

ADMINISTRATIVE LAW

Contribution to the course from the perspective of comparison of laws

concerning § 3VI The elements of legality in detail - the example of Germany

Diagram 1

The legality of an administrative decision (administrative act)¹ under German administrative law

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

A. Legality in form² [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. Administrative Procedure Act [= APA])
 - *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. Form³ [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

¹ French and German administrative law do not use the term "administrative decision" but "acte administratif" resp. "Verwaltungsakt", which literally translates as "administrative act".

² Note that the missing of some of these requirements may be "cured" by fulfilling them subsequently (sect. 45 APA) 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).

³ 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 Administrative Court Procedure) 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.

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
- 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) Feasibility 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 burden imposed must be in reasonable proportion (not excessive, not out of proportion) to the aim in view (requires thorough → *balancing*)
 - 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 [Ermessens Fehlgebrauch]
 - 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