ADVANCE OPINIONS IN DANISH ADMINISTRATIVE LAW

BY

CLAUS HAAGEN JENSEN and ORLA FRIIS JENSEN

Lecturers in Public Law,
University of Aarhus

I. SUBJECT

If administrative legislation was always clear, exhaustive and straightforward, the individual could gain a satisfactory knowledge of his legal position simply by reading the general provisions of the relevant statutes. Unfortunately, however, we are far from such an ideal state of affairs, owing to the demands of a complex modern society. The very number of rules and their interaction will often in itself be sufficient to make it impossible for the individual to ascertain his legal status beforehand. Furthermore, many provisions are imprecise and the administrative authorities are entitled to clarify or supplement the general provisions with concrete decisions, the contents and grounds of which are only partially, if at all, stipulated in the provisions.

Consequently, the individual needs information about his legal position under administrative legislation. Part of this requirement is covered by such general information as is furnished by the administration concerning the interpretation of statutes and the case law developed in the exercise of discretionary powers. Such information is given, e.g., by means of expository instructions or guidelines and replies to broad questions. However, the need for guidance is more extensive. Often the individual will have a strong interest in obtaining a statement from the administrative authority on the consequences of a concrete arrangement in the light of some specific administrative legislation, before a final administrative decision is made in his case. In possession of such information, he may perhaps refrain from the contemplated arrangement, change it or at least prepare himself in time for its legal consequences. Prior information of this kind given by administrative authorities is here called *advance opinions,* and they form the subject of our paper.

Before some of the legal questions connected with the giving of advance opinions are taken up, a more explicit formulation of the notion and a short analysis of the interests involved will be given.

1. *Delimitation of the Concept of Advance Opinions*

We shall refrain from giving an exhaustive definition of the type postulating that such statements of administrative authorities as fulfil

certain criteria are advance opinions, whereas all other statements fall outside the concept. In the first place it would be extremely difficult, because there are many phenomena closely related to the typical statements which we primarily have in mind. To adopt an exhaustive definition would mean that the paper would be weighed down by comprehensive delimitation discussions of doubtful value. Secondly—and this is the decisive argument—an exhaustive definition is neither necessary nor appropriate in a paper such as this, which aims to describe main features rather than to propose detailed solutions.

Instead, we have chosen to determine a "type concept" as our basis. We want to point out certain elements of the typical advance opinion which distinguish it, on the one hand, from definitive administrative decisions, and, on the other, from guiding statements of general content. Administrative information which contains these elements is the main subject of this study, but we do not exclude the possibility that the points of view put forward here can also be applied wholly or partly to other kinds of administrative statements. This is justifiable if such statements can be said to exhibit an essential resemblance to the typical advance opinion in relevant respects.

In our view, the typical advance opinion is a statement of an administrative authority fulfilling the following three requirements:

(*a*) The statement must concern a concrete case.[1] This means that a question or questions about a concrete situation—actual or hypothetical—must have been put to the administrative authority, and that the reply must contain an evaluation of the situation in accordance with the rules administered by the authority. No great demands as to particularity can be made. For instance, the presentation of a rough draft of a project to the building authorities would be sufficient, even though it does not contain such information that the authority would be able, on the basis of the draft, to make a decision on an application for a building permit. But an answer to a general and abstract question concerning the interpretation of a provision in the building regulations lies outside the type concept: such answers are part of the general information service of the authorities. Replies will often be framed in general terms, but when the context shows that the agency has taken a position on a certain situation, the requirements of particularity may be considered satisfied.

(*b*) The information of the administrative authority must precede an "actual" concrete decision, i.e. a decision which implies an obligation for

[1] Cf. Magnus Aarbakke, in *Lov og Rett* 1971, p. 245, and Edward Andersson, *Studies on International Fiscal Law*, volume Lb., pp. 10 f.

the inquirer or a right for him to take a specific action.[2] The advance opinion alone does not contain any actual obligation or right to act; it merely gives information on the (probable) content of any subsequent decision relating to the matter.

This requirement implies two sets of consequences as regards the delimitation. First, the concept of advance opinions is distinct from statements which, like advance opinions, are made at an early stage of the administrative decision process or on the basis of incomplete facts, but which, in contrast to the typical advance opinion, imply actual legal effects for the inquirer. In some cases the legislation allows or obliges the administration to make a decision on a measure before it is carried out. The Rent Act[3] provides an example. A landlord who wants to modernize his house can, even before the work has been performed, obtain the necessary authorization of the local rent tribunal to increase the rent later on, provided he submits a detailed project and a statement of the estimated expenses. This example is especially illustrative inasmuch as, before an amendment in 1969,[4] the same statute merely provided that the tribunal could make a guiding statement concerning the increase of rent that might be approved after the modernization had been effected. In other words, a rule regarding advance opinions has been replaced by a statutory provision concerning what might be called a ruling before the fact. For the same reason, the so-called "provisional decision" is kept distinct from the concept of advance opinions proposed in this paper. A provisional decision can be made, e.g., under the Child Welfare Act in cases where there is not sufficient evidence for a final decision;[5] such decision may contain an order about the removal of a child from its home. This is a decision with actual legal effects and not an advance opinion, although the statement of the administration has to be succeeded later on by a final decision.[6]

Secondly, the criterion which implies that an advance opinion should *precede* a final decision is obviously based on the assumption that the executive is legally empowered to make the subsequent decision, and that the statement must arise from an agency having authority in the specific field concerned. When, e.g., the Directorate of the Environment expresses an opinion on the question whether a product which is being considered for import satisfies the requirements of the general provisions of the food

[2] Cf. Aarbakke, *op.cit.*, p. 246, and the Bill of July 18, 1973, for a German Federal Administrative Act, sec. 34, concerning the notion of "Zusicherung".

[3] Statute no. 362 of July 21, 1972, sec. 13, subsec. 7.

[4] Statute no. 24 of February 14, 1967, sec. 13, subsec. 5, and previous Statute no. 355 of December 27, 1958, sec. 112, subsec. 3.

[5] Statute no. 413 of August 28, 1970, sec. 33.

[6] Cf. Klaus Obermayer, in *N.J.W.* 1962, p. 1467.

legislation—provisions which are sanctioned by penalties and do not give any administrative authority the right to issue concrete decisions—the statement falls, in principle, outside the scope of the concept of advance opinions. In our example the Directorate of the Environment certainly gives information prior to a decision, but the decision itself has to be made by an ordinary court in a criminal action. On the other hand, it must be admitted that, since the position taken by a high-ranking authority in practice carries great weight as a persuasive argument for both the prosecutor and the court, there is a very close connection between such statements and the typical advance opinion.

Cases in which a public agency guides an individual, in a concrete matter, about the contents of legislation within the jurisdiction of another administrative authority are more distinctly separated from the concept of advance opinion. On the other hand, there is hardly any reason to require, as a defining feature of that concept, that the information shall be given by the same authority which subsequently has the power to make the final decision, if the agency concerned after all has some jurisdiction as a superior authority as to future decisions in the case.[7]

(*c*) The information concerned must be granted at the request of an individual. Guidance given to a subject by an agency *ex officio* must in several respects be considered (see, especially, II and III below) in the light of rules quite different from those governing what are called advance opinions in this paper.

Statements given by an administrative authority at the request of another agency likewise fall outside the concept of advance opinion.[8] Such statements are normally obtained by the inquiring authority in the course of its hearing of a case; moreover, they are not followed up by a subsequent decision from the consulted authority giving the inquirer rights or obligations. In a number of cases, however, an administrative authority will be in a position similar to that of the individual, because the authority wants to take a specific action, and another agency has the authority to permit or prohibit the action in question. The answering of concrete questions in such situations will also be advance opinions. One good example is advance information given by the ordinary supervising authority of the municipalities concerning the approval of a measure which cannot be carried out without such approval.[9]

[7] This authority of a superior agency will mainly consist of a power to change the actual decision on its own initiative or on the basis of appeal (see *infra* II.2 (e)).

[8] Cf. Karl Zeidler, *Verhandlungen des 44. Deutschen Juristentages*, 1962, vol. 1, pp. 14 ff.

[9] Cf. Preben Espersen and Erik Harder, *Den kommunale Styrelseslov*, 3rd ed. 1974, p. 147.

These three main criteria should be sufficient to delimit the concept of advance opinions for the purposes of an examination of the questions dealt with below regarding, among other things, the right to give advance opinions, the duty to do so, and the legal consequences of advance opinions. The delimitation, on the one hand, ensures a certain uniformity of the phenomena considered and, on the other, allows the subject the necessary broadness.

2. *The Considerations Involved*

Several considerations may be put forward in favour of the administrative authorities' power to grant advance opinions. First and foremost, *individuals* are often in great *need* of such information about their legal position, which otherwise they will have difficulties in assessing beforehand. The individual who cannot obtain an advance opinion will in many cases feel uncertain, which is in itself unfortunate, and he may refrain from taking some action which might be in the public interest as well as his own.

The need is, however, a varying one. Among other factors, the *nature of the regulation* concerned is of importance for the interest of the individual in obtaining advance opinions. Generally, the wish for advance opinions can be said to be strongest where the regulation confers upon an agency the authority to make decisions in the form of *concrete orders or prohibitions*. It is, therefore, hardly surprising that the question of advance opinions is most frequently and exhaustively dealt with in tax law. Especially, the need for advance opinions will be great where the power of the administration to issue concrete orders and prohibitions is based on discretion or vague and elastic provisions.[1] A regulation consisting of a general prohibition combined with an authority for the administration to give concrete *permits* generally entails a lesser need of advance opinions, as the individual is normally not allowed to take the planned course of action until a permit has been given.[2] Nevertheless, in such cases the individual often has a considerable need of an advance opinion before applying for a permit. Suppose, for instance, that a person wants to build an hotel on a site belonging to him. He will then be interested in ascertaining, before he formally applies for a building permit, whether the establishing on the site

[1] Cf. Aarbakke, *op.cit.*, p. 239.—Thus it is illustrative that an amendment of 1973 to the Danish Food Act, by means of which a generally phrased prohibition concerning additives was replaced by a "positive list system" (i.e. a rule according to which only additives indicated in a certain list are permitted), has removed the previous need of getting advance opinions in this field; see Instruction no. 161 of August 3, 1967.

[2] Cf. Edward Andersson, *Nordisk administrativt Tidsskrift* 1973, p. 274, where it is (unjustifiably) even presumed that in these cases there is hardly any need for obtaining advance opinions.

of a business of that kind and size will be permitted at all. If he cannot obtain the advance opinion, he may spend considerable sums in vain on preparing the kind of detailed project that has to be attached to an application for a building permit. An advance opinion which is affirmative in the respects mentioned will, furthermore, enable him to make a number of preparations without economic risk, because he knows that the requirements of the building authorities for alterations in detail can rather easily be complied with.[3] A number of other things relating to the structure of the public regulation will also affect the need for advance opinions, especially provisions determining the time in a fixed series of events at which the administration can or must make the final decision on a matter.[4]

The need for advance opinions does not depend solely on the nature of the public regulation. Generally, it will also be important *whether the regulation is concerned with actions* on the part of the individual—e.g. earning an income, building a house and engaging in an economic activity—*or with the maintenance of certain standards,* e.g. a reasonable sanitary standard in a house or limits on pollution from a factory. In the first situation, where the individual is about to perform an activity which may have comprehensive economic consequences, he will often be very interested in securing an advance opinion, as he may then avert a loss by managing his affairs differently. In the second situation, while he may have a certain interest in knowing the requirements of the authorities, this interest may easily be outweighed by the hope that the authorities will remain unaware of possible defects in his property, if he does not ask. Therefore, a landlord whose house is in a dubious sanitary condition will not usually be tempted to ask for an advance opinion from the housing inspectorate, even though the latter can issue concrete orders and prohibitions on the basis of very indefinite statutory criteria.

Advance opinions are not merely in the interest of the inquirer. In the *public interest* it is desirable to avert, by advance opinions, situations which will entail trouble and expense for the administrative authorities, such as comprehensive hearings, complaints and lawsuits. Furthermore, in some

[3] Cases on building permits and town-planning legislation are, indeed, in practice an important area for the granting of advance opinions.

[4] A unique example of the impact of the character of the public regulation is to be found in the Danish Anti-Trust Act, no. 102 of March 31, 1955. If the Anti-Trust Board considers that a restriction of competition violates the generally phrased provisions of the statute, it is obliged first of all to negotiate with the firm or the association. Only when a satisfactory solution cannot be obtained by negotiation is the board empowered to issue a concrete order concerning the restriction of competition. The negotiation phase in the anti-trust proceedings implies that this field rarely provides distinct examples of advance opinions.—Compare the EEC competition law about "negative clearance" in Regulation no. 17/1962, and Arved Deringer, *The Competition Law of the European Economic Community,* 1968, pp. 263 ff.

cases it will be easier for the authorities to make stricter demands on the way in which the protective function of the legislation is performed, when they can refer to the individual's possibility of having a point cleared up by asking, rather than taking measures without knowing his legal position. Finally, it should be mentioned that advance opinions, especially from higher authorities, may serve as guidelines for subordinate agencies.

However, the granting of advance opinions is also attended by *risks* of various kinds. Above all, it may as a matter of principle be doubted whether the *process* of decision in a case ought to be *split up* as is the case when advance opinions are given. The legislation presupposes that the administration will make its decision after a careful procedure and an all-round evaluation of each case; but, by granting advance opinions, the authority makes, on a summary basis or touching on only a few aspects of the case, a statement which *de jure* or *de facto* prejudices the final decision. As a result, the careful consideration of common interests as well as of the interests of a third party may be endangered. Such objections of principle, however, may not manifest themselves with equal intensity in every case and may be reduced by the manner in which advance opinions are framed and by the preceding preparations.

3. *Aim and Basis of the Paper*

The purpose of this paper is primarily to give a broad exposition of the considerations attached to various legal problems in the granting of advance opinions, mainly questions regarding the power to give advance opinions, the obligation for the executive to do so, and the legal consequences of such opinions. The points selected for treatment are consequently very general and may not always apply to specific administrative branches without considerable modification.

The position taken in this paper is based mainly on Danish statutes, regulations and judgments, supplemented with information concerning administrative practice within, among other areas, tax and duties legislation, environmental protection legislation, adoption legislation, rent legislation, building and town-planning legislation, worker's protection legislation, and legislation concerning the administrative supervision of municipalities. Danish legal writing concerning advance opinions is extremely scanty, but the more comprehensive theoretical treatment of the subject to be found mainly in Swedish and German law has inspired the paper on many points.

It is characteristic of a great deal of the Danish material that it does not show a clear attitude towards the legal problems concerning advance

opinions. This is particularly true of the practice of the administration. In many fields, advance opinions are given on a large scale, even though it has not been explicitly decided whether, for instance, the authorities have a duty to do so or whether they are legally bound by such statements. Under these circumstances it is no wonder that in many respects relatively free argumentation and evaluation may assume considerable importance.

II. ARE THE ADMINISTRATIVE AUTHORITIES ENTITLED TO GIVE ADVANCE OPINIONS?

As mentioned above, the granting of advance opinions entails certain risks, because the authority, on a summary basis or touching only on a few aspects of the final decision, makes a statement, which is precedential *de jure* or *de facto*. Although these circumstances cannot generally preclude the granting of advance opinions, it may in various situations restrict the authority of the administration to grant such opinions.

1. *Explicit Statutory Authorization is not Required*

In a number of cases *written law* on advance opinions can be found, although there are few *statutory provisions* concerning the subject. Among these few instances mention can be made of the statute on taxation at the source, which, after an amendment in 1969, includes a rule laying down that upon request the assessment authorities must give advance opinions on certain questions concerned with taxation of the estate of a deceased person,[5] and of the Worker's Protection Act, which obliges the Labour Inspectorate to determine whether a new or rebuilt factory will meet the requirements of the statute and the regulations issued in accordance with it.[6] Even if the statute does not clearly express itself on the granting of advance opinions, it may be implied that advance opinions can and perhaps must be given.[5]

[5] Statute no. 599 of November 23, 1973, sec. 33 A, subsec. 4.—If the deceased had acquired assets—e.g. a block of shares—and would have made a profit liable to taxation by selling it subsequently, the profit is not necessarily to be taxed as part of the estate. This may happen, but as a general rule the estate may also choose to let the heir to whom the assets are transferred succeed in the fiscal position of the deceased, so that the tax liability for the heir will not become effective unless and until he sells the shares. Exactly these circumstances show the importance of advance opinions for the distribution of the estate and consequently the interest of the estate in getting advance opinions from the taxation authorities.

[6] Statute no. 297 of July 4, 1968, sec. 11, subsec. 1.

[7] An example can be found in Statute no. 102 of March 31, 1967, about Value-Added Tax. Under sec. 37 of this act, a special board was appointed to make the final administrative decision in a number of specified duty matters. The section mentioned came into force

A few *regulations,* too, contain rules on advance opinions. Most important in practice is a regulation from 1942 establishing, among other things, that the General Commissioner of Taxes shall answer inquiries relating to assessment and valuation questions.[8] An explicit statutory title is not required for regulations concerning advance opinions. A general statutory authority for a Minister to lay down provisions as to the activity or procedure of other agencies will be sufficient to enable him to stipulate rules conferring as well as limiting the power to issue advance opinions.[9] Furthermore, written law regarding advance opinions can be found in *instructions* from an authority to subordinate agencies. As an example there can be mentioned an instruction from 1972 containing rules on advance opinions from local agencies concerning the general suitability of applicant couples as adoptive parents.[1]

From the fact that there are statutory provisions empowering the authority to give advance opinions it cannot be concluded that the executive in Denmark has no right to give advance opinions in other cases. On the contrary, it must be assumed as a general rule that any administrative agency empowered to make concrete administrative decisions is entitled to grant advance opinions. In other words, the power of an administrative agency to make final decisions presumably implies the authority to give advance opinions. This point of view cannot be based on jurisprudence. To our knowledge the question has not so far been submitted for a judicial decision and is not likely to come up at all before the courts, but our position is confirmed by a comprehensive administrative practice within a number of different branches of the executive.

2. *Limitations on the Authority to Give Advance Opinions*

The fact that, as a general rule, advance opinions can be given does not imply that all agencies are in every situation entitled to grant such advance statements. In what follows there are put forward some general arguments which may be deemed to justify greater or less restrictions on the power of the administrative authorities to give advance opinions.

(*a*) *The nature of the matter.* The various types of questions which the individual would like to submit to the authorities before a final decision is

immediately on promulgation of the Act, whereas the other provisions did not come into force until about three months later. This difference regarding the time of effect was due to the fact that the board was to begin its activities immediately by granting advance rulings.

[8] Regulation no. 298 of July 7, 1942, sec. 26.

[9] See the regulation cited in the preceding note.

[1] Instruction no. 218 of October 12, 1972.

made are not all equally suitable as subjects of advance opinions. Thus, on average, the doubt as to the advisability of granting advance opinions is greater where the statement concerns the evaluation of a certain fact than where it deals with an abstract question of interpretation. It is characteristic that the above-mentioned regulation from 1942 relating to advance information from the taxation authorities definitely forbids the General Commissioner of Taxes to answer inquiries from private persons regarding the value of as yet unassessed real property.

However, the nature of the matter alone can hardly preclude the executive from giving any form of advance opinion. Thanks to reservations in its statements, the authority will be able to remove or considerably reduce the misgivings connected with the granting of advance opinions, and the unsuitability, if any, of the matter as a subject of an advance opinion is most likely to appear as a limitation of the obligation to grant advance opinions, cf. III below.

(*b*) *The nature of the statement.* It is natural to assume that the administrative authorities are subject to greater limitations in their power to issue binding advance opinions than they are in respect of non-binding information. However, in Danish law statutory authorization cannot be required as a basis for the granting of binding advance opinions.[2] In several cases agencies give advance opinions which have the appearance of binding the executive and which are indeed understood to do so by the agency concerned. This applies to numerous answers to questions concerning the administration of building and town-planning legislation, where the binding character of the statement is emphasized by terms such as "permit in principle", at the same time as the authorities reserve treatment of a number of detailed points. As even those advance statements which are only instructive in form will have a considerable actual precedential effect, it would hardly be reasonable to demand categorically statutory powers for formally binding advance opinions.

(*c*) *Third party involved.* In some situations, other private persons besides the inquirer will have an essential interest in the contents of the advance opinion. This applies, for instance, to cases regarding tenancy and environmental protection. Under actual practice the fact that a third party

[2] A similar position is normally assumed in German law, see Zeidler, *op.cit.*, pp. 52 f., and 61 f., and Goswin Pieper, in *Verwaltungsarchiv*, 1968, pp. 230 ff. In Swedish law, however, legal title usually seems to be required for the granting of a binding advance opinion, see Hans Ragnemalm, *Förvaltningsbesluts överklagbarhet*, 1970, pp. 529 ff., and Håkan Strömberg, *Allmän förvaltningsrätt*, 5th ed. 1971, p. 79. Contra, however, N. Herlitz, *Förvaltningsrättsliga plikter*, 1949, pp. 327 f.

has an opposing interest in relation to the inquirer cannot alone preclude an administrative authority from giving advance opinions. But if the third party is not involved in the case prior to the granting of an advance opinion, the binding effect of the advance opinion will be limited.[3]

(*d*) *The organization, etc., of the administrative authority.* The courts can only to a small extent make legal judgments[4] on contemplated measures and they have no power to give opinions. Consequently, it may be appropriate to raise the question whether corresponding restrictions apply to administrative boards the structure, procedure, and functions of which have a distinctly judicial character.

For boards, too, the starting point is undoubtedly that advance opinions can be given in the same way as by bureaucratically organized agencies and municipal authorities. If the board has a right of initiative, i.e. if it is entitled to initiate administrative proceedings, it is as a general rule entitled to give advance opinions, even if its organization and procedure might bear a strong resemblance to that of the courts. The question is more doubtful in the case of boards which can deal only with matters submitted to them. If a board without a right of initiative has a clearly judicial character as regards its organization and procedure—evidenced for instance by a provision to the effect that the chairman of the board shall be a judge and by the applicability of certain rules taken from the Act on Procedure—it can be assumed as a main rule that the board has no power to grant advance opinions. Such granting would be illegal, as it is for the courts. This applies especially if the board deals exclusively with appeal cases, see point (*e*) below. Presumably, most boards with a clearly judicial character, which render decisions in the first instance between two parties—two private persons or a private and a public party—will, likewise, be precluded from giving advance opinions. Thus, it seems characteristic that the valuation tribunal deciding on compensation in matters of expropriation can make a test valuation in advance of an expropriation only on the basis of explicit statutory authorization.[5]

(*e*) *The hierarchical position of the agency.* Undoubtedly, *subordinate* administrative authorities are generally entitled to give advance opinions. But the recipient of the statement should be aware of the power of the superior authority to take a different position to at least the same extent as it can change actual decisions made by subordinate agencies. Where, however, decisions of subordinate agencies are not automatically checked

[3] See *infra* IV.1 (b).

[4] Cf. Hurwitz and Gomard, *Juristmøde*, 4th ed. 1965, p. 133.

[5] See, e.g., the Building Act, no. 361 of July 17, 1972, sec. 59, subsec. 6.

by superior authorities or cannot be presented to them by means of appeal by a third party, an advance opinion from the subordinate is usually a sufficient guaranty to the inquirer.

Regarding *superior* administrative authorities it is more of a moot point whether advance opinions can be given. There are two main arguments which can justify their being reluctant to grant advance opinions. First, an advance opinion from a superior agency will at least *de facto* limit the independent deciding powers of the subordinate authority in the case in question. This may be harmful to private as well as to public interests, especially if the advance opinion concerns questions which the subordinate is specially qualified to deal with, for instance owing to its better acquaintance with local conditions. However, this consideration should not entirely preclude advance opinions from the superior authority. In particular, it is difficult to find reasons why the superior authority should be precluded from expressing an opinion beforehand on such general questions relating to the interpretation of rules and the exercise of discretion as are raised by the citizens' inquiries, whereas caution should be observed as to the evaluation of actual facts, see (*a*) above.

Secondly, the granting of advance opinions from a superior authority may prejudice its own subsequent attitude in an appeal case. Admittedly, this point of view applies generally to the granting of advance opinions, but it is of especial importance when advance information comes from appeal authorities. Where the appeal decision has been assigned to a board of judicial character dealing solely with appeals, it must be considered so essential to ensure that there are two independent administrative proceedings that the board will not be allowed to grant advance opinions.[6] Thus, the Customs Board of Appeal, which is the final administrative authority of appeal in certain tariff questions, will have no title to give advance opinions. It is another matter that the board may decide on an advance opinion given by subordinate customs agencies and brought in to the board by appeal, cf. VI below. If appeals are dealt with by other authorities—e.g. a ministry or a board not deciding on appeals alone —then, according to practice, the granting of advance opinions is not out of the question.[7] Government departments and directorates, especially, frequently answer requests for advance opinions, but practice shows that the answers are normally limited to general statements of interpretation and principles for the exercise of discretionary powers, and that the appeal authority often makes definite reservations as regards its position on questions touching on the inquirer's specific situation.

[6] Cf. Bent Christensen, *Nordisk tidsskr. for forvaltningsret*, 1958, p. 222.

[7] See Bent Christensen, *op. cit.* pp. 221 ff.

(f) Special rules of procedure, etc. Finally, we must mention the fact that special rules of procedure may preclude or limit the granting of advance opinions. For example, when the vacancy of a government post has to be advertised publicly before an appointment is made, this rule implies that the appointing authority is for that reason alone excluded from promising anybody the post before the closing date for applications.

III. OBLIGATION TO GIVE ADVANCE OPINIONS

The fact that an administrative authority is empowered to grant advance opinions does not necessarily mean that it is bound to do so. In earlier Danish legal writing it seems to have been generally accepted that the executive is obliged to issue advance opinions only under explicit statutory provisions.[8] This position can no longer be upheld. On the contrary, today the starting point must be that the individual can demand an advance opinion on a matter which is specific enough to be answered, and in the answer to which he has an individual and essential interest,[9] cf. 1 below. The *obligation* for the administration to give advance opinions is, however, more limited than the *power* to grant advance opinions, cf. 2 below.

1. *The General Obligation of the Executive to Give Advance Opinions*

A number of provisions on advance opinions state explicitly that the administrative authority has to answer requests within a specified area. This applies to all the rules of statutes, regulations and instructions mentioned in II above. However, from such provisions the converse conclusion cannot be drawn in cases where statutory rules only provide that advance opinions "can" be given or where the matter is not regulated by written law.

That such conclusions *e contrario* are unjustified can be illustrated by an example from the Building Act. According to the model by-law on building from 1962, the building authority had a duty to grant advance opinions concerning requirements for the aesthetic appearance of a building.[1] These provisions were, however, omitted in the model by-law

[8] Cf. Poul Andersen, *J.* 1965, p. 205, and Bent Christensen, *op.cit.*, p. 30. The same assumptions have been made for Norwegian law by Frihagen, *Lærebok i Forvaltningsrett* 1, 1968, p. 105.

[9] Cf. Bent Christensen in *Fast Ejendoms Regulering*, 3rd ed. 1971, p. 70.

[1] The Model By-law on Building, sec. 2, subsecs. 8 and 9.

of 1970 on the ground that they might create the erroneous impression that the authorities were not obliged to give advance opinions in other situations than those specifically mentioned.[2]

In *case law* the problem has been raised only on rare occasions. First, it should be pointed out that there is one point where court decisions allow a positive conclusion. It seems clear that, where a person has such an interest in the clarification of a legal problem which may or must form part of a later final decision that he would have been entitled, under the rules of judicial procedure, to obtain judgment on the issue if the matter had been brought before an ordinary court, the competent administrative authorities are *a fortiori* obliged to take up a position on the question in advance. Judicial decisions which establish, possibly against the plea of the administrative authority concerned in cases of this kind, that the citizen possesses a right to have his case tried, show that the individual can claim an advance opinion, and a binding one.[3] However, this conclusion refers only to a small part of that area where the granting of advance opinions is of practical interest; in particular, we have not dealt with such cases where the question concerns administrative discretion in a wider sense. Outside the limited field within which an obligation to give advance opinions is based upon general rules on the individual's right to have his case tried, he will not be able to obtain a direct judicial decision on the question, but he may get a judgment which establishes an obligation for the executive to state an opinion on the problem concerned.

Regarding situations of this kind, only a few precedents can be found. They all concern rent legislation, and none of them emanates from the Supreme Court. After the inclusion in 1958 of an explicit provision laying down that the local rent tribunal "can" give guiding opinions regarding the increase of the rent expected to be approved after modernization has been carried out, the Court of Appeal in 1962 passed a decision regarding the scope of this rule.[4] A tribunal had refused to give a guiding statement concerning the increase of rent that might be permitted on the basis of a projected modernization. The tribunal held that the rule did not create an obligation for it to give advance opinions and, furthermore, that the modernization was atypical and very extensive. The Court of Appeal established that as a main rule the tribunal was bound to grant advance opinions, but accepted that on special occasions like the one in question it was entitled to refuse to give a guiding statement. The judgment is

[2] Cf. Bent Christensen, *op.cit.*, p. 71.

[3] See 1944 U.f.R. 1071, 1945 U.f.R. 160 and 1956 U.f.R. 512, as well as Hurwitz and Gomard, *op.cit.*, pp. 132 ff.

[4] 1962 U.f.R. 202.

interesting inasmuch as a provision which, on the face of it, only creates an *authorization* for an agency to grant advance opinions was understood as implying in principle a *duty* also. The judgment suggests a more general obligation to give advance opinions, although it must be admitted that special reasons speak in favour of this assumption in those cases where the need for advance information is manifested by an explicit provision (though facultative in form) on advance opinions.

Mention can further be made, from judicial case law, of a judgment from 1967, rendered by a district court in a case concerning the approval of the rent for a new building, the fixing of which is regulated by other provisions than those mentioned above with regard to modernization of existing buildings.[5] Before the building was erected, the landlord submitted a detailed project and applied for approval of a definite rent, but the local rent tribunal refused to take a stand in the matter until the building was finished, so that the building accounts would be available and a survey could be made. This refusal was set aside by the court, because it could not be precluded that such information as was necessary for the tribunal to take up a position might be procured. (The court did not specify whether this taking up of position should be in the form of a definite ruling before the fact or of an advance opinion; this would probably depend on the kind of information that could be procured.) The judgment is of importance for the questions dealt with here, because it shows that an individual may be considered to have such an interest in the outcome of the case that at an early stage he is entitled to demand either a ruling before the fact or a more or less comprehensive advance opinion.

The scarcity of judgments regarding the obligation to give advance opinions is probably due first and foremost to the fact that executive authorities willingly give advance opinions. Anyway, within a number of areas administrative authorities regularly answer requests for advance opinions. This practice is hardly connected with careful consideration of the question whether the authority is bound to give advance opinions or not. Nevertheless it must be considered to create legal authority for such an obligation. The fact that an authority has answered requests from individuals for advance opinions obliges the executive in the same way as does administrative practice regarding other questions.[6] This means that in future the authority is bound to follow the same course as previously, unless it has an objective reason for a general change of practice. Such a change of practice will normally take place in the presence of specific

[5] Judgment of the Aarhus City Court of April 20, 1967, BS no. 206/1966.

[6] Cf. Poul Andersen, *Dansk Forvaltningsret*, 5th ed. 1965, pp. 40 f., and Ole Krarup, *Øvrighedsmyndighedens Grænser*, 1969, pp. 137 ff.

exceptions, where advance opinions are refused (cf. 2 below) and it is only in rare instances that it is likely to amount to a general refusal of requests for advance opinions.

Perhaps a more general view of the functions of the executive underlies the extensive use of advance opinions today. The administrative authority does not merely exercise authority over the individual; it is also, and increasingly, part of its functions to serve and assist him.[7] This applies even where the function of an agency according to statutory rules is to make one-sided decisions in the form of, e.g., concrete orders, prohibitions and permits. Here, too, the individual who needs it is offered the service that he can obtain an advance opinion before the final decision is made.

2. *The Extent of the Obligation*

Although the starting point adopted here is that there exists an obligation for the administrative authorities to answer requests for advance opinions, this does not mean that the duty is not subject to exceptions. The extent and contents of these are established in each case by the administrative authority concerned, but the discretion of the authority in this respect is restricted.

The method which the authority has to apply in exercising its discretion concerning the obligation to give advance opinions is a *balancing* of the inquirer's interest in taking measures against a number of circumstances which make the granting of advance opinions doubtful. These circumstances are largely the same as those which are relevant to the consideration of whether the authority ought to give advance opinions at all (cf. II above). But whereas they can only to a limited extent *exclude* the granting of advance opinions as such, they will often limit the *obligation* to issue such statements *in casu*. For example, the nature of the case at issue alone will hardly preclude an authority from giving advance opinions, but this consideration may in numerous cases justify a refusal to answer the advance inquiries. Where the evaluation of a contemplated measure from a legal point of view depends to a great extent on the concrete circumstances under which such a measure is carried out, an advance opinion may consequently often be declined.[8]

Even where there exist circumstances justifying a refusal to give advance

[7] Cf. Zeidler, *op.cit.*, pp. 8 ff.

[8] By way of example, there can be mentioned cases where a taxpayer wants to be informed whether profit from the sale of real property is to be considered taxable income and where the concrete circumstances of the sale will often be of decisive importance for the outcome of the matter. See 1954 U.f.R. 363, where, however, the authorities had answered the question, because they felt bound to do so by written law.

opinions, regard for the inquirer's interest in making arrangements may nevertheless result in an advance opinion being given. Although it can generally be presumed that administrative authorities have no obligation to give a binding advance opinion, the interest of an individual may be so strong that the authority is not entitled to refuse a request for binding advance information.[9]

IV. THE BINDING EFFECT OF ADVANCE OPINIONS

When dealing with advance opinions, one cannot avoid discussing whether such statements are to be complied with when the final administrative decision is subsequently rendered. This question, however, cannot be answered by a clear yes or no. The problem of the binding effect of the advance opinion contains several components, among the most important of these being the questions: For whom is the advance opinion binding? From what time? Under what circumstances? Thus an advance opinion can be binding for the subordinate authority which has given the statement but not for superior authorities, or vice versa. It can be binding from the moment the statement was received by the applicant or only if preparations have been made on the strength of the information received. Perhaps the advance opinion is to be followed in any case by the subsequent administrative decision, but it is possible, too, that the information is binding only on certain conditions. Finally, it must be stressed that the problem of the binding effect of the advance opinion is part of the broader question of the legal effects of advance opinions. Thus it is possible that an advance opinion is not binding as to the contents of the administrative decision but that the executive may be held liable for damages if the advance opinion is not followed. In other words, there is a close connection between the question of the binding effect, which is discussed here, and the question of the executive being held liable for damages owing to the advance opinion (see V).

If the content of an advance opinion is legally acceptable both when it was issued and at the time when the definite administrative decision is to be rendered, normally no practical problems will arise. If, however, the content of the advance opinion was illegal already when given or if the conditions for its legality no longer exist, owing to amendment of legis-

[9] Similar assumptions are made for German law by Pieper, *op.cit.*, pp. 235 ff., as regards the obligation of the executive to grant "Zusagen". Pieper's opinion, however, is not generally accepted in German legal writing, cf. among others Zeidler, *op.cit.*, pp. 61 f.

lation or changes of case law, a onflict may arise between, on the one hand, the requirement that administrative action be lawful and the public interest and, on the other, the interest of the individual in the advance opinion's being upheld.

When examining the legal effects connected with advance opinions, one can probably find some guidance in the general principles of invalidity and revocation of administrative decisions where a similar balance of conflicting interests has to be maintained with regard to such administrative decisions as confer a *favour* upon a subject. This, however, is only a hint at the solution of the problem. The binding effect of illegal administrative decisions and the possibility of revocation because of changed conditions are among the most difficult and unclarified questions in Danish administrative law. The question to what extent circumstances existing already at the time when an advance opinion was given or arising after that moment can be assumed to give such opinion a binding effect must, therefore, be submitted to a special examination.

In the above-mentioned statutory provisions on the right and obligation of the administration to give advance opinions (see II and III) the question of the binding effect of advance opinions has occasionally been considered. The few and scattered statutory provisions are not unambiguous, however. The previous rent statute provided that the local rent tribunal should give an advisory statement about the increase of rent which could probably be approved in consequence of the projected improvement of a house. However, it is doubtful whether the statute intended to give tribunals freedom to deviate from the advance opinion. As the matter is one of valuation, the only purpose of the provision may be to reserve for the administration the right to consider incomplete information from the owner or later events which could be essential to the valuation.[1]

There is only one provision which states unambiguously that a given advance opinion is binding, namely the previously mentioned rule about the taxation of the estate of deceased persons in the Act on Taxation at Source.[2] It is laid down in that statute that the advance opinion "shall be followed" at the later assessment, etc., of the estate, and it "can be changed" only by means of appeal according to the statutory rules.[3] Consequently, the advance opinion is binding both for the estate and for the taxation

[1] The Act concerning Tax on Unearned Increment of Land thus describes as "advisory" the valuation which especially parties negotiating sales might be in need of. In the case 1957 U.f.R. 516 (*infra*, p. 200, at footnote 7) the position of the tax authorities seems to have been that a fault for which only the valuation committee were to be blamed might entail that the advance opinion becomes binding.

[2] See *supra*, p. 188, at footnote 5.

[3] See Statute no. 118 of March 29, 1969, sec. 33 A, subsecs. 6 and 8.

authority—for the latter immediately upon its issue. As is evident from the *travaux préparatoires* of the statute, the binding effect persists even where false or misleading information has been given. The winding up of an estate cannot be changed, but the person who has given the false or misleading information can be punished.[4] This radical solution must be seen in the light of the possibility that the other heirs or legatees may have made arrangements in good faith on the strength of the advance opinion given; a consideration of some importance may also have been that a revised winding up of the estate would cause much trouble to everyone concerned, including the administration.

The legal position is probably different if it cannot be assumed that the advance opinion has been made binding on the basis of such extensive considerations. When the advance opinion is given only to meet the inquirer's interest in taking economic and other measures, it must be assumed that the statutory provision—whether or not it is stated as "binding"—does not aim to prevent the inquirer from obtaining a reexamination when the definite administrative decision is subsequently rendered. The Swedish legislation on advance opinions in tax cases provides an example.

Mostly, statutory rules on advance opinions contain no provision at all as to this effect. Here, as in the wide field where in practice advance opinions are given without a statutory basis, the above-mentioned specific provisions which ascribe either advisory or binding effect to the advance opinion are obviously not capable of serving as the basis of broader conclusions.

Viewed against this background, the general principles on the binding effect of advance opinions which we will attempt to set out in what follows must necessarily be characterized by uncertainty, especially as the examination cannot be based on an extensive practice. To some extent, however, the problems can be illustrated by examples from foreign law.

1. *Conditions for Binding Effect*

Often such circumstances are present at the issue of the advance opinion that the addressee is not entitled to special regard. It seems justifiable to formulate the following principles as conditions for giving the advance opinion a binding effect.

(*a*) *No reservations must have been made.* When there is a statutory obligation to give advance opinions, the question whether reservation can be made

[4] See *Folketingstidende* (official report of parliamentary proceedings) 1969/70 appendix B, col. 243.

has to be answered on the basis of an interpretation of the positive rule. If the advance opinion is said to be binding, it is certain that the authority cannot refuse to commit itself. The already-mentioned provision in the Rent Act, according to which the decision of the local rent tribunal was "advisory", at any rate implied that reservation could be made with regard to future circumstances.[5]

In most cases where there are no statutory rules on advance opinions, the authorities may make the reservation that their position will depend upon a free discretion. As they have no power to exercise an entirely free discretion, however, cases may arise where the making of a reservation implies an erroneous exercise of discretion. In such a case, however, the inquirer cannot simply ignore the reservation. The only question is whether he can try to obtain a statement without any reservation by virtue of existing remedies (see below, VI).

(*b*) *The inquirer must have made an unambiguous and exhaustive statement of the facts.* The German Tariff Act, sec. 23, provides explicitly that an advance opinion is binding unless it depends "auf unrichtigen Angaben des Antragsstellers", and this is assumed to apply also to the Swedish institution of advance opinions in tax law.[6] Likewise, in Danish law an advance opinion on the value of a plot, requested for the purpose of assessing tax on unearned increment of land, was considered to be without binding effect, the reason being merely that the inquirer had suppressed the fact that it had already for a long time been justifiable to count upon a particularly high sales price owing to the fact that a neighbouring firm was in need of space.[7]

Furthermore, it will not generally be possible to assume a binding effect beyond the facts submitted by the inquirer. If the planning authority replies that an application for parcelling out land will meet with a concrete prohibition according to the planning legislation,[8] because the entire property concerned is situated within a catchment area, this does not imply that the purchase of neighbouring land outside the catchment area would not meet with other obstacles. The logical procedure would be for the inquirer himself to bring up the possibility of buying neighbouring land if this is to be taken into account in the advance opinion.[9]

[5] In 1961 U.f.R. 83 the tribunal made a reservation of resumption out of deference to a judgment of the Court of Appeal to be passed a short time after.

[6] Cf. Sture Jarnerup, *F.T.* 1959, p. 43.

[7] See 1957 U.f.R. 516.

[8] See the Building Act, no. 246 of June 10, 1960, sec. 5, subsec. 2. The Act has later been changed, see now no. 361 of July 17, 1972.

[9] Unpublished decision from the Housing Ministry of October 15, 1968.

Incomplete information cannot, however, exclude a binding effect, if the authority in question—with complete knowledge of the case—would have given an advance opinion having the same tenor. As an illustration there may be cited a case where a county council, in its capacity as planning authority, had issued a prohibition, pointing out that the industrial building as finally projected had grown beyond the limits originally approved in an advance opinion. The prohibition was revoked by the Ministry of Housing, it being considered decisive that the county council would approve an industrial building in the area in question in any case.[1]

If a third party has an essential interest in the contents of the final administrative decision, and therefore pursuant to statute or general principles has a right of being heard and of making an appeal, it may, as stated under II, be doubtful whether it is advisable to give an advance opinion unless the third party is included in the proceedings. According to practice, advance opinions occur in such cases, too. Regularly, an explicit reservation of the right of the third party will be made.[2] However, regardless of whether such a reservation has been made, the third party can himself maintain his right before the courts, just as the administration may have an obligation to amend the advance opinion; the latter solution is, of course, probable if it should later turn out that the advance opinion has been given on a summary or one-sided basis.

(*c*) *The exact contents of the advance opinion must be provable.* If there are specific requirements as to the *form* of the definite administrative decision—which is exceptional in Danish law—the advance opinion must presumably be given in the prescribed form. Aside from that, there is nothing to prevent an oral advance opinion from being binding, although in such a case the difficulty of proving its contents may obviously be considerable. When an important question is dealt with in oral form only, there may be reason to suppose that a binding statement has neither been intended nor given.

A significant example of an oral advance opinion considered to be binding may be found in a recent judgment of the Supreme Court.[3] In the case in question, a potato exporter, during a telephone conversation with the head of the Plant Inspectorate, was informed that if a shipment of potatoes which had been rejected by the British authorities because of potato ringrot was taken back to Denmark he would be requested to destroy it. He then dumped the potatoes in the North Sea. Contrary to

[1] Unpublished decision from the Housing Ministry of December 6, 1968.
[2] See 1962 U.f.R. 875.
[3] See 1972 U.f.R. 28.

the Court of Appeal, the Supreme Court found that the legal position of the exporter should be held identical to that which would have arisen if he had received a concrete order to destroy the cargo. Consequently, he had a right to compensation in accordance with the statute on disease prevention, a compensation which is to be fixed without regard to the loss of value connected with the disease.

(*d*) *The statement must be given by the authority having jurisdiction in the case* (*cf. above I 1 (b)*). The question of which authority is entitled to give an advance opinion in Danish law raises special problems in tax law.

Pursuant to the act concerning the Tribunal of Direct Taxation, the General Commissioner of Taxes can issue general instructions for the use of the local assessment authorities.[4] These authorities are obliged to follow the instructions in question. This on the other hand implies that the above-mentioned regulation of July 7, 1942, about the activity of the General Commissioner of Taxes cannot confer binding effect for local assessment authorities upon the Commissioner's reply to an inquiry unless such reply is given in the form of general instructions. The local assessment authorities are not bound to follow an advance opinion in a specific case, as they have an authority of their own in assessment questions. Certainly, according to sec. 3, subsec. 2, of the statute, the Central Assessment Committee is theoretically empowered to change an assessment in contravention of the advance opinion. However, in practice this is hardly conceivable where the local assessment authority has found the case to be settled in a manner unfavourable to the taxpayer. At any rate the General Commissioner and the Assessment Committee will refer the taxpayer to appeal if the assessment is not palpably illegal.[5]

2. *The Extent of the Binding Effect*

(*a*) Irrespective of whether the advance opinion fulfils the conditions mentioned above, the mere fact that it has an *unlawful content* will, of course, to a great extent exclude a binding effect. As this problem contains several aspects, however, it is especially difficult to set up general legal principles concerning the binding effect of the illegal advance opinion.

If the advance opinion manifests itself to the inquirer as erroneous, owing, for instance, to the authority's having misunderstood an important circumstance in the case, no binding effect can be assigned to the advance

[4] See Statute no. 275 of July 1, 1966, sec. 3.

[5] Cf. M. O. Østergaard, in *U.f.R.* 1966 B., p. 295.

opinion. In such situations it can be said that the advance opinion has not been received in good faith. But also in cases where the advance opinion is clearly illegal in the light of general considerations—i.e. without stressing such concrete circumstances—the advance opinion must be without binding effect. In a case where a local council had induced a firm to move to its area with the promise of five years' exemption from tax on economic activities, the German Bundesverwaltungsgericht considered this promise to be without effect, because it was in obvious violation of the law.[6]

If the advance opinion has an illegal content, subordinate and coordinate authorities will be bound, unless the illegality is obvious or gross.[7] It is assumed that the administrative authority itself, superior authorities and courts of law should, as the main rule, set aside an illegal administrative decision which is in favour of the party concerned, even against the protest of the party. Furthermore, in Danish law strict conditions are set for ascribing *res judicata* to an illegal administrative decision. It would seem possible to tolerate to a greater extent departures from legality in situations where opposite interests clearly deserve protection. In the case of doubtful questions of interpretation, a good deal speaks in favour of the administration and the courts leaving the illegality out of account, if the individual has taken essential measures on the strength of the decision and if no considerable interests on the part of the public or a third party require that the decision be set aside. Probably, the legal principles now referred to concerning *res judicata* of administrative decisions are applicable to advance opinions, too.

A very illuminating decision is one by a Court of Appeal,[8] whereby a promise of granting a monopoly under the Subsoil Act was declared invalid although the promise could not reasonably be considered distinctly illegal. The judgment is mentioned by Professor Poul Andersen[9] as an example confirming the general rule according to which the effect of *res judicata* is not assigned to illegal administrative decisions. In this connection the judgment is interesting for two reasons. First, because the promise mentioned in the case was an advance opinion, namely a statement obtained with a view to the clarification of the legal position of the inquirer when a possible permit of exploitation was to be issued by the ministry concerned. Secondly, the authors submit that the decision was justified precisely for the above-mentioned reasons. Assigning a binding effect to

[6] See *N.J.W.* 1959, p. 1937.

[7] The same principles apply to formal defects, cf. Poul Andersen, *op.cit.*, pp. 280 ff. Therefore, subordinate and coordinate administrative agencies will often be bound by the advance opinion in the situations enumerated above.

[8] See 1939 U.f.R. 1150.

[9] See *op.cit.*, p. 393.

the promise would be in contravention of essential public interests, as others besides the inquirer would then for a number of years be cut off from the possibility of investigating and exploiting any raw materials comprehended by the Subsoil Act. Furthermore, the very extensive promise had not provoked decisive arrangements. The statement had been obtained after the beginning of the investigation and had caused no expenses as regards exploitation, for the simple reason that the investigations made, which were especially concerned with oil, had been without result except for the finding of salt.

The inquirer can of course be guaranteed a safer basis for taking measures by virtue of special legislation conferring binding effect even to unlawful advance opinions. In Danish law there is a single example of this, namely the above-mentioned rule about advance opinions in connection with the taxation of the estate of a deceased person.[1] To draw conclusions by analogy from this isolated provision will not be admissible. Outside situations directly covered by statutory rules, it must be assumed as a starting point that the advance opinion can be binding only provided it has a lawful content. The inquirer's interest in prior knowledge of the consequences of his planned activities does not alone justify the immediate and unqualified binding effect of an illegal advance opinion (cf. the above-mentioned Court of Appeal judgment on the granting of a monopoly). In other words, such decisive importance cannot be attached to the interest in taking economic and other measures that the general limit of administrative activity, i.e. the law, and the general interests behind it, can be set aside.[2]

To answer the question whether the unlawful advance opinion may have a binding effect, it is necessary to make an evaluation on a broad basis, and for this purpose it is especially important to consider the consequences which the advance opinion has provoked. Factors such as time, and use of labour and capital, in short actions taken on the strength of the advance opinion, will be of importance. It is obvious that there is a special need to protect the inquirer when he has made such arrangements. Therefore, there are reasons for trying to determine whether and to what extent a binding effect can be assigned, indirectly, to the advance opinion on the basis of the inquirer's reliance upon it.

In Swiss practice it has been assumed that the advance opinion is binding if the individual, acting on the strength of an illegal advance opinion, has made arrangements which cannot be undone without a loss to him and if,

[1] See *supra*, pp. 198 f.

[2] The same opinion is followed in German and Swiss law, see Pieper, *op.cit.*, p. 240, and Max Imboden, *Schweizerische Verwaltungsrechtsprechung*, 2nd ed., p. 205 I.

had he been given the correct advance opinion, he could have chosen a more advantageous course of action. In a case where debentures had been issued without payment of stamp duty, pursuant to the information obtained from the taxation authorities, it was discovered some years later, but before the expiration of the period of limitation, that the stamp exemption was illegal. It was indisputable in the case that the bonds could have been converted into tax-free deposits (*Buchguthaben*), and this had not been done only because of reliance on the given advance opinion. The judgment in question runs: "Es wiederspräche Treu und Glauben, wenn von der Gemeinde heute für zurückliegende Jahre Steuern nachgefordert würden, nur weil sie im Vertrauen auf die behördliche Stellungnahme eine steuerlich unanfechtbare und wirtschaftlich ohne weiteres gangbare Massnahme unterlassen hat, die jede weitere stempelrechtliche Besteuerung ausgeschlossen hätte."[3] In other judgments, too, it is stressed that the principle of reliance ("Vertrauensschutz") must be given preference, under certain circumstances, over the principle of legality.

A number of German decisions have assumed the same principle and in legal writing it has been widely, though not unanimously, accepted. Accordingly, binding effect must be assigned to the advance opinion if it would be in contravention of the principle of "Treu und Glauben" to insist on the principle of legality.[4] This point of view has repeatedly been followed by the Bundesfinanzhof[5] and has also evoked a response from other administrative courts.[6] Therefore, the construction seems to be in the nature of a general principle of law.[7]

In Danish law there have been no cases corresponding to the situation from Swiss case law mentioned above; so it is an open question whether Danish courts will allow the principle of legality to yield in favour of a principle of reliance. A similar solution, however, cannot be excluded *a*

[3] See Max Imboden, *op.cit.*, pp. 203 ff.

[4] See Fritz Haueisen in *N.J.W.* 1961, pp. 1901 ff., Obermayer in *N.J.W.* 1962, pp. 1465 ff., especially p. 1468, and Pieper, *op.cit.*, pp. 244 ff. Forsthoff, *Lehrbuch des Verwaltungsrechts*, 10th ed., p. 263, maintains, however, that the principle can only lead to liability for damages.

[5] The problem is very well illustrated in the so-called "Schwammurteil", Bundesfinanzhof, November 18, 1958, see *N.J.W.* 1959, p. 456. See also Hartz, *Information über Steuer und Wirtschaft* 1962, pp. 63 ff., and Alfred Monreal, *Auskünfte und Zusagen von Finanzbehörden*, 1967, pp. 106 ff.

[6] With regard to the Bundesverwaltungsgericht, see Haueisen in *N.J.W.* 1961, p. 1902. The Bundessozialgericht appears to use the principle only when not in contravention of "einem gesetzlichen Gebot oder Verbot"; but see Haueisen in *N.J.W.* 1961, p. 1904.

[7] The German Bill on administrative procedure mentioned *supra*, p. 183, at footnote 2, expressly limits, as regards the situations described in sec. 44, subsec. 2, the power of revocation as to unlawful administrative decisions "soweit der Begünstigte auf den Bestand des Verwaltungsaktes vertraut hat und sein Vertrauen unter Absägung mit dem öffentlichen Interesse an einer Rücknahme schutzwürdig ist".

priori.[8] As already stated, it is our opinion that the courts should take up a less restrictive attitude as regards the not distinctly illegal administrative decision, but should hold it valid when justified by concrete circumstances. Exactly the same view ought to be taken when the question is whether a binding effect can be assigned to an illegal advance opinion.[9]

We note that regard for the inquirer's interests cannot, however, always be extended so far that an unlimited binding effect is to be attached to the advance opinion. If an advance opinion has been given concerning the statutes on duty or value-added tax, it most frequently concerns import, sales or other similar activities spread over a long period. In this case the advance opinion can be revoked with effect *ex nunc,* since the inquirer can base his future pricing policy on the changed situation. In some situations, however, it is virtually impossible to sell an article in competition with similar products without knowing the duty imposed upon it, e.g. whether alcohol can be imported under the lower duty rate in force for schnapps and aquavit. In these cases it is conceivable that a revocation of the advance opinion with the effect *ex nunc* is not justified. When considerable special expenses are spent on promoting the sale of the brand or on special manufacturing apparatus, it may be necessary to maintain the binding effect as long as necessary for the person in question to adapt his activity to the new situation. The arrangements which the inquirer has made may, however, be so extensive as to provoke a complete binding effect, e.g. an industrial construction project carried out in reliance upon the possibility of deducting depreciation.

(*b*) The other main problem, namely the importance to be attached to *changed factual and legal conditions,* will now be examined.

If the *facts* have changed at the time of the administrative decision, this will wholly or partly abolish the binding effect of the advance opinion. This limitation in the binding effect of the advance opinion seems rather obvious; if it is explicitly stated in a statutory provision on advance opinions, it is presumably mentioned *ex tuto.* Likewise, it is only by way of general information that the Tribunal for Spirit Duties, in a number of advance opinions, adds that "the assignment of the article under the rate for aquavit and schnapps applies only for the article as submitted to the tribunal". If the facts have been changed on an insignificant point, the advance opinion will maintain its binding effect.[1]

[8] See 1969 U.f.R. 108 and 1973 U.f.R. 18, together with comments by Mr Spleth (one of the members of the Supreme Court) in *U.f.R.* 1973 B, p. 184.

[9] See also sec. 34 of the German Bill, according to which the general rules about invalidity and revocation of administrative decisions apply to advance opinions.

[1] Compare the case *supra,* p. 201, at footnote 1.

An advance opinion, which on account of later amendments will be in contravention of the *legislation* at the time of the administrative decision, can have no binding effect. This must also apply in the case where the inquirer had taken measures, acting on the strength of the advance opinion given. Thus the Swedish legislation on taxation quite generally holds that the advance opinion cannot be complied with under amended legislation. Likewise, the German Tariff Act, sec. 23, lays down that the advance opinion will become inoperative "wenn die in ihre angewendeten Rechtsvorschriften geändert werden".

This result is due to the fact that the authorities, when issuing the advance opinion, make a statement on the interpretation of existing legislation only. In general an agency neither can nor will commit itself with any certainty on possible future legislation.[1a] An exception to this rule is conceivable, though only in quite special circumstances. Thus if a builder omits to build an extension according to the older rules, being promised that building to the same extent will be possible pursuant to the new ones, too, the new, stricter rules will possibly not apply to him.[2] If the authorities remain passive and do not issue the definite administrative decision, this may have the same effect.[3]

Finally, the advance opinion may be in contravention of the later established administrative or judicial *practice* (case law). It is hardly possible to make an unambiguous statement as to whether in this situation the advance opinion will continue to have binding effect. Some general principles for the solution of the problem can, however, be given.

In the case of a planned transaction having not yet been made at the time when practice is changed, it often seems reasonable that binding effect should not be ascribed to the advance opinion.[4] Thus, if the Ministry of the Interior has given a municipality its consent to raise a loan on the sole condition that the specified terms of the loan must be approved beforehand, the loan consent cannot be assumed to have any binding effect in case of a change of practice. Accordingly, in a case where an assurance from the Ministry became incompatible with the general loan limits later stipulated by the Ministry, the latter remarked that "the raising of loans must be in accordance with all the rules applying to municipal borrowing at the time of the final approval by the supervising authority".[5]

[1a] See 1975 U.f.R. 369.

[2] Cf. Max Imboden, *op.cit.*, p. 205 II.

[3] See the situation in 1965 U.f.R. 253.

[4] According to Swedish tax legislation, the advance opinion never loses its binding effect upon a change of practice. This may sometimes unduly favour the inquirer, cf. Jarnerup, *op.cit.*, p. 44.

[5] See the Ministry of the Interior, unpublished decision of September 28, 1972. The case has been mentioned by Preben Espersen, *Beslutning og Samtykke*, 1974, pp. 272 f.

At any rate, after a reasonable time limit, the administration must have the right to change its practice with effect for the inquirer who has not made decisive arrangements according to the advance opinion. An especially illuminating example can be mentioned from the practice of the Ministry of Housing. A county council was asserted to have promised a parcelling out, e.g. for camping purposes, in an area on which building lines had been imposed by virtue of the Conservation of Nature Act. The council later changed its mind, now generally following the policy that a concentrated built-up area of weekend cottages—as in this case—should have a suitable open space,[6] and it was of the opinion that the building-line area should make up this open space. What was decisive for the case, however, was the fact that more than four years had passed from the receipt of the promise without a changed development plan having been announced and, still less, without any formal parcelling-out applications having been submitted to the county council. Consequently, the Ministry of Housing declared that an "advance promise of a permit to which the applicant has no legal claim is assumed to be revoked if not followed up by a formal application within a reasonable time. The county council is thus empowered to treat the application without regard to the assurance previously granted."[7] As clearly presumed by the Ministry of Housing, a change of practice does not automatically reverse an assurance of the kind mentioned here.[8]

In conclusion, it must be assumed to apply as a quite general rule that a change of practice can have no effect for the inquirer who has made essential arrangements in reliance on the advance opinion.

V. COMPENSATION FOR LOSS SUFFERED BY NON-BINDING ADVANCE OPINIONS

1. *Liability for Fault*

According to general rules of Danish law the executive is held liable to pay damages for its negligent (tortious) acts. Case law on incorrect administrative decisions, though not abundant, proves with sufficient clearness the general principle of liability for fault and there is no doubt that

[6] The Housing Ministry agreed that this was within the scope of the Building Act.
[7] Unpublished decision from the Housing Ministry of June 6, 1968.
[8] This has clearly been assumed in other decisions of the Ministry.

compensation for incorrect advance opinions can be claimed analogously.[9] Even statements not containing any decision at all, e.g. guiding information about legal questions, may give rise to liability for damages.[1]

In this paper, of course, no attempt will be made to examine where the limit of liability for the insufficient decision or reply is drawn by the courts. However, it ought to be stressed that the incorrect decision, if it concerns a doubtful question of interpretation, can hardly be assumed, according to traditional opinion, to justify the executive in incurring liability for damages. In Professor Poul Andersen's seminal thesis on the subject, it is said to be decisive whether the authority has "acted according to a legal opinion which a vast majority of legal experts agree to characterize as incorrect, even negligent".[2] It should also be mentioned that an expert committee appointed by the Ministry of Justice, in its report on the liability for damages of the administrative authorities, quite categorically declares that no judgment has recognized a responsibility for excusable errors of law.[3]

In the light of what has now been said it must be realized that the rules about compensation do not fully protect an inquirer who makes arrangements relying on an erroneous advance opinion. When liability for damages is not extended further than to the clear cases of incorrect application of law, compensation can only be counted upon in relatively few situations. This, however, is not an unacceptable state of law, if the points of view mentioned in IV.2 (*a*) above on the binding effect of the unlawful advance opinion are adopted. As already stated, this is an open question. But if they are not to be complied with, the inquirer will in many situations be in a very insecure and unsatisfactory position, unless the courts follow a policy of awarding damages according to stricter rules of liability than have been applied so far.

2. *Liability without Fault*

If a binding effect cannot be assigned to illegal advance opinions, the inquirer needs protection in the form of compensation which is more

[9] Cf. by implication 1972 U.f.R. 478, which concerned an advance opinion, but for other reasons did not give any compensation. In the decision *supra*, p. 200, at footnote 9, the Housing Ministry adds that it is up to the courts to decide whether the fact that the county council in its statement "referred only to the location of the land in relation to the catchment area can substantiate claims of compensation for expenses incurred in vain when making a new application for parcelling out".

[1] Cf. cases as early as 1897 U.f.R. 579 where the inquirer, having been given incorrect information, applied for an unnecessarily expensive licence.

[2] See Poul Andersen, *Offentlighedsloven og forvaltningsretten* (1958), p. 96.

[3] See committee report on state and municipal liability, no. 214/1959, p. 11.

extensive than that based upon the general rule about liability for negligence. The same arguments which speak in favour of conferring binding effect upon unlawful advance opinions may be put forward in favour of the inquirer's receiving, at the very least, compensation for damage.[4] In this connection, it should be noted that according to Danish law the courts are not prevented from granting compensation on some basis other than fault. Thus the draft Bill on administrative liability expressly lays down that "special reasons" may lead to liability for damages beyond the general rule of indemnification based on fault.[5]

When the advance opinion can have no binding effect because of later changes of facts or amendments of legislation, liability for negligence can hardly be resorted to.[6] In these cases it seems more rewarding to consider the question whether existing rules about compensation for *lawful* intervention, especially the rules of expropriation, may justify damage claims. This extensive complex of problems cannot, of course, be further examined here. It should be emphasized, however, that these aspects are not merely to be brushed aside, as can be demonstrated by a Norwegian Supreme Court judgment holding the Norwegian State liable to compensation in a case where a later regulation contravened a given advance opinion.[7]

The case was about the import of fifty pairs of musk rats for a projected zoological park. After the Norwegian veterinary agency had told an inquirer that such imports were not prohibited, the person concerned made the necessary arrangements for the establishment of the zoological park. Before the import took place, however, the Ministry of Supply had issued a general ban on the import of musk rats. In the judgment it is stressed as an argument for compensation that, as the administration was authorized to prohibit the import at any time, it might also issue binding assurances of permission to import in advance. The judgment is not unchallenged in Norwegian theory. Thus, Professor Castberg maintains that no right had been created for the inquirer,[8] and in principle this is in keeping with our remarks under IV.2 (*b*) above. At the time of issuing the

[4] See sec. 44, subsec. 3, of the German Bill, see *supra*, p. 183, at footnote 2, describing the situations where unlawful administrative decisions (and thus equally advance opinions) may be revoked. Accordingly, the public has to pay damages to the injured person who "auf den Bestand des Verwaltungsaktes vertraut hat, soweit sein Vertrauen unter Abwägung mit dem öffentlichen Interesse schutzwürdig ist".

[5] See sec. 2 of the draft Bill, see also the report *supra*, p. 209, at footnote 3, pp. 11 and 29.

[6] Compare, however, the situation mentioned *supra*, p. 207, at footnote 2. It, of course, depends on an interpretation of the new statute whether binding effect can be ascribed to the advance opinion. If not, the alternative is a liability to indemnity based on fault.

[7] See 1925 N.Rt. 988.

[8] See Frede Castberg, *Innledning til forvaltningsretten*, 1955, p. 169.

advance opinion, the administration commented on the interpretation of present legislation only. It did not comment on and normally could not comment on what can be expected of future legislation. These, however, were not the conditions in this case. The amendment in question was obviously inspired by and aimed directly at the concrete permission to import musk rats. From this point of view, where a special situation of reliance had been created and then reversed in the administration's relation to the importer, the result of the judgment can be accepted.

VI. REMEDIES

When an authority must, by virtue of a statutory provision, give an advance opinion, a refusal to give it can be challenged by appeal and brought to court according to the same rules by which the decisions proper can be contested. Whether the refusal is justified depends, of course, on a further interpretation of the provision in question.[9] In fields without statutory provisions, the refusal may be justified; none the less it constitutes a decision as to the obligation to give an advance opinion. The inquirer must therefore be assumed to be entitled to both administrative appeal and to action in court.[1]

If an advance opinion has been given which is unfavourable to the inquirer, he is generally not bound by it. This, however, does not apply in all cases. As previously mentioned, the advance opinion on taxation of the estate of a deceased person implies that the legal position of the estate, too, is fixed in relation to the taxation authorities.[2] In this case the inquirer has, beyond any doubt, the option of bringing the advance opinion before a board of appeal or before the courts.[3] Although the inquirer may later obtain a verification of the correctness of the advance opinion by means of an appeal against the final decision, he may have an essential interest in getting an earlier examination. As to decisions which come into being in several stages, an unfavourable advance opinion may even entail abandoning the planned arrangement at an early stage in the light of a negative advance opinion, e.g. about the general suitability of prospective adoptive parents. No wonder, as is also assumed in administrative[4] and judicial

[9] See 1962 U.f.R. 202.
[1] See 1945 U.f.R. 160, where this is implied.
[2] See *supra*, pp. 198 f.
[3] See expressly Statute no. 118 of March 29, 1969, sec. 33 A, subsec. 8.
[4] Thus the complaint examined by the Housing Ministry in the case 1972 U.f.R. 478 concerned an advance opinion.

practice,[5] that parties in a case are entitled to complaint and action on the advance opinion.

A single but important branch of jurisprudence departs from the general line. Complaints in connection with income taxation have to be brought before a special tribunal. In the statute the jurisdiction of this tribunal is defined by way of enumeration, and, as complaints against given advance opinions are not mentioned, the appeal must be assumed to be cut off. This cannot, of course, mean that the inquirer has no right of action according to general rules. Admittedly, there has been a rejection in the case of a plaintiff who claimed that the possible profit from the sale of a specified real property should not be considered taxable income for him on the basis of a given advance opinion.[6] The rejection, however, was principally due to the fact that the court could take no position on the claim in advance when the sale of the property was hypothetical. The circumstances of the sale play an essential part for the question of whether the income from a contemplated sale should be taxed as a speculative sale.[7]

VII. CONSIDERATIONS OF LEGAL POLICY

There hardly seems to be a need for introducing general statutory provisions about advance opinions in Danish administrative law. With respect to the power and obligation to give advance opinions as well as the binding effect of such opinions, the state of the law can by and large be said to be satisfactory. The administration seems to have a clear understanding that it provides a necessary service by giving advance opinions. Neither in case law nor in administrative practice have we found decisions contradicting this assumption. In our opinion, however, it is imprecise to say (though one often runs across such statements) that the administration giving an advance opinion may to a wide extent be "factually" bound.[8] As demonstrated above, the administration, on the contrary, can be said to be legally bound when a number of conditions have been fulfilled.

Especially concerning taxation law it is a definite weakness that, owing to the way in which the assessment administration is organized, an inquirer cannot obtain a binding advance opinion from the most expert authority in

[5] See 1945 U.f.R. 160 and 1963 U.f.R. 837.

[6] See 1954 U.f.R. 363.

[7] Cf. Thøger Nielsen, *J.* 1963, p. 278. See also Hurwitz and Gomard, *op.cit.*, p. 133 with note 42.

[8] See Poul Andersen, *op.cit.*, p. 42, and Niels Eilschou Holm, *Det kontradiktoriske Princip i Forvaltningsprocessen*, 1968, p. 450.

the field of assessment in this country.[9] Certainly, the replies of the General Commissioner of Taxes have so much authority that they are nearly always complied with by the local assessment authorities. But the whole arrangement seems awkward, since these authorities, perhaps after having obtained instructions from the General Commissioner of Taxes, are not excluded from giving binding advance opinions.

Of course, it cannot be excluded that the state of the law in other fields, too, is unsatisfactory and that, as in the field of taxation, legislation about advance opinion may be necessary. It has to be added, however, that our investigations have not revealed a need for such legislation. In our opinion, any legislation undertaken could most appropriately take the form of special provisions for the administrative activities in question.

[9] Cf. Østergaard in *U.f.R.* 1966 B., pp. 293 and 296, stating that the taxpayers cannot in practice obtain a binding advance opinion. For criticism of the similar Norwegian state of law, see Aarbakke in *Lov og Rett* 1971, pp. 250 f.