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Administrative Acts of Germany

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Unlike German administrative law in the Russian administrative law there is no strict division of non normative acts (individual acts) into burdening and favouring. It can be stipulated by the fact that traditionally individually-lawful act in domestic science is considered only one of kinds of law acts of the governance (executive authorities acts).

Keywords: administrative acts; administrative law of Germany

Point. For law enforcing activity of the executive authorities and local self-government bodies, and for judiciary practice as well the administrative act construction has a huge value. Correct understanding of its legal nature, its placement within forms of the government system, kinds of these acts will allow to make law enforcing activity more effective, passed acts legal and rational. It is deemed that a considerable part of difficulties arising at administrative acts passage and during their litigation in courts is connected with an insufficient readiness of non-normative acts theory in the Russian administrative law science, and, accordingly, with an insufficient legal regulation of passage and cancellation procedure of the acts in question. Therefore, it appears rather interesting to study theory of acts in the administrative law science of other countries, first of all, in the German administrative law science. It is connected with the fact that some moments of development of Russia and Germany are surprisingly alike, the norms regulating those or other public relations are in the same way similar too. Therefore, in some cases studying legal regulation experience can give the bases for conclusions on applicability or inapplicability, efficiency or inefficiency of those or other legal constructions.

Example. The administrative act is one of the basic concepts of administrative law of Germany.

O.Mayer's definition of an administrative act is considered to be a classical one where he described an administrative act as one of the usual decisions of state governing bodies defining what the subjects should do and what they are entitled to do in this or that concrete case. And further O.Mayer noted, that the administrative act is such a tool of the state government ensuring necessary for the lawful state requirement provision of law order («legal safety») maintenance, citizens' observance of their duties concerning the state, and also» borders of activity of the state and sphere of free behaviour of its citizens may be

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precisely defined and outlined in a legal way»' (Mayer, 1895, 64).

Official definition of the administrative act is contained in § 35 sent.1 of Law of Germany on administrative procedure. The administrative act is defined as such a «decision, instruction or other imperious action which is passed by a state body for a concrete individual case resolution in the area of public law and presents direct outward authoritative effect».

According to this legal definition, the basic signs of the administrative act (Maurer, 1997) are described in the educational literature.

1. The administrative act can be passed only by the authorised *subject* vesting with *state-imperious powers.*

2. The decision, the order or other *imperious action* can be such an act; the main thing in this sign is indication on its state-imperious character, i.e., a one-sided-imperious order of passage and compulsion for execution by those to whom it is addressed; the given sign follows from essence of relations of the «power-submission» developing between the state and the citizen in the sphere of public law, thus it does not matter what area it is passed in - in the sphere of imperious intervention of the state or in the sphere of rendering services to citizens, its form and a way of passage does not matter either, it can be technical or mechanical actions, for example, street traffic regulation by the traffic lights.

3. The administrative act is aimed at settlement, *resolution of a concrete individual case.* This sign means, that the order corresponding to the law or will expressed otherwise is directly aimed at occurrence of legal consequences, namely at occurrence, change or termination of rights or duties of citizens, and also at an establishment of a legal status of a concrete case. An action which mismatches this criterion are not administrative acts , for example, organizational actions aimed at coordination of interests, giving information or other services to citizens, and also so-called not formalized administrative actions. It concerns, first of all, organizational activity inside the bodies themselves, for example, training employees or indication of their legal status. An action on delivery of references is deemed to be an interesting issue. The issue in question is considered debatable as this activity is not directly aimed at occurrence of legal consequences, but they can arise indirectly, for example, the reference itself does not produce legal consequences however refusal to give out the reference can be appealed by the citizen. The same legal value has the circumstance that some references fall within the law provisions on citizens' rights to non-distribution of confidential information hence these actions can be appealed as well. Preparatory, research, etc. actions implementing before passage of an act do not have administrative nature of a sign under consideration.

4. The following sign - *individual character* of the administrative act allows to separate it from regulatory legal acts which always represent a rule of behavior directed on an uncertain circle of addressees. Difficulties arise at definition of legal nature of mixed acts, for example, at separation an administrative act from a regulatory by-law (decision or provision) which is addressed a relatively-defined circle of persons, but can concern a concrete case. Imperious acts possessing so-called «dual legal nature» should be specially separated out. They have a character of individual instructions concerning some subjects and are behavior rules concerning others. Granting local self-governments the right to implement indirect governance can be an example.

5. Such a sign as direct *external influence* assumes, that the act is addressed the «third» party, i.e. the persons who are not «inside» the state body or systems of state bodies as a whole.

6. A sphere of state government bodies activity - *public law* this sign is closely connected with a sign of the state authoritativeness, and it means, that any actions of the body in the sphere of private law cannot be considered an administrative act.

In an administrative-legal science there are various criteria of classification of administrative acts. Therefore, it is not necessary to speak about a uniform, universal classification. Textbooks offer a classification which has the greatest practical value.

A) Depending on a will character acts are divided into *ruling* (ordering), *forming* (creating) and *establishing* (ascertaining).

Example *of ruling* acts are orders, prohibitions, for example, the order on pulling down an apartment house or other building, the notice on necessity of tax payment , a prohibition to hold a demonstration.

As *forming* acts, the acts aimed at occurrence, change or termination of legal relations, for example, delivery of any permit, appointment of an official (a special ranked servant) to a post, dismissal of an official are considered. Acts on the basis of which civil-law relations arise are singled out into a special group.

Ascertaining (establishing) acts confirm the rights, powers, duties or the status as a whole, for example, citizenship or that circumstance, that the citizen has the right to entrepreneur activity.

B) Depending on conditions (preconditions) of passage acts are divided into the acts of the «connected» governance and those of «free» governance.

C) On influence upon citizens acts are divided into *burdening* (aggravating) and *favouring*, the first entail adverse consequences for the addressee, the second - give any advantages. This classification should be distinguished from kinds of acts depending on the sphere the act is passed - whether in the governance sphere by means of *intervention* or in the sphere of *rendering service*s governance. The administrative act in the sphere of state intervention is always a burdening act, but an act in the sphere of positive governance can be not only favouring, but burdening (for example, refusal in service rendering) either.

As all other kinds of acts to some extent find their reflexion in the Russian administrative law science too, it is deemed to be obviously necessary to dwell upon the description of favourable and burdening administrative acts in more detail. Practical value of acts division into burdening and favouring is in the fact that there is a various legal regulation, various procedures of passage, but the most important - various procedures of cancellation. It is stipulated by the fact that administrative acts entail different consequences for citizens - as a result of acts passage position of citizens either improves or worsens - hence, theory of acts and legal regulation should be aimed at maximum protection of interests of citizens.

Favourable administrative acts

According to § 48 sent.1 the Law of Germany on an administrative procedure (§ 48 Abs. 1 VwVfG) favourable is considered such an act which creates or confirms the right of a person or any essential advantages (blessing) having legal value. Building licence delivery, acquisition of citizenship by a foreigner can serve an example.

Essential advantages quite a wide concept which can include any individual interest recognised as a legal order. It can be advantages of economic or not economic character, for example, change the name of the street in interests of the owner of the site adjoining to road.

The main thing is that favourable administrative acts expand the sphere of the mentioned person's rights. They prove or confirm right granting, eliminate encumbrance or render a favorable definition.

However, it is necessary to understand, that it concerns lawful activity of state government bodies. So, *non-acceptance* of any actions concerning illegal behaviour of a person, of course, entails essential advantages to the latter, but is not an administrative act giving benefit. For example, if the authority which is carrying out supervision over construction, undertakes nothing against the person who has built a house illegally, it is impossible to consider this behaviour as a favourable act (Lehmann, 2000).

Burdening administrative acts.

Unlike favourable administrative acts the concept of burdening acts is not legislatively bound. In this sense it would be more logical to speak about favourable acts and the acts which are not those. At the same time, in the German administrative law science any act, any instructions entailing adverse consequences to the addressee (any refusals, rejections, non-granting permissions) is understood as a burdening act. Burdening acts can demand actions, omission or non acceptance of any measures («patience» - dulden), restrict rights, deprive of rights; refuse to grant privileges or ascertain adverse legal condition for a citizen.

Thus, the basic criterion is negative consequences for citizens (duties, prohibitions, refusals or requirements). For example, decision on dismissal, discharge from office, rejection to grant permission for a construction. Interesting are the cases where a citizen as a result of an administrative act simultaneously receives both benefit and negative consequences that is the act is both favouring and burdening for him. Such acts are those rendering the state service and imposing additional duties in this connection (for example, at receiving a building licence, the person is simultaneously obliged to pay a certain sum of money as a nature protection countervailing duty). The acts containing the decision on partial satisfaction of the petition (for example, the housing loan is given in half the size from requested) can be referred to the same acts.

Except described above acts of double action concerning the same addressee, there are acts of also *double* action, but concerning *the third party* (Peine, 2002). Such acts can be of two kinds: the act of favourable character passed towards the addressee, causes encumbrance for the third party (the person receives the building licence for the high-rise house, adverse consequences for neighbours are connected by reduction of solar light exposure). In the second variant the act burdening for the addressee produces favorable consequences for the third party (the decision on pulling down of the given house burdens the proprietor and entails favorable consequences for neighbours).

Legality of the administrative act

As it was already said, the major importance of division into favourable and burdening acts is connected, first of all, with various legal regulations of an order of passage and cancellation of such acts, these difficult differentiations are provided with a view of protection of the rights of citizens. The administrative act is considered legally passed if it meets *formal-legal and is material-legal requirements* established in the legislation:

First, it should be passed by the authorised body within its competence,

Secondly, it should be passed according to the provided *procedure* and in certain *forms*.

Special value for realisation of the requirements of the procedure of administrative acts passage is provision of participants'

rights of the given procedure. For this reason for cancellation of favourable and burdening administrative acts different procedures of cancellation are established.

In German administrative law cancellation *of illegal (illegal) acts and cancellation of lawful (lawful) acts* differs, and which *favourable or burdening* act exactly should be canceled is also taken into account. These four basic criteria are checked by the state body or administrative court at an act's destiny decision-making.

Cancellation *of the illegal* act (Ruecknahme) is carried out irrespectively whether this act has entered into a legal force or not, i.e. whether it is still subject to an appeal or the appeal is already impossible within the procedural framework. This cancellation is carried out, as a rule, by that body which has passed an act in question, and takes place outside the frames of the formalized appellate procedure. Legal regulation of the given kind of cancellation is bound in § 48, 50 Laws on an administrative procedure.

Cancellation *of a legal* (illegal) act (Widerruf) which is also possible irrespective of the terms for the appeal whether they are still valid or not is regulated by § 49, 50 of Law on an administrative procedure. Thus, in German administrative law there are kinds of acts cancellation depending on the fact whether an act is unlawful or not and there are accordingly various terms for a designation of these kinds of cancellation (Ruecknahme and Widerruf).

According to legislation (§ 51 Laws on an administrative procedure) renewal of the administrative procedure, already passed all stages, with a view of an act revision by the very body issued the act is possible too.

Cancellation of an unlawful act (§ 48 of Law on an administrative procedure) is implemented by means of another independent act («counter-act», actus contrarius). This cancellation also depends on, whether the cancelled act is *burdening or giving benefit* (privilege). Cancellation of the acts giving benefit, is regulated specially (§ 48 sent. 2 of Law on administrative procedure, and the rest - due a general order (§ 48 sent. 1of Law on an administrative procedure). Here, the matter is in act cancellation by the body itself, i.e. in this case act cancellation is the right (discretion) of the body as the right of the parties to the act appeal is regulated by other rules.

Cancellation of a burdening act is possible concerning the entire act or its separate part, and also this act can be cancelled from the moment of its coming into effect or from the cancelling act coming into effect.

Cancellation of an act giving benefit depends on, whether this act has a monetary or real form of execution, in the specified cases the general prohibition for cancellation of such an act, except for circumstances directly provided by the law is established. In other cases prohibition for an act cancellation can also be in effect if this cancellation can cause a requirement of material indemnification by an act addressee. The legislator recognises that the party receiving benefit (no matter whether monetary or property privilege, single or lasting), assumed stability, invariance, legality of the administrative act, i.e. treated an act with trust, and this trust is worth *of «adequately protection».* It means, at «weighing» the public interest consisting in the lawful act issue, and concrete interest of the party received benefit thanks to an illegal act, it is necessary to consider a principle of «trust protection» to the act (Mayer, Kopp, 1985). Naturally, this right of the party to «trust protection» does not extend over those cases where the administrative act has been passed on the basis of false documents, under threat, pressure, bribery or on the basis of false data or 'gross negligence». The term for acceptance of an act for cancellation is established within a year since the moment when the body becomes aware of all facts necessary

for cancellation decision-making. *Cancellation of a lawful administrative act* also depends on, whether an act is burdening or giving benefit.

Cancellation of burdening and other acts not giving benefit rules (§ 49sent.1 of Law on administrative procedure) establish that cancellation is made by the body under its discretion within its competence. It means that the body itself is entitled to cancellation of an act, and the parties have a right not to an act cancellation, but to the cancellation at the discretion of the body for it to be legal and lawful. Come or not come into effect acts can be cancelled an act can be cancelled fully or partially. Basically, any act can be cancelled at any time. Thus, unlike illegal acts, cancellation procedure starts only with acceptance of the cancelling act and is non-retroactive. The body cannot cancel an act if it has to pass a new act with the same content. Other reasons not allowing to cancel a legal act are possible either.

Basically, cancellation of lawful acts giving benefit is admissible, but in the presence of certain conditions: if it is directly provided by the rules of law if the order on getting benefit has not been executed within due term and in other cases if this cancellation is caused by public interests. Thus, the party, who is in the interest, can apply for compensation of property damage if it is connected with necessity of application of the specified above principle of «trust protection».

Resume

Unlike German administrative law in the Russian administrative law there is no strict division of non normative acts (individual acts) into *burdening and favouring.* It can be stipulated by the fact that traditionally individually-lawful act in domestic science is considered only one of kinds of law acts of the governance (executive authorities acts). Prevailing value on importance certainly belongs to normative legal acts, therefore the majority of researches are devoted namely to these acts of executive authorities. The researches concerning only individually-legal acts are quite few. It is deemed that lack of scientific workings out concerning non-normative acts absence of accurate legal binding differentiating favourable and burdening acts affect interests of citizens in the long run. At the same time, provisions of German administrative law science together with rules of law given above can be used in Russian Federation for improvement of legislation, law-enforcing and judicial practice.

References

W. Brink, «*Beck´scher Online-Kommentar VwVfG §35*» (Bader/Ronellenfitsch. 01.10.2009)

P. Lehmann, «*Allgemeinverwaltungsrecht. General administrative law*». (M., 2000.) In Russian.

O. Mayer, «*Deutsches Verwaltungsrecht*» (Bd. 1, 1. Aufl. München, 1895)

H. Maurer, «*Allgemeines Verwaltungsrecht*». (11. Aufl. München , 1997)

P.-M. Huber, «*Allgemeines Verwaltungsrecht*». (Heidelberg, 1992)

O. Mayer and F.Kopp, «*Allgemeines Verwaltungsrecht*» (5.Aufl. Stuttgart- München -Hannover, 1985)

F-J. Peine, «*Allgemeines Verwaltungsrecht*» (Heidelberg: C.F. Müller. 2002)

H.J. Wolff. and H.J. Bachof . and R. Stober, «*Verwaltungsrecht*», (Band 1. 10.Aufl. München: Beck)

Административные акты в Германии

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Статья посвящена одной из наиболее интересных теоретических и практических проблем, рассматриваемых в науке административного права Германии – административным актам. Представляется, что значительная часть трудностей, возникающих в отечественной правоприменительной практике, в особенности при принятии ненормативных актов и при рассмотрении дел об их оспаривании в судах, связана именно с недостаточной разработанностью теории ненормативных актов в науке административного права России, и, соответственно, с недостаточной правовой регламентацией процедур принятия и отмены данных актов. Поэтому весьма интересным представляется изучение теории актов в науке административного права других стран, в первую очередь, в науке административного права Германии.

В статье освещаются понятие и характерные черты ненормативных актов государственного управления, их виды, способы правового регулирования, а также административные процедуры принятия и отмены актов. Особое внимание уделяется делению актов на обременяющие и благоприятствующие. Практическое значение данной классификации актов заключается в том, что для них существует различное правовое регулирование, различные процедуры принятия, но самое важное – различные процедуры отмены. Это обусловлено тем, что административные акты влекут для граждан различные последствия - в результате принятия актов положение граждан улучшается или ухудшается, следовательно, теория актов и правовое регулирование должны быть направлены на максимальную защиту интересов граждан.

Статья может быть полезна студентам юридических вузов и юристам-практикам, а также всем, интересующимся проблемами административного права.

Ключевые слова: административные акты; административное право Германии.