

# § 12 Administrative action

## I. Forms of administrative action (overview)

- chosen form decisive for formal and procedural requirements and legal protection

### 1) Administrative act (= administrative decision) [Verwaltungsakt, sect. 35 et seq. APA]

- the main instrument of public administration
- unilateral regulation of individual cases in the sphere of public law
- also *planning approval* after a complex planning process (cf. sect. 72 et seq. APA)

### 2) Public-law contract [öffentlich-rechtlicher Vertrag, sect. 54 et seq. APA]

- bilateral regulation constituting, amending or annulling a legal relationship under public law
- two main categories: compromise agreements (sect. 55 APA) and exchange agreement (sect. 56)
- must be in writing (sect. 57 APA)
- special reasons for invalidity (sect. 59 APA)

### 3) Ordinance and bylaw [Rechtsverordnung & Satzung]

- general regulation of administrative matters

### 4) Simple, non-regulatory admin. action (real act) [schlichtes Verwaltungshandeln, Realakt]

- admin. action without regulatory character
- examples: providing information, warning, commenting, patrolling, physical help, use of physical force, preparatory and enforcement acts for admin. acts
- odd: German doctrine strongly tends to interpret physical action as a conclusive action implying regulation
  - e.g. interpret the towing of an illegally parked vehicle as enforcement of a fictitious drive-away order
  - this can make the legal handling of a simple process very complicated in German law...

### 5) Forms of action under private law

- in particular private-law contract, but also establishment of legal entities under private law
- common not only for fiscal administrative action (e.g. purchase of equipment), but also for the fulfillment of public tasks (e.g. providing public services)
- also combined with administrative acts, esp. in the granting of subsidies, according to the so-called *two-stage theory* [Zweistufentheorie]:
  - first stage: basic decision (e.g. about the subsidy or loan) in an administrative act
  - second stage: implementation via a private-law agreement (e.g. a loan agreement)

### 6) Internal administrative measures

- binding only the administration, not the citizen
- e.g. administrative provisions, internal orders
- cannot be challenged before the administrative court

## II. The administrative act (= administrative decision) [Verwaltungsakt]

- the by far *most important legal institution of administrative law*
  - developed in France already in the 19<sup>th</sup> century
  - strong focus of admin. law doctrine in most countries on this legal institution
  - narrow concept in German admin. law (only decisions regulating individual cases) versus wide concept in French admin. law (also general administrative regulations)

## 1) The concept of administrative act

- **definition:** a measure taken by a public authority to unilaterally regulate an individual case in the sphere of public law with external legal effect (→ legal definition in sect. 35 APA)
- a) **Measure taken by a public authority**
  - authority: any body which performs tasks of public administration (sect. 1(4) APA)
    - also private individuals entrusted with public powers (e.g. ship captains, aircraft pilots, notaries)
- b) **In the sphere of public law**
  - see Slide 8 (§ 9 II.)
- c) **Regulation**
  - decisive criterion for differentiation from the real act
  - measure must intend to establish a binding legal consequence
  - only *unilateral regulations* (differentiation from the public-law contract)
  - preparatory measures are not an admin. act themselves and therefore cannot be attacked separately before the admin. court
- d) **Individual case**
  - decisive criterion for differentiation from ordinances and bylaws
    - unlike in French admin. law...
  - categorical distinction between
    - concrete-individual regulation (→ classical admin. act)
    - concrete-general regulation (→ also admin. act)
      - example: prohibition of a planned demonstration (includes prohibition to anyone to participate)
    - abstract-individual regulation (→ also admin. act)
      - example: order to a property owner to grit the sidewalk in every case of black ice
    - abstract-general regulation (→ legal provision)
  - special case: *general order* [Allgemeinverfügung, sect. 35 phrase 2 APA]
    - decision directed at a group of persons defined or definable on the basis of general characteristics
    - decision on the public-law nature or use of an object by the general public
- e) **External effect**
  - decisive criterion for differentiation from internal decisions
    - distinction can be difficult in civil service law matters

## 2) The legality of the administrative act

- a) **Introduction**
  - In a state based on the rule of law, any activity of the public administration, including any individual admin. act, must be legal. The law, as an absolute standard, is binding in any single case. The elements of the legality, as presented for German law below, are the conditions for the legality of the admin. act. If only one is missing, the admin. act is illegal and may be annulled by the administrative court after an action for annulment. In the admin. law of many countries this is reflected in the traditional legal term of "grounds of review" but in an advanced admin. law system based on the rule of law *any* unlawfulness, i.e. the missing of *any* element of the legality is a "ground of review".
  - Admin. law has a different tradition in every country. In some countries it developed slowly and continuously in the course of a long history. In others, it boosted in times of political change or economic boom. As a consequence, the *structure of the examination* of the legality of admin. acts (admin. decisions) *varies from country to country*, even if the legality concept follows similar basic ideas and many elements correspond. The German model is attractive for comparative studies, because it has

strongly developed in a short time after the Second World War and therefore is a little bit more rational-logical and less historical in nature.

**b) Legality and expediency of an administrative act**

- a fundamental distinction in admin. law, required by the *separation of powers* and important for the limits of legal protection
- In the course of admin. review in objection proceedings, the admin. decision may be abolished for illegality or inexpediency (since the responsibility still lies within the administration).
- In the course of judicial review, the admin. decision can only be annulled for illegality. Unlike the administrative superior, the judge is not allowed to examine if the decision is expedient, convenient, practical or politically suitable.
- The distinction can be difficult, in particular for discretionary decisions and with regard to the principle of proportionality.

**c) The basic structure of the examination of the legality**

- as any legal examination, the *structure of the examination* of the legality of admin. acts *must follow the laws of logic and the dogmatic structures of the field of law*
- logically and dogmatically, two groups of requirements can be distinguished:
  - those concerning the making of the admin. act (external or "formal" aspects) and
  - those concerning the contents of the admin. act (internal or "material"/"substantial" aspects);
  - the aspects of these different groups must not be mixed but examined separately, and within the two groups there is partially a logical order

**d) The elements of the legality of an administrative act**

- **Further reading:** See also on the elements of legality under French and European admin. law Slide 2 from a course in Yogyakarta 2023 and the special material from a conference in Hanoi 2013
- see detailed presentation in Diagram 4
- aa) Elements of legality in form
  - competence, procedure, form
- bb) Elements of legality in substance
  - legal basis, choice of right addressee, general requirements (definiteness, feasibility of implementation, proportionality etc.), no incorrect exercise of discretion

**3) The exceptional invalidity of an unlawful administrative act**

- to keep public administration efficient, in Germany as in many countries an illegal admin. act is *not automatically invalid* or ineffective (except in special or serious and evident cases) but needs to be abolished by the way of administrative or judicial review
- see the complicated regulation of invalidity in sect. 44 APA
- if citizen misses deadline for legal remedies, even an illegal admin. act may be executed

**4) The withdrawal and revocation of administrative acts**

- a delicate balancing between the need to enforce the law and the protection of legitimate expectations, two often contrary elements of the rule of law
- detailed regulation in sect. 48, 49 et seq. APA

**III. The administrative procedure**

- regulated in detail in the *Administrative Procedure Act* (= APA), esp. sect. 9 et seq.
- follows the inquisitorial principle (sect. 24)
- detailed special regulations for *special types of procedure*, e.g. planning approval procedures (sect. 63 et seq.)

- in particular: *hearing of participants* (sect. 28)
- in particular: allowing inspection of files (sect. 29)
- in particular: admission of representatives and advisors (sect. 14)
- in particular: no involvement of persons excluded or feared to be prejudiced (sect. 20 et seq.)
- in particular: secrecy of matters of confidential nature, esp. those relating to the citizen's private life and business (sect. 30)
- in particular: statement of reasons (sect. 39)
  - communication of the chief material and legal grounds, in particular for the concrete exercise of discretionary power

#### **IV. The administrative review of administrative acts in the objection proceedings**

- legal basis: sect. 68 et seq. of the Code of Administrative Court Procedure [= CACP]
- a special remedy of *administrative review* (= by public administration itself) of admin. acts, and likewise a *precondition for judicial review*
- useful functions:
  - protection of the citizen's rights
  - administrative self-control
  - relief for the administrative courts
- nevertheless abolished in some Länder to save time and financial resources
- objection must be lodged within one month (sect. 70 CACP)
- *review not only of the legality but also of the expediency* of the admin. act
  - something not achievable by the way of judicial review, since the judge is functionally limited to the control of legality
  - the admin. act may be repealed for any legitimate reasons of expedience (suitability, practicability, fairness and morality, political reasons, financial reasons etc.)