

The legal framework of e-government

1. Efficiency of e-government

The euphoria has died down in the e-business sector, and this is not only reflected in the price development on the Neuer Markt. In many parts of the IT industry we find that exaggerated expectations cannot be fulfilled and that the Internet is not a gold mine for business ideas of all kinds. This crisis has not left the network activities of the public administration untouched. In this case, however, the traditional inertia of the administration, which drives many advocates of reform to despair, could be an advantage. The careful, step-by-step introduction of administrative Internet activities, some of which are still in the pilot scheme stage, has so far prevented unjustified enthusiasm and excessive bad investments. It is all the more important now to take stock of the current situation and review our own goals and strategies in the light of the experience to date.

My initial thesis is that "electronic government" is not in fact a new general concept of administrative action¹, but that its main function is to extend the communication options in the relationship between the

citizens and the administration, and also internally within the administration. The conventional forms for the exchange of information will not be replaced by electronic media in the foreseeable future, but they will be supplemented. This means that electronic media are not a panacea for overdue modernisation. Instead, each task must be examined to determine where it is sensible to use electronic media and where they can be deployed to best advantage.

E-government can therefore only be one element in an overall strategy of administrative reform. In particular, it can be integrated well into the participation-based and efficiency-oriented concept of the new control model². It is hardly in doubt now that a modern administration must pay special attention to its communication strategy. On the other hand, care must also be taken to ensure that the reform processes are not excessively dominated by computer requirements and do not drift towards a "dictatorship of the software". The goals of administrative reorganisation must be politically defined and subsequently implemented, including the creation of the necessary technical requirements. A major factor in this process is the adaptation of organisational forms to the forms of communication³. It is obvious that

1 Eifert, ZG 2001 and Traunmüller/Wimmer speak more carefully of a "principle" in: Reiner mann (ed.), *Regieren und Verwalten im Informationszeitalter* (Governing and administration in the information age), P. 482 ff., 486.

2 Boehme-Nessler, NVwZ 2001, 374 ff., 375.

3 Traunmüller/Wimmer (footnote 1), P. 487.

electronic media strengthen the tendency to relativise hierarchical coordination⁴.

However, the use of modern information and communication technology creates a new problem for which I do not yet see any satisfactory solution. From a legal point of view it is possible – as in the following considerations – to define various legal requirements to govern the use of e-government. But the implementation of these requirements needs to be reviewed regularly by the appropriate functions in the software used, and only a few specialists are able to check how suitable this software is. This is especially problematical if the implementation is in the hands of private companies. Small administrative units, at least, are hardly likely to have the necessary technical expertise to verify compliance with the data protection regulations. But implementation verification must take place if the legally binding character of the administration is not to be undermined, so there must at least be the alternative of calling on centralised expertise, for example in municipal computing centres, the regional data protection commissioners or institutions such as the Federal Information Security Agency (BSI).

2. Goals

Before I turn to the most important aspects of the law, I would like to point out that the goals associated with the introduction of e-government are only compatible to a certain extent, and in other respects they even conflict with each other. We need to be aware of this conflict potential before we begin the implementation. A total of three overall goals are involved:

The primary motive for reform in the administration is often an improvement in efficiency. The simplification of business processes by integrating working transactions and avoiding media discontinuity will, it is hoped, lead to cost savings which every public authority welcomes in an age of tight budgets. Indirectly, of course, this would also benefit the citizen as a taxpayer. But it must also be pointed out that experience shows that short-term financial relief is foiled by extra costs in the transition phase. And legal practitioners have a duty to ensure that efficiency in the fulfilment of tasks is not gained at the expense of compliance with the regulations. However, there is no automatic natural conflict between the two goals⁵.

From the point of view of the citizens, the primary goal of any administrative reform is to improve the service⁶. The use of electronic media can considerably simplify access to information and the handling of transactions. Particularly at the local community level, many administrations have adopted this goal. However, the demand must be carefully ascertained to avoid wrong priorities and misdirected investments. For example, in the area of form-based transactions it has been found to be sensible to concentrate on mediators with a high demand for administrative contacts⁷. On the other hand, however, care must also be taken to ensure that groups that do not yet have any access to electronic media are not excluded. The traditional forms of communication must also

4 For a general discussion cf. Gross, *Das Kollegialprinzip in der Verwaltungsorganisation* (The colleague principle in the administrative organisation), P. 127 ff.

5 Cf. the contributions in Hoffmann-Riem/Schmidt-Assmann (eds.), *Effizienz als Herausforderung an das Verwaltungsrecht* (Efficiency as challenge to administrative law).

6 Hagen, in: Reiner mann (ed.), *Regieren und Verwalten im Informationszeitalter* (Governing and administration in the information age), P. 414 f.

7 Gross, *DÖV* 2001, 159 ff., 162.

be available as a sort of multi-channel strategy⁸.

A third factor, which is often overlooked because there is less lobbying done to promote it but which is fortunately well-established in the *MEDIA@Komm* project, is the improvement of participation as a social goal. The Internet has a special significance as an instrument to enhance the transparency of the public administration and to simplify collective communication⁹. Here it can develop its potential as a means to simplify and accelerate the exchange of information, even though it would be an exaggeration to claim that it is "electronic democracy"¹⁰. But legal restrictions must also be observed, especially in relation to data protection, and considerations of efficiency must be used to help define the priorities.

3. Legal framework for municipal commercial activities

If we look at the Internet presentation of local communities, we occasionally find services which have hardly any apparent connection with the tasks of the public administration. Added to which, the creation and updating of websites in larger towns and cities are often outsourced to private companies. Both of these facts bring up the question of the limits of such activities under municipal commercial law. In the individual case this must of course be decided under the law of the respective federal state, which means that we can only discuss general issues here.

8 Cf. Lenk, in: Hoffmann-Riem/Schmidt-Assmann (eds.), *Verwaltungsrecht in der Informationsgesellschaft* (Administrative law in the information society), P. 59 ff., 90.

9 Reinermann, *DÖV* 1999, 20 ff., 24 f.

10 Kleinstüber/Hagen, *ZParl* 1998, 128 f; Zittel, *ZParl* 2000, 903 ff.; cf. also the contributions in: Kamps (ed.), *Elektronische Demokratie?* (Electronic democracy?)

First of all it must be determined whether the operation in question is, in fact, a commercial company. Here, case law uses the Popitz criterion and asks whether the operation could also be run by a private entrepreneur¹¹. This distinction between commercial and non-commercial activities is called into question by the philosophy of the new control model, which in the last resort subjects all areas of the administration to competition, and thus at least to quasi-economic mechanisms¹². But as long as the applicable municipal legislation follows the conventional distinctions, which also have a foundation in state theory, a classification of the activities of the local community is necessary.

However, an area which is regarded as permissible without further requirements is so-called marginal use¹³, i.e. commercial use of official resources as long as it is of subordinate importance. This is used, for example, to justify advertising on local community websites¹⁴. It is possible to cast doubt on this by referring to the prohibition of advertising in official municipal gazettes in some federal states (cf. for Hessen § 7 II 3 HGO in conjunction with. § 5 III 2 VO on public announcements by local communities and rural districts), but it must also be taken into account that local community Internet pages fulfil much broader functions than official gazettes.

Apart from marginal use, local community Internet activities which provide commercial services must be justified by a public purpose. This is questionable, for example, in small advert markets or the provision of free e-mail addresses. In practice, local communities are granted a generous amount of leeway in

11 BVerwGE 39, 329, 333.

12 Cf. J.-P. Schneider, *Die Verwaltung* (The administration) 3/2001

13 BVerwGE 82, 29, 34.

14 Krahn/Stenner/Werthmann, *Kommunen und Multimedia* (Local communities and multimedia), P. 31.

justifying the public purpose¹⁵, but there must be a borderline somewhere. It is problematical to justify such services globally by suggesting that they promote the use of the Internet and thus fulfil a public educational purpose¹⁶. The use of the Internet is now so widespread that this argument is no longer convincing.

4. Procedural law

I will only briefly comment on the formal changes in procedural law, because a separate contribution is planned on this subject. But it is important to mention that the importance of formal requirements for the introduction of e-government should not be overestimated. The principle of the simple design of procedures under § 10 of the Administrative Procedure Act (VwVfG) and the fundamental freedom of form in administrative acts under § 37 II of the Administrative Procedure Act already permit the use of electronic communication to a large extent¹⁷. For example, the Internet can be used without any problems for advice given by the administration, for the transmission of mandatory statistical data by business companies or for statements by public bodies in planning procedures.

Where there are specific requirements for the form, I believe that the respective purpose must be carefully examined. Global solutions which introduce an electronic format as an alternative for all purposes are problematical. Under the EC Digital Signature Directive it is permissible to introduce extra requirements

for the public sphere¹⁸. At the moment, at any rate, it seems that the electronic signature is only slowly spreading in everyday use. And here, too, my option proposition applies – i.e. other communication methods must be preserved, and there must be no de facto compulsion to use electronic media.

Another largely unsolved problem is the question of how electronic documents can be documented in the long term. Proper filing and archiving is an essential prerequisite for internal and external control of the state administration. Disciplinary or parliamentary investigations must be able to reconstruct who made what decisions in individual processes, even many years after the event. In an electronic file, this should be documented by electronic signatures. And then it must be ensured that the files are regularly checked to ensure that they are legible, and that they are copied to new data media if appropriate. Moreover, the authenticity of the signatures must be verifiable even in the long term. As long as there are no tried and tested procedures for this purpose, it is urgently advisable to document the major transactions on paper, too.¹⁹

5. Electoral law

In the public discussion, the question of e-voting, i.e. voting by the click of a mouse, assumes an over-proportional importance. It is not always sufficiently taken into account that there are a number of variants for electronic voting which must be evaluated differently from a legal point of view. Voting on a computer can initially only be an alternative or replacement for postal voting. In the medium term, however, it is also being

15 This is pointed out, for example, in Kommune online (Local community on-line), P. 93.

16 E.g. Boehme-Nessler, NVwZ 2001, 374 ff., 379.

17 Rosenbach, in: Reiner mann (ed.), *Regieren und Verwalten im Informationszeitalter* (Governing and administration in the information age), P. 239 ff., 240.

18 For greater detail cf. Rosnagel, DÖV 2001, 221 ff.; Eifert/Schreiber, MMR 2000, 340 ff.

19 Gross, DÖV 2001, 159 ff., 164.

discussed as the sole form of voting. But it makes a great difference whether the ballot box in polling stations is replaced by a computer, or whether everyone should vote from their own computer via the Internet.

A first, very fundamental cultural objection appeals to the special character which elections have as an act of the sovereign state because of the necessity of going to a polling station. It is feared that the speed with which the act of voting is carried out on the computer will impair the serious nature of the occasion²⁰. A citizen who exercises a fundamental democratic right between two computer games will not be sufficiently aware of the importance of this right. It must be stated that this objection involves speculative elements²¹. And it is difficult to formulate it in a normative manner. In the last resort, this argument is based on the nature of democratic elections and the tradition of ballot box voting. However, when other mechanisms of electronic participation have been developed and new communication techniques have become familiar, this objection will seem far less persuasive²².

The second, legally more fundamental objection relates to the question of whether adherence to the electoral principles formulated in § 38 I 1 and 28 I 2 of the German constitution (GG) can be ensured. In an election via the Internet, the software that is used must provide an identity check function and, at the same time, ensure the anonymity of the vote. Double encryption procedures have been developed for this purpose, and their security is considered sufficient²³. But this again poses the question of verifiability. For the traditional ballot box

election, § 31 of the Federal Election Act (BWG) prescribes that the election must be public. The citizens, in their sovereign capacity, should be able to convince themselves that the voting and vote counting procedures have been carried out correctly. If these functions are shifted into a computer network, the system architecture of the network must be disclosed in full so that all citizens again have the possibility of checking that the procedure has been correctly followed. The use of private software which cannot be disclosed for copyright reasons is not suitable here.

And, of course, a vote cast from a computer at home involves risks for the secrecy of the vote²⁴. In view of similar misgivings, the Federal Constitutional Court only permitted the postal vote as an exception and demanded fully functional security measures²⁵. On the other hand, it also recognised that not every principle of electoral law can be implemented "in complete purity"²⁶. Over recent years, the proportion of postal votes has already increased considerably. It will therefore be necessary to anticipate any potential forms of abuse and to design the procedure in a manner which will exclude them as far as possible. It can be argued that the electronic vote should initially be placed on a par with the postal vote, so that voters would need to give reasons why they are hindered from personal voting²⁷. However, it is difficult to see why citizens cannot be asked to show a certain amount of initiative in their voting behaviour.

A third objection relates to the security and reliability of the system. It must be guaranteed that the electronic communication channel is actually accessible throughout the

20 Bull, JbTkuG 1999, 293 ff., 298 f.

21 Buchstein, ZParl 2000, 886 ff., 901.

22 Kleinstüber/Hagen, ZParl 1998, 128 ff.; Zittel, ZParl 2000, 903 ff.

23 Rüss, MMR 2000, 73 ff., 75; Buchstein, ZParl 2000, 886 ff., 889.

24 Buchstein, ZParl 2000, 886 ff., 889, fears an "optional secret election".

25 BVerfGE 21, 200 ff.; 59, 119 ff.

26 BVerfGE 59, 119, 124.

27 Rüss, MMR 2000, 73 ff., 75.

voting period; a system crash must be excluded by suitable protective measures – which must also prevent a system crash resulting from interference by third parties. Manipulation must be rendered impossible, even after the completion of the election, so that the election process can subsequently be verified.²⁸

6. Data protection law

It is plain that the increasing use of electronic media for administrative tasks, with new possibilities for data links in networks or with multi-functional chip cards, involves increased risks for data security. More and more data are entered electronically and stored in central databases, and an increasing amount of information can be called up at computer workplaces. It can therefore not be emphasised enough that the constitutional right of self-determination of information²⁹ sets boundaries which are not always sufficiently observed in the practical, efficiency-oriented work of the administration – as is shown in many reports by commissioners for data protection.

Of fundamental importance here is the generally defined principle of system design with sparing use of data as prescribed in § 3a of the Federal Data Protection Act (BDSG), which was previously specified in the Teleservice Data Protection Act, which was partly applicable to e-government³⁰. From the outset of the concept development for IT structures, it is important to consider how the extent of the data processing services can be limited to what is really necessary and when facilities such as anonymous use or use under a pseudonym can be permitted³¹. In the

implementation, technical security features and the issue of differentiated access authorisation must be used to ensure that no unauthorised parties can gain access to personal data.

If the IT systems used by an administration are outsourced³² to a private company or any other outside body, and personal data becomes accessible in the course of this arrangement, this constitutes a commission for data processing³³, even if it is a subsidiary company³⁴. For the outsourcing body this means that under § 11 of the Federal Data Protection Act (BDSG) and/or the corresponding provisions of the federal state data protection laws, it must enter into data protection obligations and the necessary control rights³⁵.

7. Access to information law

One of the areas in which e-government offers clear advantages and improvements is the citizen's access to administrative information. The best example is § 5 VI of the Freedom of Information Act in Schleswig-Holstein, which explicitly stipulates that the administration can fulfil its obligation to provide information by referring to a publication on the Internet. General information rights have so far been introduced by the federal states of Brandenburg and Berlin³⁶, and there is a draft bill for a national act. There are also special information access entitlements, e.g. in the Environmental

28 Buchstein, ZParl 2000, 886 ff., 889.

29 BVerfGE 65, 1 ff.

30 Cf. Boehme-Nessler, NVwZ 2001, 374 ff., 376.

31 Cf. Rossnagel/Scholz, MMR 2000, 721 ff., 723 ff.

32 For a general treatment cf. Zundel, CR 1996, 763 ff.

33 Concerning the definitions, cf. Gola/Schomerus, BDSG (Federal Data Protection Act), 6th edition., § 11, note 2.3.

34 Wächter, CR 1991, 333 ff., 333.

35 For further detail cf. Jandach, DuD 2001, 224 ff.

36 Cf. Partsch, LKV 2001, 98 ff.

Information Act (UIG) and in residential registration law³⁷.

These legal provisions have a constitutional background which is only gradually breaking down the deep-seated tradition of the executive power as an arcane sphere in its own right. It has already been shown in detail that the requirement of transparency in the public administration is based on the democratic principle, the rule of law principle and objective legal aspects of freedom of information, and is also firmly rooted in European Community law³⁸.

This also affects areas that have not so far been covered by information rights explicitly stipulated in law. It has always been undisputed that § 29 of the Administrative Procedure Act (VwVfG) places the provision of information to unaffected parties at the discretion of the administration³⁹ unless secrets under § 30 of the Administrative Procedure Act (VwVfG) are involved. The legal obligation of civil servants to maintain confidentiality also excludes facts which by their nature are not confidential (§ 39 I 2 of the Civil Service Act / BRRG). There is therefore no logical reason why administrative regulations, organisational diagrams and similar information without any specific reference to persons should not be generally published, e.g. by including them in databases accessible to the citizens. This potential of the new information and communication technology is not yet sufficiently used.

37 Cf. the overview by Schild, RDV 2000, 96 ff.

38 For a full treatment cf. Scherzberg, *Die Öffentlichkeit der Verwaltung* (The public nature of the administration), passim; cf. also Denninger, in: Reinermann (ed.), *Regieren und Verwalten im Informationszeitalter* (Governing and administration in the information age), P. 68 ff., 77 ff.

39 Cf. BVerwGE 30, 154, 160; Kopp/Ramsauer, *VwVfG* (Administrative Procedure Act), 7th edition., § 29, marginal note 8.