Seminar organised by the Hellenic Council of State and ACA-Europe

Rhodes, 15-16 May 2026

New elements in the organisation and functioning of the Public Administration and Administrative Justice

Questionnaire

Responses from the Federal Administrative Court of Germany

I. New models of organisation and functioning in the Public Administration

The aim and scope of Part I of this questionnaire is:
(A) To examine collaboration with private individuals (who are not public servants) in the unilateral action taken by the Administration, and more specifically to study the delegation to private individuals of tasks traditionally performed by public servants during the procedure of issuing an administrative act. Participation, in general, of citizens/interested parties in administrative proceedings (e.g. preliminary hearings, participation and all forms of consultation), collaboration with private individuals in the Administration's contractual activity (works, supply and service contracts, concession contracts, public-private partnerships, etc.), privatisation of public-sector bodies and creation of legal entities governed by private law are not covered by this questionnaire.
(B) To study the integration of private-sector organisational models into the tools and operating methods of the Public Administration.

A. Delegation of administrative tasks to private individuals

1. General provisions

Does your legal system recognise the following forms of collaboration between private individuals and the Public Administration?

Tasks assigned to private individuals during the procedure of issuing [adopting] an administrative act X

Recruitment of private individuals who are not civil servants within the Administration's structure, e.g. executive managers, senior managers X

2. Regarding the involvement of private individuals in administrative proceedings

i. If the involvement of private individuals in administrative proceedings (as indicated above) is provided for in your legislation, please mention specific provisions.

Constitutional provision	X
General provision of a legislative nature	X
Specific legislation	X

The principle of democracy, as enshrined in Article 20 para. 2 of the German Basic Law, demands that all state authority shall be derived from the people and exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies. Article 33 para. 4 of the German Basic Law stipulates that the exercise of sovereign authority on a regular basis shall, as a rule, be entrusted to members of the public service who stand in a relationship of service and loyalty defined by public law (functional reservation - Funktionsvorbehalt). According to Section 35 Sentence 1 of the Administrative Procedure Act, 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. According to Section 1 para. 4 of the Administrative Procedure Act, for the purposes of this Act "authorities" shall comprise any body which performs tasks of public administration.

Hence, the administrative act must emanate from an authority, not necessarily from a civil servant. At the same time, the provisions mentioned above allow for the legal instrument of "Beleihung" whereby the State, by law or on the basis of law, delegates to a private entity ("Beliehener") sovereign powers to perform tasks of public administration, independently, albeit under the control of the State. The private entity then acts as an authority.

It is also possible that the State makes use of a private entity assisting in the performance of tasks of public administration ("Verwaltungshelfer"). This private entity then does not act as an authority (e.g. Section 17h of the Federal Highway Act and Section 2b of the Regulation No. 9 on the Implementation of the Federal Immission Control Act <"Projektmanager">).

As far as questions contain the term "delegation" or "entrustment", the answers given refer to the legal instrument of "Beleihung" and the authorised private entity in the aforementioned sense.

ii. Does national case-law or legislation define criteria pursuant to which the delegation of administrative tasks to private individuals is authorised?

According to the jurisprudence, sovereign powers can only be delegated to a private entity in order to perform tasks of public administration by law or on the basis of law. Some *Länder* have put this

into law (Section 16 of the Act on the Organisation of the State Adminstration of the Land Brandenburg, Section 21 of the Act on the Organisation of the State Adminstration of the Land Sachsen-Anhalt and Section 24 of the Act on the Organisation of the State Adminstration of the Land Schleswig-Holstein). The act of delegation itself can take the form of a law, a statutory instrument/ordinance, an administrative act, a contract or a municipal statute. The law must prescribe the "if" and the "how", *i.e.* the essential modalities. What essential means can vary depending on the context, if and how constitutional principles on the organization of the State and other constitutional norms (especially fundamental rights) are affected (*cf.* Federal Administrative Court, Judgment of 26 August 2010 - 3 C 35.09 - BVerwGE 137, 377 para. 25). Such a delegation can be justified even in the core area of sovereign powers by objective reasons. However, exemptions from the functional reservation (see above) are limited by the principle of proportionality.

iii. How are administrative tasks delegated to private individuals? Please provide specific examples.

Directly by law X

- According to Section 12 para. 1 of the Aviation Security Act, the Responsible Aircraft Pilot, as the person charged with fulfilling state functions (Beliehener), shall ensure security and order is maintained on board any aircraft whilst in flight. He/she shall be authorised to carry out the necessary measures in accordance with para. 2 and other applicable laws.

By an administrative act X

- The recognition of the Technical Inspection Association (TÜV) as an entity authorised to perform the main inspection and issue the inspection sticker on the basis of Section 29 para. 2 of the Road Traffic Licensing Regulation in conjunction with Annex VIII No. 3.1.1 to the aforementioned Regulation is carried out by means of an administrative act.
- The recognition of a private school as an alternative school and the sovereign power associated herewith to conduct examinations and issue certificates is carried out through an administrative act (e.g. Section 10 of the Private School Act of the Land Baden-Wuerttemberg).
- According to Section 10 of the Law on the Craft of Chimney Sweeps, the appointment of the authorised district chimney sweep is issued via an administrative act.
- The delegation to private individuals or entities of the sovereign power to conduct passenger and baggage screenings at airports (Section 16a para. 1 no. 1, Section 5 para. 1 to 3 of the Aviation Security Act) is carried out via an administrative act.

By contract X

- According to Section 3 of the Public Health Service Act of the Free State of Bavaria, for a limited amount of time certain tasks and sovereign powers of the public health authorities can be delegated to private entities via a public law contract.

Other .... ☐

iv. Which administrative tasks can be entrusted to private individuals [content of the tasks]? Please provide specific examples from legislation and case-law.

Preparation of the administrative act X

e.g. Performing public health medical exams and issuing expert opinions (Section 3 of the Public Health Service Act of the Free State of Bavaria)

Issuance [adoption] of the administrative act X

e.g. Issuance of the Certificate of the Inspection of heating appliances by the authorised district chimney sweep (Section 14a para. 1 of the Law on the Craft of Chimney Sweeps); issuance of the Pleasure Craft Skipper's Licence for inland/coastal waters, Section 16 of the Regulation on the Operation of Pleasure Crafts; setting of boundary markers by a certified survey engineer (e.g. Section 17 of the Survey and Cadastre Act of the Free State of Saxony)

Implementation of the administrative act X

e.g. Controls by the authorised district chimney sweep, Section 15 of the Law on the Craft of Chimney Sweeps)

Other ☐

v. What is the extent [range] of administrative tasks that can be entrusted to private individuals? Please provide specific examples from legislation and case-law.

Advisory tasks X

e.g. Advice to the parties as part of the administration of justice for preventative purposes, Section 24 of the Federal Code for Notaries

Decision-making tasks X

e.g. Section 16 of the Regulation on the Operation of Pleasure Crafts, see above

Control and verification tasks: X

e.g. Section 15 of the Law on the Craft of Chimney Sweeps, see above

Establishment of the facts X

e.g. Section 3 of the Public Health Service Act of the Free State of Bavaria, see above

Legal qualification of the facts X

e.g. Section 14a para. 1 of the Law on the Craft of Chimney Sweeps, see above

Other .... ☐

vi. Are there any cases where the involvement of private individuals in administrative proceedings is prohibited?

No ☐

Yes (please specify: If the delegation in the core area of sovereign powers was not justified by objective reasons or disproportionate.) X

If yes, which legal instrument provides for the corresponding prohibitions?

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Constitution X
(Article 33 para. 4 and Article 20 para. 2 of the Basic Law, see above)
Legislation ……………………………………… ☐
Other ……………………………………… ☐

Please indicate any relevant case-law.

- Federal Constitutional Court of Germany, judgment of 18 January 2012 - 2 BvR 133/10 - ECLI:DE:BVerfG:2012:rs20120118.2bvr013310 = BVerfGE 130, 76
- Federal Administrative Court of Germany, judgment 26 August 2010 - 3 C 35.09 - BVerwGE 137, 377
- Federal Administrative Court of Germany, decision of 29 September 2005 - 7 BN 2.05 - NVwZ 2006, 829 f.
- Federal Administrative Court of Germany, judgment of 27 October 1978 - 1 C 15.75 - BVerwGE 57, 55

3. Qualifications and selection procedure for private individuals

i. What is the procedure provided for in the legislation for the certification of private individuals? Please mention specific examples.

Participation in examinations X
e.g. Attorney-Notary (Section 7a of the Federal Code for Notaries)

Selection based on criteria X
e.g. District chimney sweep (Sections 9, 9a, 9b of the Law on the Craft of Chimney Sweeps)

Other ☐

ii. How are selected the private individuals who will be entrusted with a specific administrative task? Please give examples.

Random selection from a list/register ……………………………………… ☐
Selection from a list/register based on criteria (Section 9b of the Law on the Craft of Chimney Sweeps) X
Absolute discretionary power of the Administration ……………………………………… ☐
Selection by the citizen [upon a declaration] ☐
Other: ☐

iii. Is there a legal provision and/or other instrument governing the actions of private individuals when performing administrative tasks? Please indicate specific provisions.

No ☐
If yes, X

General normative act (e.g. Code of Administrative Procedure) ☐

Specific normative acts X

(e.g. Section 18 of the Law on the Craft of Chimney Sweeps and Section 14 of the Federal Code for Notaries)

Codes of Conduct, good practices (soft law) X

(e.g. Rules on Compliance set by the authorised private enterprises or professional associations, e.g. TÜV Süd Compliance Program - Code of Conduct; Compliance Policy for Chimney Sweeps

Other X

(e.g. Framework agreements between the State and professional associations, e.g. public health authorities and medical associations)

iv. How are the impartiality and integrity of private individuals guaranteed under the law? Please indicate specific provisions.

Incompatibilities X

(e.g. Sections 18 and 21 of the Law on the Craft of Chimney Sweep; Section 5 para. 1 of the Regulation for the Publicly Appointed Surveying Engineers (Exercise of Duties) in conjunction with Section 20 of the Administrative Procedure Act (Persons excluded)

Impediments X

(e.g. Section 18 and 21 of the Law on the Craft of Chimney Sweeps; Section 5 para. 1 Sentence 4 of the Regulation for the Publicly Appointed Survey Engineers of the Free State of Saxony (Exercise of Duties) in conjunction with Section 21 of the Administrative Procedure Act (Fear of Prejudice)

Criminal or disciplinary liability X

(e.g. Section 21 para. 3 of the Law on the Craft of Chimney Sweeps; Section 26 of the Survey and Cadastre Act of the Free State of Saxony

Other .... ☐

v. What are the legal consequences in the event of an error, offence or failure on the part of the private individual?

Withdrawal of the certification X

Disbarment from the professional association ☐

Imposition of a fine or other penalty X

Personal liability of the private individual (civil, criminal, disciplinary) X

Revocation of the administrative act in the issuance of which the private individual collaborated X

Civil liability of the State X
Other ☐

4. Administrative checks [controls]

i. Does the Administration carry out checks on private individuals when they perform administrative tasks?

Yes X
No ☐

ii. If yes, at what stage are the checks carried out?

A priori ☐
A posteriori ☐
At any time X

iii. How are checks activated?

Following a complaint/administrative appeal X
Ex officio X

iv. How extensive are the checks?

Checks based on sampling X
Mandatory checks for all actions ☐

v. What is the nature of the checks?

Of legality X
Of the substance, of appropriateness X

vi. What is the type of checks?

On persons X
On actions X

vii. Are the conclusions of private individuals binding on the Administration?

Yes ☐
No X

5. Judicial review

i. Can the actions of private individuals be subject to judicial review? Please indicate specific provisions or the relevant case-law.

No ☐

Yes X

(e.g. Section 1 (Scope) para. 4 of the Administrative Procedure Act in conjunction with Section 78 (defendant) para. 1 no. 2 of the Code of Administrative Court Procedure, e.g. Section 20 (authorised private entity) para. 3 of the Survey and Cadastre Act of the Free State of Saxony

If yes, what is the scope of the judicial review?

The review directly targets the action of the private individual (per se) X

(e.g. Section 20 (authorised private entity) para. 3 of the Survey and Cadastre Act of the Free State of Saxony)

The review indirectly targets the action of the private individual (appeal lodged against the final act of the Administration, whether explicit or implicit, e.g. appeal lodged against the tacit acceptance of the actions of private individuals by the Administration) X

(e.g. in case of a person assisting the public authority: Section 17h of the Federal Highway Act)

ii. What types of disputes arise when challenging the actions of private individuals?

administrative disputes X

private disputes X

iii. Please mention typical cases from national case-law concerning the delegation of administrative tasks to private individuals.

The type of dispute depends on the capacity in which the private entity acted. If the private entity acted while executing sovereign powers in order to perform tasks of public administration, the dispute will be a public law dispute. If not, it will be a civil law dispute. A district chimney sweep may issue a Certificate of the Inspection of heating appliances, thus acting in a sovereign capacity, resulting in a public law dispute, or he/she can clean the chimney or give advice on the installation of a heating appliance resulting in a civil law dispute.

Public law disputes concern

- the legality of the administrative act issued by the authorised private entity,
- the validity of the act delegating sovereign power to the private entity,

the demarcation between an authorised private entity (Beliehener) and a person assisting the public authority (Verwaltungshelfer),

- the appointment of the authorised private entity (lawsuit filed by a competitor),

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- the legality of supervisory measures taken by the public authority against the authorised private entity

B. Integration of private-sector methods and organisational models into the functioning of the Administration

1. Recruitment of senior managers outside the hierarchy of the civil service

i. What are the objectives of recruiting private individuals as senior managers within the Administration?

Flexibility, control of (long-term) costs, and transfer of know-how.

ii. In which sectors of the Public Administration is it permissible to recruit senior managers who do not belong to the hierarchy of the civil service, and in which sectors is it prohibited?

As an example for the objective of the transfer of know-how, the Federal Administrative Court refers to the General Administrative Rules on the Use of Personnel Employed Outside the Public Service (External Personnel) in the Federal Administration (External Personnel Rules):

According to No. 1.2 of the External Personnel Rules, an external person is someone who is employed outside the public service and works in the federal administration temporarily while maintaining their previous employment relationship. Public service within the meaning of this provision is service for the federal government, a state, a municipality, or other public law corporations, institutions, or foundations, or their associations, excluding public law religious societies and their associations. An activity in the public service is equivalent to an activity for legal entities, companies, or other associations of persons that are exclusively publicly owned, or intergovernmental or supranational institutions in which the federal government, a state, or another public law corporation, institution, or foundation in the federal territory or their associations are involved by paying contributions or grants or in another way.

According to No. 1.3 of the External Personnel Rules, the following are not covered by the scope of application:
- Remunerated contractual relationships involving consulting or other services,
- Fixed-term employment contracts, and
- Employees of other states.

No. 2.1 of the External Personnel permits the use of external personnel

- within the transparent framework for the exchange of personnel between the federal administration and the private sector as well as scientific, cultural, or civil society institutions,
- when the administration lacks specific expertise required for tasks. The need must be clearly defined and documented beforehand, showing it cannot be met via consulting contracts,
- or when funds are specifically provided in the budget for this purpose.

No. 2.5. of the External Personnel Rules states that the use of such personnel is not permissible in the area of

- Drafting legislation and other legal acts,
- Management/leadership functions,
- Positions in senior management or central control units,
- Positions with final decision-making authority
- Functions affecting the direct interests of the sending entity, including supervision cases or expected future employment
- Positions related to public procurement.

It is possible that private individuals act as senior managers for inhouse operations of municipal facilities, i.e. entities within a municipality that are legally non-independent but have a separate budget and accounting (e.g. Section 4 para. 2 of the Act on Inhouse Operations of Municipalities of the Land Baden-Wuerttemberg). The same is true for public savings banks that are organised in the form of a public law institution (e.g. Section 25 para. 3 of the Act on Savings Banks of the Land Baden-Wuerttemberg).

Private individuals acting as senior managers in public enterprises are quite common.

iii. What criteria does the Administration use to select external senior managers?

It depends on the context. The Federal Administrative Cour refers by way of an example to No. 2.2 of the External Personnel Rules: The selection of external personnel outside of personnel exchanges must be conducted in a competitively neutral manner. The respective need for external expertise shall be made public in an appropriate way. Prior to any engagement, the suitability of the external personnel must be established.

iv. What is the nature of the duties of external senior managers?

Decision-making	X
Advisory	X
Other	X

v. Does error on the part of a senior manager give rise to:

Civil liability of the State	X
Personal liability of the manager (civil, criminal, disciplinary)	X

2. Organisational models

i. Does your country use New Public Management, Public Value Management, Digital Era Governance, or New Public Governance policies in the organisation of its Public Administration, for example, to digitise procedures, achieve objectives, ensure accountability, evaluate efficiency, promote the rational use and distribution of resources, control expenditure and ensure compliance with budget restrictions, codify legislation, promote career progression, train staff, etc.? Please provide specific examples.

Elements of New Public Management are present in budget law, for example in the form of double entry bookkeeping (e.g. Section 1a of the Budgetary Principles Act) or budgeting models based on targets, output and decentralisation (e.g. Section 6a and Section 1a of the Budgetary Principles Act) or cost and performance accounting (e.g. Section 7 of the Federal Budget Code and Section 6 of the Budgetary Principles Act).

Some budgetary elements of New Public Management have also been introduced at the municipal level (e.g. Section 4 para. 1 and Section 14 para. 2 of the Regulation on Municipal Budgets of the Land Baden-Wuerttemberg). Certain municipal codes of the Länder contain experimental clauses in order to test new models of budgeting, accounting, simplification of procedures *et cetera* (e.g. Article 117a of the Municipal Code of the Free State of Bavaria).

Some Länder have set general organisational goals like service orientation (e.g. Section 2 of the Act on the Organisation of State Administration of the Land Brandenburg and Section 2 of the Act on the Organisation of State Administration of the Land Sachsen-Anhalt). Furthermore, certain Länder base the financing of a university on a target and performance agreement between the State and the university (e.g. Section 105a of the Higher Education Act of the Free Hanseatic City of Bremen).

According to Article 91d of the Basic Law, the Federation and the Länder may conduct comparative studies to determine and promote the efficiency of their administrations and may publish the results.

According to Article 91c para. 1 of the Basic Law, the Federation and the Länder may cooperate in the planning, construction, and operation of the information technology systems required for the performance of their tasks.

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The (federal) E-Government Act and the comparable laws of the Länder regulate the digitalisation of administrative procedures in a manner that is user-friendly and barrier-free (e.g. Section 1 *et seq*., especially Section 16 of the E-Government Act).

Section 1a para. 1 Sentence 1 of the Online Access Act mandates that federal, state, and local governments provide their services online. According to Section 1a para. 3 Sentence 1 of the Online Access Act, the federation and the state governments are obligated to link their administration portals into a portal network so that users have media-disruption-free and barrier-free access to electronic administrative services from these administrative bodies via all federal and state administration portals.

ii. Is there a specific provision for the organisation of the Administration based on the above-mentioned models (Constitution, legal provision, etc.)?

See above

iii. In which public services and agencies is this type of organisation used?

The Administration stricto sensu	X
Public enterprises	X
Other public entities	X

iv. Are the policies for achieving the objectives designed:

At national level	X
At regional level	X
By subject-matter	X
By taking into account specific public entities	X
Other	□

v. Have specific objectives been set out for the action of the Administration? Please provide examples.

According to Section 105a of the Higher Education Act of the Free Hanseatic City of Bremen, the State may reduce the financing of a university for a limited amount of time if the university violates the target and performance agreement.

If yes, is their accomplishment:

Optional	X
Mandatory	X

Does failure to meet these objectives lead to:

Personal consequences for the senior managers	X

Legal consequences for the assessed organisation ☐
Financial consequences for the assessed organisation X

Are incentives of any kind provided for civil servants (e.g. remuneration) or public entities to ensure that these objectives are achieved? X

vi. Are there any indicators for evaluating the action of the Administration in relation to the following factors:

Compliance with the regulatory framework X
Effectiveness X
Efficiency X
Economy X
Achievement of strategic objectives X
Other ☐

II. Alternative methods for resolving administrative disputes

1. General provisions

i. Does your legislation provide for alternative dispute resolution (ADR) in cases involving public law/administrative law?

Arbitration X
Mediation X
Other X

- Settlement agreement according to Section 55 of the Administrative Procedure Act.
- Conciliation hearing (hearing involving a conciliation judge according to Section 173 Sentence 1 of the Code of Administrative Court Procedure in conjunction with Section 278 para. 5 of the Code of Civil Procedure
- Extrajudicial mediation at the suggestion of the Court according to Section 173 Sentence 1 of the Code of Administrative Court Procedure in conjunction with Section 278a of the Code of Civil Procedure

ii. Are there categories of administrative disputes that are excluded from ADR by law or according to case-law?

* *Please elaborate on your answer, citing any relevant legislation and/or case-law*

In the areas of disciplinary law (e.g. Section 61 para. 1 Sentence 2 of the Disciplinary Act of the Land Brandenburg), public service remuneration law (e.g. Section 2 para. 2 of the Federal Civil Servants' Remuneration Act) and tax law (Section 155 para. 1 of the Fiscal Code), contractual agreements are excluded.
According to Section 59 para. 2 of the Administratve Procedure Act, an agreement under public law, shall be invalid when:
1. an administrative act with equivalent content would be invalid;
2. an administrative act with equivalent content would be unlawful not merely for a deficiency in procedure or form under section 46, and this fact was known to the parties;
3. the conditions for conclusion of a compromise agreement were not fulfilled and an administrative act with similar content would be unlawful not merely for a deficiency in procedure or form under section 46;

4. the authority requires a consideration which is not permissible under section 56.

2. Settlement and Mediation

** Please elaborate on your answers, citing any relevant legislation and/or case-law.*

i. In administrative disputes, is it permissible for the Administration and private individuals/legal entities to sign a settlement agreement or other similar document (without prior mediation)?

Yes X
No ☐

ia. If yes,
Is this option expressly provided for in a legislative text (Constitution, law) or does it derive from a general principle of law?

- Settlement agreement according to Section 55 of the Administrative Procedure Act
- Court settlement according to Section 106 of the Code of Administrative Court Procedure

Does this option only apply to the settlement of administrative disputes that are already under way, or can it also be used to prevent administrative disputes from arising in the first place?

A Court settlement according to Section 106 of the Code of Administrative Court Procedure has as a prerequisite that a case is pending before the Court.

A settlement agreement according to Section 55 of the Administrative Procedure Act presupposes that the legal or factual situation is uncertain, the parties hold opposing views and settle the

situation by mutual yielding (compromise). If these conditions are not present, a settlement agreement is not possible. However, it may be possible to conclude a general agreement under public law.

Do the law or case-law distinguish between application for annulment (judicial review limited to the legality) and appeal on the merits (full judicial review of both legality and substance)?

German administrative procedural law generally provides for a full judicial review of both legality and substance. However, the scope of judicial review is limited in certain areas, particularly regarding the review of discretionary decisions.

Is there a special procedure for initiating and conducting this alternative dispute resolution method, or are all matters left to the discretion of the parties involved?

According to Section 173 Sentence 1 of the Code of Administrative Court Procedure in conjunction with Section 278 para. 5 of the Code of Civil Procedure, the court may refer the parties for the conciliation hearing, as well as for further attempts at resolving the dispute, to a judge delegated for this purpose, who is not authorised to take a decision (conciliation judge).

According to Section 173 Sentence 1 of the Code of Administrative Court Procedure in conjunction with Section 278a of the Code of Civil Procedure, the court may propose to the parties that they engage in mediation or other alternative dispute resolution (ADR) procedures. Moreover, the parties may at any time engage in extrajudicial mediation (Section 1 para. 1 of the Mediation Act).

According to Section 106 Sentence 2 of the Code of Administrative Court Procedure, a court settlement may also be concluded by the parties accepting, in writing or by a statement for the record during the oral hearing, a proposal issued by the court, the presiding judge, or the reporting judge in the form of a decision. A court settlement does not require prior mediation or any other procedure.

After signing a settlement agreement (or other similar document), is ratification by a court required?

Yes	☐
No	X

If yes, by which court?

If no, can the legality of the settlement agreement (or other similar document) be examined by the judge on an incidental basis? Under what circumstances could the settlement be considered null and void and without legal effect?

According to Section 59 para. 2 of the Administrative Procedure Act, an agreement under public law shall be invalid when:
1. an administrative act with equivalent content would be invalid;
2. an administrative act with equivalent content would be unlawful not merely for a deficiency in procedure or form under section 46, and this fact was known to the parties;
3. the conditions for conclusion of a compromise agreement were not fulfilled and an administrative act with similar content would be unlawful not merely for a deficiency in procedure or form under section 46;
4. the authority requires a consideration which is not permissible under section 56.

According to Section 59 para. 1 of the Administrative Procedure Act, an agreement under public law shall be invalid when its invalidity derives from the appropriate application of provisions of the Civil Code.

Since a settlement agreement is a special type of agreement under public law the reasons for invalidity apply. If there is a dispute regarding the validity of a court settlement, the proceedings resume, and the Court renders a decision regarding the validity.

After being signed and/or validated, as applicable, does the settlement agreement have the force of res judicata? Can the enforcement of this document be pursued?

A court settlement disposes of the pending litigation. However, it does not attain *res iudicata* under Section 121 of the Code of Administrative Court Procedure. While it does not formally bar a new legal dispute regarding the same matter, a valid court settlement shapes the substantive legal position between the parties due to its dual nature.

According to Section 168 para. 1 No. 3 of the Code of Administrative Court Procedure, a court settlement is enforceable. An out-of-court settlement is not automatically enforceable. Pursuant to Section 61 para. 1 of the Administrative Procedure Act, the parties may submit to immediate enforcement. In this case, the authority is entitled to conduct the enforcement itself under Section 61 para. 2 of the Administrative Procedure Act. The private individual, however, must initiate judicial enforcement proceedings.

Which court has jurisdiction over disputes concerning such enforcement?

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Against enforcement measures that are not court decisions, an objection is available (*cf.* Section 173 Sentence 1 of the Code of Administrative Court Procedure in conjunction with Section 766 of the Code for Civil Procedure), which is decided upon by the court of first instance acting as the enforcement court (*cf.* Section 167 para. 1 Sentence 2 of the Code of Administrative Court Procedure). Against enforcement measures that are judicial decisions an appeal is available (*cf.* Section 146 of the Code of Administrative Court Procedure). In the case of an action opposing enforcement by asserting objections against the claim, the court of first instance has jurisdiction.

ib. If the signing of a settlement agreement or other similar document between the Administration and private individuals/legal entities is not permitted in your country, this prohibition results from:

a legislative provision ☐

a general principle of law ☐

ii. Does your country provide for a mediation procedure between the Administration and private individuals/legal entities for administrative disputes?

** The term 'mediation' is used here to refer to a procedure conducted by an independent and impartial third party, and not to administrative appeal procedures addressed to the Administration or to a body that is hierarchically dependent on the Administration.*

Yes X

No ☐

iia. If yes,

Is it expressly provided for in a legislative text (Constitution, law) or does it derive from a general principle of law?

Section 173 Sentence 1 of the Code of Administrative Court Procedure in conjunction with Section 278 para. 5 of the Code of Civil Procedure, see above.

Section 173 Sentence 1 of the Code of Administrative Court Procedure in conjunction with Section 278a of the Code of Civil Procedure, see above.

Is it mandatory or optional?

It is optional. Participation in both the judicial conciliation and the extra-judicial mediation is voluntary.

If it is optional, does it require:
The mutual agreement of the parties X
Only the intention of the Administration ◻
Only the intention of the private individual/legal entity ◻

Specifically with regard to the State as a party to the dispute, is mediation initiated:
After approval by a special committee ◻
By the administrative authority involved in the dispute X
Other ◻

According to Section 173 Sentence 1 of the Code of Administrative Court Procedure in conjunction with Section 278 para. 5 of the Code of Civil Procedure, the court may refer the parties for the conciliation hearing, as well as for further attempts at resolving the dispute, to a judge delegated for this purpose, who is not authorised to take a decision (conciliation judge). According to Section 173 Sentence 1 of the Code of Administrative Court Procedure in conjunction with Section 278a of the Code of Civil Procedure the court may propose to the parties that they engage in mediation or other alternative dispute resolution (ADR) procedures. In both cases, this does not require a motion or the consent of one or both parties. However, for a proper exercise of discretion there must be a certain willingness of the parties to work towards a settlement.

At what stage can a case be referred for mediation?
Necessarily before the introduction of legal proceedings ◻
At any stage of the litigation proceedings X

Is there a specific piece of legislation governing the mediation process?
Yes X
No ◻

If yes, please specify:

Extra-judicial mediation is regulated by the Mediation Act. There are no detailed provisions for the conciliation hearing. A record of the conciliation hearing will only be drawn up if all parties agree (*cf.* Section 173 Sentence 1 of the Code of Administrative

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Court Procedure in conjunction with Section 159 para. 2 Sentence 2 Code of Civil Procedure). The conciliation judge may use all methods of conflict resolution, including mediation (*cf.* Section 173 Sentence 1 of the Code of Administrative Court Procedure in conjunction with Section 278 para. 5 Sentence 2 Code of Civil Procedure). Thus, the conciliation hearings will likely align with the principles of proceedings under the Mediation Act.

Which principles of trial apply to the mediation process (hearing of the parties, adversarial principle, equality of arms, publicity, representation by a lawyer?

Section 2 para. 3 of the Mediation Act establishes the principle of omni-partiality. This means the mediator is equally committed to all parties and must ensure that everyone is involved in an appropriate and fair manner. Additionally, Section 4 of the Mediation Act mandates confidentiality for the mediator.

How is the impartiality of the mediator ensured?

The conciliation judge is a judge and therefore, by virtue of their office, independent (*cf.* Section 1 of the Courts Constitution Act, Section 25 and Section 39 of the German Judiciary Act) and duty-bound to maintain impartiality.

According to Section 1 para. 2 of the Mediation Act, the mediator is independent and impartial. Under Section 3 para. 1 of the Mediation Act, the mediator is required to disclose circumstances that may impair their independence or impartiality. Section 3 para. 2 to 4 of the Mediation Act establishes grounds for exclusion."

Is there any interim relief (stay of execution, etc.) during the mediation process? If yes, who is competent to hear the case?

The conciliation judge is not authorised to issue decisions in the pending case. Both during mediation and during conciliation hearings, the parties may initiate judicial interim relief proceedings before the adjudicating body of the Administrative Court in accordance with the general provisions (*cf.* Section 80 para. 5 and Section 123 of the Code of Administrative Court Procedure). However, once the case has been referred to a conciliation judge for a conciliation hearing, the proceedings are usually stayed by mutual agreement of the parties pursuant to Section 173 Sentence 1 of the Code of Administrative Court Procedure in conjunction with Section 251 of the Code of Civil Procedure.

At the end of the mediation process,
If an agreement is concluded:

A document is drawn up X
Other possibility (please specify)

Once a settlement has been reached in the conciliation hearing, the conciliation judge refers the case back to the adjudicating body responsible for the main proceedings, for the order for costs and the order fixing the value in dispute.

If an agreement is not concluded:
Is a time limit set for bringing the matter before the competent court?
Are the litigation proceedings already under way (if applicable) continued?

After an unsuccessful conclusion of the conciliation hearings, the proceedings — which are usually, but not necessarily, stayed — can be resumed by any party pursuant to Section 251 of the Code of Civil Procedure. There is no specific time-limit for this. If the proceedings have not been stayed, they resume automatically without requiring a declaration from the parties. The same applies if an extrajudicial mediation took place.

In the event that a document is drawn up following mediation, do the rules concerning the settlement procedure (see above) apply, or are there differences? If yes, please specify.

Subject to the consent of the parties to an extra-judicial mediation, the agreement reached can be recorded in the form of a final agreement (*cf.* Section 2 para. 6 of the Mediation Act). This can take the form of a settlement agreement according to Section 55 of the Administrative Procedure Act.

In the context of a successful conciliation mediation, the parties involved can either enter into a court settlement pursuant to Section 106 of the Code of Administrative Court Procedure or reach an out-of-court settlement according to Section 55 of the Administrative Procedure Act.

iib. If no mediation process is provided for, is this exclusion provided for in:
a legislative provision □
a general principle of law □

3. Arbitration

** Please elaborate on your answers, citing any relevant legislation and/or case-law.*

i. In administrative disputes, is arbitration between the Administration and private individuals/legal entities permitted in your country?

Yes X
No ☐

ia. If yes,
Is this option expressly provided for in a legislative text (Constitution, law) or does it derive from a general principle of law?

The Code of Administrative Court Procedure presupposes arbitration proceedings as a given possibility (*cf.* Section 168 para. 1 No. 5, Section 173 Sentences 1 and 3 and Section 187 para. 1 of the Code of Administrative Court Procedure). Additionally, voluntary arbitration is provided for in certain areas of law, for example in the case of disputes regarding measures related to the intra-Union trade in animals or products of animal origin (*cf.* Section 45 of the Food and Feed Code, Section 36 of the Act on the Prevention and Control of Animal Diseases, Section 16i of the Animal Welfare Act) or regarding measures regulating unresolved property issues in the former GDR (*cf.* Section 38a of the Act Regulating Unresolved Property Issues).

In the context of property disputes between public law entities, some state law provisions – such as Article 10 para. 1 of the Act to Implement the Code of Administrative Court Procedure of the Free State of Bavaria, based on Section 187 para. 1 of the Code of Administrative Court Procedure – prescribe arbitration proceedings before the administrative courts. Section 18a of the Hospital Financing Act provides for appraisal proceedings before arbitration boards, which, however, are not courts.

Does it concern both application for annulment (judicial review limited to the legality) and appeal on the merits (full judicial review of both legality and substance)? Are there any exceptions provided for by law or established by case-law?

Arbitration includes full judicial review of both legality and substance, unless otherwise agreed by the parties involved (*cf.* Section 173 Sentence 1 of the Code of Administrative Court Procedure in conjunction with Section 1042 and Section 1049 of the Code of Civil Procedure).

Is it mandatory or optional?

Arbitration proceedings under the provisions of the Code of Civil Procedure are generally based on an arbitration agreement (either a standalone arbitration agreement or an arbitration clause) pursuant to Section 1029 para. 1 of the Code of Civil Procedure. In administrative court proceedings, the arbitration agreement can be raised as a plea (objection) thus precluding the admissibility of an administrative action.

Mandatory arbitration proceedings are the exception: According to Section 71 of the Water Association Act (WVG), the statutes of a water association may provide for the conduct of (potentially also mandatory) arbitration proceedings.

ib. If arbitration is not permitted, is this prohibition due to

A legislative provision X
A general principle of law X

According to Section 173 Sentence 1 of the Code of Administrative Court Procedure in conjunction with Section 1030 para. 1 Sentence 2 of the Code of Civil Procedure, an arbitration agreement regarding *non-pecuniary* claims has legal effect insofar as the parties are *entitled* to reach a settlement on the subject matter of the dispute.

In the event of an objection based on an arbitration agreement against an administrative action and in proceedings concerning the application of the annulment of the arbitral award, the administrative courts shall verify in particular whether the subject matter of the dispute is not capable of settlement by arbitration under German law or whether the recognition or enforcement of the arbitral award will lead to a result that is contrary to public policy (ordre public) (*cf.* Section 173 Sentence 1 of the Code of Administrative Court Procedure in conjunction with Section 1032 Abs. 1 and Section 1059 para. 2 No. 2 of the Code of Civil Procedure).

ic. If arbitration is optional, does it require:
The mutual agreement of the parties X
The sole intention of the Administration ☐
The sole intention of the private individual/legal entity ☐

On the part of the State, is arbitration initiated:
After approval by a special committee ☐
By the administrative authority involved in the dispute X
Other ☐

ii. For disputes arising from contracts between private individuals/legal entities and the State, do the common provisions relating to commercial arbitration (domestic or international) apply, or is there a special regime?

If there is a special regime, please briefly mention the elements that differentiate it from the commercial arbitration regime.

There are no specific provisions for arbitral proceedings in the Code of Administrative Court Procedure. Pursuant to Section 173 Sentence 1 of the Code of Administrative Court Procedure, Sections 1025 *et seq*. of the Code of Civil Procedure, i.e. domestic provisions relating to commercial arbitration, apply, provided that the fundamental differences between administrative and civil court proceedings do not preclude this. The parties are free, subject to the mandatory provisions, to establish rules for the procedure themselves or to refer to an existing set of arbitration rules (*cf.* Section 173 Sentence 1 of the Code of Administrative Court Procedure in conjunction with Section 1042 para. 3 of the Code of Civil Procedure).

iii. Is arbitration provided for in contracts falling within the scope of Directives 2014/24/EU and 2014/25/EU?
If yes, have any issues been raised regarding the application of the rules governing the performance of these contracts? How have the courts addressed such issues in the relevant case-law?

The administrative courts do not have jurisdiction over the judicial review of compliance with public procurement rules, as this falls within the competence of the ordinary courts. A search regarding public procurement law and arbitration proceedings did not produce any findings.

iv. How are the independence and impartiality of the arbitrator ensured?

The parties are free to agree on the procedure for appointing the arbitrator or arbitrators. Absent an agreement made by the parties regarding the appointment of arbitrators, the court will appoint a sole arbitrator upon request by one party if the parties are unable to come to an arrangement regarding the appointment of the arbitrator. In arbitral proceedings with three arbitrators, each party appoints one arbitrator; the two arbitrators thus appointed will appoint the third arbitrator, who will act as presiding arbitrator. (*cf.* Section 173 Sentence 1 of the Code of Administrative Court Procedure, Section 1035 para. 1 and 3 of the Code of Civil Procedure).

According to Section 173 Sentence 1 of the Code of Administrative Court Procedure and Section 1036 para. 1 of the Code of Civil Procedure, a person who is approached in connection with a possible appointment as an arbitrator is to disclose any and all circumstances likely to give rise to justifiable doubts as to their impartiality or independence. Arbitrators are under obligation, also after they have been appointed and until the arbitral proceedings have come to an end, to disclose such circumstances to the parties without undue delay unless they have already so informed the parties previously. According to Section 173 Sentence 1 of the Code of Administrative Court Procedure and Section 1036 para. 2 of the Code of Civil Procedure, an arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to their impartiality or independence, or if they do not meet the prerequisites agreed to by the parties. A party may

challenge an arbitrator whom they have themselves appointed, or in theappointment of whom the party has participated, solely for reasons of which the party became aware only after the appointment was made.

In the arbitration procedure before an arbitration board pursuant to Section 18a of the Hospital Financing Act, independence, equal representation, and oversight of the arbitration board are guaranteed in Section 18a para. 2, 3, and 5 of the Hospital Financing Act.

v. Is there any interim relief when an administrative dispute has been submitted to arbitration? If yes, which body is competent to hear the case?

Unless otherwise agreed by the parties, the arbitral tribunal may also order interim measures or measures of protection (*cf.* Section 173 Sentence 1 of the Code of Administrative Court Procedure, Section 1041 para. 1 of the Code of Civil Procedure). However, the enforcement of interim measures must be authorised by a (state) court in accordance with Section 173 Sentence 1 of the Code of Administrative Court Procedure and Section 1041 para. 2 and 3 of the Code of Civil Procedure.

vi. In arbitration concerning administrative disputes:

	yes	no
Is there an obligation to make publicly available the basic information and documents relating to the proceedings?		X
Is the participation of third parties permitted?	X	☐
Is legal representation mandatory?		X
If yes, is legal aid available?		☐
Is the hearing public?		X
Is the arbitral tribunal obliged to give reasons for its award?	X	☐
Is the arbitral award made publicly available?		X

vii. During the proceedings, the applicable system is:

the adversarial system	☐
the inquisitorial system	X

viii. What powers does the arbitral tribunal have?

Reviews the legality of administrative acts of a non-pecuniary nature	☐
Reviews the legality of an administrative act of a pecuniary nature (fine, etc.)	☐
Annuls/amends an administrative act of a non-pecuniary nature	☐

Annuls/amends an administrative act of a pecuniary nature ◻
Addresses only recommendations to the Administration ◻
Restricts itself to awarding compensation for damages X

Does the arbitral award have effect:
Erga omnes (with regard to all) ◻
Inter partes (between the parties) X

Is it considered 'case-law' for other cases? ◻
If the answer to the last question is yes, please explain.

Can the validity of the arbitral award be challenged in court?
Yes X
No ◻

If yes, is the validity of the arbitral award reviewed directly or incidentally?

The validity of the arbitral award may be reviewed by the administrative court upon application by a party, pursuant to Section 173 sentence 1 of the Code of Administrative Court Procedure in conjunction with Section 1059 of the Code of Civil Procedure. The validity of the award may also be reviewed incidentally if an action regarding the same matter is brought before the administrative court. The arbitral award has the effect of a final and binding judgment handed down by a court (*cf.* Section 173 sentence 1 of the Code of Administrative Court Procedure in conjunction with Section 1055 of the Code of Civil Procedure). It therefore precludes the filing of a new action before the administrative courts pursuant to Section 121 of the Code of Administrative Court Procedure.

Is it possible to waive the right to judicial review?

Judicial review of an arbitral award pursuant to Section 173 sentence 1 of the Code of Administrative Court Procedure in conjunction with Section 1059 of the Code of Civil Procedure cannot be waived *per se*. However, the application for review is subject to a time limit (*cf.* Section 1059 para. 3 of the Code of Civil Procedure), and review under Section 1059 para. 2 no. 1 of the Code of Civil Procedure is conditional upon the raising of objections. In contrast, the examination of arbitrability or of a violation of public policy (*ordre public*) under Section 1059 para. 2 no. 2 of the Code of Civil Procedure is conducted *ex officio*.

Which courts have jurisdiction?

According to Section 173 Sentence 3 of the Code of Administrative Court Procedure in conjunction with Section 1062 of the Code of Civil Procedure, the administrative court, as well as the higher administrative court acting as court of appeal pursuant to Section 173 sentence 3 of the Code of Administrative Court Procedure in conjunction with Section 1065 of the Code of Civil Procedure have jurisdiction.

What is the scope of the judge's review according to case-law?

The scope of the judicial review is governed by Section 173 Sentence 1 of the Code of Administrative Court Procedure in conjunction with Section 1059 para. 2 of the Code of Civil Procedure. The administrative court examines whether the arbitral award suffers from the defects specified therein. In this regard, the defects listed in Section 1059 para. 2 no. 1 of the Code of Civil Procedure, must be asserted by the applicant. Pursuant to Section 1059 para. 2 no. 2 of the Code of Civil Procedure, the court examines *ex officio* whether the subject matter of the dispute is capable of settlement by arbitration under German law and whether the arbitral award will lead to a violation of the *ordre public*.

In arbitration, is the concept of public policy different, according to case-law, in cases where the State (or a legal person governed by public law) is a party to the arbitration? If yes, what are the differences compared with the concept of public policy in arbitral proceedings between private individuals?

Section 1059 para. 2 no. 2 lit. b) of the Code of Civil Procedure applies to both civil law arbitration proceedings and – via Section 173 Sentence 1 of the Code of Administrative Court Procedure – those in the field of public law.

In arbitration, in addition to the rules of European competition and consumer protection law (see C-126/97, Eco Swiss China Time Ltd v Benetton International NV and C-168/05 Mostaza Claro v Centro Móvil Milenium SL, respectively), has case-law recognised other rules of EU law as rules of international public policy? If yes, please mention the relevant cases.

There is (civil) jurisprudence regarding the violation of arbitration agreements against Article 267 and Article 344 TFEU in *intra*-EU investor-state arbitration proceedings (*cf.* Federal Court of Justice, decisions of 31 October 2018 - I ZB 2/15 - ECLI:DE:BGH:2018:311018BIZB2.15.0 = juris para. 19; of 17 November 2021 – I ZB 16/21 – ECLI:DE:BGH:2021:171121BIZB16.21.0 = juris para. 10 et seq. and of 27 July 2023 – I ZB 43/22 – ECLI:DE:BGH:2023:270723BIZB43.22.0 = juris para. 69 et seq.).

Which body has jurisdiction to hear disputes arising during the enforcement of an arbitral award? Has case-law dealt with special cases where enforcement has been contested on the grounds of the administrative nature of the dispute?

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The administrative court is competent for disputes regarding the enforceability of the arbitral award, pursuant to Section 173 sentence 3 of the Code of Civil Procedure in conjunction with Sections 1060 para. 2, 1062 of the Code of Civil Procedure. For disputes arising during the enforcement proceedings, the general provisions apply (see above).

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