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# **GENERAL LEGISLATION ON ADMINISTRATIVE PROCEDURES: WHAT IS THE RATIONALE? THE CASE OF GERMANY**

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## **The Rationale of a General Administrative Procedures Law**

### **1) *Realisation of Citizen Rights — Compliance with the Law***

The main purpose of an administrative procedure is the application of legal norms to real-life situations. Public interest as well as private rights, service offers and obligations regulated by the constitution and public law can only materialise and have practical impact in day to day life if the legal order provides a procedure by which on the one hand the citizen can demand his rights and protect himself against violations of his rights (by the state or third persons) and on the other hand the state via its administration can force the citizen to comply with the law.

### **2) *Establishment of a Working Method for an Administration***

An administrative procedures law also determines the working method of an administration, especially of those working in administrative bodies. A good working method is an essential precondition for functioning state organs and for fulfilling the state's tasks.

### **3) *Cornerstone in a Country's Investment Climate***

Last but not least, an administrative procedure law and its implementation in practice play an important role in investment decisions by entrepreneurs. Red tape and wanting rule of law will have a negative impact on the allocation of FDI/inward investment. Also the length of a an approval procedure is important in this connection.

To sum up, the rationale and purpose of a general administrative procedures law are to guarantee the rule of law, as well as efficiency and effectiveness of administrative activities and to ensure that citizens can benefit from the rights granted to them by the legal order.

To fulfil this task an administrative procedures laws should in particular:

- Provide the administration with the legal capacity to clarify ambiguities and disputes about the factual and legal situation in an efficient and effective way by respecting the rule of law.
- Provide the citizen with the necessary and adequate means to protect and claim his/ her legal rights.

## **Main Requirements for a General Administrative Procedures Law**

### **1) *Procedural Rules Must be Easy to Understand***

To fulfil these tasks in a proper way, an administrative procedures law should be clear and well structured and the wording should be clear, unequivocal and easy to understand for the addressees, i.e. the staff in the administration as well as the citizen. The fulfilment of these requirements is a necessary prerequisite to ensure the practicability of procedural rules.

### **2) *Procedural Rules Must Avoid "Over-bureaucratization"***

An important aspect in this context is that legal norms prescribing procedures should not be drafted in a too detailed and formalized way. As laws cannot be amended that easily, very detailed procedural legal norms may have a negative impact as they may well hamper necessary developments and modernization in the administration. In addition, too detailed procedural rules may easily lead to "over-bureaucratization", all the more as administrations everywhere have a tendency to hide behind formal administrative procedures and while doing so, may lose sight of swift and practical solutions.

### **3) *Procedure Rules Should not be Changed too Often***

From the given function of an administrative procedures law it seems obvious that such a law should not be changed too often. It is necessary for procedural rules to take on a character similar to signs regulating traffic so that one can rely on the fact that they are generally known and respected by the administration and the citizens.

### **4) *A General Administrative Procedure Law should Cover as Many Administrative Procedures as Possible***

For the same reasons, namely improving and ensuring legal transparency and legal certainty, **special** administrative procedures should be submitted to a very strict scrutiny and be abolished as much as

possible. The more administrative procedures are covered by the general administrative procedures law, the more likely it can be guaranteed that the procedures are known and are observed.

## **How the German General Administrative Procedure Law Does Fulfill these Purposes and Requirements**

### *A German problem: Federalism*

Germany is a federation of 16 federal states - the German “Länder” — with their own government and administration and their own legislation in respect to administrative procedures. So in Germany we have an administrative procedures law in every federal state (*Land*), as well as a general administrative procedures law on the federal level.

On the federal level, there are not many state authorities besides the government. As a rule, the federal states, the “Länder”, execute federal law through their “Länder”-administration.

For citizens, as well companies it is very important that administrative procedures rules are identical or at least very similar among the Länder, e.g. to facilitate moving from one state to the other or having commercial activities in several federal states. Germany tries to coordinate the content of its different administrative procedures laws in the “Länder” and on the federal level.

This coordination-process is not always very easy. But what concerns the main and important topics, the various Länder administrative procedures laws are on the whole identical.

## **The Main Principles of the Administrative Procedure in Germany**

### *The relationship between citizen and administration is in principle of equal rank*

In former times the citizen was in a subordinate position as a party to an administrative procedure. Today the purpose of the administrative procedure mentioned above (realisation of citizen rights — compliance with the law) makes it necessary that state authority and citizen are basically in a position of equal rank despite the prominent position the administration occupies. This principle is obviously realized in the German administrative procedures law by the provisions regulating a public law contracts (Para.54 — 62 German General Administrative Procedure Act detailing how an authority may conclude an agreement under public law instead of issuing an administrative act).

In former times it was denied that an public authority could conclude a public law contract with a citizen at all.

### *The administrative procedure is, as a rule, not formalistic*

Para. 10 of the German General Administrative Procedure Act stipulates:

“The administrative procedure shall not be tied to specific forms when no legal provisions exist which specifically govern procedural form. It shall be carried out in an uncomplicated, appropriate and timely fashion.”

This provision is supposed to make sure that an administrative procedure will be carried out effectively and efficiently without too much red tape.

The large-scale possibilities to control decisions of the public authorities are the counterbalance to this lack of prescribed form of the administrative procedure. If a citizen believes that a certain decision is not complying with the law, as a first step, he or she has the possibility (and the duty) to let the decision be reviewed by a higher administrative instance. If this authority then rejects the citizen’s objection, the citizen has, as a rule three court instances that will review the decision.

### *The principle of investigation*

The German administrative procedure law regulates that the authority conducting an administrative procedure shall determine the facts of the case ex officio. The authority shall take into account all circumstances of importance in an individual case, including those favourable to the parties. (Para. 24 German General Administrative Procedure Act)

This provision has the purpose of ensuring that the administrative authority will clarify all ambiguities and disputes regarding the factual and legal situation in an impartial way.

Together with the principle mentioned above (the administrative procedure is, as a rule, not formalistic) the administrative procedures law gives the public authorities the necessary instruments to realize the aims of an administrative procedure: On the one hand, the authorities have an effective enforcement mechanism to achieve citizens' compliance with the law and on the other hand, the citizens are given the necessary and adequate means to protect and claim his/her legal rights.

**Five additional principles** regulated in the general administrative procedures law support these purposes of an administrative procedure.

#### *The principle of impartiality*

A special provision (Para. 21 German General Administrative Procedure Act) guarantees impartiality of any administrative decision. It states that any official working on the case shall be exempted if there is any reason to doubt his or her impartiality.

#### *Advice and information to the parties*

The administrative authority also has to support a party demanding his or her right. In this respect, Para. 25 German General Administrative Procedure Act regulates:

“The authority shall cause statements or applications to be made or corrected when it is clear that these were not submitted or were incorrectly submitted only due to error or ignorance. It shall, where necessary, give information regarding the rights and duties of the parties in the administrative proceedings.”

#### *The principle of audi alteram partem*

“Before an administrative act affecting the rights of a party may be implemented, the latter must be given the opportunity to comment on the facts relevant to the decision [Para. 28 (1) German General Administrative Procedure Act].” Only in special cases regulated by the law, the hearing of the party needn't be undertaken.

#### *The principle of inspection of records*

The authority shall allow the parties to inspect the records connected with the proceedings where knowledge of their content is necessary in order to assert or defend their legal interests [Para. 29 (1) German General Administrative Procedure Act]. Exceptions to this principle have to be regulated by the law.

#### *The duty of the authority to provide grounds for an administrative act*

The duty of the authority to give reasons for an administrative act is regulated in Para. 39 German General Administrative Procedure Act:

“A written or electronic administrative act, as well as an administrative act confirmed in writing or electronically, shall be accompanied by a statement of grounds. This statement of grounds must contain the chief material and legal grounds that led the authority to take its decision. The grounds given in connection with discretionary decisions should also contain the points of view which the authority considered while exercising its powers of discretion.”

Without knowing the grounds of an administrative decision the citizen would not really be able to assert or defend his or her legal interests.

### **Special Administrative Procedures**

The German general administrative procedure law regulates three special procedures.

#### *Formal administrative proceedings*

In Para. 63 to Para. 71 German General Administrative Procedure Act, the formal administrative proceedings are regulated. With these provisions the general administrative procedures law regulates a formal administrative procedure as a model case to which every new law can refer. A public law will require such a formal administrative procedure if the administrative decision could be vitally important for

an affected party. An example of that would be the decision stating that a young man has to do his military service.

*Expediting approval procedures*

Para. 71 a. — 71 e. German General Administrative Procedure Act contain special provisions in order to expedite administrative procedures which have the purpose of issuing a permit in aid of a commercial undertaking planned by the applicant.

*Procedures for planning approval*

Special provisions (Para. 72 — 80 German General Administrative Procedure Act) are also foreseen where the law requires proceedings for planning approval. Main aspects of these provisions are the participation of the citizen in the proceedings for planning approval and the discretion of the public authority deciding on a plan.

**To conclude**, the principles and instruments laid down in the German general administrative procedures law have been put into practice for 30 years. Ambiguities and disputes are clarified by the courts. German administrative procedures law guarantees that citizen can benefit from the rights granted to them by the legal order while giving the public authorities the necessary tools to guarantee the rule of law as well as the efficiency and the effectiveness of administrative activities.