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GERMAN MODEL OF ADMINISTRATIVE PROCEDURE

НІМЕЦЬКА МОДЕЛЬ АДМІНІСТРАТИВНОЇ ПРОЦЕДУРИ

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In the article, the author analyses in detail and highlights the features of the German model of administrative procedure, using the relevant criteria and taking as a basis the provisions of the German Administrative Procedure Act. Detailed attention is paid to the elements of the German model of administrative procedure, in particular: principles, internal structure of the procedure depending on its type (formal and planning procedure), forms of objectification of the results of the administrative procedure.

At the legislative level, the principles of administrative procedure are enshrined in the German Administrative Procedure Act. These principles relate to both the organisation and the direct implementation of the procedure. Three principles underpin the German model of administrative procedure: the prohibition of formalism (abuse of formal requirements), the principle of protection of legitimate expectations and the principle of proportionality. The author notes that German procedural law is not limited to the establishment of objective rules and principles, but also pays sufficient attention to the procedural rights of participants, which are enshrined in the principles. The most important procedural right of a participant is the right to be heard. The legislator has taken a detailed approach to formulating and enshrining the principles of administrative procedure, using as a criterion the "negative consequences" for individuals that they may suffer due to violations of their powers by the authorities. Having analysed the German Administrative Procedure Act, the author identifies the following features of the German model of administrative procedure: 1) exclusively external law enforcement nature, which is aimed at preparing and issuing an administrative act or concluding a public law contract; 2) mixed procedural and substantive nature of the model (the rules on procedure and forms of public administration are enshrined); 3) wide application of administrative discretion, which means that the administrative body independently chooses the appropriate form of action for each specific case; 4) in most cases, the procedure is informal; 5) priority is given to the principles of administrative procedure, which reflect the originality of the German model, in particular the principle of legitimate expectations, proportionality; 6) detailed provisions on administrative acts and public law contracts; 7) participation in the administrative procedure of interested persons, the type and scope of whose rights depend on what tasks a particular administrative body performs, whether the necessary decision is relatively simple or complex, what public and private interests are violated in this case; 8) the stage of appealing decisions made by bodies in the administrative procedure is regulated by procedural law.

Key words: administrative procedure, model.

У статті автор детально проаналізував та виділив особливості німецької моделі адміністративної процедури, використовуючи відповідні критерії та беручи за основу положення Закону ФРН «Про адміністративну процедуру». Детальна увага приділяється елементам німецької моделі адміністративної процедури, зокрема: принципам, внутрішній структурі процедури в залежності від її виду (формальна та процедура планування), формам об'єктивізації результатів адміністративної процедури. На законодавчому рівні принципи адміністративної процедури закріплені в Законі ФРН «Про адміністративну процедуру». Ці принципи стосуються як організації, так і безпосереднього здійснення процедури. Основоположними принципами німецької моделі адміністративної процедури є три принципи: заборони формалізму (зловживання формальними вимогами), принцип захисту законних очікувань та принцип пропорційності.

Автор зауважує, що процедурне право Німеччини не обмежується встановленням об'єктивних правил і принципів, достатньо уваги приділяється процедурним правам учасників, які закріплюються через принципи. Найважливішим процедурним правом учасника є право бути заслуханим. Законодавець детально підійшов до формулювання й закріплення принципів адміністративної процедури, використовуючи як критерій «негативні наслідки» відносно приватних осіб, яких вони можуть зазнавати через порушення органами реалізації своїх повноважень.

Проаналізувавши Закон ФРН «Про адміністративну процедуру», автор виділив наступні особливості німецької моделі адміністративної процедури: 1) виключно зовнішній правозастосовний характер, який спрямований на підготовку й видання адміністративного акта або укладення публічно-правового договору; 2) змішаний процесуально-матеріальний характер моделі (закріплюються норми про процедуру, а також про форми публічного управління); 3) широке застосування адміністративного розсуду, який полягає в тому, що адміністративний орган самостійно обирає відповідну для кожного конкретного випадку форму дій; 4) у більшості випадків – неформальний характер процедури; 5) пріоритетне значення відведено принципам адміністративної процедури, в яких відображається оригінальність німецької моделі, зокрема принцип законних очікувань, пропорційність; 6) докладно розроблені положення про адміністративний акт та публічно-правовий договір; 7) участь в адміністративній процедурі зацікавлених осіб, вид і обсяг прав яких залежать від того, які завдання виконує конкретний адміністративний орган, чи є необхідне рішення відносно простим або багатоступеневим, які суспільні й приватні інтереси при цьому порушуються; 8) стадія оскарження рішень прийнятих органами в адміністративній процедурі регламентується процесуальним законом.

Ключові слова: адміністративна процедура, модель.

We will consider the model of German administrative procedure through the prism of its internal structure (main elements), which are reflected in the German Administrative Procedure Act and thus distinguish it from other models (for example, American or French). Analysing the provisions of this law, we note that the "normative model of administrative law enforcement procedure" clearly defines 1) purpose of the procedure and functions; 2) scope and application; 3) participants in the procedure; 4) principles of the procedure; 5) internal structure; 6) legal means to control the results of the procedure. *The purpose of the administrative procedure* is to guarantee an effective and reliable mechanism for making administrative decisions regarding the rights and interests of citizens. *The main function of the administrative procedure* is to ensure effective and efficient implementation and application of the law in the public interest. Scholars call the secondary function of the procedure a control function: it ensures that the main function is performed in strict accordance with the rule of law and respect for the fundamental rights of citizens.

The doctrine of constitutional and administrative law considers administrative procedure as a tool for achieving "protection of fundamental rights through procedure". *The scope of* administrative procedure is limited to the administrative activities of federal government agencies and institutions. The scope of the administrative procedure is reflected and enshrined in § 1 of the German Administrative Procedure Act. The Act does not apply directly to the administrative activities of the Länder, as all Länder have adopted their own administrative procedure laws. In addition to the Administrative Procedure Act, there are other special acts in Germany that set out additional formal and procedural requirements for certain areas of administrative law. They replace the rules of law as *lex specialis* [1]. A participant is not just a person whose rights may be harmed or violated in some way as a result of a decision, but a person who participates either by virtue of law or on the basis of an appeal to an administrative body and is considered a participant in an administrative procedure. The analysis of the provisions of the German Administrative Procedure Act in relation to the persons participating in the administrative procedure shows that the participants in the administrative procedure include: 1) the applicant; 2) those to whom the administrative body intends to send or has sent

an administrative act; 3) those with whom the administrative body intends to conclude or has already concluded a public law contract; 4) those involved by the administrative body in the proceedings. Depending on the type of administrative procedure, the number of participants may vary, for example, in a formal procedure, which is carried out only on the basis of a statutory provision and requires a written request and an oral hearing before the adoption of an administrative act, a large number of participants may be involved if the issue to be resolved in this procedure is of public importance (for example, in the construction of roads, airports or waste treatment plants). This procedure is used to resolve important issues of public importance. The German Administrative Procedure Act provides the participants of the procedure with an extensive list of procedural rights: the right to engage representatives and assistants; the right to be heard; the right to familiarise themselves with the proceedings; the right to receive explanations and recommendations, the right to be consulted and informed by the administrative authority, the right to secrecy. The above rights apply exclusively to participants in administrative proceedings. German public law is not limited to objective rules and principles, but focuses on the subjective rights of a citizen [2, p. 456]. It should be noted that the type and scope of citizens' rights to participate in administrative procedure depends on the tasks performed by the administrative body and the public and private interests involved. The administrative body should react flexibly and choose the appropriate form of action in this case. The peculiarity of the German model of administrative procedure is that a participant has procedural rights but no procedural obligations. This reflects the general approach of the German free and democratic order, which focuses on the rights rather than the obligations of the individual. Pursuant to Section 26(2)(1) and (2) of the German Administrative Procedure Act, the parties to the proceedings shall assist in clarifying the circumstances of the case, in particular, they are obliged to report facts known to them and provide the necessary evidence. Other obligations related to the clarification of the circumstances of the case, including the obligation to appear in person and give evidence, arise only if specifically provided for by law. If a participant refuses to cooperate in the proceedings, he or she bears the risk of an unfavourable decision but does not violate legal obligations.

The next important element of the administrative procedure model, which ensures order in its functioning, is the ***principles.*** We will consider the principles that are specific to the German model and are required by the European legal system.

An informal principle of administrative procedure is that form should not be absolutised over substance. According to § 10, the administrative procedure is usually not tied to specific forms, but it does not exclude the existence of special forms (e.g. oral hearings), leaving the decision to the discretion of the administrative body. This is a fundamental principle of the procedure, which ensures flexibility and makes the decision-making process more understandable for citizens. Only in exceptional cases, when required by law, is a formal administrative review conducted.

The principle of proportionality. All acts adopted by public administration authorities that restrict the rights of individuals are subject to judicial review and must be "proportionate". The principle of proportionality is not explicitly enshrined in the German Basic Law. Some argue that it is part of Art. 20(3) and Art. 1 GG [3, p. 249], while others consider it to be expressed in Art. 20(2) and (3), Art. 3(1) and Art. 19(2) [4, p. 45]. This principle is guaranteed by the Constitution and is a fundamental element of the rule of law. The idea of this principle is initially enshrined in the Police Act and the case law of Prussian administrative courts. Having already been laid down in Prussian police law [5, p. 179], this principle as a general legal principle was gradually enshrined in other areas of administrative law before, following the decision of the Federal Constitutional Court in the case of pharmacies (Apotheken-Urteil), it became part of the dogma of fundamental rights [6, p. 361] and was transferred to other European legal orders through the European Convention on Human Rights and EU law [7, p. 145]. The Fundamental Law has transformed the principle of proportionality into the universal guarantee it is today. The basis of proportionality is the balance between the intensity of the harm caused to individual rights, on the one hand, and the public interest, on the other. If the negative consequences for citizens outweigh the benefits, the administrative act is disproportionate and therefore unconstitutional and illegal. Proportionality is a legal concept. All legal acts can be checked for their compliance with the principle of proportionality if they violate individual rights [8, p. 1228].

The principle of protection of legitimate expectations. Foreign scholars used the reverse method to characterise this principle and noted that the essence of this principle is that a person whose rights have been violated by a decision should not depend on and should not suffer from a sudden change of opinion or policy of a public authority, in which case the rights of such a person should be compensated [9, p. 123]. The current German Law on Administrative Procedure enshrines this principle in § 48 (2) as the cancellation of an unlawful favourable act, and in § 49 (2, 3) as the revocation of a lawful positive act.

The German model of administrative procedure is characterised by its informal nature, simplicity and transparency, but the nature of the procedure model may vary depending on the type of administrative procedure. The German Administrative Procedure Act sets out special provisions for formal and planning procedures. Proceedings in a formal administrative procedure are conducted in accordance with this Act. This type of procedure differs from the informal procedure in that the administrative body must comply with the procedural requirements regarding the form of the application, procedural actions and stages of the procedure: at the stage of consideration of the administrative case, the administrative body is obliged to hear all participants in the proceedings, and at the stage of decision-making – to conduct oral consideration. The model of administrative procedure is characterised by the possibility to initiate proceedings not only by one entity – an administrative body, but also by a collective entity, such as a service or a committee. If commissions, advisory councils and other collegial bodies (committees) participate in administrative proceedings, the provisions of § 89-93 apply, unless otherwise provided by law. This act regulates the provisions of Section 1a on the conduct of administrative proceedings by a collegial body – a service or committee. In addition, the Law regulates the provisions on the procedure for approving plans. With regard to regulation (which scholars call a "mass procedure"), it should be noted that the Law does not provide for a separate section regulating it. However, scholars believe that this new type of administrative procedure may be subject to the provisions on formal procedure, as it involves a large number of participants – from 50 to 100,000 – who are united by the public interest at stake. The above procedures differ from each other in terms of procedural requirements, stages of the administrative procedure, and the form of objectification of the procedure results. For example, in the planning procedure, the administrative authority issues a decision in the form of a resolution, rather than an administrative act, as in the formal procedure. The German model of administrative procedure differs from the European models of administrative procedure in that it has detailed provisions on such forms of administrative procedure *as administrative acts* and *public law contracts.*

Otto Meyer's concept of an administrative act was objectified in this law and became a central concept of German procedural law, a kind of benchmark for other

countries. The Administrative Procedure Act lays down detailed rules concerning administrative acts. It defines an administrative act, its content, form, and also establishes the obligation of authorities to justify the adopted act. The provisions of the German Administrative Procedure Act reflect the substantive administrative law rules relating to the validity of an administrative act, its legal force, and issues related to the revocation or cancellation of an act. It contains detailed provisions on formal and procedural requirements for an administrative act, as well as on the consequences of procedural and formal errors made by an administrative body. The Law regulates the issues related to the grounds for declaring an act invalid, unlawful and its further consequences, such as withdrawal or cancellation. In accordance with the requirements of § 43(2) of the German Administrative Procedure Act, an administrative act is effective until it is withdrawn or cancelled. This provision applies to both lawful and unlawful acts. According to § 43 in conjunction with § 44 of the Law, an administrative act is null and void only if it contains a particularly significant error and is therefore null and void. For a person whose interests are violated by such an administrative act, an important legal consequence follows: this person has the right to file an objection to the act and, if the result is not satisfactory, to file a lawsuit with the administrative court.

Only after the administrative act is cancelled in court or voluntarily withdrawn or cancelled by the administrative body does it finally become null and void. However, if the person affected by the administrative act misses the deadline for appeal, he or she will no longer be able to claim that the administrative act is unlawful. In such a case, he or she is obliged to fulfil the requirements arising from the said administrative act, unless the administrative act is null and void.

Also, the German Administrative Procedure Act indicates the differences in consequences between a lawful negative and positive administrative act, as well as an unlawful one [10]. The effect of a so-called positive administrative act is associated with favourable consequences for its addressee. A so-called negative administrative act causes unfavourable consequences for the addressee. In addition, the legislator differentiates the use of the term "termination of an administrative act" (*aufhebung*). The definition of "cancellation" (*rücknahme*) applies to an unlawful administrative act, and "revocation" to a lawful act. *The provisions on negative and positive administrative acts are a feature of the German model of administrative procedure.* In this act, the legislator did not sufficiently substantiate the issue of fixing the procedure for appealing against administrative acts. It used a referential method: in respect of formal appeals against an administrative act, the provisions of the German Administrative Procedure Act and the rules adopted pursuant to it apply, unless otherwise provided by the German Administrative Procedure Act; in other cases, the provisions of this Act apply: if a decision is made as a result of an informal administrative procedure and it does not satisfy the applicant, he or she may file a complaint with the administrative authority.

The provisions on public law contracts are regulated in detail in Section 4 of the German Administrative Procedure Act, which is drafted with due regard to the borrowing and application of the provisions of the Civil Code. The type of public law contract depends on its content, which can be either a settlement agreement or a mutual performance agreement.

The next feature of any administrative procedure model is *its internal structure.* We are talking about the stages of the procedure. When considering the structure of an administrative procedure, we have identified *general stages and phases* typical of the classical model of administrative procedure and *special stages, the* names and list of which depend on the type of procedure. For example, the stages of a formal administrative procedure and a planning procedure differ: *the planning procedure* (approval of plans) goes through the following stages: drafting, publication, public hearings, consultations and formal hearings, and decision-making *in the form of a resolution*. I would like to draw special attention to the stage of execution of an administrative act, which is regulated by a separate law. For example, in German law, the enforcement procedure is enshrined in a separate regulatory act – the German Law on the Enforcement of Administrative Decisions of 1953 [11]. It is clear that the absence of relevant provisions in the German Administrative Procedure Act does not mean that the relevant relations are excluded from the administrative procedure model. The German concept of enforcement of administrative acts has had a significant impact on various legal orders, including the Ukrainian one. The Law on the Execution of Administrative Decisions applies to public law enforcement documents, including administrative acts of federal authorities and other subjects of the Federation. Another feature of the German model of administrative procedure is the administrative and judicial procedure for protecting the rights of citizens and legal entities in respect of which administrative acts subject to appeal have been adopted. We would like to draw attention to the phrase "administrative-judicial" procedure, which provides for the possibility to use either administrative or judicial procedure (persons are given the right to choose). However, this dual procedure has its own nuances, primarily related to legal regulation. A negative aspect of the German Administrative Procedure Act is the absence of provisions that consolidate and regulate the administrative procedure for reviewing an act adopted by an administrative body and transferring this issue to the field of procedural law. This issue is regulated by another act – the German.

Administrative Procedure Act. In the informal procedure, the administrative procedure begins with preliminary proceedings by filing an appeal or a statement of objection to the administrative authority and is regulated by § 58, § 60 of the German Administrative Procedure Act.

The formal procedure is different. The essence of a formal complaint is that a citizen has the right to immediately file a complaint in court without applying to an administrative body. Part 4 of Article 19 of the Basic Law establishes a judicial procedure for reviewing a case if a person's rights have been violated by the authorities. It is regulated by the German Administrative Procedure Act (§ 68-80) and is carried out within the framework of a court procedure. The provisions of the German Administrative Procedure Act also apply to formal appeals against an administrative act.

Thus, the German administrative model harmonises the needs of effective governance with the rule of law and respect for the rights of citizens. The model is valuable in terms of the form of objectification of the results of an administrative procedure, such as an administrative act and a public law contract, and the provisions for adopting administrative acts and concluding public law contracts. Perhaps due to the precision and significant system of checks and balances, the German model of administrative procedure is balanced and orderly in terms of the administrative decision-making procedure, which is a source of borrowing not only for European countries, but also for Ukraine. The German regulatory model of administrative procedure combines elements of the quasi-judicial and collaborative models, as it contains provisions regulating European cooperation of administrative bodies, departmental assistance, and electronic means of communication with individuals.

During our analysis of the German model of administrative procedure, we identified the following features:

– narrow approach to the scope of application of the administrative procedure model, which is limited to the external focus of administrative activities of the authorities

– the administrative procedure model is based on the following principles, which are unique to the German

model: the principle of proportionality, informal review and protection of legitimate expectations of individuals

– a wide range of procedural rights of participants in administrative proceedings and the absence of procedural obligations

– the fundamental concept of the administrative procedure model is the concept of an administrative act, as presented in the German Administrative Procedure Act. This concept distinguishes the German model from administrative procedure models in other countries by its detail, reasonableness and elaboration of provisions on the administrative act

– The internal structure of the German model of administrative procedure differs from other models by the name and number of stages, their legal regulation, which are specific to different types of proceedings within the general model. The stages of the administrative procedure are usually the same, but the regulation may vary. In the German model, the enforcement stage is regulated not by the Administrative Procedure Act, but by a special Act on the Enforcement of Administrative Decisions, which applies to public law enforcement documents (in particular, administrative acts of federal authorities and other subjects of the Federation).

Thus, the above model of administrative procedure is characterised by a certain degree of unification of provisions on it in the single German Administrative Procedure Act, but some issues related to the execution and appeal of an administrative act are in the procedural plane, since they are regulated, as noted above, by another law, but retain their procedural nature.

Having studied the German model of administrative procedure, we believe that the legislator has chosen to unify only the general part of administrative law, which is reflected in the Law on Administrative Procedure, leaving special regulation for certain areas in which administrative procedure is used. The German legislator refused to fully codify the administrative procedure, since codification of the entire administrative law means the need to provide for and consolidate all the details of the administrative procedure in one act, which may lead to excessively restricted and inflexible public administration and complication of legal understanding.

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