

The administrative procedure in German administrative law

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I. Introduction

1. The concept of administrative procedure

In a wider sense, *administrative procedure* [Verwaltungsverfahren] can be understood as any activity of an *administrative authority* [Verwaltungsbehörde] that is directed to the preparation of any kind of *administrative action* [Verwaltungshandeln]. However, in German law, due to a restrictive legal definition in sect. 9 of the federal *Administrative Procedure Act* [Verwaltungsverfahrensgesetz - VwVfG], this is not the case: The concept of administrative procedure only embraces those activities that have an external effect and are directed to the examination of the requirements, the preparation and the adoption of an administrative act or to the conclusion of an administrative contract. This includes the adoption of the act or the conclusion of the contract but excludes firstly all internal proceedings that are connected to their preparation and secondly all proceedings, internal and external, that are directed to prepare other administrative actions, such as physical administrative action, information, warnings, informal (non-binding) agreements or the issuing of administrative regulations. All these activities are not classified as adminis-

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trative procedure. However, many norms presented in my lecture can be applied analogously to them since they represent little more than a procedural concretisation of the rule of law.

2. The functions of administrative procedure in a state governed by the rule of law

The primary function of the administrative procedure is to provide for an *effective and efficient execution and enforcement of the law*, acting in the public interest and pursuing the objective defined in the relevant statutes and regulations. This is a matter of course but sometimes it is neglected in the scientific discourse in Western countries because there is a secondary function that preoccupies the scholars: to ensure that the primary function is fulfilled in a way strictly *in line with the rule of law* and *respecting* the rights, in particular the *fundamental rights* of the citizens. Both constitutional and administrative law doctrine consider the administrative procedure as a way and administrative procedure law as a tool to achieve the so-called "*protection of fundamental rights through proceedings*" ["Grundrechtsschutz durch Verfahren"²].

3. Backgrounds and basic conditions of German administrative procedure law

a) The *historical background*: German administrative law was already developed in some German states in the 18th century. However, in the course of the 19th century, the French general administrative law developed better. At the end of the century, due to the influence of the Strasbourg scholar Otto Mayer, it had a considerable impact on the modernisation of German law.³ It impregnated the German law by important concepts, including that of the administrative act [acte administratif, Verwaltungsakt]. In both countries this concept is still the central element of general administrative law. The German administrative procedure law strongly focusses on the administrative act.

b) German administrative procedure law must be understood in the *context of German federalism*. With few exceptions, the Länder do not only execute their own but also the federal laws. Therefore, in general they are competent to regulate the administrative procedure, even for most cases of executing federal law.⁴ Theoretically, there could be a different procedure law in the Federation and each Land. However, in order to ensure a certain degree of homogeneity, the Länder have resisted this temptation. Formerly, each Land has its own Administrative Procedure Act, but in substance, they are largely similar because they either just refer to the federal act or repeat its contents with minor modifications. The federal act itself applies to the administrative activities of federal authorities.

c) German administrative procedure law must be seen in the *context of European integration*. With very few exceptions, European Union law is executed by the administration in the member states. In their daily work, the authorities often have to apply a European regulation or to execute a national act that implements a European directive. In doing so, they are directly bound to the directly applicable Union law, in particular to the general principles of law, which the European Court of Justice has discovered and introduced, many of them forming, in their entirety, the European administrative law.⁵ If the national and European rules are different, due to the *primacy of European Union law*, the European rules will prevail and the national law has to be adapted. Thus the emergence of the European administrative law led to important changes of national law, sometimes against the will of national legislators and scholars.⁶ This

² See, for example, *Bergner*, Grundrechtsschutz durch Verfahren, 1998; *Pünder*, in: Erichsen/Ehlers (eds.), Allgemeines Verwaltungsrecht [General administrative law], 14th edition 2010, § 13 no. 7 with further references.

³ *Otto Mayer* praised the French administrative law in his famous book "Theorie des Französischen Verwaltungsrechts" of 1886. He invited his fellow scholars to lean on the French doctrine in order to develop the German doctrine. Nine years later, in his famous work "Deutsches Verwaltungsrecht" (vol., 1, 1895), he transferred many ideas from the French to the German doctrine. This approach was widely accepted, despite the political tensions between the two countries at that time.

⁴ See on the details art. 84 f. of the Basic Law for the Federal Republic of Germany (the German constitution, BL).

⁵ See for its development and essence *Schwarze*, Europäisches Verwaltungsrecht. Entstehung und Entwicklung im Rahmen der Europäischen Gemeinschaft, vol. 1 and 2, 1988; *Schwarze*, European administrative law, 2006 = Europäisches Verwaltungsrecht, 2005; *Schwarze (ed.)*, L' état actuel et les perspectives du droit administratif européen, 2010

⁶ Cf. *Schmitz*, Integration in der Supranationalen Union, 2001, p. 109 ff. with further references.

*Europeanisation of administrative law*⁷ has affected many parts of administrative law. Concerning the German administrative procedure law, in particular administrative finality and the practice of withdrawing illegal beneficial administrative acts were affected.

II. The federal Administrative Procedure Act of 1976

1. History

The Germans were not the first to have a codified administrative procedure law. Austria had it already in 1925, the United States of America followed in 1946.⁸ In Germany, the idea of codification became stronger in the fifties. In 1964 a joint commission of the Federation and the Länder presented a draft for a model act. The Federal Government submitted a first bill in 1970 and a second in 1973, but it took until 1976 before the federal Administrative Procedure Act⁹ was passed.¹⁰ However, since that time it has undergone rare and minor modifications only, most of them implementing European rules or trying to simplify and accelerate the procedure.

2. Scope of application

The scope of direct application of the federal Administrative Procedure Act is limited to the administrative activity of federal official bodies and institutions (even with some excluded exceptions). The Act does not apply directly to the administrative activity of the Länder, not even to the execution of federal law, since all Länder have made use of an option provided in sect. 1(3) and adopted their own administrative procedure acts. Where these acts just refer to the federal act, it is applied indirectly ("read together with..."). In the other cases, only the act of the Land is applied. Since it will widely have the same structure and contents, this makes little difference. For this reason, the scholarly debate focusses on the federal Administrative Procedure Act only.

The scope of application is limited to *administrative activity under public law*. For activities under private law, the forms and procedures of private law apply. However, when the authority is acting in order to fulfil a public mission, it cannot escape the requirements of substantial law and the rule of law. In these cases some rules codified in the Act may apply as a general principle, deriving from fundamental rights, constitutional principles or the rule of law (so-called *administrative private law* [Verwaltungsprivatrecht]).

Outside the Administrative Procedure Act, numerous legal provisions regulate special formal and procedural requirements for special measures in special fields of administrative law. They supersede the rules in the Act as *lex specialis*.

3. Contents and structure

The federal Administrative Procedure Act has a simple and clear structure that reflects, however, a rather limited content.

a) The Act *focusses on administrative acts and administrative contracts*. Concerning these forms of administrative action, it does not only regulate form and procedure but also deals with some aspects of

⁷ Cf. *Jans/Prechal/Widdershoven (eds.)*, *Europeanisation of Public Law*, 2nd edition 2013; *Ladew*, *The Europeanisation of Administrative Law. Transforming National Decision-making Procedures*, 2001; *Schwarze (ed.)*, *Das Verwaltungsrecht unter europäischem Einfluß*, 1996.

⁸ See the Österreichisches Bundesgesetz über das allgemeine Verwaltungsverfahren [Austrian Federal General Administrative Procedure Act] of 21.07.1925 and the Administrative Procedure Act (APA) of 11.06.1946.

⁹ *Verwaltungsverfahrensgesetz (VwVfG)* of 25.05.1976, last promulgated on 23.01.2003, last amended in 2009, www.gesetze-im-internet.de/vwvfg/BJNR012530976.html.

¹⁰ See for the genesis and the later development of the federal Administrative Procedure act *Kopp/Ramsauer*, *Verwaltungsverfahrensgesetz*, 13th edition 2012, Einführung I, nos. 25 ff.; *Pünder* (note 2), § 13 nos. 4 ff.

legality in substance [materielle Rechtmäßigkeit, légalité interne]. By contrast, it ignores other important forms of administrative action. In particular rules concerning official warnings and other information to the public issued by the authorities and rules on informal (non-binding) agreements that intend to avoid unfavourable administrative acts are missing. Rules on physical administrative action are also missing but this has a limited effect because German lawyers tend to classify physical action (e.g. the towing away of a car) as execution of a (real or fictitious) administrative act. However, the significance of these deficiencies is limited because many norms in the Act just concretise the requirements of the rule of law and can be applied analogously to the other forms of administrative action.

The Act is also limited to the proceedings until the adoption of the administrative act or the conclusion of the administrative contract. There are no rules on the administrative enforcement [Verwaltungsvollstreckung] or on the service of administrative notice [Verwaltungszustellung], a special, more formal kind of notification of administrative acts. These rules are the subjects of separate acts.¹¹

b) The Act contains *special provisions for special types of procedure*. The *formal administrative proceedings* (sect. 63 et seq.) take place when required by law. They differ from the common, informal proceedings by the requirements of the written form (for applications and decisions), the obligation to hear all participants and the need of an oral hearing. Furthermore, the Act knows special *procedures dealt with by a single authority* (sect. 71a et seq.) and special *procedures for planning approval* (sect. 72 et seq.). Mass procedures that involve a great number of citizens affected in a similar way, do not present a special type of procedure. However, the Act deals with this phenomenon in some special clauses (e.g. on representation and notification, see sect. 17 et seq., 67(1), 69(2)).

c) The Act also includes regulations on *general aspects of administrative procedure*, such as local jurisdiction (sect. 3), electronic communication "replacing" the written form (sect. 3a), official assistance to other authorities (sect. 4 et seq.), time limits, deadlines and restoration of the status quo ante (sect. 31 et seq.), official certification (sect. 33 et seq.), the involvement of citizens in honorary functions and committees (sect. 81 et seq.). Only in 2009, after more than fifty years of European integration, a special section on European administrative cooperation was inserted (sect. 8a et seq.). The most important general provisions are those on the procedural principles (art. 9 et seq.).

III. Guiding principles of the administrative procedure

1. Informality (sect. 10 phrase 1)

According to sect. 10 phrase 1, the administrative procedure is generally not bound to specific forms. This does not exclude special forms or procedures (e.g. oral hearings) but leaves it at the authority's discretion. This guiding principle shall provide for flexibility and make the proceedings more comprehensible for the citizens.¹² Only in exceptional cases, when required by law, will there be the formal administrative proceedings (cf. sect. 63 et seq.).

2. Simplicity, appropriateness and quickness (sect. 10 phrase 2)

According to sect. 10 phrase 2, the administrative procedure shall be carried out in a simple (uncomplicated), appropriate and timely manner. This principle aims at *minimising the costs and burden* for the administration and for the citizen. Simplicity and appropriateness require that the *authority refrains from unnecessary and disproportionate measures*, such as unjustified summons, demanding of unnecessary

¹¹ See the federal *Verwaltungs-Vollstreckungsgesetz* (VwVG) [Administrative Enforcement Act], the *Verwaltungszustellungsgesetz* (VwZG) [Administrative Notice Act] and the corresponding acts of the Länder.

¹² Cf. Schröder, in: Seerden (ed.), *Administrative Law of the European Union, its Member States and the United States*. A comparative analysis, 3rd edition 2012, p. 68.

documents or the excessive completing of forms etc. In particular, any requiring of documents that can only be obtained in another administrative procedure by another administrative authority must be based on material justifying reasons. Quickness requires a final decision within an appropriate time period. Which period is appropriate, depends from the circumstances of the individual cases. For many standard cases, according to scholars, a period of three months may be appropriate.¹³ In order to ensure a quick decision, sect. 42a introduced the legal figure of a *fictitious approval* [Genehmigungsfiktion]: An approval that has been applied for in a sufficiently definite application shall be deemed granted upon expiry of a specified decision-making period (if not determined otherwise, a period of three months) if this is stipulated by law.

3. Exclusion of officials in case of prejudice (sect. 20 et seq.)

The exclusion of officials from the proceedings in case of prejudice is an essential requirement of the rule of law. Sect. 20 absolutely excludes certain categories of persons from acting on behalf of the authority: the participants in the proceedings and other persons who may benefit or suffer directly from the decision, their relatives, employees, representatives (and their relatives) and persons who have already been active in the matter outside of their official capacity. In addition, sect. 21 obliges officers to inform the head of the authority (or a person appointed by him) if grounds exist (or are alleged by a participant) that justify fears of prejudice in the exercise of official duty, and to refrain from involvement at his request. Such grounds may lie in personal relations, possible (dis-) advantages or the behaviour of the officer. Where they exist, the officer *must* be requested to refrain even if his work is not biased, since sect. 21 targets to eliminate even the appearance of prejudice.¹⁴

4. Initiation ex officio at the authority's discretion (general case) or by application (sect. 22)

Whether and when an administrative procedure is initiated, is in principle decided by the authority (not by the citizen) in a discretionary (not bound) decision (cf. sect. 22 phrase 1). It can happen that in the individual case the discretion is reduced in the way that the authority *must* take measures in order to protect fundamental rights or other legal values against imminent threats. Furthermore, the situation is different in those cases, where the authority, due to special provisions, *must* act ex officio or upon application or *may only* act upon application and no such application is submitted (cf. sect. 22 phrase 2). In the latter case the violation of procedural law is irrelevant, if the application necessary for the issuing of an administrative act is subsequently made (cf. sect. 45(1) no.1). There are also cases, where special provisions allow certain measures ex officio *or* upon application.¹⁵ Besides, even in the ex officio cases, the citizen may trigger the initiation of the procedure by an informal suggestion.

5. Ex officio determination of the facts of the case (inquisitorial principle, sect. 24)

The administrative procedure is not a contradictory procedure. The administrative authority is responsible for a correct outcome in line with the relevant law, the rule of law and the constitutional principles. Therefore it is the *master of the proceedings*. Since a correct determination of the facts is crucial for a correct outcome, the authority has to determine the facts ex officio (*inquisitorial principle*, sect. 24). It decides on the type and scope of investigation and on the use of evidence. It is not limited to certain types of evidence (cf. sect. 26(1)). It is not bound by the participants' submissions and motions to admit evidence, but it must take account of *all* relevant circumstances, including those favourable to the participants.

¹³ Cf. Kopp/Ramsauer (note 10), § 10 no. 19; Gerstner-Heck, in: Bader/Ronellenfitsch (eds.), *Verwaltungsverfahrensgesetz*, 2010, § 10 no. 17.

¹⁴ Heßhaus, in: Bader/Ronellenfitsch (note 13), § 10 no. 3.

¹⁵ See, for example, § 10(1) of the Crafts cod [Handwerksordnung] for the registration in the register of qualified craftsmen [Handwerksrolle].

IV. The rights of the participants in the administrative procedure

German public law is not confined to objective rules and principles but focusses on the *subjective rights* [subjektive Rechte] of the citizen.¹⁶ The German administrative procedure law follows this basic approach by granting several procedural rights to the participants in the procedure. The range of participants includes applicants, opponents of applications, addressees and potential addressees of administrative acts, parties and potential parties of administrative contracts and persons whose legal interests may be affected by the result of the proceedings if the authority decides to involve them in the procedure (sect. 13).

1. Right to bring in representatives and advisors (sect. 14)

Every participant is entitled to be represented by an authorised representative or to bring in an advisor (sect. 14). However, these persons may be refused permission to make submissions if they are unsuitable to do so, i.e. incapable of a clear, sober and non-circumlocutory submission¹⁷ (sect. 14(6)).

2. Right to advice and information by the public authority (sect. 25)

According to sect. 25 the authority shall provide advice and information. It shall encourage that statements or applications be made or corrected if they were not or incorrectly submitted by mistake or ignorance. As far as necessary, it shall discuss with the citizen, before the application is made, what evidence and documents he will have to submit and how to expedite the proceedings. Where necessary, it shall also give information about the rights and duties of participants in the administrative procedure.

3. Right to be heard (sect. 28)

The most important procedural right of the participant is the right to be heard. He must be given the opportunity to comment on all facts relevant to the decision. The authority must not base its decision on circumstances on which he could not comment and must show in its statement of reasons that it has taken note of his submissions.¹⁸

Art. 28(1) only requires to hear the participant if an administrative act may be issued that will affect his rights. However, the same applies - by analogy - to other forms of administrative action such as physical administrative action or warnings, if the measure will affect the citizen's rights and is preceded by a decision.¹⁹ There is a controversy if it also applies when the authority is intending to dismiss an application for a beneficiary administrative act.²⁰ On the one hand, three reasons speak against it: the unambiguous wording of art. 28(1), the essential difference between the issuing of an unfavourable and the refusal of a favourable administrative act and the fact that in the last case the applicant has the opportunity to make his submission in his application. On the other hand, there may be a need for a hearing because the authority may have certain opinions on questions of law and the participant must have the opportunity to state his position on them.

As an exception, there is no hearing if it would be contrary to imperative reasons of public interest (sect. 28(3)). Moreover, the authority may abstain from a hearing if it is not required by the circumstances of the individual case, in particular if an immediate decision appears necessary or the authority does not intend to diverge from a participant's statement of facts to his disadvantage (see for these and other reasons art. 28(2)).

¹⁶ See on the concept of subjective rights in administrative law *Scherzberg*, in: Erichsen/Ehlers (note 2), § 12; *Maurer*, Allgemeines Verwaltungsrecht, 18th edition 2011, § 8 with further references.

¹⁷ Cf. *Kopp/Ramsauer* (note 10), § 14 no. 38.

¹⁸ *Maurer* (note 16), § 19 no. 20.

¹⁹ *Kopp/Ramsauer* (note 9), § 28 no. 4a with further references.

²⁰ See the presentation of the controversy by *Herrmann*, in: Bader/Ronellenfisch (note 13), § 28 nos. 13 f. with further references., and *Kopp/Ramsauer* (note 10), § 28 nos. 26 ff. with further references.

4. Right of inspection of files (sect. 29)

The participant has the right to inspect the files that are connected to the proceedings as far as their knowledge is necessary to assert or defend his legal interests (sect. 29). He is only entitled to see those files that concern his rights and position.²¹ Moreover, there are some exceptions. His right is complemented by a general right of access to public information that is granted by the federal Freedom of Information Act [Informationsfreiheitsgesetz] or the corresponding acts in some Länder.

5. Right to secrecy (sect. 30)

Finally, the participant has a right to secrecy, in particular with regard to private and business secrets (sect. 30). The authority may reveal them only if authorised by him or by special legislation.

6. Procedural duties of the participants?

Concerning the question of duties of the participants in the administrative procedure, the position of the German administrative law is clear: The participant has procedural rights but no procedural duties, which could be enforced by the authority. This reflects the general approach of the German free and democratic order to focus on the rights and not on the duties of the human being. According to sect. 26(2) phrase 1 and 2, the participants "shall" assist in ascertaining the facts of the case. In particular they "shall" state facts and evidence known to them. But this is a non-mandatory provision that creates a responsibility, not a duty. The legislator employed the German term "sollen", which means "shall" in the sense of "are expected", not "must". If the participant refuses to cooperate in the proceedings, he bears the risk of an unfavourable decision but does not violate a legal obligation. Sect. 26(2) phrase 3 expressly stipulates that a more extensive duty to assist in ascertaining the facts, in particular a duty to appear personally or to make a statement, only exists where specifically arranged by law.

V. Special rules concerning administrative acts

The third part of the Administrative Procedure Act contains special rules concerning administrative acts. It provides for a definition, regulates formal and procedural issues and issues of substantive law and deals with the legal validity of administrative acts, in particular the sensitive questions of withdrawal and revocation.

1. Formal requirements

Concerning formal requirements, the rules are restraint. A *written form* is only necessary when required by special legislation. However, on immediate request, a verbal administrative act has to be confirmed in writing if there is a legitimate interest that this should be done (sect. 37(2)). An administrative act can be communicated electronically, if the addressee has established access for this. In this case, the electronic document must be provided with a special qualified electronic signature (sect. 3a).

Written, electronic and confirmed administrative acts must be accompanied by a *statement of reasons* that communicates the chief material and legal grounds that have caused the authority to take its decision (sect. 39). In case of discretionary decisions, the statement must also reveal the aspects considered when exercising the discretionary power. The statement of reasons plays a decisive role in case of administrative or judicial review.

²¹ Maurer (note 16), § 19 no. 21.

Administrative acts must be accompanied by a *notification on available legal remedies* (cf. sect. 79 read together with sect. 58 et seq. of the Code of Administrative Court Procedure). However, this is not a requirement of legality but impacts the start of the deadline for the remedies.

Special legislation may stipulate further formal requirements. For example, for the appointment of civil servants, the delivery of the certificate of appointment is necessary (see sect. 8(2) of the Civil Service Status Act [Beamtenstatusgesetz]).

2. Procedural requirements

The hearing of the participants (see supra, IV.3) and the allowing of inspection of files (see supra, IV.4) are the most important procedural requirements in the preparation of administrative acts. *Special legislation* may stipulate further requirements, such as public notification, the participation of other administrative authorities, environmental impact assessments or the consent of the addressee. Besides, the need to *notify the administrative act to the addressee and concerned persons* (sect. 41 of the Administrative Procedure Act) should be stressed. However, this is not a requirement of legality but a precondition for the existence of the administrative act.

3. Irrelevance of defects in procedure and form

The presented requirements shall ensure that the administration acts in line with the rule of law and respects the citizen's rights but must not obstruct efficient administrative performance. Therefore, the legislator decided that an illegal administrative act is not invalid if it has not been annulled in the course of administrative or judicial review, unless it suffers from an especially serious effect and this is obvious (cf. sect. 44(1)). Besides, sect. 45 grants the option to "*cure*" *formal defects and procedural errors* by getting necessary applications, stating the grounds, hearing the participants or obtaining decisions of committees or the collaboration of other authorities *subsequently*. This may even be done in the course of administrative and judicial review. If the defects and errors are "cured", they become irrelevant and the administrative act is considered as legal.

Furthermore, according to sect. 46, the citizen is not entitled to request an annulment for infringement of provisions on procedure, form or local jurisdiction, if it is evident that this infringement has not influenced the decision on the matter. Thus, the legislator wants to prevent that a decision is annulled that will be taken again. However, this clause is problematic since it also applies to discretionary decisions and bears the risk that the procedural rights of the citizen will not be taken seriously: It is not the same if the participant is heard before or after the decision-making because in the latter case this will be pure formalism and in practice he will barely have a chance to influence the decision. Special legislation has introduced more of such clauses, in particular in planning law. Sect. 214 and 215 of the Federal Building Code [Baugesetzbuch] strongly limit the "relevance" of violations of formal and procedural requirements in the making of land use plans. This is a joke but not rule of law. If the procedural rules are too complicated or demanding for the local authorities, the rule of law requires the legislator to make them simpler, not irrelevant.

VI. Conclusion

German administrative procedure law has proved in practice that it *is* possible to conciliate the needs of efficient administration with the rule of law and the respect for the citizen's rights. It shows a number of elements that may be inspiring for the development of administrative law in other countries. Some solutions may be rather complicated but can be simplified without a loss in substance. However, a modern administrative procedure act should not be limited to the regulation of administrative acts (decisions) and contracts. It should also include some rules on physical administrative action and official warnings (in

particular about dangerous products or food) because they can harm the rights of the citizen in a similar way and must be brought in line with the rule of law too. Moreover, as a comprehensive codification it should include rules on administrative enforcement.

Further reading

Erichsen, Hans-Uwe; Ehlers, Dirk (eds.): Allgemeines Verwaltungsrecht [General administrative law], 14th edition 2010 (see in particular § 13)

Künnecke, Martina: Tradition and Change in Administrative Law. An Anglo-German Comparison, 2007 (see Chapter Four)

Maurer, Hartmut: Allgemeines Verwaltungsrecht, 18th edition, 2011 (see in particular § 19)

Seerden, René J.G.H. (ed.): Administrative Law of the European Union, its Member States and the United States, 3rd edition 2012 (with parts on French, German, Dutch, English, European and American administrative law)

Bader, Johann; Ronellenfisch, Michael (eds.): Verwaltungsverfahrensgesetz. Kommentar [Administrative Procedure Act. Commentary], 2010

Kopp, Ferdinand; Ramsauer, Ulrich: Verwaltungsverfahrensgesetz [Administrative Procedure Act], 13th edition 2012

All books and more resources on German administrative law can be consulted in the library of Hanoi Law University or in my office (room B102).