Chapter 1
Administrative Appeals in Germany

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List of German Abbreviations

AGVwGO	Gesetz zur Ausführung der Verwaltungsgerichtsordnung (law on the execution of the VwGO)
Amtsbl.	Amtsblatt (gazette of the Saarland)
AO	Abgabenordnung (Fiscal Code)
BauR	Baurecht (journal)
BayVBl.	Bayerische Verwaltungsblätter (journal)
BGBl.	Bundesgesetzblatt (Federal Gazette)
BSG	Bundessozialgericht (Federal Social Court)
BVerfG	Bundesverfassungsgericht (Federal Constitutional Court)
BVerfGE	Entscheidungen des Bundesverfassungsgerichts (collection of decisions of the BVerfG)
BVerwG	Bundesverwaltungsgericht (Federal Administrative Court)
BVerwGE	Entscheidungen des Bundesverwaltungsgerichts (collection of decisions of the BVerwG)
DÖV	Die Öffentliche Verwaltung (journal)
DStR	Deutsches Steuerrecht (journal)
DVBl.	Deutsches Verwaltungsblatt (journal)
FGO	Finanzgerichtsordnung (Code of Procedure for Fiscal Courts)
GG	Grundgesetz (Basic Law, the German constitution)
GV. NRW.	Official abbreviation of the gazette of Nordrhein-Westfalen
GVBl.	Official abbreviation of the gazette of Bayern, Rheinland-Pfalz and Thüringen
GVOBl.	Official abbreviation of the gazette of Niedersachsen and Mecklenburg-Vorpommern

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GWB	Gesetz gegen Wettbewerbsbeschränkungen (Act Against Restraints of Competition)
JuS	Juristische Schulung (journal)
KStZ	Kommunale Steuer-Zeitschrift (journal)
LKRZ	Zeitschrift für Landes- und Kommunalrecht Hessen, Rheinland-Pfalz, Saarland (journal)
LKV	Landes- und Kommunalverwaltung (journal)
MediationsG	Mediationsgesetz (Law on Mediation)
NdsVBl.	Niedersächsische Verwaltungsblätter (journal)
NJW	Neue Juristische Wochenschrift (journal)
NordÖR	Zeitschrift für öffentliches Recht in Norddeutschland (journal)
NVwZ	Neue Zeitschrift für Verwaltungsrecht (journal)
NVwZ-RR	Neue Zeitschrift für Verwaltungsrecht – Rechtsprechungs-Report (journal)
NWVBl.	Nordrhein-Westfälische Verwaltungsblätter (journal)
NZBau	Neue Zeitschrift für Bau- und Vergaberecht (journal)
NZS	Neue Zeitschrift für Sozialrecht (journal)
OLG	Oberlandesgericht (Higher Appeal Court of the ordinary courts)
OVG	Oberverwaltungsgericht (Higher Administrative Court)
SGb	Die Sozialgerichtsbarkeit (journal)
SGB X	Sozialgesetzbuch – 10. Buch (10th Book of the Social Code)
SGG	Sozialgerichtsgesetz (Social Courts Act)
ThürVBl.	Thüringer Verwaltungsblätter (journal)
UPR	Umwelt- und Planungsrecht (journal)
VerwArch.	Verwaltungsarchiv (journal)
VG	Verwaltungsgericht (Administrative Court)
VwGO	Verwaltungsgerichtsordnung (Code of Administrative Court Procedure)
VwVfG	Verwaltungsverfahrensgesetz (Administrative Procedure Act)
ZfBR	Zeitschrift für deutsches und internationales Baurecht (journal)
ZUR	Zeitschrift für Umweltrecht (journal)

1.1 Introduction[1]

Writing an article about alternative dispute settlement for administrative matters in Germany is a complicated matter. You cannot simply refer to the Code of

[1] The "art" of citing articles in a statute is quite elaborated in Germany: An "Art." or a "§" indicates a section of a statute, a Roman numeral indicates the subsection of a section and an Arabic numeral a phrase in a subsection. Therefore, § 80 I 1 VwGO means: Section 80 Subsection 1 phrase 1 of the VwGO.

Administrative Court Procedure (*Verwaltungsgerichtsordnung—VwGO*)[2] or to the Administrative Procedure Act (*Verwaltungsverfahrensgesetz—VwVfG*),[3] because a whole bundle of Codes and legal acts are applicable in this context, all of which use the same concepts but provide for different solutions in their details. This is because of the quite unique fact that five hierarchies of courts, each with its own specific jurisdictions and codes of procedure, have been established in Germany.[4] Three of them are specialized in administrative law matters and two in private law matters: The finance courts (*Finanzgerichte*) have jurisdiction over (federal) tax matters, the social courts (*Sozialgerichte*) have jurisdiction over social law matters and the administrative courts (*Verwaltungsgerichte*) have jurisdiction over all other administrative matters.[5] The labor courts (*Arbeitsgerichte*) have jurisdiction over (private) labor law disputes and are also competent for all disputes between those employees of the administration whose employment is based on a regular contract governed by normal (private) labor law.[6] Finally, the ordinary courts (*ordentliche Gerichte*) are competent in civil and criminal law matters. As they are competent in civil law matters, the ordinary courts are also competent for all disputes involving the administration if private law is applicable to its actions—which is quite often the case.[7] In addition, for historical reasons only the ordinary courts have jurisdiction over (nearly all) disputes on non-contractual state liability.[8]

Finally, because of a not quite convincing decision of the federal lawmakers, the ordinary courts are also competent for (nearly all) disputes concerning public procurement.[9] Due to the peculiarities of this topic, we will address alternative

[2] VwGO in the version of the promulgation of 19 March 1991 (BGBl. I, p. 686), most recently amended by Art. 5 of the Act of 10 October 2013 (BGBl. I, p. 3786)—a translation by *Neil Musset* can be found at http://www.gesetze-im-internet.de/englisch_vwgo/index.html.

[3] VwVfG in the version of the promulgation of 23 January 2003 (BGBl. I, p. 102), most recently amended by Art. 3 of the Act of 25 July 2013 (BGBl. I, p. 2749). This law only applies to federal authorities. Nevertheless, the *Länder* have adopted (nearly) identical acts applicable to the *Länder* and municipal authorities, see Maurer (2011), § 5, no. 1.

[4] For an overview of the German court system, see Foster and Sule (2010), pp. 80ff.; Robbers (2012), no. 44ff.

[5] See § 40 I VwGO: "Recourse to the administrative courts shall be available in all public-law disputes of a non-constitutional nature insofar as the disputes are not explicitly allocated to another court by a federal statute. Public-law disputes in the field of Land law may also be assigned to another court by a Land statute."

[6] See Stelkens (2011b), pp. 15f.

[7] See Stelkens (2011b), pp. 3ff. (with further references).

[8] See § 40 II 1 VwGO: "Recourse shall be available to the ordinary courts for property claims from sacrifice for the public good and from public-law deposit, as well as for compensation claims from the violation of public-law obligations which are not based on a public-law contract; this shall not apply to disputes regarding the existence and amount of a compensation claim in the context of Article 14 I 2 GG."

[9] For more details, see Burgi (2011), pp. 105ff.; Schoch (2013), § 50, no. 92ff.; Schröder and Stelkens (2011), pp. 16ff.; Stelkens and Schröder, (2010), pp. 307ff.

dispute resolution in matters of public procurement in a separate section of this chapter (*see* Sect. 1.3). In general, this article will focus on administrative appeal in the form of the "objection"[10] foreseen in §§ 68 ff. of the VwGO, §§ 348 ff. of the Fiscal Code (*Abgabenordnung—AO*)[11] in connection with §§ 44 ff. of the Code of Procedure for Fiscal Courts (*Finanzgerichtsordnung—FGO*)[12] and §§ 78 ff. of the Social Courts Act (*Sozialgerichtsgesetz—SGG*)[13] (see Sect. 1.2). In contrast to these formal procedures, informal administrative remedies have not really been able to develop in Germany, and the institution of an ombudsman is nearly unknown (see Sect. 1.2.5). The unique traits of the formal procedures may also be the reason why instruments of alternative dispute resolution could not really develop as an instrument of administrative appeal (see Sect. 1.4). Lastly, due to the quite comprehensive codification of principles of good administration since the 1970s, no real "traces of Europeanization" can be detected in the decision-making practices of the administrative authorities involved in these procedures (*see* Sect. 1.5).

1.2 The Objection Procedures in the Sense of §§ 68ff. VwGO, §§ 347ff. AO and §§ 78ff. SGG

Focusing an article about German alternative dispute resolution in administrative proceedings on the objection procedure in the sense of §§ 68 ff. VwGO, §§ 347 ff. AO and §§ 78 ff. SGG is a bit hazardous. No German scholar would treat these objection procedures as "alternative" dispute resolutions in administrative proceedings. Rather, their use is often understood as a simple (and—depending on the political position of the author—useful or dispensable) prerequisite of judicial review, one which has to be passed through prior to certain (but not all) types of court action in administrative proceedings unless otherwise stipulated by statute of the Federation or the Federal State (*Land*). Therefore, the objection procedures are (in general) either obligatory or inadmissible.[14]

A final preliminary remark: Even if the objection procedures have some predecessors in pre-war German administrative procedural law (above all in Prussian

[10] This seems to be a common translation for "Widerspruch" in the sense of §§ 68ff. VwGO, §§ 78ff. SGG and the "Einspruch" in the sense of §§ 348ff. AO. See for example Robbers (2012), no. 421; Singh (2001), p. 219.

[11] AO in the version of the promulgation of 1 October 2002 (BGBl. I, p. 3866), most recently amended by Art. 13 of the Act of 18 December 2013 (BGBl. I, p. 4318). A translation provided by the Language Service of the Federal Ministry of Finance can be found at http://www.gesetze-im-internet.de/englisch_ao/index.html.

[12] FGO in the version of the promulgation of 28 March 2001 (BGBl. I, p. 442), most recently amended by Art. 6 of the Act of 10 October 2013 (BGBl. I, p. 3786).

[13] SGG in the version of the promulgation of 23 September 1975 (BGBl. I, p. 2535), most recently amended by Art. 7 of the Act of 19 October 2013 (BGBl. I, p. 3836).

[14] See, however, *supra* note 28.

Law),[15] this tradition does not play any role in actual discussions on the effectiveness and the shaping of these procedures—aside from some more or less rhetorical arguments not really meant to convince the opponent but to dismiss him or her.[16] The irrelevance of the historic sources of these procedures in the actual discussion may be due to the fact that in Germany comprehensive legal protection in administrative matters is a post-war phenomenon[17]; the SGG entered into force in 1954, the VwGO in 1960, and the FGO in 1965. The entry into force of the German constitution, the so-called "Basic Law" (*Grundgesetz—GG*), is to be considered a clear break in the history of German law on administrative court procedure. This is due to Art. 19 IV GG, which for the first time provided a guarantee of a (effective) recourse to the courts when individual rights are infringed by public authority. Therefore, in our context, it does not seem very helpful to go into deep historical detail.

1.2.1 The Relationship Between the Objection Procedure and the Notion of the *Verwaltungsakt*

The objection procedure as foreseen in §§ 68 ff. VwGO, §§ 347 ff. AO and §§ 78 ff. SGG is closely connected to the concept of the *Verwaltungsakt* (administrative act), a core form of administrative action concerning single-case decisions and a core concept of German administrative law in general.[18]

1.2.1.1 The Notion of the *Verwaltungsakt* in German Administrative Law

The *Verwaltungsakt* is identically defined by § 35 phrase 1 of the VwVfG, § 118 phrase 1 AO and § 31 phrase 1 of the 10th Book of the Social Code (*Zehntes Buch Sozialgesetzbuch—SGB X*)[19] as follows[20]:

[15] For details, see Cancik (2010), pp. 471ff.; Sydow and Neidhardt (2007), pp. 23ff.

[16] In the political debate, the argument was put forward that the objection procedure has to be abolished because it is a relic of the German "*Obrigkeitsstaat*"—i.e. a relic of Wilhelmine constitutional monarchy—which has no place in a modern democracy (Kamp 2008, [p. 44]; Schönenbroicher 2009, p. 1144). This sort of argument can hardly be taken seriously (see Cancik 2010, pp. 468 and 474, see also Biermann 2007, p. 139).

[17] For the development of administrative jurisdiction in Germany, see Hufen (2011), § 2, no. 1ff.; Schmidt-Aßmann and Schenk (2012), Einleitung no. 70ff.

[18] For the historical development of this concept, see Bumke (2012), § 35, no. 6ff. For a brief overview, see also Singh (2001), pp. 63.

[19] SGB X in the version of the promulgation of 18 January 2001 (BGBl. I, p. 130), most recently amended by Art. 6 of the Act of 25 July 2013 (BGBl. I, p. 2749).

[20] Concerning the reason for the existence of three codes of administrative procedure (VwVfG, AO and SGB X), see Maurer (2011), § 5, no. 5. See also note 3 on the different versions of the VwVfG on the federal and the *Land* level.

> A *Verwaltungsakt* shall be any order, decision or other sovereign measure taken by an authority to regulate an individual case in the sphere of public law and intended to have a direct, external legal effect.

Every characteristic of § 35 phrase 1 VwVfG and its corresponding regulations has to be fulfilled in order for an administrative decision to qualify as a *Verwaltungsakt*. Therefore, not every administrative (single-case) decision can be qualified as a *Verwaltungsakt*.[21] Above all, (nearly all) decisions concerning the conclusion and execution of public contracts are *not* considered as *Verwaltungsakte* in Germany.[22] Also *not* considered as *Verwaltungsakte* are (nearly all) decisions concerning compensation in state liability matters. This is because of the fact that—as already mentioned—only the ordinary courts have jurisdiction over (nearly all) disputes on non-contractual state liability.

Apart from these particular cases, the qualification of administrative measures as *Verwaltungsakte* is the object of an abundant case law, reflected in the commentaries[23] on § 35 VwVfG.[24] As *Foster* and *Sule* correctly stress,[25] the legal definitions provided by § 35 VwVfG, § 118 AO and § 31 SGB X cover all sorts of (but not all) administrative measures in everyday life: The granting of licenses, building permissions, permits of residence, tax orders, demolition orders, expulsion of foreigners, granting of state benefits, the withdrawal of licenses, etc.

In addition, it is important to highlight that not only private persons may be addressed by a *Verwaltungsakt* but also public entities, even if the exercise of public authority is concerned.[26] Therefore, municipal supervisory authorities can address a *Verwaltungsakt* vis-à-vis a local government, ordering it—to give an example—to change an illegal local regulation or to withdraw an illegal individual decision. Importantly, even when a *Verwaltungsakt* is addressed to administrative authorities, the same rules are (in general) applicable as with *Verwaltungsakte* addressed to private persons.[27]

1.2.1.2 Special Procedural Remedies Concerning *Verwaltungsakte*

The correct classification of whether an administrative decision is a *Verwaltungsakt* or not is of vital importance for the individual in order that he or she uses the right procedural remedies against either a *Verwaltungsakt* imposing an obligation or the

[21] From a comparative perspective, see Singh (2001), pp. 69f.

[22] Burgi (2011), pp. 106f.; Schröder and Stelkens (2011), p. 17.

[23] For the function of commentaries in the German legal tradition, see Zimmermann (2005), p. 46.

[24] See for example Stelkens (2014), § 35, no. 50ff. For a brief overview, see also Singh (2001), pp. 63ff.

[25] Foster and Sule (2010), pp. 295f.

[26] Stelkens (2014), § 35, no. 177ff., 185ff.

[27] For exceptions concerning these kinds of *Verwaltungsakte*, see Jungkind (2008), pp. 209ff.

rejection of a beneficial *Verwaltungsakt*. There are special time-limited court actions foreseen by § 42 VwGO, § 40 FGO, § 54 SGG with which judicial quashing of a *Verwaltungsakt* (rescissory action—*Anfechtungsklage*), as well as the judicial order to issue a rejected or omitted *Verwaltungsakt* (enforcement action—*Verpflichtungsklage*), can be requested by the plaintiff if he/she claims that his/her rights have been violated by the *Verwaltungsakt* or its refusal or omission. § 42 VwGO reads as follows (§ 40 FGO, § 54 SGG are formulated in a similar way):

(1) The rescission of a *Verwaltungsakt* (rescissory action), as well as sentencing to issue a rejected or omitted *Verwaltungsakt* (enforcement action) can be requested by means of an action.
(2) Unless otherwise provided by law, the action shall only be admissible if the plaintiff claims that his/her rights have been violated by the *Verwaltungsakt* or its refusal or omission.

In general, the exhaustion of the objection procedure foreseen in §§ 68 ff. VwGO, §§ 348 ff. AO and §§ 78 ff. SGG is a prerequisite only for such rescissory and enforcement actions. As stipulated in §§ 68 ff. VwGO, §§ 44 FGO and §§ 78 ff. SGG, prior to lodging a rescissory action or an enforcement action, the lawfulness and expedience of the *Verwaltungsakt* or its rejection shall be reviewed in preliminary proceedings. If such a review did not take place, the rescissory or enforcement action is inadmissible.[28]

These preliminary proceedings begin with the objection, which shall be lodged in writing within (in general) 1 month after the *Verwaltungsakt* or its rejection has been announced to the aggrieved party (§ 70 VwGO, § 355 AO, § 84 SGG). As *Singh* correctly points out,[29] because a *Verwaltungsakt* is required to mention the remedy against it and the time within which it can be sought, the objection is facilitated to this extent. If the *Verwaltungsakt* fails to mention the remedy and the time limit, an objection can be filed within 1 year (see § 58 VwGO, § 356 AO, § 66 SGG). After the expiry of that deadline, the *Verwaltungsakt* or its rejection becomes (in general) definitive, which means, it can – despite its possible unlawfulness – no longer be challenged in the courts (see Sect. 1.2.1.3).

The deciding authorities (see Sect. 1.2.2) will uphold the objection if the corresponding act is considered to be illegal or unsuitable (see Sect. 1.2.3). If the deciding authorities find the act neither illegal nor unsuitable, they may dismiss the

[28] However, there are specific case law exceptions from the requirement for an objection procedure. These exceptions do not exclude the admissibility of the objection (Pietzner and Ronellenfitsch 2010, § 31, no. 31) but are meant to make a rescissory action or an enforcement action admissible without having exhausted the objection procedure. This may be the case if the objectives of the objection procedure (see *supra* Sect. 1.2.4) have been fulfilled through other means. These exceptions are highly controversial in doctrine but cannot be discussed here in any further detail. On such exceptions, see (with further references) Geis (2010), § 68, no. 158ff.; Schoch (2011), pp. 1207ff.

[29] Singh (2001), p. 220.

objection by a formal decision (*Widerspruchsbescheid*), which shall be reasoned, supplemented with a notice on appeals and served. In this case, the applicant has (in general) once more to decide within 1 month if he wants to lodge a rescissory or enforcement action (§ 74 VwGO, § 47 FGO, § 87 SGG). If he does not, the *Verwaltungsakt* or its rejection again becomes definitive.

The specific case of non-decision within a reasonably period is referred to in § 75 VwGO (§ 46 FGO and § 88 SGG provide for similar provisions):

> If with regard to an objection or an application to carry out an *Verwaltungsakt* it has not been decided on the merits within a suitable period without sufficient reason, the action shall be admissible in derogation from § 68. The action may not be lodged prior to the expiry of three months after the lodging of the objection or since the filing of the application to carry out the *Verwaltungsakt*, unless a shorter period is required because of special circumstances of the case. If an adequate reason applies why the objection has not yet been ruled on or the requested *Verwaltungsakt* has not yet been carried out, the court shall suspend the proceedings until expiry of a deadline set by it, which can be extended. If the objection is admitted within the deadline set by the court or the *Verwaltungsakt* carried out within this deadline, the main case shall be declared to have been settled.

This means that the administrative authority may not delay judicial protection by either non-deciding on an application to carry out a *Verwaltungsakt* or by non-ruling on an objection. If there is an inexplicable delay, the applicant may go directly to court without having to exhaust the objection procedure. However, the applicant is not required to do so: He or she may also wait and pursue the administrative proceedings further. In other words, there are no time limits set for the direct action rendered possible by § 75 VwGO, § 46 FGO and § 88 SGG. Furthermore, even if in the end the administrative authority belatedly decides against the applicant, the already filed action in court does not become inadmissible but may be pursued by the applicant without the necessity to exhaust (again) the objection procedure.[30]

Three points have to be clarified concerning the scope of the objection procedure foreseen in §§ 68 ff. VwGO, §§ 348 ff. AO and §§ 78 ff. SGG: First, they are (in general) not admissible in contractual disputes and disputes concerning state liability. This is because of the fact that they are only a prerequisite for rescissory or enforcement actions, which for their part require that the administrative authority has issued or rejected a *Verwaltungsakt*. Furthermore, as already mentioned, administrative decisions concerning contractual disputes, public procurement and state liability matters are generally not considered as *Verwaltungsakte* (see Sect. 1.2.1.1). In such cases, direct court actions for a declaratory judgement (*Feststellungsklage*) or order for relief (*allgemeine Leistungsklage*) are admissible

[30] BVerwG, 13 January 1983—5C 114/81—BVerwGE 66, pp. 342–346 (p. 344); Hufen (2011), § 15, no. 28.

and—depending on the nature of the contract[31] or the foundation of the state liability claim—the administrative courts or the ordinary courts are competent. A formal administrative appeal comparable to the objection procedure is not foreseen in these cases (except in public procurement matters as will be described Sect. 1.3).

Secondly, even if the issue at stake is a *Verwaltungsakt*, the objection procedures cannot be used if the *Verwaltungsakt* in question has been settled—by repeal or otherwise—before the authorities competent to decide on the objection could decide. Yet in this situation, the applicant may still have an interest in having it declared that this act was illegal and infringed his/her rights (e.g. in case of a danger of re-offending under similar circumstances). Nevertheless, according to jurisprudence, in these cases only a court action for a declaratory order is admissible and therefore the objection procedure, being a prerequisite only of rescissory or enforcement actions, is not admissible.[32] This consequence is disputed by some scholars who argue that these procedures could fulfil their functions (see Sect. 1.2.4) also in these cases.[33]

Thirdly, it has to be stressed that if a *Verwaltungsakt* addresses a public authority—like many acts of municipal supervisory authorities—the addressed public authority has to go through the same procedure to challenge this supervisory act. This means that also in these cases, the rescissory action is applicable, that public authorities have to exhaust the objection procedure (if not stipulated otherwise by law) and that a supervisory measure may become definitive (even if potentially illegal) if the time limits are not respected. Therefore, in general, neither the courts nor the administrative authorities involved in the objection procedure would treat public entities filing an objection or a court action against a *Verwaltungsakt* differently from private persons in similar situations. For this reason, in the following we will not go into further details concerning these kinds of *Verwaltungsakte*.

1.2.1.3 Material Consequences of the Procedural Time Limit: The Notion of *Bestandskraft* of *Verwaltungsakte*

The fact that there are time limits for the initiation of the objection procedure and for the subsequent rescissory or enforcement actions has repercussions for the material conception of the *Verwaltungsakt*. This is the point of origin of the notion of *Bestandskraft* (non-appealability and definitiveness after the expiry of these time limits) of *Verwaltungsakte*.[34] As foreseen in § 43 VwVfG, § 124 AO, § 39 SGB X,

[31] On the qualification of the nature of a public contract in German law, see Stelkens (2011b), pp. 12ff.

[32] See decision of the BVerwG, 9 February 1967—I C 49.64—BVerwGE 26, pp. 161–168 (pp. 165ff.); Hufen (2011), § 18, no. 55.

[33] See for example Pietzner and Ronellenfitsch (2010), § 31, no. 29f.; Schenke (2012), no. 666.

[34] For the following, see Singh (2001), pp. 80ff.

a *Verwaltungsakt* comes into effect as soon as it is brought to the attention of the person concerned and continues to remain in effect until it is repealed, annulled, otherwise cancelled or expires for reason of time or for any other reason. As soon as a *Verwaltungsakt* comes into effect, it becomes binding not only on the affected parties but also on the administrative authority. It can only be repealed by the administrative authority for the reasons foreseen by the law.[35] Therefore, after the expiration of the time limits, the *Verwaltungsakt* becomes final and conclusive: It is beyond challenge through the regular remedies of objection or through an action in court. However, the administrative authority can still repeal the *Verwaltungsakt* (i.e. "withdraw" an illegal act [*Rücknahme*] or revoke a legal act [*Widerruf*])[36] or reopen administrative proceedings under the conditions foreseen by the law. Nevertheless, the person addressed by the *Verwaltungsakt* can only request the administrative authority to consider the possibility of a withdrawal of the *Verwaltungsakt* or to reopen the proceedings. In rare cases, the person may have an enforceable right to such a decision by the administrative authority (which may be pursued by an enforcement action).[37] Still, in general the decision to repeal an illegal *Verwaltungsakt* or to reopen the proceedings is a discretionary decision of the administrative authority. Furthermore, even if the administrative authority is aware of the illegality of the *Verwaltungsakt* or its rejection, it is generally not considered a misuse of these discretionary powers to reject such a demand, referring to the *Bestandskraft* of the *Verwaltungsakt* in question[38]—the *Bestandskraft* of a *Verwaltungsakt* being considered as a significant element to assure legal certainty and the effectiveness of administration. This fact has even been affirmed by the Federal Constitutional Court.[39]

The concept of *Bestandskraft* may also be the reason why informal remedies, the right to petition and the right to appeal to the ombudsman (in those *Länder* where an ombudsman exists) are not really considered by lawyers as useful instruments of alternative dispute resolution in cases where a *Verwaltungsakt* is at stake (see Sects. 1.2.5.1 and 1.2.5.2). On the one hand, the *Bestandskraft* is a "perfect excuse" for the administration not to reopen administrative proceedings.[40] On the other hand, the imminent expiration of the short time-limits for the objection procedure or the rescissory or enforcement actions forces the parties to initiate these formal remedies if they do not want to risk that the *Verwaltungsakt* in question becomes definitive (see Sects. 1.2.1.2 and 1.2.5.3).

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[35] See for example OVG Münster, 27 May 2013—1A 2782/11—NVwZ-RR 2013, pp. 745–747 (pp. 745f.).

[36] For the differences between "repealing," "withdrawing" and "revoking" of *Verwaltungsakte*, see Foster and Sule (2010), pp. 299f.; Nierhaus (2005), pp. 87–120ff. (pp. 99f.); Singh (2001), pp. 87ff.

[37] For more details, see Singh (2001), pp. 91f.

[38] So, most recently, BSG, 8 February 2012—B 5 R 38/11 R—NJW 2012, pp. 2139–2141 (point 17 of the judgment).

[39] BVerfG, 20 April 1982—2 BvL 26/81—BVerfGE 60, pp. 253–305 (p. 270).

[40] Wolke (1984), pp. 419–426 (pp. 424f.).

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