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The requirements of the legality of the administrative decision in German and European law

I. Introduction

Administrative 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 administrative decisions *varies*, even if the concept of legality follows similar basic ideas and many elements correspond. In some legal systems, the concept of legality developed hand in hand with the so-called "grounds of review", i.e. the grounds on which an action for annulment at the courts can be based. These grounds were limited in the past but have been extended and complemented with the emergence of the rule of law. In other legal systems there is not really a concept of "grounds of review" because (theoretically) *any* violation of any legal norm in the making or by the contents of the administrative decision makes it illegal and should lead to its annulment. In these legal systems, German law included, the structure of examination is less influenced by history, but constitutional principles may have an impact on it.

Logically, all elements of the legality of an administrative decision can be allocated to *two basic categories:* the *legality in form* (= with regard to formal requirements) and the *legality in substance* (= with regard to substantive requirements). The first category embraces all requirements concerning the making of the decision (who, how, in which form?), the second category those on its contents. This is reflected by the French terms *"légalité externe"* [external legality] and *"légalité interne"* [internal legality]. German legal terminology uses the corresponding but ambiguous terms "formelle Rechtmäßigkeit" ["formal legality"] and "materielle Rechtmäßigkeit" ["material legality"]. Not only foreign observers but also German students have difficulties to understand what is meant by that. There is also some *confusion about "form" and "procedure"*: While the French and the Germans consider the procedural requirements being elements of the legality in form, the British see it the other way around. However, one statement can be made: Any elements of legality outside the two basic categories of external and internal legality are - even theoretically - impossible.

The distinction between these two blocks is an important step to a more rational administrative law. However, due to historical reasons, it is not made everywhere. For example, in European Union law it is not established.

From the perspective of the rule of law, all elements of legality are equally important. However, from the perspective of other constitutional principles, of the rights of the citizen and of the purpose of the relevant law, the elements of the legality in substance are more important. Formal and procedural requirements are not an end by themselves but mainly serve to ensure that the outcome, that means the contents, the substance of the decision, complies with the law. This explains why the structure of the first block is rather homogeneous in the various legal systems (competence of the acting authority, formal requirements, pro-

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cedural requirements), while the composition of the second block varies considerably. Some elements of legality in substance are not recognised in some countries, arrived later or are known under a different label. The biggest and most interesting differences concern the requirements for the exercise of discretionary power.

II. The legality of an administrative act in German administrative law

German administrative law strongly focusses on the administrative act (the German term for administrative decision). But neither the requirements of its legality neither the grounds for its judicial review are determined by statute; the federal Administrative Procedure Act only deals with some special aspects (cf. sect. 37(1) and 40). The reason for the legislator's abstinence lies in the *important role of jurisprudence and scholarly doctrine* in the development of sophisticated legal dogmatics. The courts and scholars work out the individual elements of legality. Then the scholars categorise, systematise, discuss and present them to the public in numerous articles and textbooks. This way allows more flexibility than a statutory regulation. In countries where jurisprudence and doctrine cannot yet perform this function, a statutory regulation is necessary. However, it should leave room for new developments and therefore abstain from enumerating the elements of legality conclusively.

The elements of the legality of an administrative act in German law are outlined in *diagram 1* (see infra, IV.1). Some aspects should be highlighted:

1) Unlike other legal systems, German law *distinguishes between competence and power*. Competence [Zuständigkeit] means that a certain authority has the mission to deal with certain matters. This is a question of legality in form. However, if this authority wants to take measures that interfere with fundamental rights or are essential for their exercise, due to the *principle of statutory reservation* [Gesetzesvorbehalt][2] it also needs a specific *legal basis* [Ermächtigungsgrundlage], i.e. a statutory provision that allows for such measures in the given case. This is an essential aspect of legality in substance.

> In some cases the formal requirements as well as the legal conditions for a measure depend on the type of measure. In order to classify the measure it is often necessary to have a look on the potential legal basis. For this reason, some scholars, when examining the legality of a given administrative act, first specify the legal basis (without analysing if it has been applied correctly), then discuss the legality in form and afterwards the legality in substance of the act. However, this approach is inappropriate because it leads to a three-tier structure of the examination, which does not reflect the dogmatic two-tier structure of the legality of administrative acts. Instead, the type of the measure should be determined in a short preliminary remark.[3]

2) In some fields of administrative law, in particular in the fields of public security and environmental protection, the *choice of the right addressee* is an important topic. Dogmatically, this is a question of correct exercise of discretionary power. However, since special legislation deals with it in numerous provisions, it has become common to discuss it separately.

3) Concerning *discretionary decisions*, a sophisticated doctrine of incorrect exercise of discretionary power ["Ermessensfehler"] has evolved. It differs significantly from corresponding doctrines in French law and the law of other countries. In particular, there is a basic distinction between *discretion*, which is granted by a legal provision as a legal consequence (if the preconditions set by the provision are fulfilled) and the *margin of appreciation* [Beurteilungsspielraum] in the interpretation of so-called *indefinite legal concepts* [unbestimmte Rechtsbegriffe] in legal provisions, such as "public interest", "public order" or "reliability".[4]

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[2] This principle derives from the principle of the rule of law [Rechtsstaatsprinzip] and, according to some scholars, also from the principle of democracy, cf. *Maurer*, Allgemeines Verwaltungsrecht, 18th edition 2011, § 6 no. 4.

[3] See on this problem that causes considerable difficulties in practical legal case-solving *Schmitz*, Zum Prüfungsaufbau in der verwaltungsrechtlichen Fallbearbeitung. Vom zweigliedrigen zum dreigliedrigen Grundaufbau? [On the structure of examination in practical case-solving in administrative law. From two-tier to three-tier basic structure?], 2004, http://lehrstuhl.jura.uni-goettingen.de/tschmitz/Lehre/PruefungsaufbauVR.htm.

[4] See *Künnecke*, Tradition and Change in Administrative Law. An Anglo-German Comparison, 2007, p.79 f.

III. The legality of a decision (art. 288 sub-sect. 4 FEU Treaty) in European Union law

European Union law does not know the concept of administrative decision or administrative act. It follows an archaic system of legal acts that is more than 50 years old (see art. 288 of the Treaty on the Functioning of the European Union - FEU Treaty).[5] However, this system knows the category of "decisions". A decision is a binding regulation for an individual case. If it specifies those to whom it is addressed, it shall be binding on them only (art. 288 sub-sect. 4 FEU Treaty). In these cases, the "decision" corresponds to an administrative decision or act.

In European Union law, the elements of the legality of legal acts are defined by the law. Art. 263 sub-sect. 2 FEU Treaty expressly stipulates the grounds of review for an action for annulment before the European Court of Justice: "lack of competence, infringement of an essential procedural [formal] requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers". These grounds follow the grounds of review in French administrative law at the time of the foundation of the European Communities. However, due to the particularities of European law and as a result of half a century of jurisprudence of the European Court of Justice, they have become slightly different in details and structure. In particular, since the European Union does not execute its law itself at the local level, the "misuse of powers", which historically played an important role in French administrative law, is less important.

The various elements of the legality of a decision in European Union law are outlined in *diagram 2* (see infra, IV.2). Some aspects should be highlighted:

1) The *confusion about "form" and "procedure"* (see supra, I.) finds an odd expression in European Union law: Since art. 263 sub-sect. 2 follows the French tradition, it only talks about essential *formal* requirements ["violation des formes substantielles"] but not about procedural ones. This applies to almost all language versions of the Treaty, including the German, Italian, Spanish, Portuguese and Dutch version. However, the later English version talks about "infringement of an essential *procedural* requirement" without mentioning the formal ones. In practice, this obvious discrepancy does not cause problems because everyone agrees that this ground of review comprises *both* aspects. You may, just as you like, either examine the violation of procedural requirements as a special category of formal requirements or the other way around.

2) Concerning violations of substantive law, there is no such elaborated dogmatic structure as in French administrative law. In practice, one aspect is particularly important: the need of any legal act to comply with the unwritten *general principles of Union law*, which have been discovered and introduced (but not made!) by the European Court of Justice in a comparative approach, taking into account the newest developments in the various member states. Here you find a *comprehensive up-to-date inventory of all elements of the rule of law* which may serve as an interesting source of inspiration for any legislator that wants to modernise administrative law. Since European Union law is usually executed by the member states, these principles also have a *strong impact on the administration in the member states*. Indeed, the impact on the national administration is the main reason for the significant practical importance of European administrative law.

IV. Further reading

Erichsen, Hans-Uwe; Ehlers, Dirk (eds.), Allgemeines Verwaltungsrecht [General administrative law], 14th edition 2010 (see in particular § 11 and § 22)

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

Maurer, Hartmut: Allgemeines Verwaltungsrecht, 18th edition, 2011 (see in particular § 6, § 7 and §10)

Craig, Paul; Búrca, Gráinne de: EU law, 5th edition 2011 (see p., 519 ff.)

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5 See on the sources and characteristics of European Union law the diagram of *Schmitz*, The Law of the European Union, 2009, http://home.lanet.lv/~tschmit1/Downloads/Schmitz_EC-IntML_additional-material1.pdf.

Fairhurst, John: Law of the European Union, 9th edition 2012 (see p. 247 ff.)
Streinz, Rudolf (ed.): Vertrag über die Europäische Union und Vertrag über die Arbeitsweise der Europäischen Union [commentary on the EU Treaty and the FEU Treaty], 2nd edition 2012 (seen commentary of *Ehricke* on art. 263 FEU Treaty, nos. 73 ff.)

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).

V. Annex (diagrams)

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Diagram 1:
The legality of an administrative act in German administrative law

- preliminary step: determination of the *type of measure*

A. Legality in form[1] [formelle Rechtmäßigkeit = légalité externe]

I. Competence [Zuständigkeit)

1) Subject-matter jurisdiction [sachliche Zuständigkeit]
2) Local jurisdiction [örtliche Zuständigkeit]
3) Acting of the right authority in the hierarchy of authorities [instanzielle Zuständigkeit]
4) Where applicable: acting of the right person within the authority [funktionelle Zuständigkeit]
   - e.g. in case of reservation of certain measures to the head of authority

II. Procedure [Verfahren]

1) No violation of general procedural requirements (sect. 9 et seq. Adm. Proc. Act)
   - *hearing of participants* (sect. 28)
   - allowing *inspection of files* (sect. 29)
   - admission of representatives and advisors (sect. 14)
   - *no involvement of excluded persons* and persons feared to be prejudiced (sect. 20 et seq.)
2) No violation of special procedural requirements according to special legislation
   - in particular public notice, collaboration of other authorities, public tender, environmental impact assessment, consent of the addressee when required by law
3) Where applicable: choice of the appropriate special type of procedure and compliance with their special requirements (cf. sect. 63 et seq. + special legislation)
   - in particular public notice, oral hearings, formal hearings and discussions

III. Form[2] [Form]

1) Form in its strict sense (cf. sect. 37(2-5))
   - in general no particular form is required; the admin. act may be issued electronically, verbally or even by implied conduct
   a) Where required by law: written or electronic form
      - must indicate authority and contain signature or name of head, representative or deputy
      - electronic acts must be provided with a qualified electronic signature
   c) Where required by law: compliance with special formal requirements
      - e.g. delivery of certificates
2) Statement of reasons (sect. 39)
   - communication of the chief material and legal grounds, in particular of the aspects considered when exercising discretionary power

B. Legality in substance [materielle Rechtmäßigkeit = légalité interne]

I. Legal basis [Ermächtigungsgrundlage]

1) Necessity of a legal basis
   - according to the *principle of legal reservation* [Gesetzesvorbehalt], a legal basis is needed if the admin. act interferes with *fundamental rights* or is *essential* in another way for their exercise [Wesentlichkeitstheorie]
   - in German law, the legal norms on the jurisdiction generally do *not* imply the granting of powers; therefore, usually a specific legal basis (in a separate provision) is necessary
2) Existence of a legal basis
   - the relevant legal provision must not only concern such measures but grant the power to take them
3) Validity and applicability of the legal basis
   - if incompatible with EU law, the norm is inapplicable, in the other cases it is invalid
   a) Compliance with European Union law
   b) Compliance with the Basic Law
   c) In case of Land law: compliance also with federal law and with the Land constitution
   d) In case of statutory regulations or by-laws: compliance also with the relevant statutory legislation

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[1] Note that the missing of some of these requirements may be "cured" by fulfilling them subsequently (sect. 45 Admin. Proc. Act) or may not entitle the citizen to request annulment if it is evident that it has not influenced the decision on the matter (sect. 46).

[2] Note: Neither the *notification of the administrative act* to the addressee and concerned persons (sect. 41), neither the *notification on available legal remedies* (cf. sect. 58 et seq. Code of Admin. Court Proc.) are requirements of legality. The former is a precondition for the existence of the administrative act. The latter is relevant for the start of the deadline for legal remedies.

4) Fulfilment of the preconditions set in the legal basis
   - usually one of the major problems in a given case

II. Choice of the right addressee

- a sensitive question in the fields of police (public security) law and environmental protection law
- dogmatically a special problem of the correct exercise of discretionary power

III. General requirements of legality in substance

1) Definiteness (sect. 37(1))
2) Feasability of implementation
   - there must not be any material or legal grounds making it impossible to implement the admin. act
3) **Proportionality** of the measure [Verhältnismäßigkeit]
   - the principle of proportionality as ***core essence of the rule of law***
   a) Legitimate aim
      - the measure must pursue an objective provided or allowed for in the law
   b) Suitability
      - the measure must be conducive to its purpose
      - caution: measures might be harsh but nevertheless suitable!
   c) Necessity
      - the measure must be the least intrusive act of intervention that is equally conducive
      - often the crucial point in the examination of a case
      - consider possible alternatives to the measure!
   d) Proportionality (in its strict sense)
      - the burdens imposed must not be out of proportion to the aim in view
      - in particular no infringement of the essence ["Wesensgehalt"] of fundamental rights
4) No violation of (other) legal norms

IV. In case of discretionary decisions: no incorrect exercise of discretion [Ermessensfehler]

1) Non-exercise of discretion [Ermessensnichtgebrauch]
2) Exceeding of discretionary power [Ermessensüberschreitung]
3) Abuse of discretion [Ermessensfehlgebrauch]
   a) Wrongful determination of the facts of the case
   b) Misuse of discretionary power [Ermessensmissbrauch]
      - if decision relies on extraneous considerations
   c) Basic deficits in the reasoning
      - such as logic errors, inconsistencies, disregard of essential aspects etc.
   d) Unproportionality (see supra, B.II.3)
   e) Violation of the principle of equality (art. 3(1) Basic Law)
      - e.g. unjustified deviation from administrative provisions or general practice
   d) Violation of other fundamental rights or constitutional principles

Diagram 2:

The legality of a decision (art. 288 sub-sect. 4 FEU Treaty) of the European Union

- = no violation of any primary law or higher-ranking secondary law[1]
- the examination follows the categorisation of the grounds of review for an action for annulment in art. 263 sub-sect. 2 FEU Treaty

A. No lack of competence

I. Competence of the Union as acting organisation [no "incompétence absolue"]

1) Exercise of an attributed competence
   - existence of a *specific legal basis*, fulfilment of its requirements, acting within the limits of the conferred power
2) No illegitimate exercise of the competence
   - compliance with the principles of subsidiarity and proportionality (art. 5(1, 3, 4) EU Treaty)
3) Acting within the territorial jurisdiction of the European Union

II Competence of the acting institution of the Union [no "incompétence relative"]

B. No infringement of essential formal or procedural requirements

- = "violation des formes substantielles" / "infringement of an essential procedural requirement"[2]

I. No infringement of essential formal requirements

1) Adequate *statement of reasons* (art. 296 sub-sect. 2 FEU Treaty)
   - in particular specification of the legal basis
2) Other formal attributes required by primary or secondary law
   - e.g.information on legal remedies

II. No infringement of essential procedural requirements

1) Decision-making in accordance with the standard procedure referred to in the legal basis
2) Participation of other EU institutions and member states as specified in the legal basis
3) Voting with the majority specified in the legal basis (if European Parliament or Council are involved)
4) Hearing of concerned natural or legal persons

C. No infringement of substantive law

- = "infringement of the Treaties or of any rule of law relating to their application"[3]

I. No violation of substantive law specific to the concerned policy

II. No violation of general requirements of substantive law

1) Compliance with the *fundamental values* and *general objectives* of the Union (art. 2, 3 EU Treaty)
2) No violation of other rules and principles in the Treaties
3) No violation of *general principles of Union law*
   - in particular compliance with the *principle of proportionality*, the *principle of legal certainty* and others deriving from the rule of law; some now are codified in the Charter of Fundamental Rights

III. In particular no violation of the rights of the citizens of the Union

1) No violation of the *economic fundamental freedoms*
2) No violation of *fundamental rights* (cf. art. 6 EU Treaty, Charter of Fundamental Rights)
   - in particular compliance with the *right to good administration* (art. 41 ChRFR)
3) No violation of the rights deriving from the *citizenship* of the Union (art. 20 et seq. FEU Treaty)
4) No prohibited discrimination on grounds of nationality (art. 18 FEU Treaty)

D. No misuse of powers

- = "détournement de pouvoir"

I. No pursuit of an objective other than specified

II. No evasion of a procedure specifically prescribed for dealing with the circumstances of the case

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[1] On the sources and characteristics of European Union law see the diagram of *Schmitz*, The Law of the European Union, http://home.lu.lv/~tschmit1/Downloads/Schmitz_EC-IntML_additional-material1.pdf.

[2] The wording of art. 263 sub-sect. 2 FEU Treaty in English differs from the wording in other languages.

[3] Note: Since all external aspects fall into the first two categories, this category is practically limited to the violation of substantive law.