been advised of the possibility of such damage or loss. [emphasis added]

10 The first affidavit of Thong Wai Lin, the Director of the Land Sales and Acquisition Division of the SLA, explains (at [27], [86] and [87]) how the Table of Development Charge rates are determined. The DC Table is split across different categories of land use and different geographical sector areas in Singapore. There is a specific rate for each category of land use in each particular sector area. The rates are revised half-yearly in March and September. The rates are not spot valuations but are based on past transactional prices of a preceding six-month period and on the average of such prices in a particular sector area. As the DC Table is a snapshot of rates determined in advance, the DC Table does not necessarily reflect the actual prevailing value of land. In a rising market, the DC Table's rates would be lower than spot valuations. In contrast, a spot valuation assesses the actual value of a piece of land at the time of assessment. A plot of land located in a more desirable location may have a much higher value than another plot of land in the same sector. The Chief Valuer takes into account various factors, including transactions involving similar developments (corrected for differences in time), the natural attributes of the land, its shape, and its accessibility.

11 On or about 25 January 2010 (shortly after the applicant had acquired Lot 1338M), the applicant filed an application with the URA for the requisite planning permission for redevelopment. Provisional permission was granted on 2 July 2010. The applicant then submitted revised plans to comply with the requirements of the provisional permission. Planning permission was granted by the URA on 14 January 2011.

12 On or about 25 January 2011, the applicant submitted an application to the SLA for the lifting of title restrictions on the Land for the purposes of redevelopment. On or about 21 February 2011, the applicant's solicitors, Legal21 LLC, wrote to the SLA to seek the SLA's written consent to sell units in the proposed redevelopment to individual purchasers and to align the lease tenures of Lots 1338M and 2818V (which had 67 and 64 years remaining respectively). By way of an email dated 4 March 2011, the SLA informed Legal21 LLC that

"[a]pplications for consent for sale typically take approximately 4 weeks from the date of receipt to process" but that the SLA was "happy to expedite the case" and hoped to give a definite response by 9 March 2011.

13 On 15 March 2011, the SLA sent an email to the applicants stating that the alignment of the tenures of both Lots 1338M and 2818V would involve a downgrading of the tenure of Lot 1338M which required a surrender and re-issue of the lease for the said lot. The email also stated that the SLA would process the application for the lifting of title restrictions upon approval for the downgrading of tenure; this would ensure that the calculation of the DP payable took into account the aligned tenure.

14 The applicant made numerous telephone calls and sent many emails between March and November 2011 to rush the SLA into making a decision. In the meantime, the applicant obtained the requisite construction permit on 8 April 2011 and started construction work despite the lack of response. Finally, on 29 November 2011, the SLA wrote a letter to Legal21 LLC. The contents of this letter are set out below:

> 2. The Lessor has no objections to the sale of the individual units in the Development by your client in respect of [the Land]. The consent is restricted to the particular sale and all the other covenants [in the leases] shall remain in full force and respect
>
> …
>
> 6. Your client has also applied for the downgrading of [Lot 1338M] to align with the tenure of [Lot 2818V] which is currently being processed.
>
> 7. As for your client's application to lift title restrictions in respect of [the Land], we would like to inform your client that **differential premium equal to 100% of the enhancement to land value as assessed by the Chief Valuer will be levied for the lifting of title restrictions**. Before we may process this application, your client is required to apply to URA to subdivide [Lot 2818V] since [Lot 2818V] will be developed separately from its remaining parcel. Please let us have a copy of the URA's written permission for the sub-division once that is issued.
>
> 8. You may contact the undersigned if you have furher questions. [emphasis added]

15 The applicant accordingly applied for, and obtained on 4 January 2012, the URA's permission for the requisite sub-division of Lot 2818V. This was forwarded to the SLA. On 13 January 2012, the SLA wrote to the applicant stating that it was prepared to recommend the surrender of the existing title to Lot 1338M and re-issue a fresh title to align the tenures of Lots 1338M and 2818V. The applicant accepted this offer on 8 February 2012. On 16 August 2012, the SLA informed the applicant that the surrender and the re-issue were approved. To that end, the SLA wrote to the applicant on 14 September 2012, attaching the re-issued lease for execution. The applicant duly executed the re- issued lease on 24 September 2012.

16 On 20 February 2013, the SLA wrote to the applicant stating that it was prepared to lift the title restriction upon payment of $44,067,828.23. The breakdown of this sum is as follows:

(a)	DP in respect of Lot 1338M	$33,523,349.00
(b)	GST on DP in respect of Lot 1338M	$2,346,634.43
(c)	DP in respect of Lot 2818V	$7,660,640.00

(d)	GST on DP in respect of Lot 2818V	$536,244.80
(e)	Processing fee for Lot 1338M	$80.00
(f)	Processing fee for Lot 2818V	$880.00
(g)	Total	$44,067,828.23

17 On 6 March 2013, the applicant wrote to the SLA seeking clarification on how the DPs payable were calculated. In its reply dated 13 March 2013, the SLA stated that the DPs were "assessed by the Chief Valuer based on 100% enhancement in land value for the lifting of title restrictions." Legal21 LLC, in a letter to the SLA dated 2 April 2013, wrote:

> With respect, your said letter of reply dated 13 March 2013 is unhelpful, as no requested clarification on the basis of calculation of the differential premium set out in your said letter dated 20 February 2013 was offered. Specifically, our clients would like to seek clarification on which date the determination of the differential premium is pegged to, and which table of development charge rates was used. Our clients have instructed a team of valuers to conduct a separate assessment to the Chief Valuer's assessment of the differential premium payable and to render advice on the same to our clients. …

18 The SLA sent a letter on 3 April 2013, stating that the material date for the determination of the DP was 2 July 2010 (*i.e.*, the date of provisional permission). More importantly, the SLA also stated that:

> The differential premium payable in respect of Lots 1338M and [2818V] is determined by the Chief Valuer. As such, the Development Charge table was not adopted in determining the differential premium.

19 On 9 April 2013, Legal21 LLC wrote a further letter to the SLA:

> We are instructed to request for clarification as to why the table of development charge rates, which is the prescribed method of assessment as published by SLA, was not adopted in determining the differential premium payable.
>
> We are further instructed that the differential premium payable for the 2 plots, computed based on the table of development charge rates as at March 2010, are as follows:
>
> In respect of Lot [1338M] S$8,831,607 In respect of Lot [2818V] S$2,343,508

20 The SLA replied to Legal21 LLC by way of a letter dated 11 April 2013 stating:

> We would like to explain that **this case is different from conventional leasehold sites** because lots 1338M and [2818V] **were formerly directly alienated to the former owner instead of through competitive tender.** Under the applicable policy for lifting restrictions on directly alienated properties, and where the land is capable of independent development, private sector lessees are required to pay differential premium (DP) based on the full difference (i.e. 100%) between the land values based on the proposed and original use / intensity, if allowed. The Government has stated clearly on 29 Nov 11 that DP pegged at 100% of the enhancement in land values will be levied for the lifting of title restrictions in this case. [emphasis added]

21 In response, Legal21 LLC wrote to the SLA on 24 April 2013, seeking the following particulars:

(a) Full details of the policy pertaining to the DP chargeable for directly alienated land ("the Policy"), including its rationale, when it was first established and applied and when the Policy will be applied and against whom;

(b) Whether the Policy applied to all lessees of directly alienated properties (including subsequent lessees);

(c) Details of whether the Policy had been established by the SLA, and details of where a copy of the Policy may be obtained; and

(d) Confirmation that the Policy had not been published by the SLA, if this was indeed the case.

22 As an aside, the Policy was applied to the proposed redevelopment by CapitaLand of Market Street Car Park. This was widely reported in the Straits Times and the Business Times. In particular, in a news release dated 3 January 2008, it was stated:

> The existing lease of Market Street Car Park, which expires on 31 March 2073, has a restriction on use. The restriction has to be lifted to permit a re-development of the site and this will be subject to the following two conditions:
>
> **payment by the lessee (CCT) of 100% of the enhancement in land value as assessed by the Chief Valuer in a spot valuation; and**
>
> - no extension of the existing lease of Market Street Car Park
>
> [emphasis added]

23 On 30 April 2013, Legal21 LLC wrote to the SLA stating that the applicant wished to appeal against the assessed DP on a without prejudice basis and enclosed a cheque for the $5,000 appeal fee. Legal21 LLC also stated:

> … Further, there are no conditions specified under [the Leases of both lots] to indicate that [the Land] was "special" and this warranted a different method of computing the differential premiums. In all the circumstances, our clients take the position that the Chief Valuer ought to have assessed the enhancement in land value by reference to the Development Charge.

24 For the purposes of the appeal, the SLA met with the applicant on 8 May 2013. The SLA explained to the applicant the mechanism behind the computation of the DP (*i.e.*, 100% of the enhancement in value of the land as assessed by the Chief Valuer in a spot valuation). A further meeting was held on 15 May 2013, where representatives of the applicant, SLA and the Chief Valuer's Office ("CVO") were present. The applicant brought valuers from Colliers International (Singapore) Pte Ltd ("Colliers") along to the meeting. The CVO explained to Colliers that the CVO had adopted the comparison method, which involves using comparables with similar land use, for the spot valuation used to determine the DP payable. The applicant allegedly agreed at the meeting to submit a valuation report for CVO's consideration. This originating summons was filed on 17 May 2013. In a letter dated 6 July 2013 (*i.e.*, after this Originating Summons was filed) from Legal21 LLC to Allen & Gledhill (the SLA's solicitors), the applicants denied that they had agreed to furnish the CVO with an alternative valuation report. The applicant has since withdrawn from the appeal process.

25 At a pre-trial conference on 5 June 2013, the Attorney-General applied to be given the right to be heard at the substantive hearing before me. That was granted by the Assistant

Registrar. At another pre-trial conference on 12 July 2013 before me, the parties agreed to address both the issue of leave and the substantive hearing in a consolidated hearing because of the urgency of the matter. Accordingly this judgment will deal with both the application for leave for judicial review and the merits of the case.

Leave and other preliminary issues

26 An applicant seeking judicial review must meet three conditions for leave to be granted (*Jeyaretnam Kenneth Andrew v Attorney-General* [2013] 1 SLR 619 at [5] and affirmed by the Court of Appeal ([2013] SGCA 56 at [5])):

(a) The subject matter must be susceptible to judicial review;

(b) The applicant has sufficient interest (i.e., *locus standi*) in the matter;

(c) The material before the court discloses an arguable or *prima facie* case of reasonable suspicion in favour of granting the remedies sought by the applicant.

27 The parties agreed that the subject matter was susceptible to judicial review and that the applicant had sufficient interest in the matter to apply for judicial review. Accordingly the only issue before me with regard to leave is whether the applicant could make out an arguable or *prima facie* case of reasonable suspicion. As the parties had agreed to consolidate the application for leave with the substantive application, the applicant's case would therefore be decided on its merits.

28 There are however two preliminary issues which have to be decided before the substantive issues can be addressed. The first issue pertains to whether the application for leave is out of time due to the operation of O 53 r 1(6) of the Rules of Court (Cap 322 R 5 2006 Rev Ed). The second relates to whether the applicant had exhausted all alternative remedies before seeking judicial review.

Was the application for leave out of time?

29 O 53 r 1(6) of the Rules of Court reads:

> Notwithstanding the foregoing, leave shall not be granted to apply for a **Quashing Order** to remove any judgment, order, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made within 3 months after the date of the proceeding or such other period (if any) as may be prescribed by any written law or, except where a period is so prescribed, the delay is accounted for to the satisfaction of the Judge to whom the application for leave is made; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the Judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired. [emphasis added]

30 The applicant took the position that the SLA made its decision on 20 February 2013 as that was when the SLA informed the applicant of the amount of DP payable (see [16] above). It was only then that the applicant became aware of the SLA's decision to assess the DP payable without reference to the DC Table. As the application for leave to apply for judicial review was filed on 17 May 2013, the application was made within the time prescribed by O 53 r 1(6) of the Rules of Court.

31 The SLA argued that the effective date of the SLA's decision was 29 November 2011 (see [14] above). That was the date the SLA first conveyed to the applicant that the DP levied in

its case would be "equal to 100% of the enhancement in land value as assessed by the Chief Valuer" and not based on the DC Table rates. The application was therefore way out of time.

32 The Attorney-General did not make any submissions on whether the application was out of time.

33 The applicant made several arguments in support of its contention that the SLA decision was made on 20 February 2013:

(a) DP is assessed and imposed only after the SLA has made a decision to allow the lifting of title restrictions. As SLA only decided to lift title restrictions on 20 February 2013, the decision pertaining to the assessment of the DP could only have been made on or after 20 February 2013;

(b) The 29 November 2011 letter was wholly unclear and could not reasonably be construed to be a decision on the assessment of DP payable. The SLA stated that the application for lifting of title restrictions would be processed only after approval for subdivision for the lot now known as Lot 2818V. The DP payable would be assessed by the SLA only in the course of processing the application for lifting of title restrictions. The applicant also made several calls to the SLA to enquire about the amount of DP payable but received no response until 20 February 2013;

(c) The 29 November 2011 letter, while referring to DP being payable at 100% of the land enhancement value, did not indicate to the applicant that the SLA had decided to assess DP without reference to the DC Table. The applicant had understood the letter to mean that the DC Table would be adopted but that DP would be assessed at 100% of the applicable DC Table. This was buttressed by the 2007 SLA Circular in which the SLA wrote that it would "apply a factor of 5/7 to the new revised Table of DC Rates" with regard to remnant State land (see [7] above). The applicant reasonably expected that "100% land enhancement value" would be calculated in a similar way; and

(d) In a letter from the SLA to Legal21 LLC dated 30 April 2013, the SLA themselves wrote that "[i]n view of your appeal, we are pleased to grant to your client a further extension of time to accept the offer dated 20 Feb 13".

34 The SLA submitted that its decision was made on 29 November 2011. The method of DP assessment stated in the 29 November 2011 letter was not contingent on the subdivision of the lot now known as Lot 2818V. The only thing pending was the quantum of DP payable. It was clear that the letter informed the applicant of the SLA's final decision on the methodology for assessing the DP payable.

35 O 53 r 1(6) also allows a court to grant an extension of time where "the delay is accounted for to the satisfaction of the Judge" (see also *UDL Marine (Singapore) Pte Ltd v Jurong Town Corp* [2011] 3 SLR 94 at [49] and *Teng Fuh Holdings Pte Ltd v Collector of Land Revenue* [2007] 2 SLR(R) 568 at [18]). The applicant submitted that the circumstances justified the grant of an extension of time. The applicant at all material times believed that the SLA would assess the DP payable in accordance with the DC Table and only found out that the SLA would not be doing so on 20 February 2013. The SLA submitted that an extension of time should not be granted. The delay of more than 17 months was inordinately long. Further, as an established and experienced developer, the applicant should have understood the significance of the words "equal to 100% of the enhancement in land value as assessed by the Chief Valuer" to mean that the DC Table would not be used. Lastly, the applicant had proceeded with the redevelopment and had already received

substantial payments from individual purchasers. It would therefore be unfair to the SLA for the applicant to take advantage of this and further delay the payment of the DP.

36 I agree with the applicant. Time only started to run from 20 February 2013 and not 29 November 2011. The SLA's decision was a multiple-step decision process. As a practical matter, the nub of the applicant's complaint was not just the method that was used to compute the DP payable but also the outcome of that method. The applicant would have had no grievance if the outcome of the Chief Valuer's assessment of the DP was similar to the DP payable under the DC Table. The 29 November 2011 letter did not specify the amount of money that was payable. The applicant therefore did not have the full picture before it and would not have been in a position to determine if an application for judicial review should be made (indeed, an application at that early stage would have been premature). This is strengthened by the SLA letter dated 30 April 2013 (see [33(d)] above) in which the SLA said that the offer to lift the title restrictions upon payment of the DP would run from 20 February 2013.

37 If I am wrong on this point and time started running from 29 November 2011, I would hold that the delay in filing this originating summons is justified for the same reasons articulated in [36]. It would have been reasonable for the applicant in the circumstances of this case to have misapprehended which event was the final decision to challenge. In any case, O 53 r 1(6) of the Rules of Court only applies to quashing orders and not to mandatory orders. The applicant has sought both a quashing order against the SLA's decision and a mandatory order requiring the SLA to assess the DP in accordance with the DC Table. O 53 r 1(6) would only operate against the former and not the latter.

38 I therefore hold that the application for judicial review is not time-barred under O 53 r 1(6) of the Rules of Court.

Did the applicant exhaust all possible alternative remedies?

39 As a general rule, a person seeking judicial review of a decision by a public body must exhaust all alternative remedies before invoking the courts' jurisdiction in judicial review (*Borissik Svetlana v Urban Redevelopment Authority* [2009] 4 SLR(R) 92 at [25]). The applicant submitted that it was not caught by this general rule because the prescribed appeal process presupposes a developer which is not satisfied with a DP payable based on the DC Table (see [8] above). As the DP payable in this case was not based on the DC Table, the appeal process is inapplicable to the applicant. The SLA submitted that the crux of the inquiry is whether the alternative remedy is "equally effective and convenient" (citing *Regina v Hillingdon London Borough Council, Ex parte Royco Homes Ltd* [1974] QB 720 at 728) and the administrative appeal in this case was expedient and hassle-free and effective in that the SLA and the Chief Valuer would be prepared to hear and consider any alternative valuation that a developer puts forward.

40 The appeal process contemplates an aggrieved developer who, disagreeing with the DP based on the DC Table, initiates an appeal process culminating in the SLA consulting the Chief Valuer for a spot valuation. The appeal process is not an alternative remedy for two reasons. First, as the applicant has pointed out, the DP payable in its case was not based on the DC Table and accordingly, the appeal process does not apply to the applicant. Second, and more fundamentally, the appeal process necessarily involves a spot valuation done by the Chief Valuer. This is precisely the outcome that the applicant seeks to impugn as the applicant argues that the DC Table should apply. There is simply no room in the prescribed process for the DP to be assessed based on DC Table rates. The foregoing also accords with *Regina v Secretary of State for the Home Department, Ex parte Swati* [1986] 1 WLR 477 at 485, where Sir John Donaldson MR held that the general rule does not apply where "the

applicant can distinguish his case from the type of case for which the appeal procedure was provided."

41 I therefore hold that the applicant did not fail to comply with the general rule to exhaust all alternative remedies before invoking the courts' jurisdiction in judicial review. There were no alternative remedies for the applicant to seek.

The substantive application for judicial review

Weight to be ascribed to Gaw Seng Suan's affidavit

42 The SLA disputed the admissibility of, and the weight to be ascribed to, an affidavit filed by a Gaw Seng Suan ("Gaw"), an ex-employee of the SLA. The applicant had requested Gaw to provide an expert opinion on the issue of whether the Land Return Clause in the leases for both lots (see [4] above) would have indicated to a reasonable property developer looking to purchase the Land that the DP payable for a change in use of the Land would be assessed at 100% of land enhancement value as assessed by the Chief Valuer through a spot valuation. Gaw opined that a reasonable developer in the applicant's shoes would expect the DP payable to be assessed on the basis of the DC Table and that it was not market knowledge that the presence of a Land Return Clause in a lease would lead to a higher DP or the DP being assessed on a different basis.

43 The SLA argued that Gaw's expert evidence is inadmissible. The issue at stake is not a question of expert opinion because it does not pertain to any point of scientific, technical or other specialised knowledge. Mr Gaw was never a property developer. In any case, Gaw's responsibilities at the SLA pertained to records management and administrative work. Gaw was not involved in any work relating to the DP Clause and/or the Land Return Clause or the policy of charging DP equal to 100% of the enhancement of land value as assessed by the Chief Valuer. Thus, Gaw had no basis to hold himself out as an expert nor did he have any particular insight into the issue.

44 In response, the applicant pointed out that it was not disputed that Gaw had worked on the change in DP policy (*i.e.*, from spot valuations for all cases to the DC Table-based system) which eventually resulted in the issue of the 2000 SLA Circular. Gaw also had significant experience providing specialist advice on land matters to private sector clients, including issues relating to the lifting of title restrictions and DP assessments. The fact that Gaw was not a property developer is not a reason to disregard his evidence. Further, s 47 of the Evidence Act (Cap 97, 1997 Rev Ed) states that expert evidence is admissible if the court is "likely to derive assistance from an opinion upon a point of scientific, technical or other specialised knowledge" and it was introduced in 2012 to broaden the categories of admissible expert evidence and to allow the Court to have the benefit of any expert opinion that may be useful and is in the interests of justice (citing the second reading of the Evidence (Amendment) Bill as reported in *Singapore Parliamentary Debates, Official Report* (14 February 2012) vol 88).

45 The Attorney-General submitted that the question posed to Gaw — that is, whether the Land Return Clause would have put a reasonable property developer on notice — is a question for the court's determination and not for expert opinion. As the Court of Appeal held in *Pacific Recreation Pte Ltd v S Y Technology Inc and another appeal* [2008] 2 SLR(R) 491 at [85] (in turn citing *The H156* [1999] 2 SLR(R) 419 at [27]), an expert may not usurp the function of the court and present his finding. In other words, an expert may not answer the very question that is before the court (in this regard, see also Chen Siyuan, "Expert Evidence and the Ultimate Issue Rule" (2011) Research Collection School of Law, Paper 21 (<http://ink.library.smu.edu.sg/sol_research_smu/21>, accessed on 22 October 2013).

Further, there was no explanation as to how Gaw's experience equipped him to provide an opinion.

46 In my view, Gaw's evidence was admissible pursuant to s 47 of the Evidence Act. However, his evidence was of limited weight. The issue is not just about actual knowledge — the enquiry also touches on constructive knowledge (*i.e.*, what a reasonable property developer would have known had he made the requisite enquiries, as shall be discussed below at [122] to [127]). Gaw was not a property developer and his opinion with regard to whether a reasonable property developer would have known that the Land Return Clause meant that the DP payable would be based on a spot valuation by the Chief Valuer at 100% of the enhancement value would be premised on, at best, second-hand knowledge based on his dealings with private sector developers. His second-hand knowledge would not be persuasive.

The arguments

47 The applicant's various arguments can essentially be divided into two strands: first, the SLA's decision to assess DP via a spot valuation was irrational and unreasonable because no public authority would act so inconsistently, especially in the light of the unequivocal representations made. Second, the SLA's decision deprived the applicant of its legitimate expectation of the DP being assessed in accordance with the DC Table.

48 The SLA argued, firstly, that its decision was not irrational and unreasonable because the SLA has statutory duties and functions to discharge; in particular, the public interest in ensuring that the State realises the full value of State land. Secondly, the doctrine of substantive legitimate expectation has yet to be accepted as part of Singapore law. Even if it is part of the law, the applicant could not have had the legitimate expectation that the DP would be assessed in accordance with the DC Table. Even if the applicant had such a legitimate expectation, the disappointment of that expectation in this case was justified.

49 The Attorney-General averred that the policy of assessing DP via a spot valuation cannot be impugned in court because this would be tantamount to a "merits review". Moreover, the application of the policy to the applicant was not unreasonable because it was done after due deliberation with all stakeholders. The Attorney-General also argued that the doctrine of substantive legitimate expectation should not be adopted in Singapore. In any event, no substantive legitimate expectation could be said to have arisen on the facts. At most, any legitimate expectation would have pertained to procedure and this had already been given effect to.

The issues

50 Accordingly two main issues arose for consideration in this case:

(a) Was the SLA's decision to assess the DP through a spot valuation instead of abiding by the DC Table irrational and/or unreasonable?

(b) Should the doctrine of substantive legitimate expectation be recognised in Singapore law? If so, can the applicant avail itself of this doctrine?

Was the SLA's decision to assess DP via a spot valuation irrational and/or unreasonable?

51 The applicant's first argument is that the SLA's decision to assess the DP by means of a spot valuation was irrational and/or unreasonable. The assessment, it submitted, ought to have been in accordance with the DC Table.

52 In *Associated Provincial Picture Houses, Limited v Wednesbury Corporation* [1948] 1 KB 223 ("*Wednesbury*"). Lord Greene MR, speaking for a unanimous Court of Appeal, held (at 229) that:

> It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. **He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider.** If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington L.J. in Short v. Poole Corporation [1926] Ch 66 gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another. [emphasis added]

53 In the House of Lords decision of *Council of Civil Service Unions and others v Minister of the Civil Service* [1985] 1 AC 374 ("the *GCHQ* case"), Lord Diplock equated *Wednesbury* unreasonableness with irrationality (at 410):

> By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1
> K.B. 223). It applies to a decision which is **so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.** Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. [emphasis added]

Lord Diplock's comments were adopted in Singapore law by the Court of Appeal case of *Chng Suan Tze v Minister for Home Affairs and others and other appeals* [1988] 2 SLR(R) 525 ("*Chng Suan Tze*") at [119].

54 Both the SLA and the Attorney-General contended that *Wednesbury* unreasonableness is a high standard that is difficult to meet. The SLA cited the Court of Appeal case of *Manjit Singh s/o Kirpal Singh and another v Attorney-General* [2013] SGCA 45 at [7] where it was stated that "[t]he *Wednesbury* test sets a high bar". The Attorney-General relied on *Chee Siok Chin and others v Minister for Home Affairs and another* [2006] 1 SLR(R) 582 where V K Rajah J (as he then was) (at [125]) held that the standard of unreasonableness "is from a jurisprudential perspective, pragmatically fixed at a very high level".

55 Before the analysis can proceed any further, it is useful to characterise the act that the applicant is seeking to impugn as being unreasonable.

56 The SLA, in its first affidavit filed by Thong Wai Lin, Director of the Land Sales and Acquisition Division of the SLA, averred (at [36]) that:

> Directly-alienated lands, where the leases contain the Land Return Clause, have always been one of those cases to which the DC Table has no application. …
>
> In the case of directly-alienated land where the lease contains the Land Return Clause, the policy is to charge DP based on 100% enhancement in value as assessed by the Chief Valuer in a spot valuation, if the State decides to forego the right to the return of the land and to allow the requested change of use of the land.
>
> [emphasis in original]

The SLA thus characterised its decision as one that was made pursuant to an existing policy and not as a result of a change in policy. The SLA thus did not depart from the DC Table (a method that was spelt out in the SLA circulars and the SLA website, see [6] – [8] above). The Attorney-General essentially agreed with the respondent and pointed out that there were two operative policies: one concerning State leases without a Land Return Clause where the DP payable is calculated according to the DC Table and another concerning State leases with a Land Return Clause where, assuming that the Government chooses not to exercise its right to require the return of the land, the DP is charged based on 100% of the enhancement in land value as assessed by the Chief Valuer in a spot valuation. The applicant did not indicate clearly which characterisation it was relying on, presumably because its arguments would remain the same either way.

57 At the outset, I would like to point out that there is an immense difference between, on the one hand, the implementation of a second extant policy (which was not discernible from the public statements put out by the SLA), and on the other hand, a change in policy (with there being only one policy applicable to start with) or a decision not to apply a policy to a particular case. In the former, the policy was already in operation at the time of the act in issue. In the latter, the change of policy or decision not to apply the policy is contemporaneous with the act in issue. The legal analysis that flows from each characterisation is markedly and necessarily different. This court's analysis shall be premised on the former (see also [68] – [71] below).

58 The applicant submitted that the plain wording of the SLA Circulars and the SLA website is clear, unambiguous and affirmative: the DP would be assessed by reference to the DC Table. No other policy or method for assessing DP is specified in the aforementioned sources or in any other publicly available document. The 2000 SLA Circular (see [6] above) explicitly states that the specified method for assessing DP is "a transparent system" which "provide[s] greater certainty to landowners who will now be able to compute the DP payable themselves." The SLA Circulars and the SLA website are exhaustive and they only specify two exceptions: where the use stipulated in the title restriction does not fit into any of the use groups in the DC Table and where the lease tenure is upgraded. None of these exceptions applies here.

59 The applicant argued that the SLA had acted unreasonably in the *Wednesbury* sense because a legitimate expectation arose that the "SLA will behave as it says it will". This conflates the doctrine of substantive legitimate expectation with *Wednesbury* unreasonableness. The issue of whether substantive legitimate expectation is part of Singapore law and if so, whether it is a stand-alone head of judicial review or is in truth a subset of *Wednesbury* unreasonableness will be discussed subsequently (see [117] below).

60 The essence of the applicant's arguments was that it was unreasonable for the SLA not to adhere to its public promulgations. The applicant proceeded to point out that the existing policy of charging a DP based on 100% enhancement in value as assessed by the Chief Valuer in a spot valuation (see [56] above) is inconsistent with an earlier statement by the

then Minister for National Development Mah Bow Tan (*Singapore Parliamentary Debates, Official Report* (19 July 2010) vol 87, at col 815):

> Currently, DP or DC rate is pegged at 70% of the enhancement in land value. The DP or DC collected allows the State to provide the necessary infrastructure and services (eg, roads, drainage and sewerage) without which the developer cannot materialise the higher development intensity in the area. **The balance of the gain from the land value enhancement is retained by the land-owner and provides an incentive for him to undertake the development work.**
>
> In calibrating the DC rate, there is a need to balance between providing an equitable share of the land value enhancement for the State to fund the necessary infrastructure and services and, at the same time, providing a reasonable incentive for land-owners and developers to undertake development works. We believe that the current 70% DC rate is reasonable in the current market conditions.
>
> [emphasis added]

In a similar vein, the 2000 SLA Circular (see [6] above) states that:

> With effect from 31 July 2000, the Singapore Land Authority has implemented a transparent system of determination of differential premium (DP) for the lifting of State title restrictions involving change of use and/or increase in intensity. **This is to encourage optimisation of land use and to facilitate the overall pace of redevelopment in Singapore**. [emphasis added]

61 Further, on its plain terms, the Land Return Clause only requires the lessee to inform the SLA if any part of the land is not being used for the purpose specified in the lease. When the applicant made its application for the lifting of title restrictions, the whole of the land was being used for the specified purposes. Thus the question of the State giving up its right to take back the land does not even arise and it would be wrong to assess the DP on the basis of compensating the state for giving up such a right. Additionally, the SLA has not been able to provide any explanation as to why the policy should apply to subsequent *bona fide* purchasers of directly alienated lands, where the subsequent purchaser obtained the land through a competitive tender process and derived no benefit from the earlier direct alienation. The subsequent purchaser would also have no way of finding out that the land was directly alienated to the former owner.

62 The SLA averred that it was not unreasonable for the DP to be assessed by a spot valuation at 100% value. It was in the interests of the public for the State to realise the full value of any land that it disposes of. Where directly alienated land is concerned, the State is in fact forfeiting its legal right to take back the land (pursuant to the Land Return Clause) and the chance to re-sell the land at a higher price in a competitive tender. The State must ensure that it obtains a DP that fully and accurately reflects the enhancement in value that the state is foregoing. Indeed, the SLA was merely discharging its statutory duties and functions. Section 6(1)(*a*) of the Singapore Land Authority Act (Cap 301, 2002 Rev Ed) ("the SLA Act") states that it shall be the function and duty of the SLA "to optimise land resources". This necessarily entails a duty on SLA's part to obtain the full enhancement on land value where directly-alienated state lands are concerned.

63 The Attorney-General argued that the reasonableness (or otherwise) of the policy to assess DP by a spot valuation at full value is a "polycentric" matter which is not suited to a "merits review" by the court. In assessing the DP, the SLA acts as the agent of the Government (s 6(1)(*e*)(iv) of the SLA Act). In carrying out this function, the SLA is involved in "polycentric" decision making; s 6(2) of the SLA Act stipulates:

In carrying out its functions, the Authority shall —

(*a*) have regard to efficiency and economy and to the social, industrial, commercial and economic needs of Singapore…

64 It is well-established that the courts will be slow to review such "polycentric" matters. In *Lee Hsien Loong v Review Publishing Co Ltd and another and another suit* [2007] 2 SLR(R) 453 ("*Lee Hsien Loong*"), Sundaresh Menon JC (as he then was) held (at [96] and [98]) that:

96 Second, within the span of executive decisions that are immune from judicial review are those involving matters of "high policy". This includes such matters as dissolving Parliament, the conduct of foreign affairs, the making of treaties, matters pertaining to war, the deployment of the armed forces and issues pertaining to national defence. These are what the American courts call "political questions" and the reasons underlying the deference accorded to the executive branch of government in such areas have been articulated in the cases I have referred to. In my judgment, cases concerning international boundary disputes or the recognition of foreign governments comfortably fall within this class of cases.

…

98 … In my judgment, the correct approach is not to assume a highly rigid and categorical approach to deciding which cases are not justiciable. Rather, as Laws LJ put it in Marchiori ([94] supra) at [39], the intensity of judicial review will depend upon the context in which the issue arises and upon common sense, which takes into account the simple fact that there are certain questions in respect of which there can be no expectation that an unelected judiciary will play any role. In this regard, the following principles bear noting:

(a) Justiciability depends, not on the source of the decision-making power, but on the subject matter that is in question. Where it is the executive that has access to the best materials available to resolve the issue, its views should be regarded as highly persuasive, if not decisive.

(b) Where the decision involves matters of government policy and requires the intricate balancing of various competing policy considerations that judges are ill-equipped to adjudicate because of their limited training, experience and access to materials, the courts should shy away from reviewing its merits.

…

65 The Attorney-General also cited Lord Woolf, *et al, De Smith's Judicial Review* (Sweet & Maxwell, 7th Ed, 2013) at paras [1-042] and [1-043]:

A third limitation on the court's institutional capacity occurs when a legal challenge is made on substantive grounds to a matter which is "polycentric" — where the decision-taker has broad discretion involving policy and public interest considerations. …

Most "allocative decisions" — decisions involving the distribution of limited resources — fall into the category of polycentric decisions. If the court alters such a decision, the judicial intervention will set up a chain reaction, requiring a rearrangement of other decisions with which the original has interacting points of influence. …

…

Another typical polycentric decision is one involving the allocation of scarce resources among competing claims.

66 It was submitted that the formulation of the policy to assess the DP by a spot valuation was clearly a polycentric decision that was taken only after due deliberation and consultation with other relevant agencies and stakeholders on whether to exercise the right to take back the land. This policy is inextricably intertwined with the State's macro-policy considerations of what is in Singapore's economic, commercial, industrial and social interests.

67 In order to satisfy the high threshold of *Wednesbury* unreasonableness, the applicant must show that the SLA had, on one formulation, taken into account extraneous considerations that it should not have taken into account or had not taken into account considerations which it should have taken into account. Alternatively, the applicant must show that the SLA's decision was so outrageous in its defiance of logic that no sensible person who had applied his mind could have arrived at the same decision.

68 There are three ways of characterising the SLA's allegedly unreasonable conduct:

(a) Applying the policy of assessing the DP via a spot valuation at 100% of land enhancement value;

(b) Applying the policy of assessing DP via a spot valuation at 100% of land enhancement value but not disclosing the existence of such a policy beforehand;

(c) Applying the policy of assessing DP via a spot valuation and at 100% of land enhancement value, not disclosing the policy beforehand and not taking into account the applicant's legitimate expectation.

69 In the first characterisation, it is the policy alone that is being impugned. The SLA, in formulating policy, is statutorily obliged to have regard to "efficiency and economy and to the social, industrial, commercial and economic needs of Singapore" (s 6(2) of the SLA Act, see [63] above). The balancing of these competing interests is not within the institutional competence of the judiciary (*Lee Hsien Loong* (at [98(b)], see [64] above). Thus, the policy by itself cannot be said to be unreasonable in the *Wednesbury* sense.

70 However, the applicant was not aggrieved by the SLA's policy. The applicant's complaint was that the policy was not publicised, giving it the impression that the publicised policy (that is, DP assessed at DC Table rates) would apply.

71 At common law, there is no legal duty on the part of the Government to publicise the policies which it seeks to implement. In the context of administrative decisions, there is no general rule that reasons must be given (see *e.g. Marta Stefan v General Medical Council* [1999] 1 WLR 1293 at 1300G-H). It was therefore not unreasonable in the *Wednesbury* sense for the SLA not to publicise its policy of assessing DP via a spot valuation at 100% of the land enhancement value. In any case, the applicant's contention was that it was led to believe that the said policy would refer to the DC Table anyway.

72 This leaves me with the last characterisation — that it was unreasonable for the SLA to have applied an undisclosed policy to the applicant's case and thereby neglecting unreasonably to take into account the applicant's legitimate expectation. This issue will be dealt with in the discussion on the law pertaining to substantive legitimate expectations (see [118]

– [128] below). Should the doctrine of substantive legitimate expectations be recognised in Singapore law? If so, can the applicant avail itself of this doctrine?

73 The term "legitimate expectation" was first used by Lord Denning MR in *Schmidt and another v Secretary of State for Home Affairs* [1969] 2 Ch 149 ("*Schmidt*"). The case concerned the Home Secretary's decision to refuse an extension of a foreign student's temporary permit to stay in the United Kingdom. Lord Denning MR rejected the foreign student's contention that he ought to have been afforded a hearing. He held that:

> It all depends on whether he has some right or interest, or, I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say.

74 In the *GCHQ* case, a majority of the House of Lords held that the applicants there had a legitimate expectation that they would be consulted before their rights to unionise were taken away. This duty was however overridden by national security concerns. Lord Diplock held (at 408F – 409A):

> To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other person either:
>
> (a) by altering rights or obligations of that person which are enforceable by or against him in private law; or
>
> (b) by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn. (I prefer to continue to call the kind of expectation that qualifies a decision for inclusion in class (b) a "legitimate expectation" rather than a "reasonable expectation," in order thereby to indicate that it has consequences to which effect will be given in public law, whereas an expectation or hope that some benefit or advantage would continue to be enjoyed, although it might well be entertained by a "reasonable" man, would not necessarily have such consequences.

In the same case, Lord Fraser of Tullybelton formulated the doctrine of legitimate expectations on a more general basis which could be construed to include substantive (as opposed to merely procedural) relief (at 401A-B):

> But even where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege, and, if so, the courts will protect his expectation by judicial review as a matter of public law. This subject has been fully explained by my noble and learned friend, Lord Diplock, in O'Reilly v. Mackman [1983] 2 A.C. 237 and I need not repeat what he has so recently said. Legitimate, or reasonable, expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue.

75 For the moment, I turn my attention to related cases which granted substantive relief on other grounds. The Court of Appeal case of *Lever (Finance) Ltd v Westminster Corporation* [1970] 3 All ER 496 ("*Lever Finance*") granted relief on the ground of estoppel. In that

case, developers applied for and obtained planning permission to build 14 houses on a particular tract of land. A month after this, the developers' architect made some variations to the plan. One of the houses was to be sited 23 feet away from existing houses (as opposed to 40 feet under the original approved plan). The planning authority's planning officer had lost the file containing the original approved plan and because of this mistakenly told the developer's architect over the telephone that this variation was not material and that no further planning consent was required. The developers went ahead with construction. Sometime later, the planning authority said that planning permission was actually required (after complaints received by the existing residents) and permission was subsequently denied. The developers sought an injunction restraining the authority from serving an enforcement notice requiring them to demolish the half-built house. Lord Denning MR (at 500h–j) held that:

> I know that there are authorities which say that a public authority cannot be estopped by any representations made by its officers. It cannot be estopped from doing its public duty. See, for instance, the recent decision of the Divisional Court in Southend-on-Sea Corpn v Hodgson (Wickford) Ltd. But those statements must now be taken with considerable reserve. There are many matters which public authorities can now delegate to their officers. If an officer, acting within the scope of his ostensible authority, makes a representation on which another acts, then a public authority may be bound by it, just as much as a private concern would be.

76 The House of Lords case of *In re Preston* [1985] 1 AC 835 held that substantive relief could be granted on the basis of abuse of power where the conduct complained about is equivalent to a breach of contract or a breach of representation. The case concerned a taxpayer who alleged that an officer from the Inland Revenue Commissioners ("IRC") had represented to him that the IRC would not raise further inquiries on his tax affairs if the taxpayer withdrew certain claims for interest relief and capital loss. The House of Lords found that no such representation was made. Nevertheless, Lord Templeman said (at 864G) that:

> The court can only intervene by judicial review to direct the commissioners to abstain from performing their statutory duties or from exercising their statutory powers if the court is satisfied that "the unfairness" of which the applicant complains renders the insistence by the commissioners on performing their duties or exercising their powers an abuse of power by the commissioners.

Lord Templeman continued (at 866H – 867B):

> In principle I see no reason why the appellant should not be entitled to judicial review of a decision taken by the commissioners if that decision is unfair to the appellant because the conduct of the commissioners is equivalent to a breach of contract or a breach of representation. Such a decision falls within the ambit of an abuse of power for which in the present case judicial review is the sole remedy and an appropriate remedy. There may be cases in which conduct which savours of breach of conduct [*sic*] or breach of representation does not constitute an abuse of power; there may be circumstances in which the court in its discretion might not grant relief by judicial review notwithstanding conduct which savours of breach of contract or breach of representation. In the present case, however, I consider that the appellant is entitled to relief by way of judicial review for "unfairness" amounting to abuse of power if the commissioners have been guilty of conduct equivalent to a breach of contract or breach of representations on their part.

77 Thus, with respect to substantive relief where no existing legal right was alleged to have been infringed, there were at least three doctrines (or variations thereof) at play: legitimate expectation, estoppel and abuse of power. I shall next consider how some common law jurisdictions have dealt with these doctrines.

England

78 *Regina v Secretary of State for the Home Department, Ex parte Ruddock and others* [1987] 1 WLR 1482 ("*Ex p Ruddock*") was the first case to state expressly that the doctrine of legitimate expectation could not be restricted to cases involving the right to be heard. An active and prominent member of the Campaign for Nuclear Disarmament had his phone tapped. He alleged that this was not done in accordance with the criteria for the interception of communications which had been published on six occasions. The court dismissed the application on the facts but relied on Lord Frasier's speech in the *GCHQ* case (see [73] above) in stating (at 1497A – B):

> Whilst most of the cases are concerned, as Lord Roskill said, with a right to be heard, I do not think the doctrine is so confined. Indeed, in a case where ex hypothesi there is no right to be heard, it may be thought the more important to fair dealing that a promise or undertaking given by a minister as to how he will proceed should be kept. Of course such promise or undertaking must not conflict with his statutory duty or his duty, as here, in the exercise of a prerogative power.

79 In the House of Lords decision of *Regina (Reprotech (Pebsham) Ltd) v East Sussex County Council* [2003] 1 WLR 348, a purchaser of a waste treatment plant, with a view to using waste to generate electricity, consulted the county planning officer who said that generating electricity on the plant on a 24-hour basis would not amount to a material change of use requiring planning permission. Some years after the purchase, the purchaser was told that planning permission was actually required. Relief was denied on the facts. Lord Hoffman spoke for a unanimous House of Lords:

> 33 In any case, I think that it is **unhelpful to introduce private law concepts of estoppel into planning law**. As Lord Scarman pointed out in Newbury District Council v Secretary of State for the Environment [1981] AC 578, 616, estoppels bind individuals on the ground that it would be unconscionable for them to deny what they have represented or agreed. But **these concepts of private law should not be extended into "the public law of planning control, which binds everyone"**. (See also Dyson J in R v Leicester City Council, Ex p Powergen UK Ltd [2000] JPL 629, 637.)
>
> 34 There is of course an analogy between a private law estoppel and the public law concept of **a legitimate expectation created by a public authority, the denial of which may amount to an abuse of power**: see R v North and East Devon Health Authority, Ex p Coughlan [2001] QB
> 213. But it is no more than an analogy because remedies against public authorities also have to take into account the interests of the general public which the authority exists to promote. Public law can also take into account the hierarchy of individual rights which exist under the Human Rights Act 1998, so that, for example, the individual's right to a home is accorded a high degree of protection (see Coughlan's case, at pp 254-255) while **ordinary property rights are in general far more limited by considerations of public interest**: see R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] 2 WLR 1389.
>
> **35** It is true that in early cases such as the Wells case [1967] 1 WLR 1000 and Lever Finance Ltd v Westminster (City) London Borough Council [1971] 1 QB 222, Lord Denning MR used the language of estoppel in relation to planning law. **At that time the public law concepts of abuse of power and legitimate expectation were very undeveloped and no doubt the analogy of estoppel seemed useful.** In the Western Fish case [1981] 2 All ER 204 the Court of Appeal tried its best to reconcile these

invocations of estoppel with the general principle that a public authority cannot be estopped from exercising a statutory discretion or performing a public duty. But the results did not give universal satisfaction: see the comments of Dyson J in the Powergen case [2000] JPL 629, 638. **It seems to me that in this area, public law has already absorbed whatever is useful from the moral values which underlie the private law concept of estoppel and the time has come for it to stand upon its own two feet.**

[emphasis added]

80 The Court of Appeal, in the subsequent case of *South Bucks District Council v Flanagan and another* [2002] 1 WLR 2601 (decided later than the above case but reported earlier), construed the foregoing passage (at [16]) as the House of Lords deciding that "there is no longer a place for the private law doctrine of estoppel in public law or for the attendant problems which it brings with it."

8 1 *The Queen on the application of, Bhatt Murphy (a firm) and others v The Independent Assessor* [2008] EWCA Civ 755 concerned a group of individuals and solicitors who had been denied access to a compensation scheme run by the government. The Court of Appeal denied relief on the facts but Law LJ commented on the underlying basis of the doctrine of legitimate expectation (at [28]):

Legitimate expectation of either kind may (not must) arise in circumstances where a public decision-maker changes, or proposes to change, an existing policy or practice. **The doctrine will apply in circumstances where the change or proposed change of policy or practice is held to be unfair or an abuse of power**: see for example Ex p Coughlan paragraphs 67 ff, Ex p Begbie [2000] 1 WLR 1115, 1129F — H. The court is generally the first, not the last, judge of what is unfair or abusive; its role is not confined to a back-stop review of the primary decision-maker's stance or perception: see in particular Ex p Guinness Plc [1990] 1 QB 146. Unfairness and abuse of power march together: see (in addition to Coughlan and Begbie) Preston [1985] AC 835, Ex p Unilever [1996] STC 681, 695 and Rashid [2005] INRL 550 paragraph 34. But these are ills expressed in very general terms; and it is notorious (and obvious) that the ascertainment of what is or is not fair depends on the circumstances of the case. The excoriation of these vices no doubt shows that the law's heart is in the right place, but it provides little guidance for the resolution of specific instances. [emphasis added]

82 There is no doubt that the doctrine of substantive legitimate expectation is part of English law. The Court of Appeal decision of *Regina (Patel) v General Medical Council* [2013] 1 WLR 2801 ("*Patel v GMC*") is the latest pronouncement on the law as it currently stands in England. The case pertained to a medical doctor who received e-mail assurances that, upon completion of a distance learning pre- clinical course from a particular university, he would be provisionally registered as a doctor with the General Medical Council ("GMC"). The GMC subsequently told the claimant that his primary medical qualification was unacceptable and denied provisional registration. The Court of Appeal granted substantive relief on the ground of substantive legitimate expectation and declared that the GMC was compelled to recognise the claimant's primary medical qualification for the purposes of registration. The court utilised the following framework:

(a) The statement or representation relied upon as giving rise to a legitimate expectations must be "clear, unambiguous and devoid of relevant qualification" (at [40]);

(b) The party seeking to rely on the statement or representation must have placed all his cards on the table (at [41]);

(c) While detrimental reliance is not a condition precedent, its presence may be an influential consideration in determining what weight should be given to the legitimate expectation (at [84]).

(d) The statement or representation must be pressing and focused. While in theory there is no limit to the number of beneficiaries, in reality the number is likely to be small as

(i) It is difficult to imagine a case in which government will be held legally bound by a representation or undertaking made generally or to a diverse class; and

(ii) The broader the class claiming the benefit of the expectation the more likely it is that a supervening public interest will be held to justify the change of position (at [50]).

(e) The burden of proof lies on the applicant to prove the legitimacy of his expectation. Once this is done the onus shifts to the respondent to justify the frustration of the legitimate expectation. It is for the authority to identify any overriding interest on which it relies to justify the frustration of the expectation (at [58]); and

(f) The court has to decide for itself whether there is a sufficient overriding interest to justify a departure from what has been previously promised (at [60]). In doing so the court must weigh the competing interests. The degree of intensity of review will vary from case to case, depending on the character of the decision challenged (at [61]).

83 It is clear that the doctrine of substantive legitimate expectation is part of English law. It appears that the doctrine of estoppel has been subsumed under the doctrine of substantive legitimate expectation.

Australia

84 Australia has hitherto not recognised the doctrine of estoppel in the context of public law (*Annetts and another v McCann and others* (1990) 97 ALR 177 at 184, cited with approval in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 72 ALD 613 ("*Ex p Lam"*) at [69])

85 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 353 ("*Teoh*") was a High Court of Australia case which held that a legitimate expectation arose from the ratification of an international treaty that had not been implemented by statute. The court held that ratification was not an ineffectual act. It was a positive statement by the executive that its agencies will act in accordance with the treaty.

86 However, the subsequent High Court of Australia case of *Ex p Lam* has cast doubt on *Teoh*. In that case, the applicant was granted a transitional (permanent) visa. He was convicted of trafficking heroin. An officer from the Department of Immigration and Multicultural Affairs advised the applicant that his visa might be cancelled. The applicant was told that he would be provided with an opportunity to comment and was advised of the matters to be taken into account, including the best interests of any children with whom he was involved. The applicant responded and included a statement from the carer of the applicant's children. An officer subsequently wrote to the applicant requesting contact details of the children's carer and stating that the respondent wished to contact the carer in order to assess the applicant's relationship with his children. The applicant duly provided the contact details.

However, no further steps were taken to contact the carer and the applicant's visa was subsequently cancelled by the respondent. In four concurring judgments, the applicant's appeal for substantive relief was dismissed. Two of the speeches did not consider the doctrine of legitimate expectation but merely held that there was no denial of procedural fairness on the facts. I turn now to the two speeches which touched on the doctrine. McHugh and Gummow JJ observed that the notion of "abuse of power" as applied in England appeared to be concerned with the judicial supervision of administrative decision-making by the application of certain minimum standards and that it represented an attempted assimilation of doctrines derived from European civil systems (at [73]) into the English common law. However, civil systems are characterised by a close connection between the administrative and judicial functions, with administrative judges having administrative training and being alive to realities of administration (at [74]). Further, Australia has a written federal constitution with separation of power and judicial power does not extend to the executive function of administration (at [76]). In the light of developments in Australian case law of the requirements of procedural fairness, the doctrine of legitimate expectation does not have any distinct role (at [81]). The doctrine should be understood as being synonymous with natural justice as merely indicating "the factors and kinds of factors which are relevant to any consideration of what are the things which must be done or afforded". If natural justice does not condition the exercise of power, the notion of legitimate expectation can have no role to play. Otherwise, the doctrine would "become a stalking horse for excesses of judicial power" (at [82]).

87 Callinan J opined that the expression "legitimate expectation" is unfortunate and misleading. The necessity for the invention of the doctrine is questionable; the law of natural justice has evolved without the need for recourse to any fiction of "legitimate expectation" (at [140]). When Lord Denning MR first articulated the expression, he was doing no more than using it as a synonym for a right or interest. "Legitimate expectation" does not connote a freestanding or new right altogether (at [141]). If "legitimate expectation" were to remain part of Australian law, it would be better if it were applied only in cases where there is an actual expectation (at [145]). On any view, the doctrine of "legitimate expectation" gives rise to only procedural rights and cannot give rise to substantive rights (at [148]).

88 A 3-2 majority of the judges in the High Court of Australia in *Ex p Lam* have thus held, albeit *obiter*, that the doctrine of legitimate expectation is of questionable legitimacy and utility. *Rush v Commissioner of Police* (2006) 150 FCR 165 (at [75] and [82]) and *Habib v Commonwealth (No 2)* (2009) 254 ALR 250 (at [70]) have subsequently confirmed that the doctrine of substantive legitimate expectation is not recognised in Australian law.

Canada

89 The seminal case in Canada is the Supreme Court decision of *Centre hospitalier Mont-Sinaï c Québec (Ministre de la Santé & des Services sociaux)* [2001] 2 SCR 281 ("*Mount Sinai*") . The respondent, Mount Sinai Hospital, originally dealt primarily with tuberculosis patients and only had long-term care facilities. They decided to move from Quebec to Montreal. The hospital had, by that time, both short-term and long-term beds and wanted to alter its permit to reflect this. The ministry promised to alter the permit after the move to Montreal and this was reaffirmed by successive ministers. The hospital moved and applied for its permit to be amended. However, its application was denied on the basis that it was no longer in the public interest to have short-term beds. The court unanimously held that the Minister was compelled to issue the amended permit. There were two speeches. Bastarache J (with whom L'Heureux-Dubé, Gonthier, Iacobucci, and Major JJ concurred) did not touch on the doctrine of legitimate expectation. McLachlin CJC and Binnie J, in *obiter*, held that legitimate expectation cannot be used to ground substantive relief and that the doctrine of estoppel (which has more stringent requirements) should be used to ground substantive relief instead.

90 McLachlin CJC and Binnie J opined that the doctrine of legitimate expectation, as applied in England, performs a number of functions that are kept distinct in Canada (at [24]). The doctrine has, in their view, developed into a comprehensive code that embraces the full gamut of administrative relief, from procedural fairness to estoppel (not properly so-called) (at [26]). At the high end, this represents a level of judicial intervention that the Canadian courts have considered inappropriate (unless constitutional rights are implicated) (at [27]). Canadian cases have differentiated procedural fairness and legitimate expectation (at [28]). If the courts are to grant substantial relief, more demanding conditions precedent must be fulfilled than are presently required by the doctrine of legitimate expectation (at [32]). There are two further limitations: first, a purely ministerial decision, on broad grounds of public policy, will typically afford the individual no procedural protection unless there has been an abuse of discretion (at [33]); secondly, public bodies exercising legislative functions may not be amenable to judicial supervision (at [34]). However, estoppel may be available against a public authority in narrow circumstances (at [39]). In this respect (at [42]),

> It is to be emphasized that the requirements of estoppel go well beyond the requirements of the doctrine of legitimate expectations. As mentioned, the doctrine of legitimate expectations does not necessarily, though it may, involve personal knowledge by the applicant of the conduct of the public authority as well as reliance and detriment. Estoppel clearly elevates the evidentiary requirements that must be met by an applicant.

91 The doctrine of estoppel in the public law milieu, however, requires an appreciation of the legislative intent embodied in the power whose exercise is sought to be estopped. Therefore, circumstances that might otherwise create an estoppel may have to yield to an overriding public interest expressed in the legislative text (at [47]).

92 The latest pronouncement of the law as it currently stands in Canada is contained in the 2013 Supreme Court case of *Agraira v Canada (Minster of Public Safety and Emergency Preparedness)* (2013) CarswellNat 1983. In a unanimous judgment, the court reaffirmed the principle that the doctrine of legitimate expectation cannot give rise to substantive rights (at [97]).

93 To sum up, Canadian law does not grant substantive relief via the doctrine of legitimate expectations. Instead, an applicant seeking substantive relief would have to rely on the doctrine of estoppel.

Hong Kong

94 In *Ng Siu Tung & others v Director of Immigration* [2002] 1 HKLRD 561, the Court of Final Appeal emphatically held that the doctrine of legitimate expectation can be a ground for substantive relief. The case concerned constitutional challenges to certain amendments made to the Immigration Ordinance. There were over 5000 claimants who made applications for legal aid to commence proceedings; in order to reduce the number of cases and costs, several cases were chosen for a determination by the court of the common issues. The government generally represented to the public that it would abide by the decisions of the courts. Some applicants received *pro forma* replies that the government would abide by the decisions of the courts and that it was unnecessary to join in existing proceedings or commence fresh proceedings. The cases were successful in impugning the constitutionality of the amendments. Legislation was then promulgated which prospectively reversed the successful cases. The legislation expressly stated that it did not affect rights of abode which had been acquired pursuant to the judgments. The issue at stake was whether the applicants in the instant case were entitled to the acquired rights of abode, in the sense of them being in the same position as the successful parties.

95 The Court of Final Appeal granted relief on the ground of substantive legitimate expectation but only for the applicants who received specific representations in *pro forma* replies that it was unnecessary for them to join in existing proceedings or commence fresh proceedings. The entire court agreed that the doctrine of substantive legitimate expectation was part of Hong Kong law.

96 Li CJ, Chan and Riberio PJJ and Sir Anthony Mason NPJ, speaking for a 4-1 majority, utilised the following framework:

> The doctrine of substantive legitimate expectations recognizes that, in the absence of any overriding reason of law or policy excluding its operation, situations may arise in which persons may have a legitimate expectation of a substantive outcome or benefit, in which event failing to honour the expectation may, in particular circumstances, result in such unfairness to individuals as to amount to an abuse of power justifying intervention by the court (at [92]):
>
> (a) A legitimate expectation arising from a promise or representation made by or on behalf of a public authority must be taken into account in the decision-making process so long as to do so falls within the power of the decision-maker (at [92] and [94]).
>
> (b) Generally speaking, a representation must be clear and unambiguous; if a representation is susceptible to multiple interpretations, the interpretation applied by the public authority will be adopted (this interpretation is subject to *Wednesbury* unreasonableness) (at [104]).
>
> (c) The question of whether reliance is required was left open (at [109]). However, no issue as to reliance occurs if the representations are calculated to induce reliance (at [110]).
>
> (d) Unless there are reasons recognised by law for not giving effect to legitimate expectations, then effect should be given to them. Fairness requires the decision-maker to give reasons if effect is not given to the expectation, so that such reasons may be tested in court (at [95]).
>
> (e) Even if the decision involves the making of a political choice with reference to policy considerations, the decision-maker must make the choice in the light of the legitimate expectation of the parties (at [96]). If the decision-maker does not take into account the legitimate expectation, the decision constitutes an abuse of power and will usually be vitiated by reason of failure to take account of a relevant consideration (at [97]).

Singapore

97 *UDL Marine (Singapore) Pte Ltd v Jurong Town Corp* [2011] 3 SLR 94 ("*UDL Marine*") concerned a case where a tenant applied unsuccessfully to its landlord, a statutory board, for the renewal of a lease. The application for leave for judicial review was dismissed on the ground that the respondent's act of not renewing the lease was not susceptible to judicial review because it was exercising its *private* contractual rights not to renew the lease. Lai Siu Chiu J commented, *obiter*, that both parties had not submitted on the issue of legitimate expectation. Nevertheless, she doubted that the doctrine of substantive legitimate expectation was part of Singapore law because of the presence of competing tensions and her

concern that the need to check against inconsistent treatment must be balanced against the undesirable effects of excessively fettering administrative discretion (at [65] and [66]).

98 In *Borissik Svetlana v Urban Redevelopment Authority* [2009] 4 SLR(R) 92 ("*Borissik Svetlana*"), the applicant was a joint owner of a semi-detached house who applied for leave for judicial review of the Urban Redevelopment Authority's decision to deny the applicant's application for the construction of a detached bungalow. Leave was denied on the ground that the applicant had not exhausted all her remedies before applying for judicial review. Tan Lee Meng J nevertheless found, *obiter*, that the applicant could not point to any promise made to her by a person with actual or ostensible authority. Tan J went on to state (at [49]):

> [*De Smith's Judicial Review* (Sweet & Maxwell, 6th Ed, 2007) lists four conditions for the creation of a legitimate expectation, namely that the expectation must be:
>
> (i) clear, unambiguous and devoid of relevant qualification;
>
> (ii) induced by the conduct of the decision maker;
>
> (iii) made by a person with actual or ostensible authority; and
>
> (iv) applicable to the applicants, who belong to the class of persons to whom the representation is reasonably expected to apply.

It is unclear if Tan J was referring to a procedural or substantive legitimate expectation. However, at [46], Tan J said:

> Finally, the applicant's claim that she had a legitimate expectation that the proposal to redevelop No 2 would be approved **will be considered**. [emphasis added]

The above passage seems to suggest that Tan J had procedural, rather than substantive, legitimate expectation in mind.

99 The Court of Appeal case of *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189 ("*Yong Vui Kong*") concerned an appellant who was convicted of a drug trafficking offence and sentenced to death. In a concurring judgment, Andrew Phang and V K Rajah JJA addressed the appellant's argument that a legitimate expectation had arisen that it is the President who would make the decision as to whether the appellant would be pardoned. Citing *Regina v Director of Public Prosecutions, Ex parte Kebilene* [2000] 2 AC 326, they held that such a legitimate expectation could not arise on the facts because clear statutory words will override any expectation. In this respect, Art 22P(1) of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) clearly states that the President shall act "on the advice of the Cabinet".

100 Prior case law has thus not addressed, head-on, the issue of whether the doctrine of substantive legitimate expectation is part of Singapore law. Lai J in *UDL Marine* did not have any submissions on this issue before her and doubted that the doctrine existed. Tan J in *Borissik Svetlana* ostensibly had procedural, rather than substantive, legitimate expectation in mind when he cited a framework espoused in the sixth edition of *De Smith*. Andrew Phang and V K Rajah JJA in *Yong Vui Kong* did not address the issue of whether substantive legitimate expectation is part of Singapore law. They dismissed the appellant's argument on the basis that no substantive legitimate expectation could have arisen on the facts.

Summary of respective submissions

101 The applicant here relied chiefly on *Borissik Svetlana* for the proposition that the doctrine of substantive legitimate expectation has received implicit judicial recognition in Singapore. The applicant submitted that Tan J had in that case assumed that judicial review could be used to protection legitimate expectations of substantive benefit. The applicant further contended that a legitimate expectation arose on the facts. Firstly, the SLA Circulars and the SLA website constituted clear and unambiguous representations that the DP would be computed on the basis of the DC Table. Secondly, in deciding whether to acquire the Land and in determining the appropriate price it was willing to pay, the applicant was induced by the representations. Thirdly, the SLA Circulars and the SLA website were circulated by a person with actual or ostensible authority. Lastly, the applicant belonged to the class of persons to whom the representations were reasonably expected to apply. The applicant also argued that there was no way for it to discover that the SLA had considered directly-alienated land to be an exception to the prescribed method of assessment. There was no publicly available document which stated that directly-alienated land was an exception to the prescribed method of assessment. There was in fact no way for the applicant to find out that the Land was directly alienated to its former owner. The Land Return Clauses in the two lease documents merely state that the DP would be payable in accordance with the DP Clauses. The DP Clause is found in all state leases and there is therefore nothing to disturb the applicant's understanding that the DP would be assessed in accordance with the DC Table.

102 The SLA relied on *UDL Marine* for the proposition that the High Court had, in that case, doubted the existence of the doctrine of substantive legitimate expectation in our law. The SLA, however, conceded that local jurisprudence has not definitively pronounced whether the doctrine of substantive legitimate expectation is part of Singapore law. The SLA submitted that the reasons for and against the said doctrine are finely balanced. In England, the doctrine is hedged with qualifications. Even then, the English approach was categorically rejected by the Australian High Court in *Ex p Lam*, where the court found that the English position did not sit well with the Australian constitutional framework. The SLA also asserted that no expectations whatsoever arose in this case. The threshold for a representation that is clear, unambiguous and devoid of qualification is a high one. Further, the applicant in fact already knew or ought to have known that the DP in its case would be assessed via a spot valuation by the Chief Valuer at 100% in enhancement in land value. There were media releases concerning the redevelopment of a property located at Market Street. Any reasonable developer would have noticed that the leases contained a special covenant — the Land Return Clause
— which is not ordinarily found in other State leases.

103 The Attorney-General argued that the doctrine of substantive legitimate expectation should not be adopted in Singapore for three reasons. First, the doctrine was developed in England against the backdrop of the Human Rights Act 1998 and the pressure to assimilate European doctrine into the common law. Second, the underlying rationale of the doctrine is that of abuse of power, which is not principled. Third, the doctrine is inconsistent with the doctrine of separation of powers as enshrined in the Singapore Constitution. In any event, no legitimate expectation arose on the facts. There was no clear, unambiguous or unqualified representation. The SLA Circulars were directed to the general public and did not have the character of a contract. There was also no inducement.

My decision on the doctrine of legitimate expectation

104 The above analysis (at [97] to [100]) shows that case law in Singapore has not addressed directly the issue of whether the doctrine of substantive legitimate expectations is part of Singapore law.

The separation of powers

105 Both the SLA and the Attorney-General placed especial emphasis on the cases of *Ex p Lam* and
Mount Sinai. I shall deal with both cases in turn.

106 Both the SLA and the Attorney-General relied on *Ex p Lam* for the proposition that the doctrine of substantive legitimate expectation was influenced by European law and is inconsistent with the Australian Constitution and, more specifically, the separation of powers. As Singapore and Australia both have written constitutions, the reasoning in *Ex p Lam* also applies to Singapore.

107 As a preliminary matter, I note that this line of reasoning was present in only McHugh and Gummow JJ's speech and thus did not command the assent of the majority of the court. Gleeson CJ and Hayne J, in separate speeches, did not consider the question of whether the doctrine of substantive legitimate expectation ought to be part of Australian law. Callinan J opined that the said doctrine is not part of Australian law but did not cite the Australian Constitution and the separation of powers as a reason for this holding (see [87] above). This line of reasoning was also not adopted by the Canadian Supreme Court in *Mount Sinai.*

108 Secondly, although European law may have influenced English law, is the English system of government, with its unwritten Constitution, fundamentally different from the Singaporean and Australian systems of government with their written Constitutions? Implicit in the SLA's and the Attorney-General's argument is that a written constitution is a pre-requisite for the separation of powers. According to this argument, the written constitutions of Australia and Singapore explicitly demarcate the powers that are to be allocated to the legislative, executive and judicial branches respectively and it would therefore tantamount to judicial overreach for the judiciary to enforce substantive legitimate expectations. However, it is clear that the UK system, despite the absence of a written constitution, also recognises the separation of powers. In the House of Lords decision of *Regina v Secretary of State for the Home Department, Ex parte Fire Brigades Union and others* [1995] 2 AC 513 ("*Ex p Fire Brigades*"), Lord Keith of Kinkel said (at 567D – E):

> **It is a feature of the peculiarly British conception of the separation of powers that Parliament, the executive and the courts have each their distinct and largely exclusive domain.** Parliament has a legally unchallengeable right to make whatever laws it thinks right. The executive carries on the administration of the country in accordance with the powers conferred on it by law. The courts interpret the laws, and see that they are obeyed. *This requires the courts on occasion to step into the territory which belongs to the executive, to verify not only that the powers asserted accord with the substantive law created by Parliament but also that the manner in which they are exercised conforms with the standards of fairness which Parliament must have intended.* Concurrently with this judicial function Parliament has its own special means of ensuring that the executive, in the exercise of delegated functions, performs in a way which Parliament finds appropriate. [emphasis added in bold and in italics]

109 As a side-note, this case was decided when the House of Lords was still functioning as a court of law, 14 years before the establishment of the Supreme Court of the United Kingdom in 2009 which formalized the separation of the legislative and the judicial functions of the House of Lords in order to comply with the European Convention on Human Rights. In this respect, I refer to a consultation paper entitled *Constitutional Reform: A Supreme Court for the United Kingdom* (July 2003, CP11/03) (available at

http://webarchive.nationalarchives.gov.uk/+/http:/www.dca.gov.uk/consult/supremecourt/supreme.pd last accessed 28 October 2013) (at para 3):

> **It is not always understood that the decisions of the 'House of Lords' are in practice decisions of the Appellate Committee and that non judicial members of the House never take part in the judgments. Nor is the extent to which the Law Lords themselves have decided to refrain from getting involved in political issues in relation to legislation on which they might later have to adjudicate always appreciated.** The fact that the Lord Chancellor, as the Head of the Judiciary, was entitled to sit in the Appellate and Judicial Committees and did so as Chairman, added to the perception that their independence might be compromised by the arrangements. *The Human Rights Act, specifically in relation to Article 6 of the European Convention on Human Rights, now requires a stricter view to be taken not only of anything which might undermine the independence or impartiality of a judicial tribunal, but even of anything which might appear to do so.* [emphasis added in bold and in italics]

110 It cannot be argued, therefore, that the doctrine of substantive legitimate expectation should not be law in Singapore simply because Singapore has a written constitution while England, which recognises the doctrine, does not. Instead, this issue should be looked at from first principles.

111 If private individuals are expected to fulfil what they have promised, why should a public authority be permitted to renege on its promises or ignore representations made by it? If an individual or a corporation makes plans in reliance on existing publicized representations made by a public authority, there appears no reason in principle why such reliance should not be protected.

112 The upholding of legitimate expectations is eminently within the powers of the judiciary. In the context of private law, this is expressed through the enforcement of contracts (which upholds bargains freely made) and the equitable doctrine of estoppel (which upholds the reliance interest of a representee if a representor resiles from his representation inequitably). However, in the public law sphere, in deciding whether a legitimate expectation ought to be upheld, the court must remember that there are concerns and interests larger than the private expectation of an individual or a corporation. If there is a public interest which overrides the expectation, then the expectation ought not to be given effect to. In this way, I believe the judiciary can fulfil its constitutional role without arrogating to itself the unconstitutional position of being a super-legislature or a super-executive.

113 In my view, there ought to be no difference in principle between procedural and substantive legitimate expectations. The reasons enumerated above do not distinguish between the procedural and the substantive and apply equally to both.

114 In practice, it may be difficult to distinguish between the procedural and substantive. This was acknowledged in *Mount Sinai* (at [35]):

> In affirming that the doctrine of legitimate expectations is limited to procedural relief, it must be acknowledged that in some cases it is difficult to distinguish the procedural from the substantive. In Bendahmane v. Canada, supra, for example, a majority of the Federal Court of Appeal considered the applicant's claim to the benefit of a refugee backlog reduction program to be procedural (p. 33) whereas the dissenting judge considered the claimed relief to be substantive (p. 25). A similarly close call was made in Canada (Attorney General) v. Canada (Commissioner of the Inquiry on the Blood System), [1996] 3 F.C. 259 (T.D.). An undue focus on formal classification and categorization of powers at the expense of broad principles flexibly applied may do a disservice

here. The inquiry is better framed in terms of the underlying principle mentioned earlier, namely that broad public policy is pre-eminently for the Minister to determine, not the courts.

115 The SLA and the Attorney-General referred, in particular, to [27] and [28] of *Mount Sinai* to buttress their argument that the doctrine of legitimate expectation should not be recognised in Singapore. The two paragraphs cited are as follow:

> 27 In ranging over such a vast territory under the banner of "fairness", it is inevitable that sub- classifications must be made to differentiate the situations which warrant highly intrusive relief from those which do not. Many of the English cases on legitimate expectations relied on by the respondents, at the low end, would fit comfortably within our principles of procedural fairness. At the high end they represent a level of judicial intervention in government policy that our courts, to date, have considered inappropriate in the absence of a successful challenge under the Canadian Charter of Rights and Freedoms.
>
> 28 Canadian cases tend to differentiate for analytical purposes the related concepts of procedural fairness and the doctrine of legitimate expectation. There is, on the one hand, a concern that treating procedural fairness as a subset of legitimate expectations may unnecessarily complicate and indeed inhibit rather than encourage the development of the highly flexible rules of procedural fairness: D. Wright, "Rethinking the Doctrine of Legitimate Expectations in Canadian Administrative Law" (1997), 35 Osgoode Hall L.J. 139. On the other hand, there is a countervailing concern that using a Minister's prior conduct against him as a launching pad for substantive relief may strike the wrong balance between private and public interests, and blur the role of the court with the role of the Minister.

116 The two paragraphs, read in isolation, seem to suggest that substantive relief is denied as a matter of course because of a perceived need to rein in inappropriate judicial intervention and that the doctrine of legitimate expectations has no place in Canadian law. The procedural aspect of the doctrine is better analysed as a matter of procedural fairness, while the substantive aspect is better analysed as a matter of promissory estoppel. However, at [31], McLachlin CJC and Binnie J stated:

> It is difficult at one and the same time thus to lower the bar to the application of the doctrine of legitimate expectation (for good policy reasons) but at the same time to expand greatly its potency for overruling the Minister or other public authority on matters of substantive policy. One would normally expect more intrusive forms of relief to be accompanied by more demanding evidentiary requirements.

The court proceeded to state that promissory estoppel is available against a public authority. Promissory estoppel is to be preferred to legitimate expectations because the requirements for granting relief under promissory estoppel are more stringent than those for legitimate expectations (at [42]):

> It is to be emphasized that the requirements of estoppel go well beyond the requirements of the doctrine of legitimate expectations. **As mentioned, the doctrine of legitimate expectations does not necessarily, though it may, involve personal knowledge by the applicant of the conduct of the public authority as well as reliance and detriment.** Estoppel clearly elevates the evidentiary requirements that must be met by an applicant. [emphasis added]

117 The difference between the two doctrines would therefore appear to be the requirements of proof of an applicant's personal knowledge together with actual reliance and detriment. The Canadian court was therefore not denying substantive relief altogether but was amenable to granting it in a less liberal fashion, with an applicant having to prove certain matters to the satisfaction of the court.

The doctrine and its requirements

118 In my opinion, the doctrine of legitimate expectation should be recognised in our law as a stand-alone head of judicial review and substantive relief should be granted under the doctrine subject to certain safeguards. Having regard to the case law from the various common law jurisdictions and applying some commonsensical principles, I believe the doctrine can operate effectively and fairly in the following manner without the court overstepping its judicial role:

(a) The applicant must prove that the statement or representation made by the public authority was unequivocal and unqualified;

(i) If the statement or representation is open to more than one natural interpretation, the interpretation applied by the public authority will be adopted; and

(ii) The presence of a disclaimer or non-reliance clause would cause the statement or representation to be qualified.

(b) The applicant must prove the statement or representation was made by someone with actual or ostensible authority to do so on behalf of the public authority;

(c) The applicant must prove that the statement or representation was made to him or to a class of persons to which he clearly belongs;

(d) The applicant must prove that it was reasonable for him to rely on the statement or representation in the circumstances of his case.

(i) If the applicant knew that the statement or representation was made in error and chose to capitalize on the error, he will not be entitled to any relief;

(ii) Similarly, if he suspected that the statement or representation was made in error and chose not to seek clarification when he could have done so, he will not be entitled to any relief;

(iii) If there is reason and opportunity to make enquiries and the applicant did not, he will not be entitled to any relief.

(e) The applicant must prove that he did rely on the statement or representation and that he suffered a detriment as a result;

(f) Even if all the above requirements are met, the court should nevertheless not grant relief if:

(i) Giving effect to the statement or representation will result in a breach of the law or the State's international obligations;

(ii) Giving effect to the statement or representation will infringe the accrued rights of some member of the public;

(iii) The public authority can show an overriding national or public interest which justifies the frustration of the applicant's expectation.

Application of the doctrine's requirements to the facts

119 I shall first deal with the statements or representations set out in the SLA website. The use of the website is governed by its Terms of Use (see [9] above) which explicitly state that "the SLA does not make any representations or warranties whatsoever" including "any representations or warranties as to the accuracy, completeness, reliability, timeliness, currentness, quality or fitness for any particular purpose of the Contents of this Site". The representations set out in the SLA website were therefore qualified and cannot found a claim for substantive relief under the doctrine of legitimate expectation. Faced with such a wide disclaimer, the applicant should have written to the SLA to confirm its alleged understanding of how the policy would work in practice and, more specifically, how it would impact the particular transaction that the applicant was contemplating getting into. It did not do so and cannot now claim relief under the doctrine.

120 I next consider the SLA Circulars. The SLA Circulars were circulated to the public at large. However, realistically speaking, the only people who would have read (or would be expected to read) the SLA Circulars were property developers or their advisors. The applicant, a property developer, is clearly within the class of persons that the SLA Circulars were targeted at.

121 The SLA Circulars did contain unequivocal and unqualified statements or representations. The 2000 SLA Circular stated that the "determination of DP will be based on the published [DC Table] rates". The 2007 SLA Circular reiterated this by its statement that the "determination of DP will still be based on the published [DC Table] rates". Both circulars also enumerated certain exceptions to the applicability of DC Table: where the use as spelt out in the particular title restriction does not fit into any of the use groups and where the lease tenure is upgraded (only the 2000 Circular). The two Circulars stated that the SLA reserves the right to determine if title restrictions should be lifted. However this does not mean that the SLA also reserves the further right to deviate from the DC Table if title restrictions are indeed lifted. Both Circulars did not state that there might be other unpublished exceptions or policies.

122 There was no dispute that the SLA Circulars and the SLA website were published by or with the authority of the SLA.

123 The applicant must prove that it was reasonable for him to rely on the statement or representation. The applicant must also prove that he did rely on the statement or representation and that he suffered a detriment as a result. The applicant averred that it had relied upon the representation in the SLA Circulars that DC Table rates would apply in purchasing the land. It would appear therefore that reliance was placed on the SLA's publications and if the applicant now has to pay a much higher DP than was represented, there would definitely be detriment caused to the applicant. However, was it reasonable for the applicant to have relied on the SLA's publications in the circumstances of this case?

124 The Land Return Clause (present in the leases of both Plots) (see [4] above) provided that the applicant as lessee was obliged to notify the lessor, the Singapore Government, if the land in question was not used for the purposes specified. Upon notification, the

Government would have a year to decide whether or not to buy over the land at Land Acquisition Act (Cap 152, 1985 Rev Ed) rates. Such rates might turn out to be lower than the price which the land would have fetched in the market, simply because potential purchasers would have paid a higher price in the anticipation of getting approval for a change of the use of the land or for an increase in the plot ratio. In particular, s 33(5)(*e*) of the Land Acquisition Act explicitly states that:

> the market value of the acquired land shall be deemed not to exceed the price which a bona fide purchaser might reasonably be willing to pay, after taking into account the zoning and density requirements and any other restrictions imposed by or under the Planning Act (Cap. 232) as at the date of acquisition and any restrictive covenants in the title of the acquired land, and **no account shall be taken of any potential value of the land for any other use more intensive than that permitted by or under the Planning Act as at the date of acquisition.** [emphasis added]

The applicant in purchasing the Land took upon itself the risk of compulsory acquisition which, if it had occurred, could have resulted in a huge loss.

125 The SLA furnished evidence that the Land Return Clause was present in only 242 State leases, representing only 1.25% of the total number of State leases. The applicant, an experienced property developer, would have known that the Land Return Clause was peculiar and atypical of State leases. The applicant tried to understate this by arguing that the Land Return Clause merely referred back to the DP Clause for the computation of the DP payable and that it was therefore unaware of the significance of the Land Return Clause. I was not convinced by this. The Land Return Clause should have alerted an experienced property developer like the applicant to the fact that the Land was not under a "normal" State lease.

126 It was widely reported in the local media in 2008 that Capitaland had to pay a DP equivalent to 100% of the enhancement in land value to redevelop the Market Street Car Park. At the hearing, the applicant tried to downplay this by saying that it understood 100% of the enhancement in land value to mean 100% of the enhancement in land value as indicated by the DC Table (because the convention after the 2007 SLA Circular was to charge 70%, an increase from the 50% payable under the 2000 SLA Circular). I accept that the local media reports did not state the method upon which the 100% enhancement in value was calculated. However, the press release by Capitaland on 3 January 2008 (almost two years before Lot 1338M was acquired), stated that the said redevelopment was subject to two conditions, one of which was "the payment by the lessee (CCT) of 100% of the enhancement in land value as assessed by the Chief Valuer in a spot valuation".

127 Considering the evidence cumulatively, the irresistible inference is that the applicant ought to have known that the DP for the Land would not be assessed according to the DC Table. At the very least, the applicant should have written to the SLA to ask if DC Table rates would be applied to State leases which contain the Land Return Clause, especially in the light of the widely-reported Market Street Car Park redevelopment. In fact, the applicant started construction work sometime after 8 April 2011 and before the SLA letter dated 29 November 2011, where the SLA first approved the lifting of title restrictions and stated that the DP would be assessed at 100% of the enhancement in land value in a spot valuation. The construction costs could very easily have been incurred for nothing had the SLA not given approval for the lifting of title restrictions in the first place.

128 As an experienced property developer going into a multi-million dollar transaction, it was therefore not reasonable for the applicant to have relied solely on the SLA's publications in the circumstances of this case. It was in the business of making money from land

development. It had many professional advisors and could have easily checked with the SLA on what the DP would be if it decided to buy the Land and embark on its redevelopment plans. In any case, the SLA had made it clear in its correspondence with the applicant that the DP was assessed without reference to the DC Table.

129 Assuming that the applicant had satisfied the first five requirements (which it clearly had not) for invoking the doctrine of legitimate expectation to claim relief, there would still be the safeguards in the sixth requirement to consider. As the SLA has rightfully pointed out, it is under a statutory duty to "optimise land resources" (s 6(1)(*a*) of the SLA Act) and to "have regard to efficiency and economy and to the social, industrial and commercial and economic needs of Singapore" in the carrying out of its functions (s 6(2)(*a*) of the SLA Act). Its statutory duty would encompass getting the best returns for the State when it deals with State land. This would in turn benefit the public at large. It is therefore unacceptable in the circumstances here to argue that the State's finances would not suffer as much as the applicant's if the SLA were to make an exception for this case and not apply its unpublished policy relating to directly-alienated State land to the Land here. The overriding public interest must therefore prevail over the financial interests of a commercial enterprise like the applicant in this case.

Conclusion and costs

130 The applicant has failed to show irrationality on the part of the SLA or to establish a legitimate expectation on the facts of this case. Accordingly, its application for judicial review on these grounds is dismissed.

131 The applicant is to pay the costs of the SLA and of the Attorney-General, such costs to be agreed or taxed. The parties may also agree that the costs be fixed by me. In that event, I will fix the amount of costs after hearing their submissions on the appropriate quantum to award.

III. Piano Teacher Case

Read the short summary of the case and think about what principles should be taken into account in a case of legitimate expectation. On which of these principles is the court's argumentation based? Do you agree with the argumentation?

Short Summary of the case BGE 137 I 69

1. Overview

- Revocation of an initially incorrect ordinance; Art. 9 of the Swiss Constitution
- The supervisory authority is also competent to revoke the ordinance, which was originally issued by the supervised authority
- Requirements for revocation of an ordinance (decision):
    - There are opposed interests of A) a correct implementation of the law (principle of legality) and B) the protection of legitimate expectations (if the requirements for the protection are met in the first place)

- Assessment of the requirements for the protection of legitimate expectations
- Consideration/deliberation of the respective interests

2. Facts and Findings

X, a pianist and conservatory student (Music College) was an aspiring music teacher. He had experienced difficulties to perform his final exam in front of an audience due to emotional stress. Therefore, he was granted an exception to repeat that same exam in front of the examination board and without a public audience. The examination board offered him this setting. He passed the exam and received a written protocol from the examination board. Hereinafter, he received a written statement in the form of an administrative decision that he had successfully completed his educational training for his teaching certificate.

The director of the school requested that the certificate should not be issued because X had not completed the aforementioned exam in front of a public audience. Subsequently, the competent authority (EKSD) decided to refuse the issuing of the certificate. The supervisory authority (EKSD) argued that the exam was not performed in accordance with the law and that the initial administrative decision (decision that X passed the exam) was therefore incorrect and had to be revoked although it was already legally binding.

The Federal Court argues that X had reason to believe that the procedure was correct and that the examination board was competent to decide that he could perform the exam without the presence of an audience. Therefore, he relied on the initial administrative decision that he had passed the exam.

The decision to revoke a (already legally binding) administrative decision is subject to strict rules: Such an administrative decision cannot be revoked if the interest of protection of legitimate expectations is considered to be higher than the interest of the correct implementation of the law. There are exceptions of this rule; in particular if there is a substantial public interest in the correct implementation of the law.

In this case the court considered X's interest of the protection of his legitimate expectations based on Art. 9 of the Swiss Federal Constitution to be higher than the interest to implement the formal "correct" law provisions; particularly with regard to arrangements he had already made. He would face serious disadvantages if the initial decision was revoked.

The court decided that the authority was bound by the initial administrative decision and that the administrative decision could not be revoked.

IV. Questions to the Decision

1. What principles should be taken into account in a case of legitimate expectation?
2. On which of these principles is the court's argumentation based?
3. Do you agree with the argumentation?

H Good Administration (Lecture 5)

I. Article 41 of Charter of Fundamental Rights of the European Union

Read the article below and think about the advantages and disadvantages of codifying the right to good administration as a fundamental right. Do you think there is something missing in the article that you think would be important for "good administration"? Are there further guarantees codified as fundamental rights in your country to ensure "good administration"?

Article 41

Right to good administration

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.

2. This right includes:

(a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;

(b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;

(c) the obligation of the administration to give reasons for its decisions.

3. Every person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.

4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

II. Questions to the Article

1. What are the advantages and disadvantages of codifying the right to good administration as a fundamental right?
2. Do you think there is something missing in the article that you think would be for "good administration"?

3. Are there further guarantees codified as fundamental rights in your country to ensure "good administration"?

III. Annual Report of the European Ombudsman

Read the report and think about what is considered as "good administration" in it. Would you agree? What else would you understand under "good administration"?

European Ombudsman

Annual Report 2020

EN

European Ombudsman

Annual Report 2020

Introduction

Emily O'Reilly, European Ombudsman.

2020 was a tragic year for many people across the globe, as loved ones were lost through the COVID-19 pandemic and many others suffered, and continue to suffer, serious illness. The year was also a stark reminder of the importance of public administrations in whose competence and accountability we can trust. The pandemic upended people's lives and put profound strain on our health systems, our societies and our economies. At EU-level it demanded rapid decision making on EU funding, on the procurement of products and services to help tackle the pandemic, and on what policies to prioritise.

Yet it is precisely in challenging times that the highest standards of good administration are required to reassure and to comfort the public that the measures taken are the correct ones and will be properly implemented.

As European Ombudsman, it is our role to assist in that process. We therefore reminded the European Commission, in April, that all decisions related to the pandemic need to be taken as transparently as possible. We followed this up in July with information-gathering requests to the European Medicines Agency, the European Investment Bank and the Commission, and two inquiries concerning the Council of the EU and the European Centre for Disease Control. The aim is to ensure that all decision making related to the pandemic – whether it concerns the assessment of new medicines or the choice of projects to be funded – is clear, accessible, and justified. Wanting to ensure there was no interruption to our case-handling work, my Office made a fast transition to a digital workplace – the number of new complaints handled were similar to those handled in 2019.

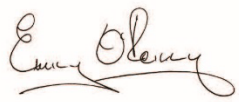
The year also saw inquiries with highly relevant conclusions for the entire EU administration. In one case, we found maladministration in how the European Banking Authority (EBA) handled a move by its Executive Director to a financial sector lobby group. Our recommendation was accepted and followed by the EBA. In a case concerning sustainable finance, we found that the relevant EU law is too vague to allow for an adequate assessment of conflicts of interest in the context of decisions for awarding of EU-funded contracts.

We carried out several important inquiries related to the transparency of decision making around environmental issues. These included an inquiry into why a 'sustainability impact assessment' was not finalised before the EU-Mercosur trade deal was agreed, and an inquiry into whether the European Investment Bank gives sufficient environmental information about the projects it finances.

An Ombudsman's work also entails following up on previous inquiries and making sure that recommendations that have been accepted are being implemented. I therefore launched a follow-up inquiry to examine how the European Border and Coast Guard Agency's (Frontex) 'complaints mechanism' – which established following a previous Ombudsman inquiry – works in practice.

The year 2020 was a special one for the European Ombudsman as it marked our 25th anniversary. This provided an opportunity to celebrate what the Office has become: a trusted upholder of transparency and ethical standards in the EU administration. We also looked back at the profile of cases over the years and the positive changes that EU institutions and bodies have implemented as a result of our work. We saw immediate results in many cases, but also a more general positive influence over time. Our review also strengthened our awareness of, and our gratitude for, the other rivers of influence that flow alongside our work, including an engaged and supportive European Parliament, a vibrant civil society, strong media, and EU institutions that believe in the value of an ombudsman's work.

In 2021, I look forward to implementing our new strategy 'Towards 2024', which sets out how I plan to achieve further positive impact with the EU administration, maintain the real-life relevance of our work and, by raising public awareness of our activities, enable citizens to further exercise the rights granted to them under the Treaties and the Charter of Fundamental Rights.



Emily O'Reilly

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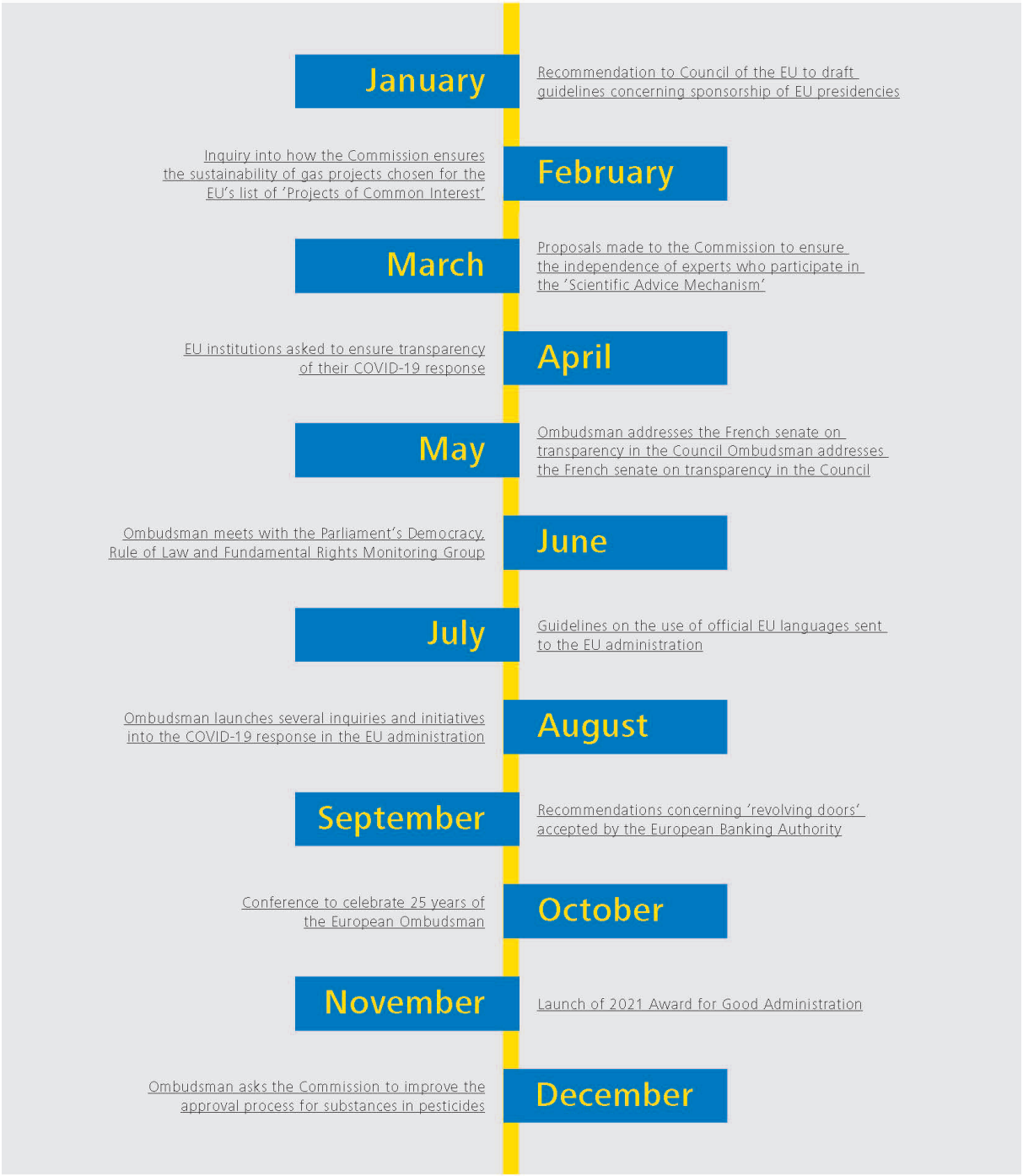
2020 at a glance

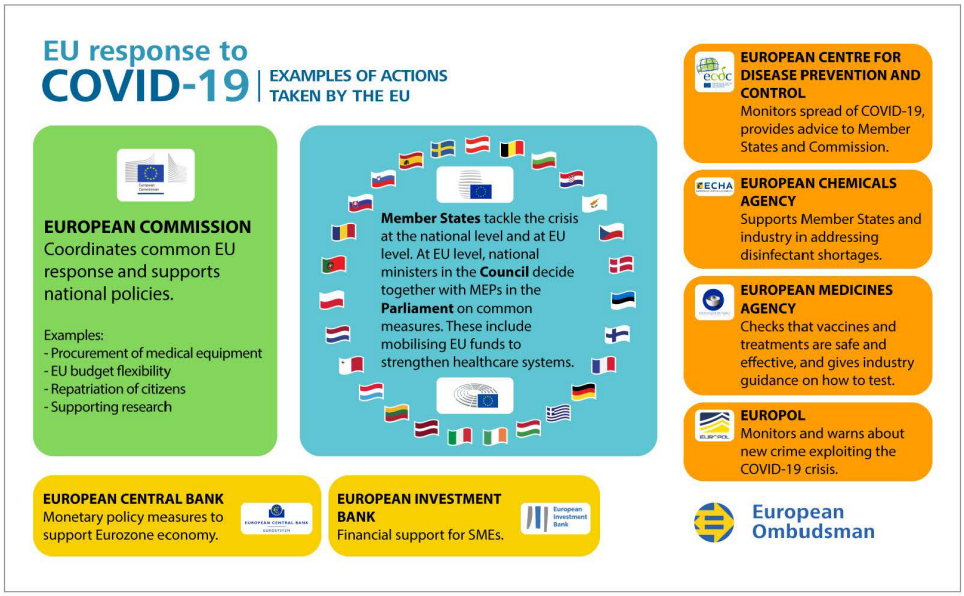

January
Recommendation to Council of the EU to draft guidelines concerning sponsorship of EU presidencies
Inquiry into how the Commission ensures the sustainability of gas projects chosen for the EU's list of 'Projects of Common Interest'
February
March
Proposals made to the Commission to ensure the independence of experts who participate in the 'Scientific Advice Mechanism'
EU institutions asked to ensure transparency of their COVID-19 response
April
May
Ombudsman addresses the French senate on transparency in the Council Ombudsman addresses the French senate on transparency in the Council
Ombudsman meets with the Parliament's Democracy, Rule of Law and Fundamental Rights Monitoring Group
June
July
Guidelines on the use of official EU languages sent to the EU administration
Ombudsman launches several inquiries and initiatives into the COVID-19 response in the EU administration
August
September
Recommendations concerning 'revolving doors' accepted by the European Banking Authority
Conference to celebrate 25 years of the European Ombudsman
October
November
Launch of 2021 Award for Good Administration
Ombudsman asks the Commission to improve the approval process for substances in pesticides
December

2

Key topics

The Ombudsman helps people, businesses and organisations as they engage with the EU institutions, bodies and agencies. Problems can range from lack of transparency in decision making, to refusal of access to documents, to violations of fundamental rights, and contractual issues. The profile of complaints changes according to the worries and concerns Europeans face in a given year. This year's annual report contains new sections on inquiries related to COVID-19 and transparency in environmental decision making. The various sections give an overview of the key cases related to a particular area.

2.1. COVID-19 related inquiries and initiatives



Infographic on the EU response to COVID-19 crisis: examples of actions taken by the EU.

In response to the unprecedented situation created by COVID-19, many of the EU institutions, agencies and bodies were required to adopt targeted measures and adapt their working processes to deal with the challenges of the emergency. These ranged from helping to coordinate the public health response in the EU and the approval of dedicated medicines to economic measures to address the social and economic impact of the crisis.

In April 2020, the Ombudsman began examining the work of the EU administration in the context of the COVID-19 crisis. She reminded the European Commission and European Council that their obligations concerning transparency were just as important during a crisis.

In July 2020, the Ombudsman sent three information-gathering requests – to the European Medicines Agency (EMA), the European Investment Bank (EIB) and the Commission – and opened two inquiries – concerning the European Centre for Disease Control (ECDC) and the Council of the EU – as part of the Office's role monitoring how the EU's frontline institutions were carrying out their work during the pandemic.

The Ombudsman examined how the ECDC gathered and communicated data linked to the COVID-19 pandemic. In addition to inspecting documents related to the ECDC's role in managing information about the pandemic, the Ombudsman's inquiry team also conducted a meeting with ECDC representatives in October 2020. The Ombudsman then asked for more information on specific parts of the ECDC's work, including related to the transparency of its rapid risk assessment. The aim of the inquiry is to identify some of the issues that may have hampered the ECDC as it sought to tackle the pandemic.

In the inquiry concerning the Council, the Ombudsman assessed its decision to temporarily derogate from the standard way of taking decisions, and the implications this has had for the transparency of the process.

The Ombudsman asked the Commission about the transparency of the scientific advice it receives, its meetings with interest representatives, and its decisions related to emergency public procurement. The EIB provided the Ombudsman with information about how it ensures transparency and good administration while adopting measures to address the economic

fallout of the crisis. In response to the Ombudsman's questions, EMA said it was committed to ensuring the independence of how it assesses medicines for COVID-19 and to publishing clinical data about those medicines.

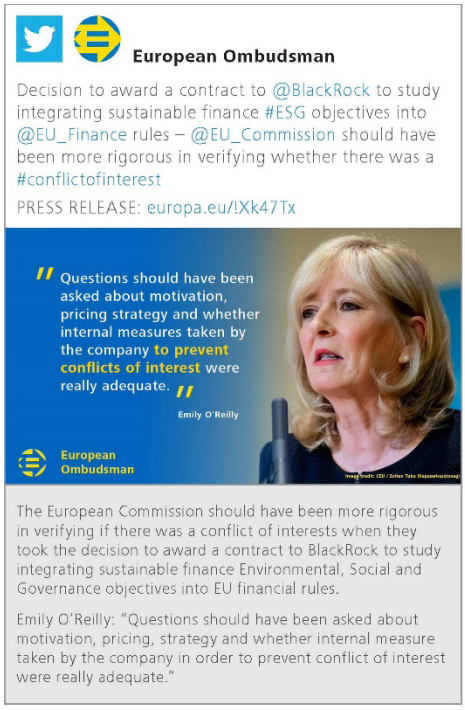
The Ombudsman also opened several complaint-based inquiries related to COVID-19, including the Commission's decision not to grant paid extensions to projects affected by the COVID-19 pandemic. The complainants – researchers in the Marie Skłodowska-Curie Actions (MSCA) programme – argued that the measures taken by the Commission are insufficient, as they do not allow them to continue their research without additional funding. In a letter outlining her preliminary findings, the Ombudsman asked the Commission to consider providing the research community with a dedicated online platform through which they can raise problems they are facing due to COVID-19 restrictions. The Ombudsman also urged the Commission to continue its efforts to find solutions for all MSCA researchers whose work was affected by the COVID-19 crisis and to encourage the organisations that received grants to avail of these solutions. The inquiry continued into 2021.

2.2. Ethical issues

Following complaints by Members of the European Parliament and a civil society organisation, the Ombudsman opened an inquiry into the Commission's decision to award BlackRock Investment Management a contract to carry out a study on integrating environmental, social and governance (ESG) objectives into EU banking rules. The Ombudsman's inquiry assessed how the Commission evaluated the company's offer in the context of the call for tenders for carrying out the study.

The Ombudsman found that the company's bid gave rise to concerns, since, as the world's largest asset manager, it has a financial interest in the sector at issue in the study. Furthermore, the low price of the company's bid could be perceived as part of a strategy to gain insights into, and influence over, the regulatory environment in this sector. As such, the Ombudsman found that the Commission should have been more rigorous in verifying that the company was not subject to a conflict of interest that may negatively affect its ability to execute the contract. However, given the limitations of EU rules on public procurement, the Ombudsman found that this did not amount to maladministration.

The Ombudsman suggested that the Commission update its guidelines on public procurement procedures for policy-related service contracts, giving clarity to staff as to when to exclude bidders due to conflicts of interest that may negatively affect the performance of the contract. The Ombudsman also suggested that the Commission consider strengthening the conflict of interest provisions in the Financial Regulation – the EU law governing how public procurement procedures financed by the EU budget are conducted. The Ombudsman wrote to the EU legislators to draw attention to her decision, particularly with regard to the Financial Regulation.



2.3. Fundamental rights

In November 2020, the Ombudsman opened an inquiry into how the European Border and Coast Guard Agency (Frontex) deals with alleged breaches of fundamental rights. The aim of the inquiry is to assess the effectiveness and transparency of Frontex's 'complaints mechanism' for those who feel their rights have been violated in the context of Frontex border operations, as well as the role and independence of Frontex's 'Fundamental Rights Officer'.

In opening the inquiry, the Ombudsman sent a set of detailed questions to Frontex regarding how and when Frontex will be updating the mechanism to reflect its expanded mandate; what happens to complainants who are faced with forced return while their complaint is still being processed; what appeal possibilities are open to complainants; how Frontex monitors complaints against national authorities; how those who have been affected by Frontex operations but are in non-EU countries can complain about alleged breaches of fundamental rights; and the role of the Fundamental Rights Officer in this process.

The Ombudsman also informed members of the European Network of Ombudsmen (ENO), with a view to their possible participation in the inquiry.

This own-initiative inquiry is a follow-up to the Ombudsman's recommendation in 2013 that Frontex set up an individual complaints mechanism, and that its Fundamental Rights Officer be in charge of the mechanism. Since then, such a mechanism was put in place and further developed, with a view to providing safeguards for fundamental rights in the context of Frontex's expanding mandate, as well as ensuring increased accountability and redress for those impacted by its actions.

Another key inquiry linked to fundamental rights focuses on how the Commission seeks to ensure that the Croatian authorities respect fundamental rights in the context of border management operations. The complainant, Amnesty International, raised concerns about border management by the Croatian authorities, drawing attention to alleged human rights violations linked to 'pushbacks' of migrants and other border operations. The complainant raised doubts as to whether Croatia has set up a 'monitoring mechanism' – which it was obliged to do in the context of the EU funding it received – to ensure that border management operations are fully compliant with fundamental rights and EU law.

The Ombudsman set out a series of questions to the Commission, seeking to establish the nature of the monitoring mechanism and how the Commission has verified it has been set up. If it has been created, the questions seek to establish how the Commission has verified its effectiveness and, more generally, how the Commission ensures that border management operations that receive EU funds ensure respect for fundamental rights.

2.4. Transparency in environmental decision making

In 2020, there were several inquiries concerning how decisions related to the environment and sustainability issues are taken. A group of civil society organisations turned to the Ombudsman after the Commission failed to finalise an updated 'sustainability impact assessment' (SIA) before the conclusion of the Mercosur-EU trade agreement in June 2019. The complainants argued that, by not taking this step, the Commission disregarded its own guidelines on SIAs and breached the EU Treaties, which contain sustainability goals for EU trade. The complainants also raised concerns about the fact that the interim impact assessment was not published when public consultations on the trade negotiations were ongoing and that, when it was published, it did not contain the latest information.

The Ombudsman put a series of questions to the Commission, including on how it intends to use the final report and whether the standard procedure for SIAs was followed.

The Ombudsman also looked into how the Commission ensures that the sustainability of gas projects is assessed before their inclusion on the EU's list of 'Projects of Common Interest' (PCIs) – cross-border energy infrastructure projects meant to help achieve EU energy and climate policy objectives. The Commission acknowledged that the sustainability assessment of candidate gas projects had been suboptimal, due to a lack of data and inadequate methodologies, and said it would update the criterion used for assessing the sustainability of projects that are candidates for inclusion on the next PCI list, which it will draw up in 2021. While the Ombudsman regretted that gas projects were included on previous PCI lists without having their sustainability properly assessed, she welcomed the Commission's pledge to ensure that this update is in place before the decision is taken on the next PCI list.

In July, the Ombudsman opened three inquiries – based on complaints from one environmental group – related to the disclosure of environmental information by the European Investment Bank (EIB). One inquiry concerns the EIB's refusal to grant public access to the minutes of meetings in which its management committee discussed the financing of a biomass project. The other two inquiries concern whether the EIB gives sufficient and timely environmental information about projects it finances either directly or indirectly.

In November, the Ombudsman closed an inquiry concerning how the Commission approves 'active substances' used in pesticides. In particular, the Ombudsman looked into the Commission's practice of approving active substances for which the European Food Safety Authority (EFSA) – the EU agency in charge of the scientific safety assessment – had identified

critical areas of concern or had identified no safe use. The Ombudsman also revisited the Commission's practice of approving substances for which additional data confirming their safety is needed (the 'confirmatory data procedure'). In the context of her inquiry, the Ombudsman set out in detail to the Commission why she considers that its current practices raise concerns. She closed the inquiry with three suggestions to the Commission: that it approve substances based only on uses that have been confirmed to be safe by EFSA; that the approval process is fully transparent; and that its use of the confirmatory data procedure is further restricted.

In April, the Ombudsman confirmed her finding of maladministration against the Council for not agreeing to proposals to improve the transparency of the decision-making process around the adoption of annual regulations setting fishing quotas. However, the Ombudsman welcomed the separate move by the Commission to make public documents related to proposals on fishing opportunities when they are transmitted to the Council.

2.5. Accountability in decision making

The Ombudsman has opened several inquiries aimed at improving the transparency of decision making, particularly by Member States in the Council. Her major inquiry in this area led to recommendations on improving legislative transparency in the Council, which were overwhelmingly supported by the European Parliament and many national parliaments. This led to some small but concrete improvements in 2020: the Council agreed to start proactively publishing progress reports on negotiations on draft laws, the Council mandate for negotiations with the European Parliament, and the calendar for trilogue meetings. These changes mark progress in one of the Ombudsman's key objectives – ensuring that citizens know what decisions governments are taking on their behalf in Brussels. The Ombudsman continues to encourage the Council to pursue its efforts to improve legislative transparency, notably by recording the identity of Member States when they express positions on draft laws.

Mário Centeno

This week we have launched the #Eurogroup document register, making it easier to access available documents. This step completes the list of measures to increase #transparency that were agreed in last September's EG, and were welcomed by @EUombudsman

This week we have launched the Eurogroup document register, making it easier to access available documents. This step completes the list of measures to increase transparency that were agreed in last September's Eurogroup, and were welcomed by the European Ombudsman.

In another inquiry with important implications for accountable decision making, the Commission agreed to implement measures to strengthen the transparency and usefulness of its database detailing planned national technical regulations by Member States. Under the EU Single Market Transparency Directive, the Commission and Member States may examine national technical regulations that other Member States intend to introduce. The Commission runs a database giving the public access to information on the draft measures. However, Member States can request that their proposed measures remain confidential. The Commission said it plans to give a detailed explanation on its website about how it will treat comments by interested parties. The Commission also intends to highlight best practices when it comes to notifications by Member States, and will take stronger action if a Member State is suspected of abusing the right to make confidential notifications.

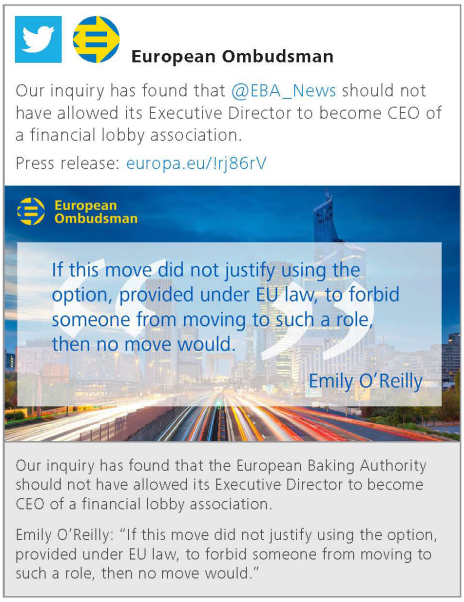
The Ombudsman in March concluded an inquiry into how the Commission ensures that scientific experts who advise it have no conflicts of interest. The inquiry was based on a complaint from a civil society organisation, which had raised concerns about the independence of experts who had contributed to a report on pesticides.

The inquiry focused more generally on the systems by which the Commission verifies the independence of experts that contribute under its 'Scientific Advice Mechanism'. The Ombudsman found these systems to be adequate but asked the Commission to ensure that, in future, all financial interests are included in experts' declarations of interests and that all such declarations are published.

2.6. Lobbying transparency

The challenge of so-called 'revolving doors' – where EU officials take positions in the private sector, or where individuals join the EU institutions from the private sector – is an area of particular focus for the Ombudsman. Revolving door moves can in some cases be damaging for the institutions themselves and damaging to the public perception of the EU.

In January, the Ombudsman opened an inquiry into the decision by the European Banking Authority (EBA) to allow its then executive director to take up a position as CEO of the Association for Financial Markets in Europe (AFME), an association representing banks and other financial institutions.



The Ombudsman found that the EBA should have forbidden the job move, and that the measures it put in place to prevent conflicts of interest were not sufficient to address the risks involved. She also found that, once the EBA had been notified of the planned move, it should have immediately withdrawn the executive director's access to confidential information.

The Ombudsman recommended that the EBA should, in future: forbid senior staff members from taking up certain positions after their term of office; set out criteria for when it will forbid such moves; and put in place internal procedures so that, once it is known that a staff member is moving to another job, their access to confidential information is immediately withdrawn.

In response to the Ombudsman's recommendations, the EBA said it intends to forbid senior staff from taking up certain positions when they leave. It also adopted a procedure for assessing post-employment obligations on staff, and a policy whereby it will suspend access to confidential information for staff known to be moving to the private sector. The Ombudsman welcomed the steps taken by the EBA and closed the case.

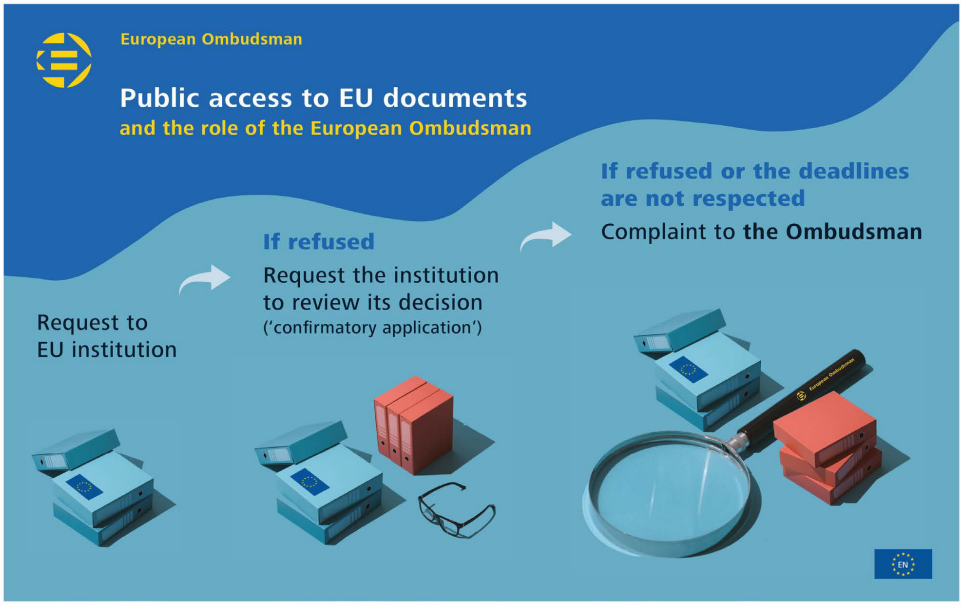
It is also important for institutions to monitor revolving door moves at staff level in the EU institutions, with desk officers having access to policy information that can be useful for the private sector. In one inquiry, a journalist turned to the Ombudsman because he sought public access to documents related to a corporate event attended by Commission staff members. He said he needed the documents to investigate whether a former Commission head of unit, who had taken up a position in a multinational company, acted in accordance with his legal obligations not to lobby former colleagues. While the Commission granted access to parts of the documents sought by the complainant, it refused to disclose the name of the former head of unit. The Ombudsman found that the former Commission head of unit must accept a certain degree of public scrutiny of his professional activities after his move to the private sector, and that the Commission's refusal to disclose the name of its former staff member therefore constituted maladministration.

Some inquiries concern the extent to which industry representatives or other interest groups have access to decision makers in the Commission, and how this access is documented. One such inquiry involved a journalist looking for documents related to a presentation by a biopharmaceutical company during a meeting with the Commission President in March 2020. The Ombudsman's inquiry is examining whether the Commission failed to provide sufficiently broad access to a presentation given at the meeting, failed to identify all documents related to this video conference, and failed to identify any documents related to other video conferences held in April 2020.

The Ombudsman's inquiry into corporate sponsorship of presidencies of the Council of the EU came to a successful close in June 2020 after the Council agreed to draw up guidance for Member States. The complainant, a German civil society organisation, had turned to the Ombudsman following sponsorship of the Romanian EU presidency (in the first half of 2019) by a major soft drinks company. The Ombudsman looked into the issue

of sponsorship of presidencies more generally. In her recommendation, she noted that, as the presidency is part of the Council, its activities are likely to be perceived by the wider European public as being linked to the Council and the EU as a whole. The Ombudsman therefore found that the sponsorship of presidencies entails reputational risks which the Council should address. In addition to the Council's positive response, a number of Member States (including the German presidency in the second half of 2020 and future presidencies) indicated that they would no longer accept sponsorship in the context of their presidencies.

2.7. Access to documents



Flowchart outlining the steps to follow in order to request public access to EU documents.

EU citizens have broad rights to access documents held by the EU institutions. The Ombudsman is a redress mechanism for those who face difficulties gaining access to these documents.

Various Ombudsman inquiries in 2020 resulted in access being granted to documents that are of wider public interest. The Ombudsman closed an inquiry in November, after the Commission agreed to release information about miscellaneous costs – amounting to EUR 8 320 – incurred during an official visit by the then President of the European Commission to Buenos Aires to attend a G20 summit. The Commission also agreed to proactively disclose information on the nature of such miscellaneous costs in future.

The European Economic and Social Committee (EESC) agreed to release information – such as flight details, ticket costs and seating class – related to a business trip by an EESC delegation to Shanghai, China, in July

2019. Closing the inquiry, the Ombudsman encouraged the EESC to establish a policy of proactive transparency about members' travel expenses.

Another inquiry concerned a request by a journalist for access to the reviews of the ethical, legal and social aspects of bids that the European Defence Agency had received for carrying out defence research projects. The Ombudsman found that the EDA should not have taken such a restrictive approach to the reviews of those bids that had been awarded EU funding. The EDA agreed that successful proposals should not benefit from the same level of protection as unsuccessful proposals and gave the complainant almost unrestricted access to the documents in question.

The Ombudsman examined Europol's (the EU Agency for Law Enforcement Cooperation) refusal to provide access to various agreements it entered into with Member States to create 'Joint Investigation Teams' for combatting cross-border crime, and to documents regulating the Joint Liaison Task Force on Migrant Smuggling. The Ombudsman found that Europol was justified in refusing full access to most of the documents but should grant partial access to a document entitled 'The Joint Liaison Task Force – Migrant Smuggling, draft Process Description', which described the activity of the taskforce. Europol then granted partial access to the document, with redactions that the Ombudsman found justified.

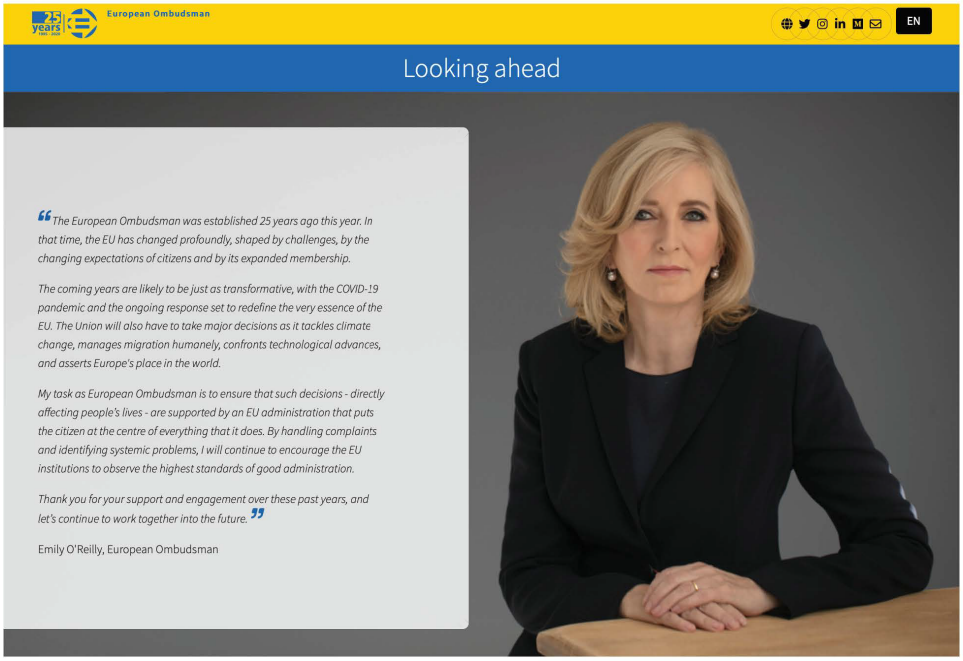
An inquiry concerning the European Council raised important questions about record keeping related to text and instant messaging. The complaint concerned a request for public access to mobile phone based messages sent by the President of the European Council to heads of state and government in 2018. The General Secretariat of the Council said that it did not hold any messages that would constitute a 'document', under the EU's rules on public access to documents. The complainants questioned this argument. The Ombudsman found no maladministration but noted that the EU institutions should reflect on how to ensure adequate record keeping when instant messages and texts are also used for communicating substantive information.

In October, the Ombudsman opened an inquiry into how Frontex deals with requests for public access to documents after receiving two complaints concerning difficulties with Frontex's dedicated online portal for dealing with such requests. Ombudsman case handlers met with representatives from Frontex to discuss how the portal was set up, how it is operated and why the public cannot submit access to document requests by other means, such as email.

The Ombudsman carried out a review of the 'fast-track procedure' for dealing with complaints about public access to documents held by the EU institutions. This review demonstrated that these complaints are now being dealt much faster: four times faster in 2019 than in 2014. This is important given their often highly time-sensitive nature. However, the review also identified issues with the indicative timeline, as well as compliance by institutions with the Ombudsman's recommendations. This will help us to optimise the procedure and improve how it is framed to potential complainants.

3

25 years of the European Ombudsman



Last page of the special scrollable web story produced for the 25th anniversary of the European Ombudsman's Office.

The European Ombudsman celebrated its 25th anniversary in 2020. Since being set up in 1995, the Office has handled over 57 000 complaints, conducted more than 7 300 inquiries and raised ethical and accountability standards across a range of areas and EU institutions.

Over the years, various innovations have helped ensure the Ombudsman continues to have an impact and remain relevant for citizens. These include creating the European Network of Ombudsmen, devoting designated case handlers to carry out strategic investigations and introducing a Fast-Track procedure for access to document complaints.

The main areas of the Ombudsman's work concern access to information and documents, accountability and public participation in EU decision making, problems with EU tenders and grants, and respect for fundamental and procedural rights.

Emily O'Reilly presided the digital conference on the 25th anniversary of the European Ombudsman from the European Parliament in Strasbourg, while some of the speakers were at the European Parliament in Brussels.

Dealing with individual complaints is the core of the Office's work. However, in recent years, the Ombudsman has increasingly used own-initiative powers to help to tackle systemic problems in the EU administration.

As a result of Ombudsman inquiries, EU trade negotiations have become more transparent, the results of clinical trials of medicines evaluated in the EU are made public, complaints mechanisms have been set up for asylum seekers who feel their fundamental rights have been breached, and ethics rules for European Commissioners have been strengthened.

The Ombudsman has also focused on broad areas related to good administration, such as improving the transparency of law making and making sure that rules on revolving doors are properly implemented.

The Office has influenced the behaviour of the EU administration by publishing guidelines on various issues, such as on: good administrative behaviour;

The European Ombudsman with Jeanne Barseghian (left), Mayor of Strasbourg, and Julia Dumay (right), Deputy Mayor for European Relations and EU institutions, during the opening ceremony of the 25 years exhibition, outside the town hall in Strasbourg.

the use of the EU's 24 official languages by the EU institutions; and how EU civil servants should interact with interest representatives. An Award for Good Administration – launched in 2016 – shines a spotlight on projects and actions by the EU administration that deliver real benefits for the public, and encourages the sharing of good ideas across the EU civil service.

The Office marked the 25th anniversary on social media, through a dedicated webpage and with a leaflet outlining the main achievements since it was set up. A mobile exhibition featuring highlights of the Ombudsman's work since 1995 was displayed outside the town hall in Strasbourg from October to November with the opening ceremony attended by Strasbourg Mayor Jeanne Barseghian. The exhibition then travelled virtually and physically to other public spots in the city. A special conference – 25 Years of the European Ombudsman – brought together high-level speakers to discuss the future of the Office. Among the broad range of issues discussed were the merits of giving the Ombudsman binding powers in relation to access to document requests, and the role of the Ombudsman in supporting national ombudsmen who are under pressure in their efforts to uphold the rule of law.

4

‘Towards 2024’

In 2020, the Office drew up a new strategy 'Towards 2024', which sets out objectives and priorities for the current term. It builds upon the successful 'Towards 2019' strategy of the previous term, which aimed to increase the impact, visibility and relevance of the Office.

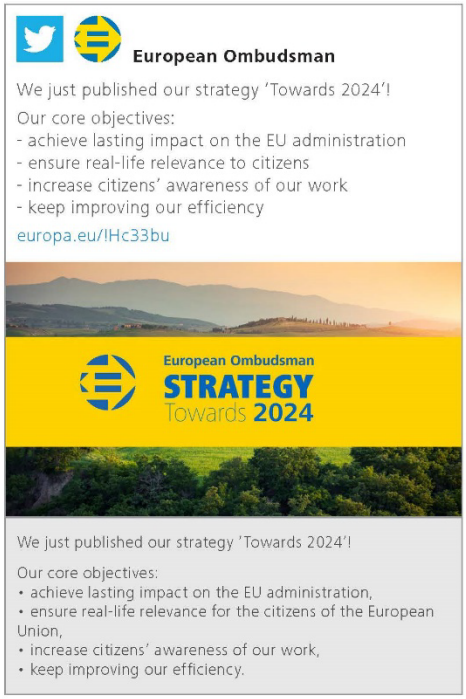
The strategy outlines the Ombudsman's mission to help support European citizenship by working with the EU institutions to create a more transparent, ethical and effective administration. It notes the changing context in which the Office operates and how it has shaped the public's understanding of what constitutes good administration.

It draws attention to the major policy issues facing the EU – such as climate change, the migration crisis, and rule of law problems within the EU – noting the importance of maintaining high ethical standards within the EU institutions so the public trusts the decisions and laws that are taken in the coming years.

The strategy aims to achieve four objectives:

- To make a **lasting positive impact** on the EU administration – priorities include developing a more systematic and substantive follow-up of the Ombudsman's work, and strengthening cooperation and dialogue with the EU institutions.
- To continue the **real-life relevance** of the Ombudsman's work – priorities include identifying the systemic trends in public administration, at EU and national levels, and assessing their implications for European democracy.
- Increasing **citizens' awareness** of the Ombudsman's work – priorities include developing a participatory approach with stakeholders and multipliers, such as civil society organisations, media, businesses, and other organisations.
- To further **increase the efficiency** of the Office's work – priorities include structuring the office, work processes and outreach in a flexible and adaptive way.

Concrete actions to achieve the objectives will be planned and evaluated on an annual basis.



5

Complaints and inquiries: how we help the public

The European Ombudsman helps people, businesses and organisations facing problems with the EU's administration by dealing with the complaints they submit, but also by proactively looking into broader systemic issues with the EU institutions.

With a view to streamlining how the Office deals with complaints and carries out inquiries, the Ombudsman's case-handling operations were streamlined in 2020, notably through the creation of a single Inquiries Directorate. This directorate brings together all staff dealing with complaints within the Ombudsman's mandate, which has helped further improve the consistency and efficiency of Ombudsman inquiries.

Despite the backdrop of the pandemic, there was no fall off in the core work of the European Ombudsman. The Ombudsman's online complaints system meant that complainants saw no disruption in the Office's ability to help them.

With a view to making it easier for the public to follow Ombudsman inquiries, and provide even greater transparency, the information about inquiries on the Ombudsman's website was improved and restructured in 2020. The changes include a central 'case page' for each inquiry, from which all relevant documents can also be accessed. Many of these case pages also now include a short descriptive overview of the inquiry and the latest developments.

The Office's diverse team of case handlers, and the website, reflect the Ombudsman's commitment to communicate with those seeking assistance in all 24 official languages of the EU. The website was also further improved in 2020, with a view to meeting high accessibility standards for persons with disabilities.

While the Ombudsman is not always in a position to inquire into all complaints received, the Office nonetheless tries to help all those who seek assistance, for example by providing advice on other possibilities for redress.

5.1. Type and source of complaints

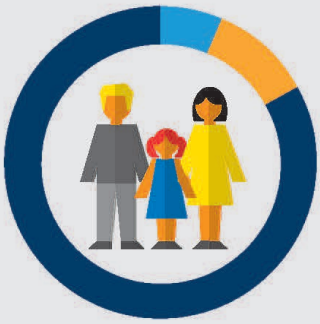
5.1.1. Overview of complaints and strategic inquiries

The Ombudsman may open an inquiry only into complaints that are within her mandate and have fulfilled the necessary 'admissibility criteria', such as having previously tried to resolve the matter directly with the institution involved. However, the Ombudsman's Office endeavours to assist all those that submit complaints. The new office structure has led to further improvements in how the Ombudsman deals with complaints, with a further reduction in the amount of time taken to complete inquiries.

The themes of the Office's work derive from the Ombudsman's mandate and the complaints received, given these account for most cases. As with previous years, transparency remains the leading topic of complaints, and this is also reflected in the Office's strategic work.

Advice, complaints and inquiries in 2020

20 302
People helped



16 892
Advice given through the Interactive Guide on the Ombudsman's website

2 148
New complaints handled

1 262
Requests for information replied to by the Ombudsman's services

370
Inquiries opened

365
Inquiries opened on the basis of complaints

5
Own-initiative inquiries opened

394
Inquiries closed

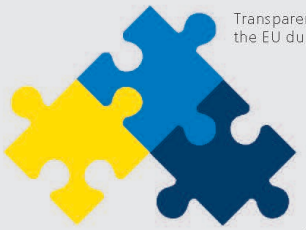
392
Complaint-based inquiries closed

2
Own-initiative inquiries closed

In addition to the Ombudsman's core work on complaints, the Ombudsman also conducts wider strategic inquiries and initiatives into systemic issues with EU institutions. In 2020, this included a series of inquiries and initiatives into the response by different EU institutions and agencies in the context of the COVID-19 crisis.

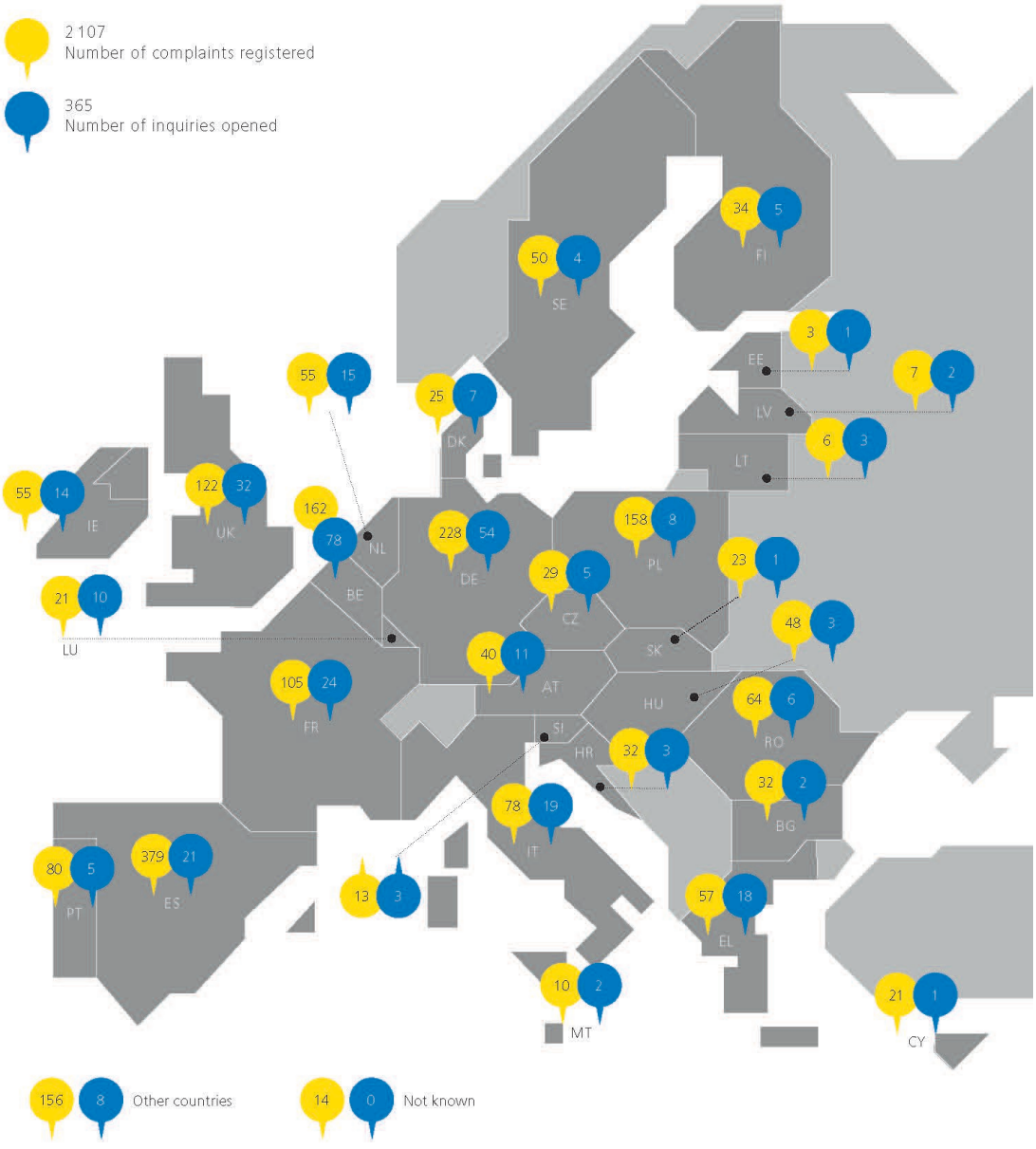
Topics of strategic work in 2020

Strategic inquiries



Strategic initiatives (requests for clarification, not formal inquiries)

National origin of complaints registered and inquiries opened by the European Ombudsman in 2020



5.1.2. Complaints outside the Ombudsman's mandate

In 2020, the European Ombudsman processed over 1 400 complaints that did not fall within her mandate, mostly because they did not concern the work of the EU administration. The greatest numbers of such complaints came from Spain, Poland and Germany.

Out of mandate complaints primarily related to problems citizens encountered with national, regional or local public bodies, national or international courts (such as the European Court of Human Rights) and private entities (including airline companies, banks or online businesses and platforms). In the main, citizens complained about issues concerning court cases, healthcare, consumer protection, employment and equal treatment.

The Ombudsman also received a variety of out of mandate complaints related to the COVID-19 crisis, such as on issues like healthcare, travel, employment and education, linked to measures national authorities put in place in response to the pandemic.

Other out of mandate complaints concerned EU institutions but related to political or legislative work.

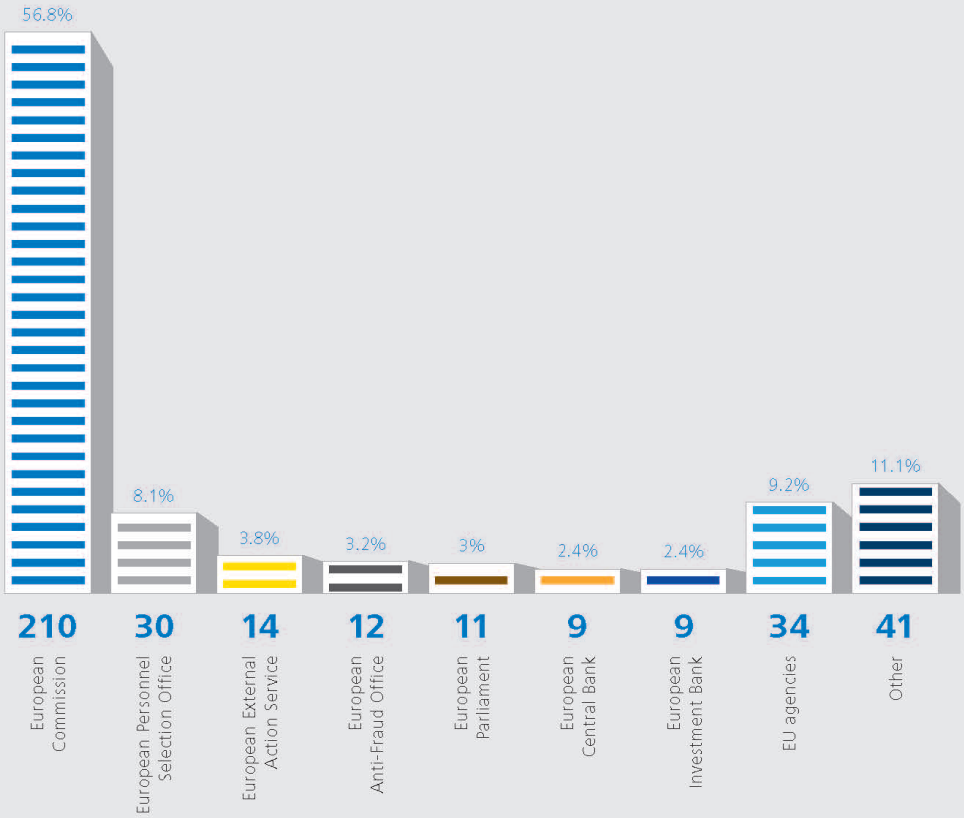
The Ombudsman replied to all those seeking help in the language of their complaint. These replies explained the Ombudsman's mandate and, as far as possible, advised complainants to turn to other bodies that could help. These were chiefly, national and regional ombudsman institutions, the Commission, the Parliament, and other organisations and national institutions. With the complainant's agreement, the Ombudsman also transferred complaints to members of the European Network of Ombudsmen (ENO).

Where complainants were unhappy with specific EU legislation, the Ombudsman generally advised them to turn to the European Parliament's Committee on Petitions. She referred those who raised issues relating to the implementation of EU law to national or regional ombudsmen or to EU networks such as SOLVIT. Alternatively, the Ombudsman informed complainants about the possibility to submit an infringement complaint to the Commission.

Number of complaints 2016-2020

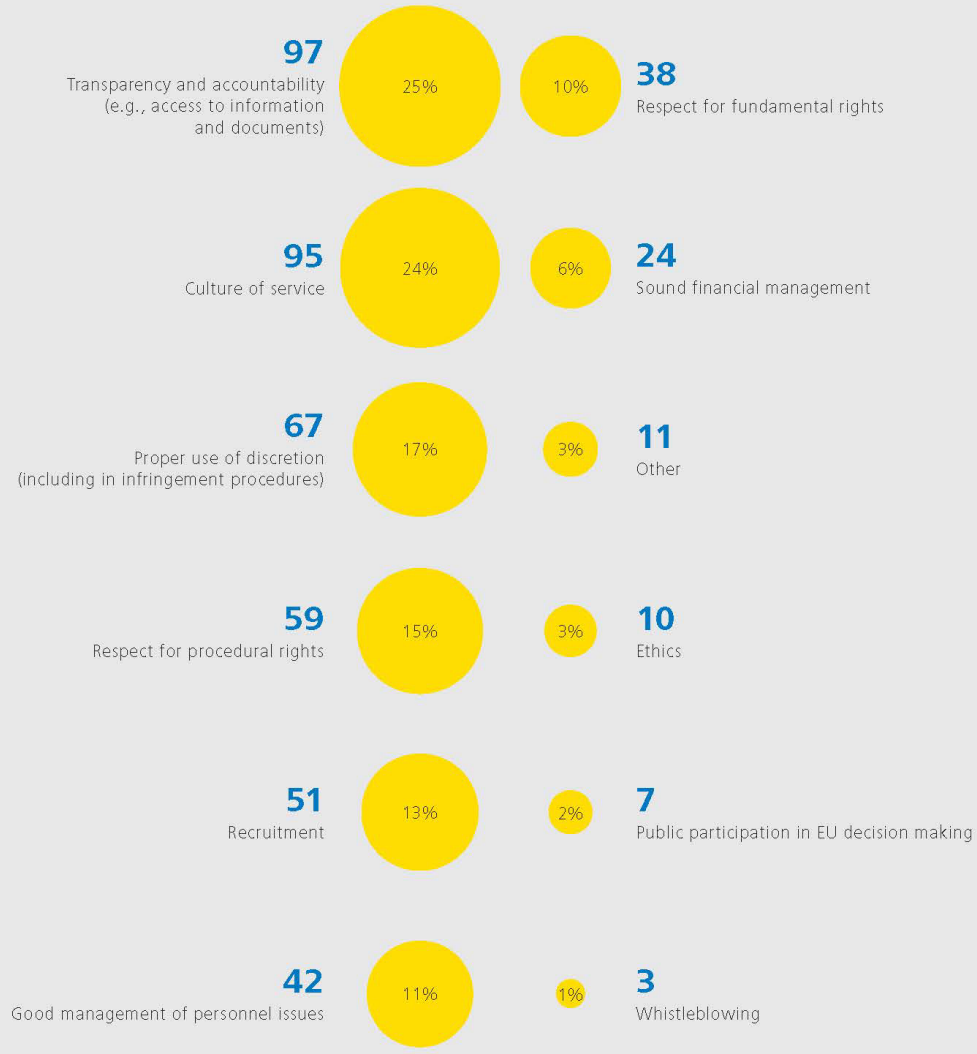
5.2. Against whom?

Inquiries conducted by the European Ombudsman in 2020 concerned the following institutions



5.3. About what?

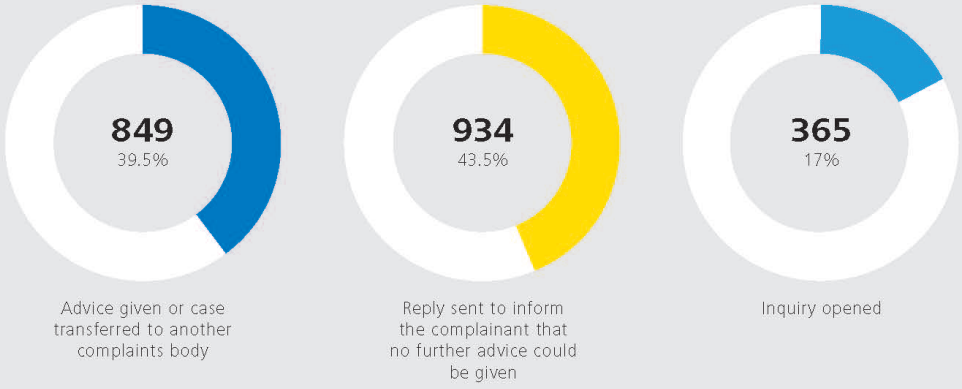
Subject matter of inquiries closed by the European Ombudsman in 2020



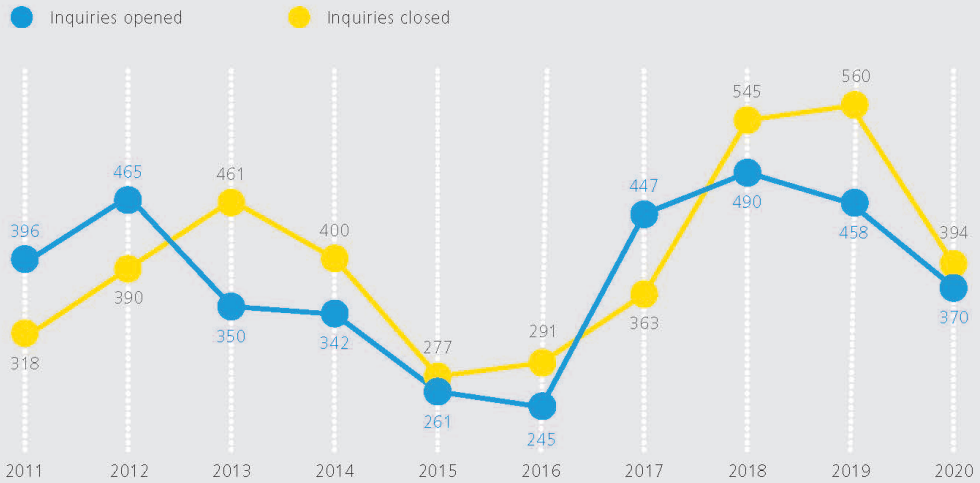
Note: In some cases, the Ombudsman closed inquiries with two or more subject matters. The above percentages therefore total more than 100%.

5.4. Results achieved

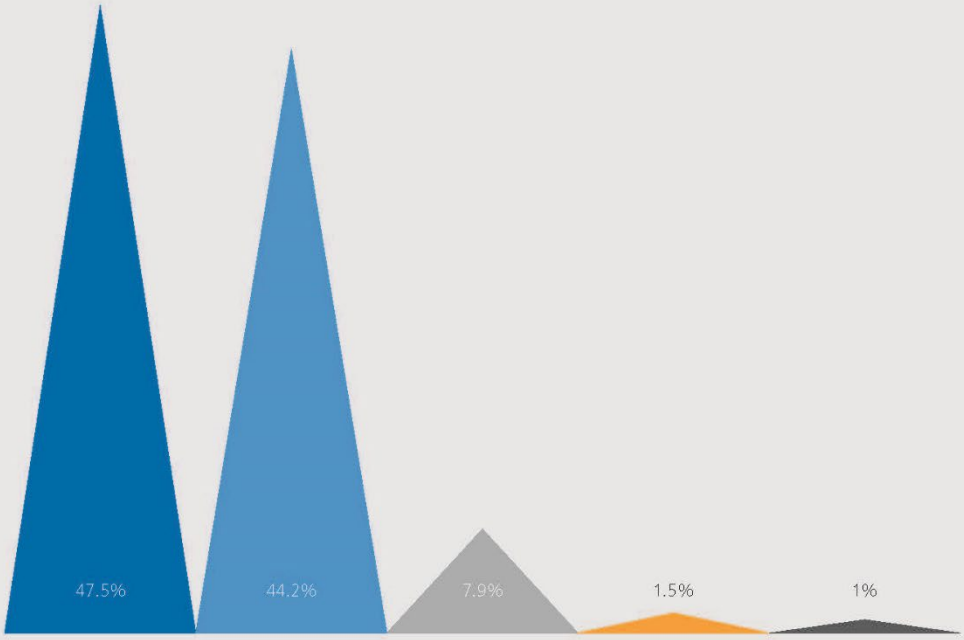
Action taken by the European Ombudsman on new complaints dealt with in 2020



Evolution in the number of inquiries by the European Ombudsman



Results of inquiries closed by the European Ombudsman in 2020



187 No maladministration found

174 Settled by the institution, solutions achieved, solutions partly achieved

31 No further inquiries justified

6 Maladministration found, recommendation agreed or partly agreed

4 Other

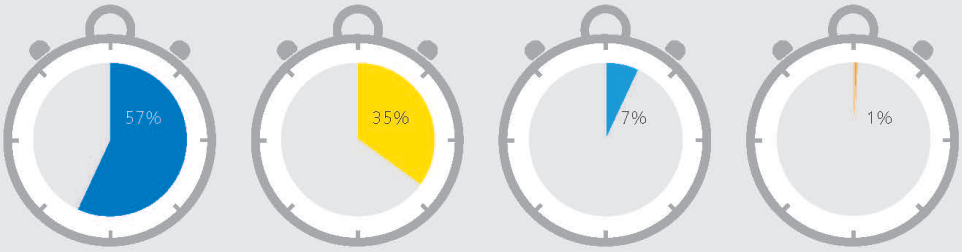
Note: In some cases, the Ombudsman closed inquiries on two or more grounds. The above percentages therefore total more than 100%.

Length of inquiry of cases closed by the European Ombudsman

in 2013 (13 months on average)

101	171	65	124
Cases closed within **3 months**	Cases closed within **3 to 12 months**	Cases closed within **12 to 18 months**	Cases closed after **more than 18 months**[1]

in 2020 (less than 5 months on average)



223	136	26	5
Cases closed within **3 months**	Cases closed within **3 to 12 months**	Cases closed within **12 to 18 months**	Cases closed after **more than 18 months**[1]

1. Some complex cases require several rounds of consultations with the complainant and the institution concerned.

5.5. Impact and achievements

One of the overarching goals of the European Ombudsman is to achieve, through her inquiries and other work, tangible improvements for complainants and the public vis-a-vis the EU administration. This can be partially measured in statistics, in terms of how the institutions responded to the Ombudsman's proposals. However, a purely statistical approach fails to capture the broader impact of Ombudsman inquiries. The Ombudsman's annual *Putting it Right?* report, which looks back on the impact over the previous year, tried to capture this broader impact for the first time in this year's report (2019).

5.5.1. Broader impact

This impact includes inquiries in which the positive outcome was evident only after the inquiry was closed. Some of the Ombudsman's proposals are far-reaching, involve significant efforts and may imply reforming procedures and practices that have been in place for decades. In other instances, ongoing external momentum after an inquiry has closed may lead, at a later stage, to changes even though the institution may have responded negatively to a proposal while the inquiry was ongoing.

A specific example of this was the Ombudsman's inquiry into the process for appointing the Secretary-General of the European Commission, the EU's highest civil servant. The Ombudsman had asked the Commission to put in place a specific procedure for appointing its Secretary-General. In its reply to the Ombudsman, the Commission rejected her recommendation, and initially refused to make any changes. However, the Commission subsequently did as the Ombudsman recommended, towards the end of 2019, by initiating a specific appointment procedure for the post of Secretary-General, including a vacancy notice and a well-defined timeline. The new Secretary-General was selected in January 2020, following a transparent and fair procedure.

Another example concerns the issue of 'revolving doors' in the Commission. In 2018, the Ombudsman closed an inquiry into how the Commission handled the post-mandate employment of a former Commission President, and the role of its 'Ethics Committee' in this matter. The Commission rejected two recommendations and four out of five suggestions made by the Ombudsman. However, in 2019, in the context of a subsequent inquiry into how the Commission manages 'revolving doors', the Ombudsman made 25 proposals to ensure a more systematic and effective approach to dealing with former staff members moving to the private sector or people moving from the private sector to the Commission. In response, the Commission pledged to put in place almost all of the Ombudsman's proposals regarding how it implements its rules on revolving doors. These included asking the person moving to the private sector to provide more information about the organisation they are going to, and more detail about the nature of their new job.

5.5.2. Acceptance rate

The Ombudsman's annual *Putting it Right?* report also recorded the statistical 'acceptance rate' for 2019, which showed that the EU institutions responded positively to the Ombudsman's proposals (solutions, recommendations and suggestions) in 79% of instances. This represents an improvement on the previous year, and is a positive reflection on the EU institutions, which sought to put right what they did wrong and, more generally, improve their administrative practices.

Overall, the EU institutions reacted positively to 93 out of the 118 proposals the Ombudsman made to correct or improve their administrative practices. Out of 17 institutions to which the Ombudsman made proposals, 10 complied fully with all solutions, suggestions and recommendations.

6

Communication and cooperation

6.1. Communication

The European Ombudsman launched a campaign during the summer with 10 recommendations on the use of the 24 official EU languages.

The Ombudsman's digital communications continued to evolve and improve in 2020, with the website being transformed into a more dynamic content hub for the Ombudsman's work. The website now has a news section, which includes easy-to-read news articles that delve into developments in prominent inquiries or explore other aspects of the Ombudsman's work. With a view to making it easier to follow Ombudsman inquiries, each inquiry now has a central 'case page', many of which also include a short teaser text explaining the inquiry and the latest developments. A new dedicated section on public access to documents was also launched.

In addition to regular content on the website, the Ombudsman's Office also started using other interactive online publication formats to make our work more interesting and accessible for a wider audience.

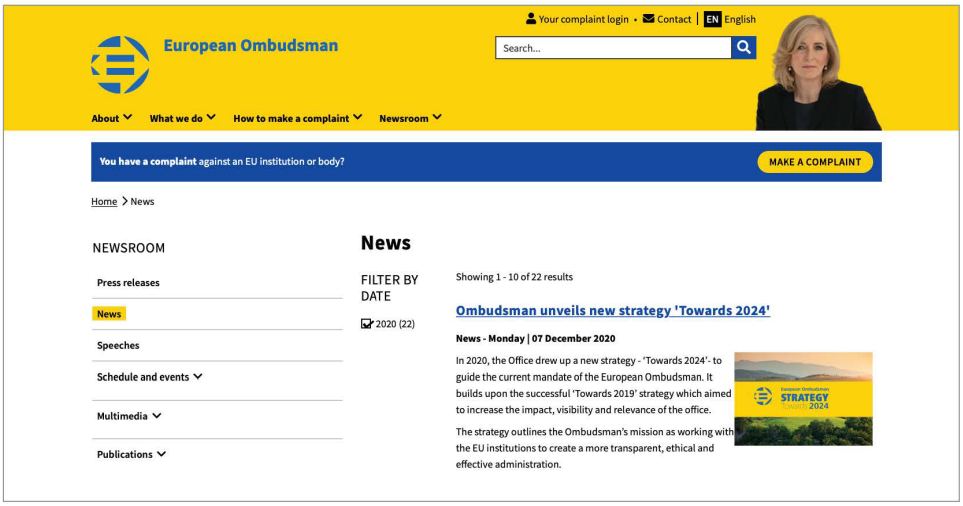
A dynamic, scrollable web story about the European Ombudsman was developed to mark the Ombudsman's 25th anniversary. This is a format the Ombudsman's Office hopes to build on in the future.

The Ombudsman continued to expand the use of social media to provide information in a clear and engaging manner on what the Office does and who it helps, as well as providing updates and views on the latest developments in inquiries. On Twitter, in particular, the Ombudsman started to make use of more innovative ways to explain the Office's work, including through the use of threads. The Ombudsman's presence on our main platforms – Twitter, LinkedIn and Instagram – increased. Among the highlights of the year were the activities around the Ombudsman's 25th anniversary, which could be followed through the hashtag #EO25years.

In the context of the Ombudsman's work on the EU response to the COVID-19 crisis, the Office also provided an at-a-glance infographic and related news article, giving an overview of the roles and responsibilities of different EU institutions and agencies. The Office also carried out a campaign to promote Ombudsman's guidelines to the EU administration on the use of official EU languages when communicating with the public.

In 2020, the fastest-growing channel was Instagram. The audience grew by 71% during the year (1 068 new followers). On LinkedIn, the number of followers increased by 34% (+1 237), while on Twitter, where the Ombudsman has the largest audience, the number of followers reached 29 200 in December 2020, which represents an 11% increase (+2 870).

The main communications event of the year was the annual conference, which was an occasion to mark the 25th anniversary of the European Ombudsman. With over 240 participants, the Ombudsman had to innovate to offer a quality online event. The conference made use of the Interactio platform and interpretation facilities provided by the European Parliament, to ensure real time interpretation. The Ombudsman also used Slido, an online platform for virtual events, enabling participants to ask questions and take part in polls in real time. This helped to make the conference truly interactive in spite of the challenges posed by its virtual nature.



The news section provides a quick access to the different highlights of the work of the institution.

6.2. Relations with EU institutions

6.2.1. European Parliament

Following her re-election at the end of 2019, European Ombudsman Emily O'Reilly continued consolidating the strong ties between her Office and the European Parliament, a fundamental partner for the Ombudsman. In 2020, the Ombudsman addressed a plenary session of the European Parliament and, despite the difficulties posed by COVID-19, continued to hold regular video meetings with Members of the European Parliament from all sides of the political spectrum. The Ombudsman was also invited to speak at several meetings of different Parliament committees, as well as workshops relevant to the Office's work. Due to the pandemic, the handover of the Ombudsman's Annual Report to the European Parliament President took place through email on 5 May 2020.

6.2.2. Committee on Petitions

The Ombudsman and the European Parliament's Committee on Petitions cooperate to address European citizens' concerns regarding the accountability of the EU institutions. In 2020, the relationship between the Committee on Petitions and the Ombudsman was further strengthened. The Ombudsman took part in various committee meetings and there was continuous communication between the Ombudsman's Office and the Committee. Various resolutions of the Committee referred to the Ombudsman's work, particularly on the rights of persons with disabilities in the COVID-19 crisis. In the context of the 25th anniversary of the European Ombudsman's Office, Emily O'Reilly was delighted to receive messages of congratulations and best wishes for her work from several MEPs, and particularly from the Chair of the Petitions Committee, who also participated in the conference organised to mark the occasion.

Dolors Montserrat, Chair of the Petitions Committee, high-level speaker at the 25th anniversary digital conference.

6.2.3. European Commission

The European Commission is the EU's executive and has the largest administration of any EU body. It is only natural that the largest proportion of complaints to the Ombudsman concern the work of the Commission. The working relationship between the Commission and the Ombudsman was again very constructive in 2020, and Vice-President Maroš Šefčovič was a keynote speaker at the 25th anniversary conference. Close contacts were also maintained at services level to ensure that complainants' concerns could be addressed effectively.

Maroš Šefčovič, Vice-President of the European Commission, was the keynote speaker at the 25th anniversary digital conference.

6.2.4. Other institutions, agencies and organisation

It is important for the Ombudsman to also maintain fruitful relations with the other institutions, agencies, bodies and offices. In 2020, the Ombudsman was in contact with the heads of the European Investment Bank, the European Court of Auditors and the European Medicines Agency. The relations with different parts of the EU administration is an integral part of the Ombudsman's strategy 'Towards 2024'. Only through close cooperation can a long-lasting and positive impact on the EU administration be achieved.

6.2.5. UN Disability Rights Convention

As a member of the EU Framework, the Ombudsman protects, promotes, and monitors the EU administration's implementation of the United Nations Convention on the Rights of Persons with Disabilities (UN CRPD). In 2020, the Ombudsman was chair of the EU Framework.

Together with the European Disability Forum, the European Parliament and the EU's Fundamental Rights Agency, the Ombudsman sent a joint letter to the European Commission, presenting the EU Framework's views on what a more ambitious and comprehensive post-2020 European Disability Strategy should contain. To this end, in July 2020, the EU Framework met Commissioner for Equality Helena Dalli, to continue the dialogue on the upcoming European Disability Strategy. European Ombudsman Emily O'Reilly also addressed a workshop that was organised by the European Parliament's Committee on Petitions on the disability strategy.

In June 2020, the Ombudsman launched a strategic initiative on how the Commission accommodates the special needs of staff members with disabilities in the context of the COVID-19 emergency. The Ombudsman wrote to the Commission, setting out a series of questions on issues such as the measures in place for remote working and health insurance, as well on lessons that could be learned for the Commission's wider interaction with members of the public with disabilities. The Ombudsman is currently assessing the Commission's reply, having sought the input of organisations representing persons with disabilities.

The Ombudsman inquired into a complaint on the use of European Structural and Investment Funds (ESI funds) for the construction of institutional care facilities for persons with disabilities in Hungary and Portugal. The complainant considered that the Commission should have taken action with regard to these projects, as they are at odds with the EU's obligations to ensure people with disabilities are supported to live in community-based settings. After carefully examining the measures taken by the Commission, the Ombudsman closed the inquiry making suggestions for improvement, and will continue to monitor this important matter.

In the same area, the Commission has responded positively to suggestions made by the Ombudsman in her inquiry into how it dealt with allegations of human rights abuses in a social care institution for persons with disabilities. Following the Ombudsman's suggestion, the Commission stated that EU funds should, to the greatest extent possible, not be used to maintain institutions and should instead be used to support deinstitutionalisation.

The Ombudsman also dealt with a complaint concerning delays in the applicable procedure for reintegrating a staff member with disabilities. The Ombudsman closed the case after the Commission stated that it had reactivated the procedure to reintegrate the complainant.

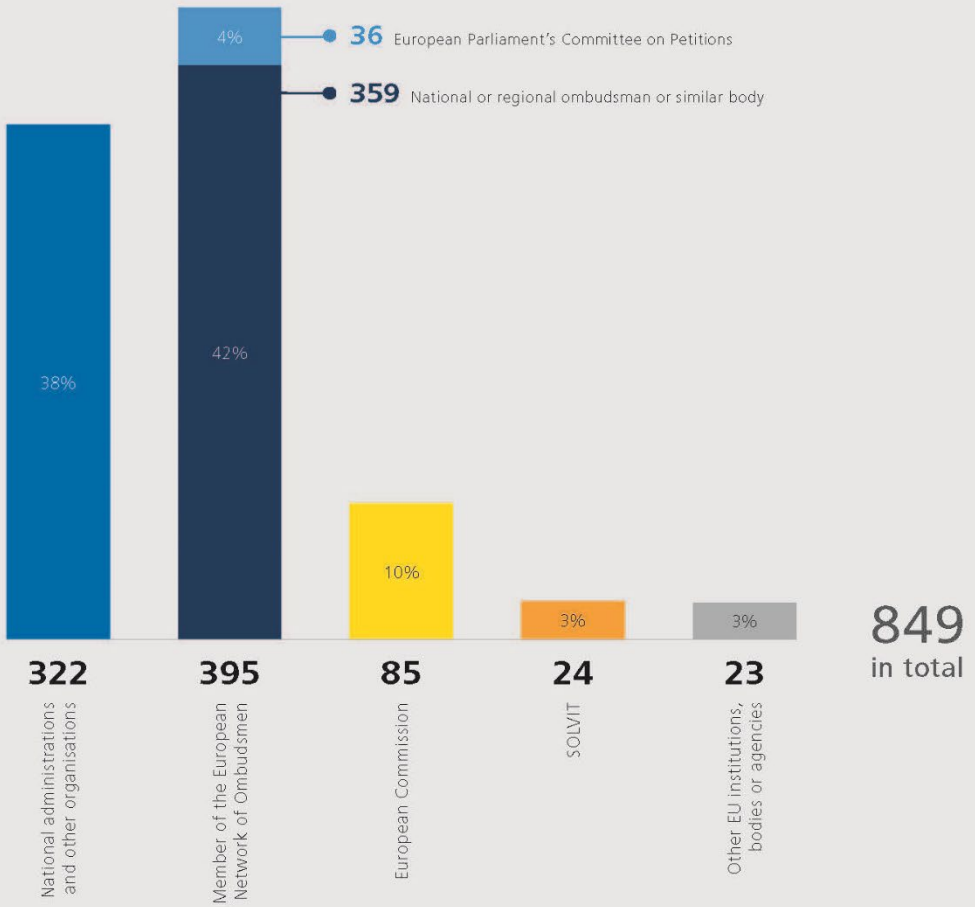
6.3. European Network of Ombudsmen

The implications of the pandemic clearly affected working methods and procedures of many public bodies and transnational entities. This was naturally also the case for the European Network of Ombudsmen (ENO), which is an informal network consisting of 96 offices in 36 European countries and also includes the European Parliament's Committee on Petitions.

European Ombudsman Emily O'Reilly was in direct contact with members of the ENO from an early stage in the crisis, with a view to ascertaining how the network could best serve its members. Building on this, the European Ombudsman organised and hosted a webinar on 12 May 2020 on the implications of COVID-19 for ombudsmen. This webinar brought together ombudsmen or their equivalents from 33 member organisations, with a view to sharing experiences and promoting best practices in the crisis response.

The normal yearly focal point of the ENO, the annual conference, also took place in digital format. On 26 October (the same day as the Ombudsman's 25th anniversary conference), 106 participants from across Europe joined virtually to the network conference. In addition to the anniversary and the debate on the future of the European Ombudsman, the network conference discussed future cooperation over the coming term and possible topics and modalities for future parallel inquiries. The conference, which had a keynote address from Commissioner for Jobs and Social Rights Nicolas Schmit, also provided another opportunity to discuss the COVID-19 crisis and anticipate how this will affect the work of ombudsmen over the coming years.

Complainants advised to contact other institutions and bodies by the European Ombudsman in 2020 and complaints transferred



7 Resources

7.1. Budget

The Ombudsman's budget is an independent section of the EU budget. It is divided into three titles. Title 1 covers salaries, allowances, and other expenditure related to staff. Title 2 covers buildings, furniture, equipment, and miscellaneous operating expenditure. Title 3 covers the expenditure resulting from general functions that the institution carries out. In 2020, budgeted appropriations amounted to EUR 12 348 231.

With a view to ensuring the effective management of resources, the Ombudsman's internal auditor regularly checks the internal control systems and the financial operations that the Office carries out. As is the case with other EU institutions, the European Court of Auditors also audits the Ombudsman.

7.2. Use of resources

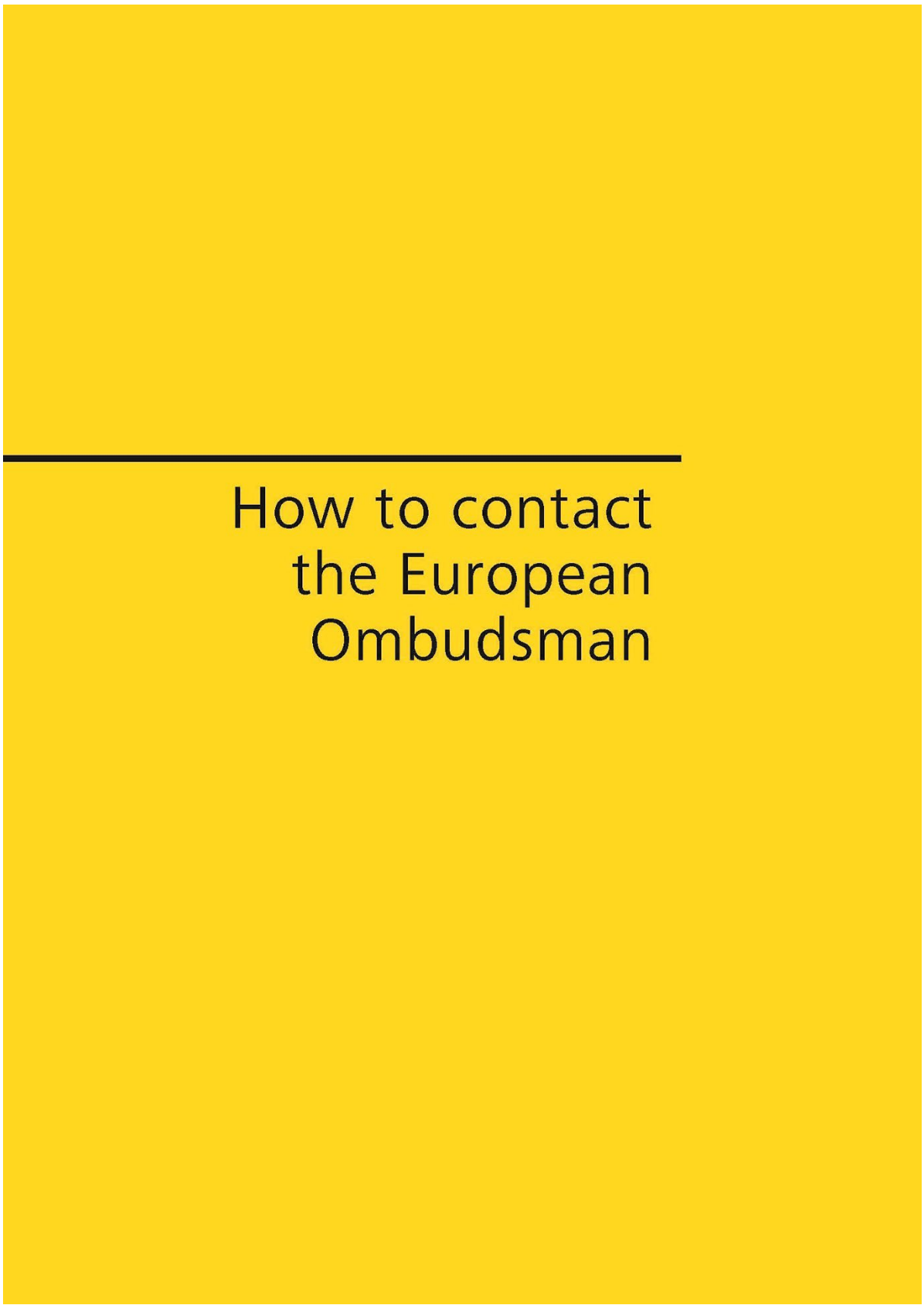
Every year, the Ombudsman adopts an Annual Management Plan, which identifies concrete actions that the office expects to take to give effect to the objectives and priorities of the Ombudsman's five-year strategy 'Towards 2019'. The 2020 Annual Management Plan is the sixth to be based on this strategy. In December 2020, the Ombudsman adopted a new strategy, 'Towards 2024'.

The Ombudsman has a highly qualified multilingual staff. This ensures that the Office can deal with complaints in the 24 official EU languages and raise awareness about the Ombudsman's work throughout the EU. In March 2020, in response to the COVID-19 pandemic, the Ombudsman's Office made an efficient and quick transition to become a digital workplace, with no interruption to the core complaint-handling work. In 2020, there were 69 posts in the Ombudsman's establishment plan, in addition to which, there was an average of eight contract agents working with the Office, while 13 trainees gained work experience over the course of the year.

In September 2020, Rosita Hickey, who has been working in the Ombudsman's Office since 2001, was appointed Director of Inquiries following an open competition.

Detailed information on the structure of the Ombudsman's Office and the tasks of the various units is available on the Ombudsman's website.

Rosita Hickey was appointed Director of Inquiries in 2020.


How to contact
the European
Ombudsman

By telephone

+33 (0)3 88 17 23 13

By e-mail

eo@ombudsman.europa.eu

Online

ombudsman.europa.eu
twitter.com/EUombudsman
instagram.com/euombudsman
linkedin.com/company/272026
youtube.com/eotubes

Our offices

Strasbourg

Postal address

Médiateur européen
1 avenue du Président Robert Schuman
CS 30403
F-67001 Strasbourg Cedex

Visitor address

Bâtiment Václav Havel (HAV)
Allée Spach
F-67070 Strasbourg

Brussels

Postal address

Médiateur européen
Rue Wiertz
B-1047 Bruxelles

Visitor address

Montoyer-Science (MTS)
30 rue Montoyer
B-1000 Bruxelles

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IV. Questions to the Report

1. What is in the report considered as “good administration”?
2. Do you agree with that?
3. What else would you understand under “good administration”?