

## ADMINISTRATIVE LAW

Contribution to the course from the perspective of comparison of laws

concerning § 5 Exercise in practical case-solving**Diagram 3<sup>1</sup>****Prospects of success of a legal action before the administrative court  
under German administrative law**

A legal action before the administrative court will be successful if it is admissible and well-founded, i.e. if it meets all the requirements of the admissibility of the action (A.) and of the well-foundedness of the action (B.).

**A. Admissibility of the action**

A legal action before the administrative court is admissible if it meets all the requirements of admissibility (A.I. - A.IV.).

**I. Recourse to the administrative courts<sup>2</sup>**

- 1) According to special regulations
- 2) According to the general clause of sect. 40(1) CACP<sup>3</sup>
  - for every *public law dispute* of non-constitutional nature not explicitly allocated to other courts by statutory law

**II. Form of action<sup>4</sup>**

- 1) **Action for annulment** (sect. 42(1), 1<sup>st</sup> alternative CACP)
  - plaintiff seeks annulment of an administrative act (= admin. decision)
  - the most common action before the administrative courts
- 2) **Action for the issue of an administrative act** (sect. 42(1), 2<sup>nd</sup> alternative CACP)
  - plaintiff seeks court order to issue a specific administrative act (e.g. a licence, permit, approval)
- 3) **Action for performance**
  - plaintiff seeks court order to perform a specific administrative action that does not constitute an admin. act (e.g. paying money)
- 4) **Action for prohibitory injunction<sup>5</sup>**
  - plaintiff seeks court order to cease and desist from a certain administrative action
  - also possible as preventive action
- 5) **Declaratory action** (sect. 43 CACP)
  - plaintiff seeks declaratory judgement on the existence/non-existence of a legal relationship or the nullity of an admin. act
- 6) **Action for the establishment of the unlawfulness of a settled admin. act** (sect. 113(1) phrase 4 analogously ["Fortsetzungsfeststellungsklage"])
  - plaintiff seeks declaratory judgement that an already settled (e.g. executed/followed) admin. act was unlawful
- 7) **Application for judicial review of sub-legislative legal provisions** (sect. 47 CACP)
  - applicant seeks court decision declaring by-laws or other sub-legislative provisions at local or Land level void

**III. Special admissibility requirements depending on the form of action<sup>6</sup>**

- 1) For an action for annulment or for the issue of an administrative act
  - a) **Right to bring proceedings** (sect. 42(2) CACP)
    - plaintiff must *claim violation of own rights* by the admin. act or its omission
    - note that *in some other countries only a legal interest* in the proceedings is required!
  - b) **Objection proceedings** before the administrative authorities (sect. 68 et seq. CACP)
    - an obligatory preliminary administrative review of the admin. act (restricted in some Länder)
  - c) **One month period for filing the action** (sect. 74 CACP)

<sup>1</sup> In Germany, the students in the course Administrative Law must study and learn thoroughly this (or a similar) examination scheme and be able to apply it correctly to the individual case. This is to ensure that the law does not remain in the realm of the theoretical but is applied and enforced precisely and correctly in practice. The diagram lists as a "checklist" all the aspects the lawyer needs to think about but many will be unproblematic in the particular case and the lawyer's explanations will be limited to those that are significant.

<sup>2</sup> If there is only recourse to other courts, the administrative court will refer the legal dispute ex officio to the competent court.

<sup>3</sup> Court of Administrative Court Procedure ["Verwaltungsgerichtsordnung"].

<sup>4</sup> It is essential to first determine the relevant form of action (A.II.) because there are special admissibility requirements depending on it (A.III.).

<sup>5</sup> A special case of the action for performance.

<sup>6</sup> In the case solution for an individual case only the specific requirements for the relevant form of action will be discussed.

- 2) For an action for performance or for prohibitory injunction
  - Right to bring proceedings (sect. 42(2) CACP analogously)
- 3) For a declaratory action
  - a) No other form of action available (sect. 43(2) CACP)
  - b) Declaratory interest (sect. § 43(1) CACP)
    - plaintiff needs justified interest in the declaratory judgement (but not to claim violation of own rights)
- 4) For an action for establishment of the unlawfulness of a settled administrative act
  - a) Right to bring proceedings (sect. 42(2) CACP)
    - plaintiff must *claim violation of own rights* by the settled admin. act
  - b) Deadline for objection proceedings not expired before admin. act was settled
  - c) Special declaratory interest
    - recognised case groups: risk of recurrence, vindication (restoration of reputation), preparation of state liability lawsuit, typically short-term settlement preventing judicial review
- 5) For an application for judicial review of sub-legislative legal provisions
  - a) Sub-statutory legal provision submitted to judicial review (cf. sect. 47(1) CACP)
  - b) Right to bring proceedings (sect. 47(2) phrase 1 CACP)
    - applicant must be concerned public authority or *claim violation or imminent violation of own rights* by the challenged provision or its application
  - c) One year period for filing the application (sect. 47(2) phrase 1 CACP)

#### IV. General admissibility requirements

- 1) Jurisdiction of the court
  - subject-matter jurisdiction, local jurisdiction, acting of the right court in the hierarchy of courts
- 2) Requirements concerning the parties involved
  - a) Capacity to sue and to be sued (cf. sect. 61 CACP)
  - b) Capacity to effect procedural acts (cf. sect. 62 CACP)
  - c) Ability to postulate (cf. sect. 67 CACP)
  - d) Action/application directed against the right defendant (cf. sect. 78, 47(2) phrase 2 CACP)
- 3) Proper filing of the action/application (cf. sect. 81, 82 CACP)
- 4) No final judgements or pending of the case elsewhere (cf. sect. 121 CACP)

## B. Well-foundedness of the action

A legal action before the administrative court is well-founded if it meets the specific requirements for the well-foundedness for the relevant form of action (B.I or B.II./III./IV./V./VI./VII.).

### I. Action for annulment (cf. sect. 113(1) phrase 1 CACP)

- 1) Illegality of the challenged administrative act
  - see **diagram 1** in the annex to my special material "The requirements of the legality of the administrative decisions in German and European law"
  - When solving a practical case, check at this point, in a structured way, all aspects listed in diagram 1. Like that you can solve correctly, precisely and in a transparent way even the most complicated cases!
  - a) Legality in form
    - competence, procedure, form
  - b) Legality in substance
    - legal basis, choice of the right addressee, general requirements (no violation of legal provisions, proportionality etc.), no incorrect exercise of discretion
- 2) Violation of the rights of the plaintiff by the challenged administrative act
  - otherwise the action is not well-founded, even if the challenged admin. act turns out to be illegal!

### II. Action for the issue of an administrative act (cf. sect. 113(5) CACP)

- well-founded if plaintiff is entitled to the requested admin. act (= if its omission is illegal and violates his rights)
- in discretionary cases not yet mature for adjudication, court will only hand down the obligation to decide, taking its legal view into consideration (sect. 113(5) phrase 2 CACP)

### III. Action for performance

- well-founded if plaintiff is entitled to the requested performance (= if its omission is illegal and violates his rights)

### IV. Action for prohibitory injunction

- well-founded if plaintiff has a right to injunctive relief under public law (= if the prohibited administrative action is illegal and violates his rights)

*V. Declaratory action*

- wellfounded if the alleged legal relationship exists, the contested legal relationship does not exist or the admin. act in question is not only illegal but even invalid (under sect. 44 of the Administrative Procedure Act)

*VI. Action for establishment of the unlawfulness of a settled admin. act*

- 1) Illegality of the challenged settled administrative act
  - see **diagram 1** (→ see above, B.I.)
- 2) Violation of the rights of the plaintiff by the challenged settled administrative act

*VII. Application for judicial review of sub-legislative legal provisions*

- application wellfounded if the challenged legal provision is illegal

(Date: Diagram 3 (AdminLaw))