CHAPTER 12

Control and Accountability: Administrative Courts and Courts of Audit

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1 Introduction

In this chapter, two very different mechanisms are described. Both of them play a central role in the system, guaranteeing an adequate level of control of the administration in Germany (for a broad picture of both means of control see Kempny 2017). At all levels—the federal (Bund), the state (*Länder*) and the local level—the respective administration is a potential object of control by administrative courts and by audit offices. The administrative courts form—by and large—a joint system. As one of the characteristics of this joint system, cases are generally decided by courts established by the *Länder*, even when they invoke questions regulated by federal law, while the highest court of appeal in all matters regarding the application of federal law is a federal court. In contrast to this, there are no formal links between the different courts of audits in Germany. Rather, the federal level and each of the *Länder* have instituted them in their respective constitutions and have fulfilled their constitutional obligation to establish them as independent bodies. At the local level, similar

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instruments are in place under the supervision of the respective *Land* that controls the financial propriety and efficiency of actions by the local governments in their territory.

In both scientific and general public debate, control is regarded as 'a necessary evil' (Püttner 2001: 560). As will be shown, the mechanisms of control described in this chapter are well-established (for a typology see Püttner 2001: 561). The same could be said about the concept of accountability, which, from a legal point of view, is an element of the more complex concept of democratic legitimacy. In this sense, it is not the role of administrative courts and courts of audit to hold the administration accountable. Rather, their efforts to control the administration give other actors—parliaments, the public, the media and so on—the possibility to hold the respective administration accountable.

2 Administrative Courts

The control of administrative actions by specialised courts has a long history in Germany (see von Oertzen and Hauschild 2001: 569–570; Ramsauer 2019: 24–25). The fact that administrative courts are not the 'ordinary' courts does not imply any privileges on the part of the administration. Part of the judicial system as set out by Article 95 of the Basic Law—the *Grundgesetz* (GG)—comprises 'ordinary courts' on the one hand, and specialised courts on the other. The latter are set up in the fields of administrative law, tax law, employment law and social security law. This set of different types of courts shows that their creation is a question of professional specialisation, not of institutional privileges.

The relevant rules regarding the system of control as exercised by the administrative courts can be found in the *Grundgesetz*—Basic Law,[1] the *Verwaltungsverfahrensgesetz*—Administrative Procedure Act (APA),[2] and the *Verwaltungsgerichtsordnung*—Code of Administrative Court Procedure (CACP).[3]

2.1 The Structure of Administrative Courts in Germany

As previously mentioned, the German judiciary is divided into five different branches. Three of these five branches are courts with a certain control function regarding some part of the administration. Apart from the administrative courts in the strict sense, there are the so-called finance courts for all matters regarding the application of tax law. A similar level of

specialisation can be observed with regard to the social courts in matters regarding social security, which include legal questions regarding pensions and public healthcare and other matters that involve a public insurance system or social benefits provided by public administration. In these cases, due to the explicit responsibility of these specialised entities—that is, specialised administrative courts—the administrative courts as such do not get involved. In contrast to this, claims of damages against the public administration have to be pursued in the ordinary courts just as in cases of civil litigation. Other laws give the administrative courts exclusive jurisdiction to review certain administrative decisions. Probably the most prominent cases involve matters regarding the individual employment of civil servants (while public employees have to pursue their claims in the so-called labour courts).

If neither of the two preceding constellations—exclusive jurisdiction of the administrative courts or of any other specialised court—is given, the so-called administrative court's universal clause is applicable (see von Oertzen and Hauschild 2001: 570). According to Section 40 (1), first sentence of CACP: '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.' The *Länder* have the same power to allocate disputes to other courts in all matters of '(p)ublic-law disputes in the field of *Land* law' (Section 40 (1), sentence 2 CACP). The application of the clause therefore requires a definition of the term 'public-law dispute' (see Singh 2001: 197ff.). In most cases, though, the interpretation is not a problem because in practice the application of the norm is quite well-established and normally does not give rise to any relevant legal problem.

There are three levels of administrative courts in Germany (Singh 2001: 187ff.). Most cases have to be filed in the administrative courts (*Verwaltungsgericht*), which are courts of first instance with a regional configuration (see Mehde 2017: 119ff.). Appeal can be granted to or by the higher administrative court (*Oberverwaltungsgericht* or *Verwaltungsgerichtshof*), of which there can only be one in each *Land* (Section 2 CACP). The *Länder* Berlin and Brandenburg have established a joint *Oberverwaltungsgericht* so that there is a total of fifteen among the sixteen German *Länder*. Both the administrative courts and the higher administrative courts are established by the *Länder*. In contrast to the compulsory establishment of only one higher administrative court, the *Länder* are free to decide how many administrative courts they want to

have and how large their judicial districts should be. Especially the more populous states have a number of administrative courts—and therefore judicial districts—while smaller states (the city-states Berlin, Bremen and Hamburg as well as Saarland and Schleswig-Holstein) have established only one (Mehde 2017: 128; von Oertzen and Hauschild 2001: 572; Singh 2001: 187–188). These courts apply law enacted by the *Länder* or the local governments as well as federal law, so that the federal government and its administrative bodies can be sued before the administrative court in the respective judicial district.

The Federal Administrative Court (*Bundesverwaltungsgericht*) is the highest court of appeal in the field of administrative law. While the administrative courts and the higher administrative courts apply law passed by the parliaments at the federal level or in the respective *Land* as well as by rule-making bodies at the local level, the jurisdiction of the Federal Administrative Court is restricted to questions of federal law. As a consequence, the interpretation of the law of the *Länder* falls within the exclusive jurisdiction of the administrative courts in the respective *Land*, with the court of last instance in these cases being the respective *Oberverwaltungsgericht*. It should be noted, though, that many questions of administrative law have to be seen in the context of the constitutional and European framework, which can provide an angle to assume a federal jurisdiction (see Mehde 2017: 136).

2.2 Empirical Facts

Cases that have to be decided by the administrative courts often mirror practical developments, namely special challenges the executive is faced with. Especially the number of cases pending with the courts of first instance can give an impression which topics are most controversial in the relationship between the various parts of the state and citizens. In the ten years between 2007 and 2016, pending before the administrative courts were—on average—between 100,000 and 150,000 cases (all figures regarding administrative courts are according to Statistisches Bundesamt 2019b: 12–13). The year 2017 saw an increase to almost 190,000, followed by a massive peak with more than 338,000 in 2018. An explanation for this increase can be found in the number of cases pending before the chambers with special jurisdiction for asylum cases. They saw a decrease from just over 67,000 in 2004 to just under 10,000 in 2010. From then on, the number increased, slowly at first and then very significantly towards

the end of the decade (2017: 104,060; 2018: 242,077). Here, of course, the effects of the so-called refugee crisis of late 2015 can be seen as in 2016 and the following years, many of those who came to Germany received the decision regarding their right to stay in Germany from the Federal Office for Migration and Refugees. The figures for the chambers that have no jurisdiction for asylum cases have developed quite differently: these parts of the administrative courts of first instance have seen a constant decrease in the number of cases pending, from 175,048 (2004) to 86,275 (2013). The figures stayed at approximately the same level in the years following (2017: 85,113; 2018: 95,998). As the number of new cases also remains more or less stable (2014: 104,408; 2015: 94,206; 2016: 89,755; 2017: 92,171; 2018: 90,253), the—relatively modest—increase since 2017 probably cannot be explained by the number of new cases, but is far more likely a consequence of a massive shift of resources in the direction of the chambers dealing with asylum cases. That this was also regarded as a political challenge in need of decisive actions is proved by the fact that the number of positions for judges in the administrative courts of first instance saw a considerable increase from just under 1400 in 2013 to just over 1900 in 2018 (Bundesamt für Justiz 2019).

By and large, the social courts of first instance have an even higher number of cases to decide (the following figures are all according to Statistisches Bundesamt 2019a: 14–15). The figures for cases pending have remained stable at a very high level: from 355,379 in 2005 to 445,559 in 2018, reaching a peak in 2012 (497,697). Of the cases concluded in 2018, around a third dealt with questions regarding the second book of the social code (Statistisches Bundesamt 2019a: 28), which provides the legal basis for the rights of people searching for employment and which was the subject of major reforms in the first decade of the century. As a consequence of the high number of cases, it could well be said—at least quantitatively—that the social courts are the more relevant type of administrative courts. Nevertheless, the following remarks will focus on courts officially called ‘administrative courts’, as they can be regarded as the most important point of reference in the development of administrative law and have, thereby, also contributed to the perception of the law in other areas, such as social security law.

2.3 Types of Decisions

Three types of applications can be filed with the administrative courts (see von Oertzen and Hauschild 2001: 575; Singh 2001: 210ff.): first, motions to quash an administrative act; second, motions to force the administration to do something or refrain from doing something; and third, motions to declare that a certain legal relationship exists or does not exist or that an administrative act is void. Conceptually, the motion to quash an administrative act can be regarded as the basic structure. In this case, the administration made a formal decision that was issued and that is still in place. Following the motion, the court then decides the matter directly. Section 113 (1), first sentence of CACP, determines: 'Insofar as the administrative act is unlawful and the plaintiff's rights have been violated, the court shall rescind the administrative act and any ruling on an objection.' When the judgement of the court enters into effect, the administrative act becomes invalid. In cases where the administrative act has ceased to have any effect before the judgement of the court could be delivered, the plaintiff can file a motion to declare the administrative act illegal and an infringement of his or her rights. A declaration of illegality is, in effect, also possible if the action of the administration does not qualify as a formal administrative act.[4] This declaration can also be made with regard to the different types of executive legislation. While only the respective (federal or *Länder*) constitutional court can rule statutes passed by parliament at the federal or *Länder* level to be unconstitutional—and thereby void—all administrative courts can regard 'other legal provisions ranking below the statutes of a *Land*' (see Section 47 (1), no. 2 CACP) or of the federation (the Bund) as illegal and therefore not applicable. If the administration refuses to grant an administrative act, the courts can order the administration to do so or, if the administration has scope for decision-making (see previous Sect. 2.2), force the administration to decide again, 'taking the legal view of the court into consideration' (Section 113 (5), sentence 2 CACP). If the matter the plaintiff applies for is not an administrative act, similar rules apply.

In all cases where the plaintiff—for whatever reason—does not have the time to wait for a judgement following the regular procedure, the court can grant interim injunctions (see von Oertzen and Hauschild 2001: 581–582; Singh 2001: 237ff.). As a general rule, interim injunctions cannot replace decisions taken in the ordinary procedures. Nevertheless, the protection of the plaintiff's rights is the priority that can be a justification

for taking decisions that are, in effect, final if this is the only possibility to protect the respective rights.

Altogether, this brief description shows that the various possible constellations are covered in a system that tries to make available effective legal remedies in all cases where infringements of rights can be avoided or amended, or at least to provide a retroactive control mechanism when the infringement of rights has already ended. The differences in the applications lead to equivalent procedural differences, but they are no reason to raise doubts about the universal protection of rights by the administrative courts.

2.4 Depth of Control

The administrative courts use the same methodology as the administration to decide a particular case in its decision-making process. This also implies that the German system of judicial review, in principle, does not accept the notion that there should be scope for administrative actions not fully reviewable by the courts. That is to say, even very vague words in any given law—be it 'public interest', 'proportionality', 'trust' or similar terms open to interpretation—will be interpreted by the courts independently. Any difference between the interpretation found by the administration, on the one hand, and the finding by the court on the other, will lead to the conclusion that the original administrative decision violated the law (Ramsauer 2019: 33–34). This rule is backed by a constitutional right, enforceable in all courts, including the Federal Constitutional Court (*Bundesverfassungsgericht*). The respective norm, Article 19 (4), sentence 1 of the Basic Law, reads as follows: 'Should any person's rights be violated by public authority, he may have recourse to the courts.' This is understood by the *Bundesverfassungsgericht* and the various administrative courts as prescribing a full judicial review of undetermined legal norms in all cases where the claimant's rights would be violated if the administrative actions were illegal. Consequently, the vast scope of the judicial review regarding the application of the law is not only a legal rule but also a basic right.

Two exceptions to the rule regarding the full control of the application of norms are accepted (see Ramsauer 2019: 30ff.). The courts distinguish between the provisions of the norm itself and the legal consequences, that is, the actions the administration can take because the norm is applicable in the respective case. The latter concerns situations where the

administration can act without authorisation in the law because its actions do not involve any interference with rights and are not regulated by any applicable norm. More often, the administration is granted discretion whenever the law explicitly says so. The norm indicates this fact by stating that certain actions 'may' or 'can' be taken.

2.4.1 Exception No. 1: Discretion

The legal concept of administrative discretion concerns the legal consequences whenever the conditions of an application of a certain norm are met. Section 40 of APA reads as follows: 'Where an authority is empowered to act at its discretion, it shall do so in accordance with the purpose of such empowerment and shall respect the legal limits to such discretionary powers.' The rule shows that discretion is regarded as an exception—and that this exception is granted by the law itself. It is not stated explicitly, but undoubtedly implies that the administrative courts have to accept that, only in this case, the administration has the final say on which decision should be taken in a specific context and that the administrative courts then have no authority to give the final decision in the case under consideration. This is confirmed by Section 114, first sentence of CACP, which reads as follows: 'Insofar as the administrative authority is empowered to act in its discretion, the court shall also examine whether the administrative act or the refusal or omission of the administrative act is unlawful because the statutory limits of discretion have been overstepped or discretion has been used in a manner not corresponding to the purpose of the empowerment.' This description shows the difference. In the case of 'regular' control, the courts provide the authoritative interpretation of a given norm, which is binding for the administration in the case under review. In the case of discretion, the role of the courts is restricted to the question of whether the administration made mistakes in the application of the norm. In other words, the norms mentioned demonstrate the shift from the question 'What is the right interpretation of the law?' to 'Was the administration right in its application of the law?'

The exercise of discretionary powers does not imply an authorisation to 'free' decision-making. The courts apply the above-mentioned Section 114 (1) of CACP in a way that allows them to cover a broad spectrum of aspects relevant in all administrative decision-making. The starting point are four clearly defined types of 'discretion mistakes' that can be made by the administration (Singh 2001: 156ff.). The first two of these types—the

first dichotomy of possible mistakes—could be regarded as mere formalities: the courts ask if the deciding administration was aware of the scope of its discretionary power and if it saw the boundaries of the law established. The former aspects include cases in which the administration did not see at all that it had been granted discretionary power. Of course, this is a rather theoretical idea which—in times of highly professionalised administrations—does not play a noticeable role. In contrast to this, the precise definition of boundaries is very relevant in practice, as it includes the question of whether the respective decision was proportionate. Proportionality is probably the single most important topic in all matters involving administrative discretion. The concept gives the court broad power to determine whether the decision is necessary—that is, is there an equally effective alternative that would infringe rights to a lesser degree? More importantly, it also implies the question of whether there was an adequate balance between the aim of the decision and the impairment of the addressee's rights. Considering that this requires a weighing of legal positions that tend to be virtually impossible to compare, it seems fair to say that there are no clear-cut rules that can guide this balancing act.

The second dichotomy of possible mistakes refers to the merits of the decision under consideration. The joint headline for this kind of mistake is 'wrongful exercise of discretion'. The starting point of this concept is the above-mentioned provision that ties the administrative decision to the purpose of the norm providing the administration with discretionary powers (Section 40 APA; Section 114 (1) CACP). In relation to this purpose, the court can establish which aspects of the case should be considered when taking the decision and vice versa. In other words, the courts scrutinise the reasons the administration gives for the respective decision. They will then decide if the arguments are legitimate in the application of the legal norm or if a certain aspect of the cases should have been considered or should have played a larger role in determining the decision. In both variances, the courts regard any mistake as a reason to declare the exercise of discretion as wrongful and, therefore, the respective decision as unlawful.

2.4.2 Exception No. 2: Scope for Appreciation

In the other case where courts do not control the interpretation of legal norms to its full extent—administrative scope for the application of the legal terms—the primary interpretative role of the administration is typically not stated explicitly in the respective law. It should also be noted that

in the German system, the courts generally have to investigate all relevant facts irrespective of the evidence provided by the parties (von Oertzen and Hauschild 2001: 576), so that the role of the courts is always a very relevant one. Nevertheless, there is no doubt that, in certain instances, there are factual problems regarding a full-scale review of administrative actions (see Ramsauer 2019: 35ff.). A typical example in this respect is the appraisal civil servants receive after a certain period of time. The grade any given person has to receive for a given achievement is defined by legal norms. Obviously, from a merely practical point of view, it is impossible for an administrative court to reconstruct the personal behaviour and the achievements of the respective civil servant over such a long period of time, thereby finding the 'right' grade. Very similar problems arise with regard to exams (see Bundesverfassungsgericht 1991a, 1991b). Other constellations in this regard concern specific decision-making processes. In all these cases, the restricted role of the courts could be described as an exercise in legal realism. The courts do realise that a tighter form of control would be nothing less than hubris.

As with discretion, the courts in these cases do not abstain from all forms of control but rather change the method they apply, asking if the administration made a mistake in taking the specific decision. The types of mistakes that lead to quashing the respective decision are very similar to the ones described with regard to administrative discretion. The *Bundesverfassungsgericht* points out that the control by the administrative court has to meet certain substantial standards. In particular, it rules that it is not within the scope of the decision-making by the administration to grade a position that is arguable or has foundation in the relevant scientific literature as being wrong (Bundesverfassungsgericht 1991a: 55; see also Bundesverfassungsgericht 1991b: 79).

2.5 Extent of Control

The description has shown that the different types of motions, in addition to the wide-ranging interpretation of the law, seem to lead to a near-complete control of the administrative action under review by the courts. Obviously, this is not the full picture. There are safeguards in place that prevent a complete dominance of administrative decision-making by the courts. The most important instrument in this respect is the restriction the German system provides for the question of *locus standi* (the *Klagebefugnis*) (see Singh 2001: 214ff.). Control of administrative actions by administrative

courts is an intended element of the German *Rechtsstaat* and therefore, of course, no accident. Nevertheless, it would be wrong to assume that the law established the courts as institutions of general control or even as a means to dominate executive decision-making. Rather, the protection of rights is the focus of judicial review, with the question of legality being one part of this. In fact, it could well be argued that the role of the administrative courts is not to control the administration, but rather to provide a remedy when rights are violated by the administration. The vast possibilities the courts have to exercise control in every case they have to decide is only acceptable because access to the court is clearly defined and restricted. The previously mentioned Article 19 (4), first sentence of the Basic Law, while guaranteeing access to the court in the case of violations of rights, has, in practice, been turned into a provision that reduces the court's role to one of protector of these rights, thereby effectively barring them from all other forms of control.

Section 42 (2) of CACP plays the role of a kind of gatekeeper. It states, 'Unless otherwise provided by law, the action shall only be admissible if the plaintiff claims that his/her rights have been violated by the administrative act or its refusal or omission.' This rule, directly applicable only to rescissory actions and enforcement actions (see Section 42 (2) CACP), is applied in all cases brought before the administrative courts. The courts will only decide on the merits of the case if a violation of the claimant's rights seems plausible. The previously mentioned Section 113 (1), first sentence of CACP, stresses this point even further, stating that the court will rescind the administrative act only if two conditions are met: illegality of the act and violation of the plaintiff's rights. The same rule—court action only in the case of violations of the plaintiff's rights—applies with regard to enforcement actions as is clearly stated in Section 113 (5), first sentence of CACP. In some constellations, the question of whether a certain rule is not only 'objective' law but also grants a 'subjective' right might prove to be more problematic than the legality of the administrative action itself, and it might thereby determine the outcome of the case. This is particularly relevant in 'triangular legal relationships', that is, whenever a third party tries to get an administrative act rescinded that was addressed to someone else, such as in the case of someone trying to invalidate his or her neighbour's building permission.

These restrictions give rise to a number of questions relating to the obligations stemming from EU law (see, e.g., Mehde 2010: 400 f.; Ramsauer 2019: 29; Siegel 2012: 456). Unlike the approach described

under Section 42 (2) of CACP, the European legislature seems to regard the courts in the EU member states much more as instruments to safeguard the implementation of European law (Schlacke 2014: 11; see also Mehde 2010: 401). At the very least, it can be said that the European Court of Justice (ECJ) tends to rule much more generously when the question arises as to whether the plaintiff has a legal right with the consequence of *locus standi* (Steinbeiß-Winkelmann 2010: 1233, 1234). The German legislature as well as the courts have tended to widen the rules on *locus standi* in the respective areas of the law without challenging the concept as such. To the above-mentioned rules a general reservation, 'unless EU law requires otherwise', must be added.

It should also be noted that as another development introduced by European as well as by international law, in a number of fields, the law now grants *locus standi* to certain, formally accredited associations (NGOs) that are engaged in the respective fields. This privilege is restricted to legal provisions for which there is typically no claimant under the traditional system, as the negative effects concern aspects of the environment, that is, no person or legal entity. The respective rights are not laid down in the CACP but in the special legislation. The most relevant of these can be found in environmental law, namely the Aarhus Convention and Directive 2003/35/EC of the European Parliament and of the Council (see Siegel 2012: 145–146). It should also be mentioned that there are certain areas in which the *Länder* can decide to allow associations to bring claims in restricted areas, such as matters concerning animal protection.

2.6 Remaining Aspects Concerning Judicial Control

It is one of the features of the German system that judgements tend to have greater effect than the law requires (see Mehde 2010: 382; Ramsauer 2019: 42ff.). In most cases, the formal binding effect is restricted to the plaintiff and the defendant—normally the administration acting or failing to act—and possible third parties subpoenaed to the concrete proceedings. In fact, though, the administration tends to apply the merits of the judgements in the same way as they would apply legal norms. The administration and the individuals acting on behalf of the administration can avoid criticism or at least deflect possible blame away from themselves when they are able to depict their decision as a necessary consequence of court rulings, even if these rulings are—in a strictly legal sense—not binding for them with regard to the case under consideration (Mehde 2010:

384). This can be described as a matter of precise interpretation of the law and as an element of the German *Rechtsstaat* or the legalistic tradition respectively. From a different point of view and equally arguable, the same phenomenon can be regarded as an overly cautious approach that undermines the primary role of the executive in the application of the law.

3 Courts of Audit

Unlike the courts of justice, the courts of audit can decide themselves if and when to look into a certain matter. In general, the scope of their control is restricted to questions of financial propriety and efficiency. In federal law, the legal base can be found in Article 114 (2), first and second sentences of the Basic Law: 'The Federal Court of Audit, whose members shall enjoy judicial independence, shall audit the account and determine whether public finances have been properly and efficiently administered. It shall submit an annual report directly to the Bundestag and the Bundesrat as well as to the Federal Government.' The provisions determine the basic organisational structure as well as the scope of review and the manner in which its work can gain effect. It should be noted that this is only a minimal requirement. Article 114 (2), sentence 3, determines that further powers can be transferred to the court by federal law. In fact, the role of the federal court and its president has been extended and organisational features further developed in statutes, namely the *Bundesrechnungshof* Act (BA).[5]

In accordance with a long-standing tradition, the president of the federal court is also appointed to the position of 'Federal Performance Commissioner'.[6] In this position, he or she has a broad spectrum of possibilities to advise both the legislature and the executive and can also be asked to provide expert opinions.[7] Nevertheless, the role does not feature as prominently in practice as its description or the possibilities implied by it might suggest.

In the *Länder*, the respective constitutions contain equivalent provisions. Therefore, there is a total of seventeen courts of audit in Germany, one at the federal level and one in each one of the sixteen *Länder*—all with 'similar institutional design' (Seyfried 2016: 494). At the local level, similar institutional arrangements have been established in the local government laws of the *Länder*.

3.1 Organisational Features

As '(i)ndependence is one of the most important preconditions for the effectiveness of' supreme audit institutions (Seyfried 2016: 494), the aspect of the organisational design that seems most relevant is the fact that the courts of audit are independent institutions bound only by the law that cannot be ordered to perform their functions in any specific way (Seyfried 2016: 494 f.; von Wedel 2001: 586 f.). As the above-mentioned constitutional requirement points out, the members enjoy the most independent status possible in the public sector: judicial independence. Pursuant to Section 3 (1) of BA, the members of the *Bundesrechnungshof* are the president, the vice-president, the senior audit directors and audit directors. These members—but only three audit directors—serve on the *Senate* of the *Bundesrechnungshof*. Its independent character is further guaranteed by the fact that both the president and the vice-president are not appointed by the government of the day—as would be the case with 'ordinary' high-ranking positions in the administration—but elected by the Bundestag and the Bundesrat, respectively, and appointed by the federal president (Section 3 (2), sentence 1, and Section 5 (2), sentences 1–3 BA; for a description of the procedure in the federal states see Seyfried 2016: 495ff.). The appointees chosen are elected for a term of twelve years, cannot be re-elected and have to retire after their time in office (Section 3 (2), sentence 2, and Section 5 (1), sentence 4 BA). According to Section 7 of BA, the duties are assigned to the different entities within the *Bundesrechnungshof* by the president, the vice-president and the *Senate*.

3.2 Scope of Review

In accordance with the provisions of Article 114 (2), sentence 1 of the Basic Law, the court of audit controls the respective administration, which includes all transactions of any financial relevance (von Wedel 2001: 587). There are different kinds of audits, with the courts being able to freely determine the different aspects (von Wedel 2001: 589). The measures applied are propriety, on the one hand, and efficiency, on the other. Propriety includes the question of whether budgetary means were spent in the way prescribed by the budget. This can be controlled quite effectively when the officials from the courts of audit establishing the facts have access to the invoices and other documents relating to particular spending processes. The question of efficient expenditure gives rise to more complex

deliberations (see Engels 2015: 116ff.). Obviously, various definitions can be applied. There are basically two variables: the costs and the effects. Both have to be put in relation to each other (von Wedel 2001: 588). Efficiency requires an optimal relation between the two. It is part of the responsible assessment by the court of audit if this standard has been met in a particular case. It is part of the role of these institutions that their impact largely depends on the soundness of their assessments. This is probably the most effective instrument to ensure that the evaluations have a firm basis.

While the original role described in Article 114 (2) of the Basic Law is a retroactive one, the courts of audit have subsequently been given an advisory role that they can exercise before a final decision is made by the government or the parliament (von Wedel 2001: 591). It can also be described as a change in the 'audit philosophy' that the courts try to get involved in planning processes at an early stage (Engels 2015: 118).

3.3 Effects

The courts of audit have no executive powers and perform no judicial functions (von Wedel 2001: 593). The above-mentioned Article 114 of the Basic Law mentions the audit and the annual publication of findings as the only activity by the *Bundesrechnungshof*. In fact, courts of audit act by informing the relevant administrative entities as well as the respective parliaments and/or the relevant parliamentary committees. In particular, relevant findings have to be published (see Kempny 2017: 241ff.). Before the publication, the findings are normally discussed with the respective administrations and, if relevant, existing supervisory bodies (von Wedel 2001: 590). In reality, reports by the courts of audit only become part of the political debate when 'wasteful' spending is denounced—typically in the annual reports, less frequently when the courts of audit are commissioned to file special reports. Over the course of a year, with budgets and bureaucracies as big as those of the German *Länder* and at the federal level, it is literally unthinkable that the courts of audit do not find some kind of spending that can be described as unnecessary or otherwise wasteful. From a point of acceptance of the system as a part of democratic legitimacy, this effect bears a certain ambivalence, as this kind of critique might not be regarded as a normal form of control that is part of a well-functioning system but, on the contrary, might be misunderstood as evidence of systemic failure on the side of the administration and possibly of the government of the day.

4 Lessons Learned

The control mechanisms described in this chapter enable the public as well as the electorate to hold the executive accountable. Both types of control have almost nothing in common but, at the same time, and in many respects, complement one another. They are important parts of a system that, overall, leads to an acceptable level of control and which plays an important role in guaranteeing an adequate level of democratic legitimacy of the administration.

In the case of the courts, it should be noted that the essential idea behind the mechanism is not to control the executive in a general way. Their role is designed to help people as well as other entities that can bear subjective rights to enforce their rights effectively. In order to fulfil this task, courts have to control the legality of administrative actions. In addition, the law as well as the courts have developed a number of mechanisms that give them the possibility to rule on cases even when there is no question of a present violation of rights involved, mainly because the administrative action has already occurred and cannot be revoked retroactively. Mainly as a consequence of the adaption of EU requirements, in some areas, the courts get involved at the request of organisations that do not invoke their own legal rights. Rather, their claims involve interests in the topic that do not fulfil the necessary requirements for the establishment of a legal right. Altogether, this leads to a mechanism which has effects far beyond the particular case. Administrative courts, in this sense, are the authoritative source of the interpretation of the law. In many instances, when an administrative court has ruled on a certain matter involving an interpretation of a certain legal rule, the administration will consider the relevant legal question as settled. Administrations often apply the essential findings of the courts as if they were the law itself even when they deal with cases on which the court's decision has no direct effect.

In the case of courts of audit, the control is exercised in a clearly defined but certainly broad fashion without the need for initiation by external actors. Administrations have to fear that a control may be exercised, which could lead to an embarrassing—published—claim of wasteful spending. This possibility should already have a restricting effect on administrations so that the lack of formally binding executive powers is likely not missed.

Notes

1. All translations of this law in accordance with https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0108 (all websites quoted in this chapter were last visited on 10 January 2020).
2. All translations of this law in accordance with https://www.bmi.bund.de/SharedDocs/downloads/EN/gesetztestexte/VwVfg_en.pdf?__blob=publicationFile&;v=1.
3. All translations of this law in accordance with http://www.gesetze-im-internet.de/englisch_vwgo/englisch_vwgo.html#p0545.
4. The administrative act is defined in Section 35, first sentence of APA: 'An administrative act 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.'
5. All translations of this law in accordance with https://www.bundesrechnungshof.de/en/bundesrechnungshof/rechtsgrundlagen/bundesrechnungshof-act.
6. https://www.bundesrechnungshof.de/en/bundesrechnungshof/bundesbeauftragter-bwv?set_language=en.
7. https://www.bundesrechnungshof.de/en/bundesrechnungshof/bundesbeauftragter-bwv/status-and-tasks?set_language=en.

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