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*Fully Digitalized Administrative Procedures in the German Legal System**

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ABSTRACT The article analyses the fully digitalized administrative procedures introduced by the reform of the General Administrative Procedures Act (*Verwaltungsverfahrensgesetz – VwVfG*) of 2017. This act is not an all-encompassing codification since the presence of several administrative procedures in the German legal system is dependent upon two factors: Germany's federal structure, and its so-called "three columns system" comprising the General Administrative Procedures Act, tax procedure law and social law.
However, the legislator is committed to ensuring the uniformity of administrative procedure rules in every code in order to make their interpretation and use easier for administrations and judges. Following changes in tax law, a generalized introduction of robotic measures generated by algorithms was inaugurated in 2017, as it had become clear that mass procedures in tax law administration were particularly suitable for digitization.

1. *Introduction*

Administrative procedure was rightly defined by a commentator as the "*Grundgesetz* (fundamental law) of public administration"[1], a tool enabling quick and orderly administrative action. With this in mind, procedural law should serve as a reference enabling civil servants to act in a transparent and effective way, on the basis of precise and detailed rules[2]. From an administrative perspective, procedure is considered to be a privileged form of participation in administrative decision-making, in the sense of "shared, non-authoritative, administration"[3], where people are considered citizens rather than subjects[4]. This aspect is also relevant to the judicial review by administrative judges, who must be able to follow the logical path of administrative procedures, in addition to having extensive investigative powers according to the inquisitorial principle[5].

2. *The variety of administrative procedures in the German legal system*

The General Administrative Procedures Act (*Verwaltungsverfahrensgesetz – VwVfG*) of 1976[6] is quite detailed, much more than the Italian Administrative Procedure Act (APA) no. 241/1990, and envisages very precise regulation of administrative activity. Nevertheless, it is generally considered incomplete, since it only regulates part of the process, i.e. the conditions and procedures leading to issue of an administrative act or to stipulation of a public law agreement[7]. Other issues are regulated by specific laws, as in the case of digitization by the e-government law (*E-Government-Gesetz – EgovG*)[8] of 2013 and by the law on online access to public services (*Onlinezugangsgesetz – OZG*)[9] of 2017, both discussed in this contribution.

The presence of several procedures in the German legal system is essentially due to two factors: on the one hand its federal structure, on the other the so-called "three columns system", based on three different codes, as explained in the following paragraphs.

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[1] J. Ziekow, *Das Verwaltungsverfahrensrecht in der Digitalisierung der Verwaltung*, in *Neue Zeitschrift für Verwaltungsrecht*, vol. 16, 2018, 1169.

[2] The jurisprudence of the Federal Constitutional Court has elaborated the *Wesentlichkeitsprinzip* (principle of essentiality), as a derivation of the democratic principle and the rule of law. In compliance with this principle, the fundamental rules governing the action of public administration must be established by Parliament as a popular representation and not delegated to executive regulations, especially if they are essential for the protection of fundamental rights (see H. Maurer and C. Waldhoff, *Allgemeines Verwaltungsrecht*, XIX ed., München, C.H. Beck, 2017, § 6, Rn. 12). In this sense, the principle of essentiality is combined with the *Bestimmtheitsgebot* (obligation of certainty), referred to in § 37 (1) *VwVfG*, according to which an administrative act "must be sufficiently determined in its content", so as to be easily and correctly understood by the public concerned.

[3] M. Bombardelli, *Democrazia partecipativa e assetto policentrico dell'organizzazione amministrativa*, in *Per governare insieme: il federalismo come metodo*, G. Arena and F. Cortese (eds.), Padova, Cedam, 2011, 25 ss.

[4] See more extensively A. Jacquemet-Gauché and U. Stelkens, *Caractères essentiels du droit allemand de la procédure administrative*, in *Droit comparé de la procédure administrative*, J.B. Auby (director), Paris, Bruylant, 2016, 15 ff.

[5] Compare § 86 (1) *Verwaltungsgerichtsordnung – VwGO* on the inquisitorial principle.

[6] *Verwaltungsverfahrensgesetz (VwVfG)* of 25.5.1976, *BGBl.*, I, 1976, 102.

[7] § 9 *VwVfG*.

[8] *Gesetz zur Förderung der elektronischen Verwaltung (EGovernment-Gesetz – EgovG)*, *BGBl.*, I, 2013, 2749.

[9] *Gesetz zur Verbesserung des Onlinezugangs zu Verwaltungsleistungen (Onlinezugangsgesetz – OZG)*, *BGBl.*, I, 2017, 3122 and 3138.

2.1. *Administrative procedures in the federal state and the "simultaneous legislation pact"*

The German *Grundgesetz* generally requires the *Länder* to implement federal rules as their own competence (art. 83 *GG*). This is the classic hypothesis of so-called "executing federalism" (*Vollzugsföderalismus*) which attributes the function of the regulator to the federal legislator and the task of implementing the laws to the *Länder*. The subsequent art. 84 (1) *GG* also specifies that when the *Länder* exercise federal law as their own competence, the law applicable to the procedure and to administrative organization is that of the *Länder*. This regulatory framework posed the problem of ensuring both federal variety and uniformity of rules. Drafting of the Administrative Procedure Act was therefore long and troubled[10]. The aim was to avoid placing the *Länder* in a schizophrenic position when applying federal law or their own legislation. After a long and articulated debate lasting twenty years, a Commission composed of representatives of the Federation and the *Länder*[11], agreed on a Solomonic solution, consisting in elaboration of a "model code" (*Musterentwurf*), which was the starting point for enactment of the Federal Administrative Procedure Act (*Verwaltungsverfahrensgesetz – VwVfG*) approved in 1976, in force since 1.1.1977.

Section 1, para. 3 *VwVfG*, on the scope of the law, stipulates that if a *Land* implements federal laws, the federal APA does not apply, provided the *Land* in question has issued its own APA. This was genuine "incitement" to the *Länder* to pass their own statutes[12].

According to the "inter-federal pact of simultaneous legislation", decided by the Interior Ministers of the *Länder* and by the Federation on 20.2.1976, a more or less identical transposition of the federal legislation, as well as real-time adaptation to its subsequent amendments, have to be ensured[13].

2.2. *Codification without unification: the principle of the three columns*

As mentioned, the law on administrative procedure is not an all-encompassing codification, since a code on tax procedure, the *Reichsabgabenordnung* (1919), was issued at the time of the Weimar Republic, and in the field of social law, there was already a code on procedure, namely the *Reichsversicherungsordnung* of 1911. However, a general law on federal administrative procedure was missing, except in some *Länder*, for example in Thuringia[14].

During drafting of the *Verwaltungsverfahrensgesetz*, the Ministries of Finance and Social Affairs insisted on maintaining their own codes in view of the specificities of tax law and social law. That is why the tax code (*Abgabenordnung – AO*) and the code of procedure in social matters (*Zehntes Buch des Sozialgesetzbuches – SGB X*) have remained in force and coexist with the general APA, preserving a regime of complete speciality[15].

However, also in relation to this triple codification, currently called the "three columns principle", the legislator is committed to ensuring the uniformity of administrative procedure rules in the three codes, in order to make their interpretation easier for administrations and judges.

Thus on 9.12.2015, when the federal government presented a law aimed at modernizing tax procedure (*Gesetz zur Modernisierung des Besteuerungsverfahrens*)[16], approved on 18.7.2016 and in force since 1.1.2017, stating that tax assessment (*Steuerfestsetzung*) had to be fully digitized[17], the innovation was extended in parallel to the other two codes.

According to the art. 22 of the European General Data Protection Regulation (GDPR), a general ban on fully automated decisions has been in force since May 2018, unless "authorized by the law of the Member State [...] to which the data controller is subject", which is why it is believed that the new legislation traces back to this derogation[18].

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[10] See on this point H. Maurer and C. Waldhoff, *Allgemeines Verwaltungsrecht*, § 5, Rn. 2 ss. and in the Italian language D.U. Galetta, *La legge tedesca sul procedimento amministrativo (Verwaltungsverfahrensgesetz)*, Milano, Giuffré, 2002, 6 f.

[11] Bund-Länder-Ausschuss.

[12] A. Jacquemet-Gauché and U. Stelkens, *Caractères essentels du droit allemand de la procédure administrative*, 22.

[13] In this regard, four different mechanisms are highlighted, namely complete resumption of the provisions of the federal law (*Vollgesetz*) by a Land law; static or dynamic referral to federal law by *Verweisungsgesetz*; and insertion of the provisions of the federal law into a more general law through *Integrationsgesetz* (H. Maurer and C. Waldhoff, A*llgemeines Verwaltungsrecht*, § 5, Rn. 17 ff).

[14] A. Jacquemet-Gauché and U. Stelkens, *Caractères essentels du droit allemand de la procédure administrative*, 19.

[15] This structure also corresponds to the division of administrative courts, because pursuant to art. 95 (1) *GG*, a distinction is made between the general administrative jurisdiction governed by the *Verwaltungsgerichtsordnung (VwGO)*, the financial jurisdiction, regulated by the *Finanzgerichtsordnung (FGO)* and the social jurisdiction referred to in the *Sozialgerichtsgesetz (SGG)*.

[16] *BGBl.*, I, 2016, 1679.

[17] So called ELSTER-system (electronic tax declaration).

[18] GDPR Art. 22, para. 2 b); see N. Braun Binder, *Vollautomatisierte Verwaltungsverfahren, voll automatisiert erlassene Verwaltungsakte und elektronische Aktenführung*, in *Digitalisierte Verwaltung vernetztes E-Government*, M. Seckelmann (ed.), Berlin, Erich Schmidt Verlag, 2019, 313.

In 2017, this led to the generalized introduction of robotic measures generated by algorithms. The push came from tax law, where mass procedures are widespread and therefore particularly suitable for digitization. Since the regulations of the three codes have traditionally developed in parallel, a new § 35a on the fully robotic provision is also foreseen in the *VwVfG*. Section 31a *SGB* X introduced a similar provision in the social sphere[19].

3. *The VwVfG faces the challenge of digitization*

Changes to the *Verwaltungsverfahrensgesetz* after 1976 can be counted on the fingers of one hand. Those concerning digital administrative procedure were carried out in three stages, illustrated in the following pages. They consisted in introduction of electronic procedure in 2003, transposition of the services directive in 2008 and introduction of the aforementioned electronic procedure by means of algorithms in 2017.

The purpose of digital management is notoriously to achieve transparent, flexible, more affordable and citizen-oriented administration. The path that led to the digital procedure was long and tedious. An important step towards digitization was recognition of electronic administrative acts, according to §§ 3a and 37 II *VwVfG* (they also recognized the electronic form of an administrative act). Following the innovations introduced by the third law amending the Administrative Procedure Law of 2003 (3. *Verwaltungsverfahrensänderungs-gesetz*) of 21.8.2002, the foundations were laid for digitization of the public administration. This amendment introduced a new § 3a on multi-channel electronic communication of an administrative act on an optional basis[20].

However, it should be borne in mind that in the original version of the law, electronic transmission of documents required a digital signature (compulsory only for notaries and lawyers), which is why the reform did not work as expected[21]. The second problem was the federal structure of the German state and therefore the non-interoperability of the IT systems of the Federation, the *Länder* and the Municipalities, which did not encourage exchange of data.

Electronic transmission of documents requires electronic access. The premises for this were laid down by the *Bolkenstein* directive on the free movement of services[22], which provided service operators at transnational level with a one-stop shop for requesting the necessary authorizations. Transposition of the directive into German law led to addition of a new section of the *VwVfG* (§ 71a ff.), which introduces an authentic subjective right to an electronic procedure[23].

Finally, the 2017 reform introduced fully automated administrative procedures, managed by algorithms without human intervention. They should be distinguished from partially automated ones, in which some internal procedural phases, including for example the preliminary ones, are carried out in traditional form. There is therefore a difference between the partially automated measures (*mit Hilfe automatischer Einrichtungen*), referred to in §§ 28 (2) no. 4, 37 (5) and 39 (2) no. 3 *VwVfG*, and fully automated acts, issued in a fully robotic manner. The terms „*ausschließlich automationsgestützt*" (§ 155 (4), first sentence *AO*) and „*vollständig durch automatische Einrichtungen"* (§ 35a VwVfG and § 31a *SGB X*) are intended to be synonyms[24].

As a result of this procedure, a robotic act is issued. This requires electronic document management. As we saw, the push towards digital acts, generated by algorithms, came from tax law, where mass procedures, particularly suitable for digitization, are particularly widespread. The starting point for fully automated administrative procedures therefore lies in the new provisions regarding "special tax acts" (§ 155 ff. *AO*). The new para. 4 of this article allows tax administrations to carry out investigations "on the basis of the information in their possession and the data provided by taxpayers in an exclusively automated form, to correct them, cancel them *ex officio* and to revoke or modify them at the request of a party"[25].

If on one hand the tax code contains rather broad regulation of the powers attributed to the financial administration, on the other it does not provide regulation truly identical to the other two

[19] „*Ein Verwaltungsakt kann vollständig durch automatische Einrichtungen erlassen werden, sofern kein Anlass besteht, den Einzelfall durch Amtsträger zu bearbeiten. Setzt die Behörde automatische Einrichtungen zum Erlass von Verwaltungsakten ein, muss sie für den Einzelfall bedeutsame tatsächliche Angaben des Beteiligten berücksichtigen, die im automatischen Verfahren nicht ermittelt würden*".

[20] See more extensively I. Augsberg, *Herausforderungen und Innovationen im Verwaltungsverfahrensrecht*, in *Sfide e innovazioni nel diritto pubblico*, L. De Lucia and F. Wollenschläger (eds.), Baden-Baden, Giappichelli-Nomos, 2019, 88 f.

[21] *Ibidem*,88.

[22] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, L 376/36 2006.

[23] T. Siegel, *Der Europäische Portalverbund – Frischer Digitalisierungswind durch das einheitliche digitale Zugangstor ('Single Digitale Gateway')*, in *Neue Zeitschrift für Verwaltungsrecht*, vol. 13, 2019, 905.

[24] N. Braun Binder, *Vollautomatisierte Verwaltungsverfahren, voll automatisiert erlassene Verwaltungsakte und elektronische Aktenführung*, 313.

[25] § 155 (4) *AO*.

codes regarding fully automated acts. The possibility of issuing them is generally in line with the *VwVfG* and the *SGB* X, whereas the tax code only regulates automation of the tax assessment procedure (*Steuerfestsetzungs-verfahren*) and therefore only of a specific act[26].

Since the legislation of the "three columns" of administrative procedure needed to be developed together, a new § 35a *VwVfG* on electronic provision was added. It is extremely laconic in its wording and in this sense reminiscent of art. 3bis of the Italian APA no. 241/1990 on the use of telematics. Section 35a *VwVfG* envisages adoption of administrative acts (governed by the previous § 35 *VwVfG*) through a fully automated procedure. To make that possible, a general rule of primary or secondary rank (*Rechtsvorschrift*) is required to ensure that only suitable procedures can be carried out in a fully automated manner. In summary, the criteria set out in § 35a *VwVfG* are as follows: the administrative act must be suitable for issue in a fully automated format by electronic equipment; this must be envisaged by a legal provision; and the administration should not be endowed with discretionary power or margin of appreciation (*Beurteilungsspielraum*)[27]. However, it should be added that sectoral legislation can derogate from this criterion and that the rule is believed to have the primary function of limiting and cautioning the legislator[28]. In the social sphere, a provision similar to § 35a *VwVfG* was introduced in § 31a *SGB* X, which however does not expressly mention the lack of discretionary power[29].

§ 24 (1) *VwVfG* on the investigative powers of public administration was also amended, adding a new sentence, according to which if an administration makes use of robotic acts, it must take into account indications provided by the parties that cannot be detected in digital format. This change considers the architecture of German administrative procedure, focused on strong investigative powers of public administration and on the inquisitorial principle. This highly participatory procedural system is threatened by robotic systems[30]. A specific obligation to consider the allegations of the parties was therefore added (even if they do not flow into the electronic procedure), but only if they are relevant to the individual case[31]. On one hand, it is therefore a warning addressed by the legislator to the public administration to ensure that the implementation of robotic systems does not hinder participation of the parties in the procedure[32]. On the other hand, since the purpose of the provision is to improve efficiency, only allegations that may actually have weight in the decision-making process should be considered. A similar rule was introduced in the social code of *SGB X*[33].

The same reasoning was originally followed in tax procedures, on the assumption that an exclusively automated procedure presupposes that there is no need to entrust the practice to the financial administration staff[34]. In summary, to compensate for limitations to the inquisitorial principle, linked to fully automated treatment of procedures, § 88, para. 5 *AO* was added. It states that the tax administration can provide a computerized risk management system (*Risikomanagementsystem*), which makes it possible to identify anomalous cases (according to criteria to be kept confidential), to check manually, while continuing to observe the principle of economy of public administration[35].

[26] N. Braun Binder, *Vollautomatisierte Verwaltungsverfahren, voll automatisiert erlassene Verwaltungsakte und elektronische Aktenführung*, 317.

[27] See more extensively J. Ziekow, *Das Verwaltungsverfahrensrecht in der Digitalisierung der Verwaltung*, 1169 ff. The author investigates doctrinal discussion on the legal nature of robotic decisions, pointing out that due to the absence of human intervention, there is no declaration of will, which is otherwise considered inherent to an administrative act. However, this approach does not take into account that even the discipline of silent assent (so-called "*Genehmigungsfiktion*"), referred to in § 42a *VwVfG* does not depend on manifestation of will by a public administration, since the administrative act is formed with the time, pursuant to a specific legislative provision (p. 1170). Another example of a fully automated administrative act, cited in the doctrine, is algorithmic traffic regulation devices (for example traffic lights), framed in the German system as general administrative acts (*Allgemeinverfügungen*), and referred to in § 35, second sentence *VwVfG* (see I. Augsberg, *Herausforderungen und Innovationenim Verwaltungsverfahrensrecht*, 94; A. Kube, *E-Government: Ein Paradigmenwechsel in Verwaltung und Verwaltungsrecht?*, in *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer (VVDStRL)*, vol. 78, 2019, 303.

[28] H. Schmitz, L. Prell, *Neues vom E-Government, in Neue Zeitschrift für Verwaltungsrecht*, vol. 18, 2016, 1276.

[29] See more extensively E. Buoso, *Fully automated administrative acts in the German legal system*, in this Volume, Issue 1-2, 113.

[30] This is demonstrated by the fact that § 24, para. 2 *VwVfG* obliges the administration to consider all relevant circumstances in individual cases, including "those favourable to the parties".

[31] „*Setzt die Behörde automatische Einrichtungen zum Erlass von Verwaltungsakten ein, muss sie für den Einzelfall bedeutsame tatsächliche Angaben des Beteiligten berücksichtigen, die im automatischen Verfahren nicht ermittelt würden*".

[32] J. Ziekow, *Das Verwaltungsverfahrensrecht in der Digitalisierung der Verwaltung*, 1172.

[33] § 31a *SGB X*: „*Ein Verwaltungsakt kann vollständig durch automatische Einrichtungen erlassen werden, sofern kein Anlass besteht, den Einzelfall durch Amtsträger zu bearbeiten. Setzt die Behörde automatische Einrichtungen zum Erlass von Verwaltungsakten ein, muss sie für den Einzelfall bedeutsame tatsächliche Angaben des Beteiligten berücksichtigen, die im automatischen Verfahren nicht ermittelt würden*".

[34] § 155, para. 1 *AO*.

[35] N. Braun Binder, *Vollautomatisierte Verwaltungsverfahren, voll automatisiert erlassene Verwaltungsakte und elektronische Aktenführung*, 315; Id., *Vollautomatisierte*

To protect the inquisitorial principle, tax procedure exceptions were also introduced for situations that require intervention of the human mind, such as when the risk management system detects a problem, or tax office staff raises a question, or in case of taxpayer requests in a special section of the tax declaration[36].

A final change introduced by the amendment of 2017 concerns the communication and publication of administrative acts, which must be possible in electronic form on virtual portals. This option was initially envisaged by § 6 (4) of the Bavarian e-government law (*BayEGovG*), in force since 30.12.2015[37]. At federal level it resulted in the addition of § 41 (2) *VwVfG*, which states that with the consent of the interested party, an administrative act can be made accessible to the party or his representative for download on the digital platform[38]. The administration has the obligation to ensure that download of the administrative act, duly authenticated, is possible, and that the act can be saved by the party on an electronic medium. The authority in charge ensures that the electronic measure is deemed to be communicated the day after the download is made and that if the download is not made within ten days, the communication is deemed not to have taken place, without prejudice to the administration's faculty to repeat the communication in this or another form. Similar legislation was introduced in the social sphere by the new § 37, para. 2a *SGB X*.

A robotic tax act must also be able to be communicated in a digital way, i.e. made available for download on the financial administration website, entrusting the administration with the task of making the corresponding communication. Consequently, § 122a (4) *AO* provides that the administration informs the party electronically that the administrative act is available for download on the financial administration website. If the administration is unable to demonstrate that this communication was received by the party, the administrative act is understood to be communicated at the time the download is made[39]. Otherwise, the administrative act is considered communicated three days after the electronic message[40]. The burden of proof rests on the administration in doubtful cases. If the administrative act is not downloaded from the site, the financial administration has the possibility of sending a postal communication.

As with the other codes, electronic communication is on a voluntary basis (considering the so-called "digital divide", i.e. the fact that not all citizens have access to electronic devices) and requires the party's consent which can be revoked at any time (§ 122a, (2) *AO*). This provision was criticized, as it does not specify whether such consent should be granted once and for all, or for a limited period or for individual acts. Since the taxpayer cannot be expected to regularly check his email, consent should be granted on a case-by-case basis or for a limited period of time[41]. Instead, the legislator only provided the possibility of revoking the authorization with pro-future effects[42]. However, publication on the website is independent of the fact that the procedure is fully (or partially) automated[43].

4. *Changes introduced outside the APA*

4.1. *The law on e-government and destruction of paper records*

Classic administrative activity is "analogue", namely that of a public administration acting under the old paradigm of paper documents. According to this *modus operandi*, the written form is the "backbone of the administration", but at the same time also the "ball and chain of digitization"[44]. It also has the undoubted merit of lending itself to physical perception (by sight and touch), not requiring electronic media for access[45].

An analysis of the "digital compatibility" of the existing legislation was therefore required. With this in mind, the federal e-government law of 2013 provided for examination of all federal administrative law for the purpose of promoting digitization[46]. The law triggered a far-reaching process and led to promulgation of various laws

Verwaltungsverfahren im allgemeinen Verwaltungsverfahrensrecht?, in *Neue Zeitschrift für Verwaltungsrecht*, vol. 14, 2016, 960.

[36] § 155, para. 4, combined with § 150, para. 7, *AO*.

[37] *Gesetz über die elektronische Verwaltung in Bayern (Bayerisches E-Government-Gesetz – BayEGovG)* of 22.12.2015 *(GVBl.*, 458). In the meantime also the *Länder* Baden-Württemberg, Berlin, Bremen, Mecklenburg-Vorpommern, Nordrhein-Westfalen, Saarland, Sachsen, Schleswig-Holstein and Thüringen have issued their own e-government laws (A. Guckelberger, *E-Government: Ein Paradigmenwechsel in Verwaltung und Verwaltungsrecht?*, in *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer (VVDStRL)*, vol. 78, 2019, 279).

[38] N. Braun Binder, *Elektronische Bekanntgabe von Verwaltungsakten über Behördenportale*, in *Neue Zeitschrift für Verwaltungsrecht*, vol. 6, 2016, 342.

[39] *Ibidem*, 347.

[40] So called "*Drei-Tages-Fiktion*" (three days fiction).

[41] N. Braun Binder, *Elektronische Bekanntgabe von Verwaltungsakten über Behördenportale*, 347.

[42] § 122a, para. 1 *AO*.

[43] N. Braun Binder, *Vollständig automatisierter Erlass von Verwaltungsakten und Bekanntgabe über Behördenportale*, in *Die Öffentliche Verwaltung*, vol. 21, 2016, 891.

[44] L. Prell, *E-Government: Paradigmenwechsel in Verwaltung und Verwaltungsrecht*, in *Neue Zeitschrift für Verwaltungsrecht*, vol. 17, 2018, 1255.

[45] *Ibidem*, 1256.

[46] *Gesetz zur Förderung der elektronischen Verwaltung (E-Government-Gesetz – EGovG)* of 25.7.2013, *BGBl.*, I, 2013, 2749.

of the *Länder* (such as the Bavarian law), even outside the APA, in order to promote digitization of administrative procedure[47].

The e-government law obliges administrations to store documents electronically[48]. Since January of this year, electronic archives have become mandatory, provided electronic format is not uneconomical for the administration in a long-term perspective[49]. The law envisages the conversion of paper documents into electronic format[50]. Electronic documents are to replace paper records that must be returned or destroyed, depending on whether their further conservation is still necessary. The electronic documents must match the paper ones in graphics and content (for example, they must be scanned in colour).

Section 8 *EGovG* also integrates the provisions of § 29 *VwVfG* on document access during administrative procedures, regulating access to electronic documents. The choice of how to access documents (by printing, viewing on video, or electronic transmission) is generally entrusted to the public administration. It is mandatory to use digital procedures and to make the data held by the public administration available in electronic form. The same applies to communication obligations.

Finally, in 2017, a law was issued with the aim of systematically purging German administrative law of the requirement of the written form[51]. This legislative intervention was only introduced to a limited extent in the *VwVfG*, through a provision envisaging that in procedures relating to town planning (*Planfeststellungsrecht*), the administrative act (after publication) can also be requested in electronic form, for example via email[52], removing the requirement of the digital signature and obliging the administration to provide electronic access, albeit still limited to the communication or transmission of documents[53].

4.2. *The law on digital access to public services (Onlinezugangsgesetz 2017)*

In relation to e-government, Germany has still much to do, as its digitalization index is relatively low by European standards[54]. As proposed by the *IT Planungsrat*, the coordinating body of the Federation and the *Länder* in the field of digital technologies[55], on 14.10.2016, the Joint Conference of Prime Ministers of the Federation and the *Länder* decided to set up an "integrated website" (*Portalverbund*), a sort of digital one-stop-shop to access public services on a national basis.

However, this reform required a constitutional amendment, attributing legislative competence in this field to the Federation. The constitutional law of 13.7.2017 (on the reform of financial federalism)[56], amending the *Grundgesetz*, introduced a new art. 91c (5) *GG*, by which the Federation has exclusive legislative competence and the task of regulating the institution of the website, from which all public services at federal and *Länder* level are accessed. This laid the foundations for the great federal e-government project, whereby administrations are required to publish the range of services available on their homepage.

The rule is in the section of the Constitution dedicated to common tasks and administrative cooperation between the various levels of government. The constitutional amendment allowed promulgation of the *Onlinezugangsgesetz* (*OZG*)[57] on 14.8.2017, with the aim of allowing access to public services free of temporal or spatial constraints[58]. According to the multichannel principle, § 1 *OZG* provides that the Federation and the *Länder* are required to offer their respective services "also" in electronic form through the single digital gateway by 31.12.2022 and to connect their respective websites (§ 1, para. 1 and 2 *OZG*)[59]. Exceptions are only made for services that are unsuitable for offer online[60]. An essential

[47] T. Siegel, *Der Europäische Portalverbund – Frischer Digitalisierungswind durch das einheitliche digitale Zugangstor ('Single Digitale Gateway')*, 905.
[48] *EGovG* § 6, para. 1.
[49] *EGovG* § 6, para. 2.
[50] *EGovG* § 7.
[51] *Gesetz zum Abbau verzichtbarer Anordnungen der Schriftform im Verwaltungsrecht des Bundes* of 29.3.2017 (*BGBl.*, I, 2017, 626).
[52] § 74 (5) fourth sentence *VwVfG*, as modified by art. 5 of the *Gesetz zum Abbau verzichtbarer Anordnungen der Schriftform im Verwaltungsrecht des Bundes* of 29.3.2017 (*BGBl.*, I, 2017, 626.)
[53] L. Prell, *E-Government: Paradigmenwechsel in Verwaltung und Verwaltungsrecht*, 1257.
[54] See the 2017 annual report of the *Nationaler Normenkontrollrat* (National Regulations Control Council), 35 ff.
[55] https://www.it-planungsrat.de/DE/Home/home_node.html. See more extensively A. Guckelberger, *E-Government: Ein Paradigmenwechsel in Verwaltung und Verwaltungsrecht?*, 257.
[56] *BGBl.*, I, 2017, 2347.
[57] *BGBl.*, I, 2017, 3122, 3138; see T. Siegel, *Auf dem Weg zum Portalverbund – Das neue Onlinezugangsgesetz (OZG)*, in *Die Öffentliche Verwaltung*, vol. 5, 2018, 185.
[58] Compare art. 9 of the *Gesetz zur Neuregelung des bundesstaatlichen Finanzausgleichs ab dem Jahr 2020 und zur Änderung haushaltsrechtlicher Vorschriften* of 14.8.2017 (*BGBl.*, I, 2017, 2787).
[59] T. Siegel, *Auf dem Weg zum Portalverbund – Das neue Onlinezugangsgesetz (OZG)*, 188.
[60] *OZG* § 1 (1) second sentence. It should be added that in October 2018, the European legislator had the idea of a single website of its own with launch of Regulation (EU) 2018/1724 on the single digital gateway as a prominent element of the digital strategy of the European Union. This "metaportal" is set up by the Commission (art. 2) with the function of front office, and therefore without affecting back office tasks of Member States, in line with their procedural autonomy, as can be seen from recitals 24-26. EU regulation

requirement for the function of the integrated portal is the standardization of IT components, which must be jointly defined by a regulation[61].

This virtual interface is a tool with which Germany aims to overcome its digital shortcomings, through technical integration of the websites of the Federation and the *Länder*. It is a "front-office" portal, which like the provisions of the Bolkenstein directive 2006/123/EC, does not change the structure of the "back office", namely the administrations of the three levels of government (federal, *Länder* and municipal). It should also be borne in mind that since transposition of the services directive, the so-called *Behördenportale*[62] have become increasingly widespread in Germany. The *IT-Planungsrat* approved the guidelines for implementation of the single digital gateway on 5.10.2017. This suggests that the gateway will be implemented on time[63].

5. *Potential and limits of the fully automated procedure*

These pages show that the possibility of fully automated procedures is envisaged in all three "columns" of administrative procedure since 2017. About 120 million tax assessments can now be issued digitally. In the other two sectors it is not yet clear which administrative acts will be digitized and the legislator is expected to intervene[64], even if it is reasonable to believe that mostly bilateral, standardized and above all not discretionary administrative acts will be automated[65].

A limit for public administrations will consist in a loss of autonomy and growing dependence on external service operators. The conception, programming and maintenance of digital procedures requires specific knowledge, which overshadows the public administration's role of "mistress of the procedure". Conversely, IT experts often do not have know-how in the administrative area, which is why an interdisciplinary approach is required[66].

We currently live in a so-called VUCA world, an acronym standing for a situation of volatility, uncertainty, complexity and ambiguity[67]. Considering that with fully automated administrative procedures rules have to be translated into algorithms, IT systems should only be employed after having verified the legitimacy and transparency of decisions[68]. Individuals relate to the robotic administrative procedure as to a *blackbox*, and as a rule are unable to determine whether or not the procedure is harmful to their rights[69]. The transparency of administrative procedures is, however, a crucial element of the rule of law, which is why it is essential to guarantee the accountability of these systems, as the German legislator has endeavoured to do[70].

Even considering the enormous opportunities offered by the digital world in terms of efficiency of public administration and cost reduction, as well as the fact that absences due to illness or holidays do not affect the efficiency balance, it should be borne in mind that complex procedures cannot be easily automated in a short time and require a medium or long term perspective. Despite the digital revolution we are experiencing, it can be underlined that e-government cannot replace the current anthropocentric system on which the public administration is organized[71]. In the field of e-government, Germany still has a big margin for improvement by European standards. It is to be hoped that the pandemic will at least give a decisive push to the digital process.

2018/1724 envisages establishment of this portal for accessing information, procedures and support services in the case of difficulties (art. 7). It refers to information and procedures relevant for the internal market. It comes into force on 12.12.2020 (art. 39, para. 2). In legal science, the goal of one-stop-government without changing the spheres of competence of the single administrations has long been pursued. See T. Siegel, *Der Europäische Portalverbund – Frischer Digitalisierungswind durch das einheitliche digitale Zugangstor ('Single Digitale Gateway')*, 906.

[61] See § 4 *OZG* on IT components; § 5 on safety standards; § 6 on communication standards.

[62] Also called *Verwaltungsportale* or *Bürgerportale*.

[63] T. Siegel, *Auf dem Weg zum Portalverbund, Das neue Onlinezugangsgesetz* (*OZG*), 192.

[64] N. Braun Binder, *Vollautomatisierte Verwaltungsverfahren, voll automatisiert erlassene Verwaltungsakte und elektronische Aktenführung*, 318.

[65] *Ibidem*, 318.

[66] L. Prell, *E-Government: Paradigmenwechsel in Verwaltung und Verwaltungsrecht?*, 1258.

[67] H. Hill, *Kommunikation und Entscheidung in der 'VUCA-World*, in *Zukunft der Parlamente – Speyer Konvent in Berlin*, H. Hill and J. Wieland (eds.), Berlin, Duncker & Humblot, 2018, 121.

[68] A. Guckelberger, *E-Government: Ein Paradigmenwechsel in Verwaltung und Verwaltungsrecht?*, 267.

[69] M. Martini and D. Nink, *Wenn Maschinen entscheiden*, in N*eue Zeitschrift für Verwaltungsrecht*, vol. 10, 2017, 682; A. Kube, E-*Government: Ein Paradigmenwechsel in Verwaltung und Verwaltungsrecht?*, 312.

[70] L. Guggenberger, *Einsatz künstlicher Intelligenz in der Verwaltung*, in *Neue Zeitschrift für Verwaltungsrecht*, vol. 10, 2019, 849.

[71] L. Prell, *E-Government: Paradigmenwechsel in Verwaltung und Verwaltungsrecht?*, 1259.