"Digital Only" in Administrative Procedures and Fundamental Rights

A German Perspective

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Abstract

In Germany, the digital transformation of public administration has sparked a debate about the compatibility of 'digital-only' administrative procedures with fundamental rights. As far as can be seen, there is no discussion about whether the EU Charter of Fundamental Rights (CFR) includes a 'fundamental right to analogue life', nor about the fundamental rights limits of mandatory e-government. This is surprising, given that European fundamental rights will have a significant impact on the digitalization of Member State administrations and that digitalization of administration will, of course, also occur at the European level. The paper distinguishes between three scenarios: (i) complete digitalization; (ii) partial digital-only services; and (iii) incentivized (nudge-based) digital engagement between citizens and companies affected by mandatory digital administration. The current status of the digitalization of administrations and the relevant secondary legislation is presented. The findings suggest that full digitalization without analogue alternatives or hardship provisions for citizens is incompatible with the CFR. In addition, reform ideas for a fundamental right to analogous life are presented and critically evaluated.

Keywords: analogous life, digital administration, Germany, e-government, digitalization

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1. Introduction

In the EU, administrative services are increasingly being digitalized. This means that all procedural steps of an administrative procedure can be carried out electronically. In particular, applications and documents can be submitted to authorities, communication can be handled and a decision by the authority can be delivered electronically. This can be achieved through communication by email, app and/or via an account created for this purpose. Digital procedures exclude verbal or written interaction with the administrative authorities, also referred to below as analogue communication.

Exclusively digital communication could be a logical next step. This is because the efficiency of the administration will not be increased and costs will not be reduced if analogue and digital channels are kept open in parallel.[1] So far, there has been little discussion as to whether not offering an analogue alternative would be compatible with European fundamental rights and which limits demanded by fundamental rights would have to be drawn. The CFR does not contain a specific "fundamental right to analogous life" or a right of defence against e-government. As far as can be seen, there is no relevant case law from EU courts or the ECtHR.[2]

In this paper, first of all, the status quo with regard to the digitalization of administrative services is portrayed. This is necessary to find out which constellations must be examined for their compatibility with fundamental rights. The EU law is implemented by the Member States to a significant extent. Therefore, the current status of administrative digitalization in one Member State, namely Germany, is studied. From this it can be deduced how far digitalization has progressed (Section 2). It must then be assessed whether the identified constellations are compatible with the fundamental rights guarantees of the CFR (Section 3). In order to obtain regulatory impulses, regulations that already exist and have been put forward in the sphere of legal policy are then examined to determine whether they are suitable as a blueprint for a fundamental rights norm (Section 4). Finally, a conclusion is drawn (Section 5).

1 Sönke E. Schulz, 'Der elektronische Zugang zur Verwaltung', *Recht Digital,* 2021, p. 378.
2 Dariusz Kloza, 'It's All About Choice', *Völkerrechtsblog,* 29 November 2021.

2. The Development of the Digitalization of the Administration

2.1. EU Law

EU law does not yet contain any provisions on the mandatory use of digital communication channels for citizens to access administrative services. However, there are general objectives set at Union level for the Member States to achieve as part of the 'Digital Decade' proclaimed by the Commission from 2020 to 2030. The Member States must provide essential public services in digital form according to Article 4(1) no. 4 lit. a) Decision 2022/2481.[3] At the same time, the use of digital form is to be voluntary.[4] Indeed, the European Parliament points out that analogue alternatives must always be offered.[5]

In recent years, the legislative framework has been created at European level to digitalize administrative services. First of all, natural or legal persons must be able to provide clear proof of their identity for their digital interaction with public authorities. To this end, the EU took action in 2014 and adopted the eIDAS Regulation.[6] However, initially not all member states established electronic identification options.[7] In 2021, the Commission presented the draft of an amended regulation,[8] which was significantly amended during the legislative process and adopted by the European Parliament in February 2024.[9] In particular, the amended eIDAS Regulation

3 Decision (EU) 2022/2481 of the European Parliament and of the Council of 14 December 2022 establishing the Digital Decade Policy Programme 2030.

4 Id. Recital (18).

5 Digitalisation and Administrative Law, European Parliament resolution of 22 November 2023 with recommendations to the Commission on Digitalisation and Administrative Law, 2021/2161(INL), Annex, Recommendation No. 2, 2.iii.

6 Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC. 'eIDAS' stands for Electronic IDentification, Authentication and trust Services.

7 Commission Staff Working Document, Accompanying the document Report from the Commission to the European Parliament and the Council on the evaluation of Regulation (EU) No 910/2014 on electronic identification and trust services for electronic transactions in the internal market (eIDAS), SWD(2021) 130 final, pp. 14 *et seq.*

8 Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 910/2014 as regards establishing a framework for a European Digital Identity, COM(2021) 281 final.

9 European Parliament, legislative resolution of 29 February 2024 on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) No 910/2014 as regards establishing a framework for a European Digital Identity, COM(2021) 0281 – C9-0200/2021 – 2021/0136(COD).

contains a European wallet for digital identity (Article 5a *et seq.* eIDAS Regulation), which the Member States must provide by the fall of 2026. Citizens can use the wallet to identify themselves and store digital evidence. However, its use is voluntary [Article 5a(15) sentence 1 eIDAS Regulation].

In addition, Regulation 2018/1724 (SDG Regulation)[10] requires the Commission and the Member States to set up a single digital gateway. Digital access to information (Article 4 *et seq.* SDG Regulation), full online access to procedures (Article 6 SDG Regulation) and access to assistance and problem-solving services in accordance with Article 7 SDG Regulation must be guaranteed. The material scope is codified in the three annexes, and the procedures covered are enshrined in Annex II. The material scope is limited by Article 6(3) of the SDG Regulation. According to this, Member States may require personal presence for administrative services relating to public safety, public health and combating abusive behavior if the public interest so requires. Even more significant, however, is the restriction to areas with a potential cross-border dimension (21 in total), as these are the only areas in which the Union has competence (see *e.g.,* recitals 4 and 6 of the SDG Regulation). In the information areas listed in Annex I, an explicit reference to the EU is made (*e.g.,* travel within the Union or work and retirement within the Union). There are no such clear references in Annex II, but the life events mentioned there imply an (at least potential) cross-border element.[11] Thus, with the SDG Regulation the legislator does not want to harmonize the administrative procedures of the Member States (and is not allowed to do so for reasons of competence), but to create a uniform digital access gateway.

The Union framework is therefore generally rather restrictive. However, the Member States may extend the single digital gateway to domestic matters. This is because nationals could otherwise be discriminated against compared to EU citizens and because the technical infrastructure exists anyway.[12] Digital identity is a prerequisite for the provision of e-government services and its establishment makes it easier for Member States to offer more administrative services digitally.

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10 Regulation (EU) 2018/1724 of the European Parliament and of the Council of 2 October 2018 establishing a single digital gateway to provide access to information, to procedures and to assistance and problem-solving services and amending Regulation (EU) No 1024/2012.

11 Thorsten Siegel, 'Der Europäische Portalverbund – Frischer Digitalisierungswind durch das einheitliche digitale Zugangstor ("Single Digital Gateway")', *Neue Zeitschrift für Verwaltungsrecht,* 2019, p. 908.

12 Id. pp. 908 *et seq.*

Union law therefore does not impose a general obligation to use digital administrative services. The situation is different in certain sectors, where companies in particular must use a digital gateway. For example, online use is largely mandatory in public procurement law.[13] As far as can be seen, there was no discussion in the legislative process about whether such mandatory electronic use violates fundamental rights. These specific areas also show that the legislative framework created is sufficient to offer at least some administrative services only in digital form.

2.2. Germany as an Example of the Development of Digital Administrative Services

The following section outlines the development of digital administration in Germany. The overview serves as an example of the current status of the Member States and how this may develop in the near future. This is important for the assessment of fundamental rights because the Member States implement Union law within the meaning of Article 51(1) sentence 1 CFR. The compatibility of national law with the national constitutional law, in particular with national fundamental rights, is not considered in this article.

In Germany, the federal states implement the majority of laws and have their own administrative procedural laws that govern their administrative activities. However, these often largely refer to the Administrative Procedure Act ("*Verwaltungsverfahrensgesetz*"; VwVfG) of the federal government. An important first step towards digital administration was the recognition of electronic form in Sections 3a; 37(2) VwVfG. Furthermore, Section 35a VwVfG (as well as Section 31a of the Tenth Book of the German Social Code ("*Sozialgesetzbuch X*") and Section 155(IV) of the Fiscal Code ("*Abgabenordnung*"; AO) provides for the possibility of issuing an administrative act completely automatically under certain conditions. In addition to this, the federal government has enacted the E-Government Act ("*E-Government-Gesetz*"; EGovG), which enables electronic payment (Section 4 EGovG) and provides for electronic file management (Section 6a EGovG). The federal states also created their own e-government laws.[14] In September 2017, Ger-

13 Thorsten Siegel, 'Elektronisierung des Vergabeverfahrens', *Landes- und Kommunalverwaltung,* 2017, pp. 387 *et seq.*, 391.

14 Wissenschaftliche Dienste des Deutschen Bundestags, *Sachstand: E-Government in Deutschland,* WD 3 – 3000 – 134/19, 2019, at https://www.bundestag.de/resource/blob/655082/32a17c3834d5c5c5d6f5a7232f0491c0/wd-3–134-19-pdf-data.pdf, pp. 9 *et seq.*

many was the first EU member state to notify an eID system to the Commission.[15]

These voluntary procedural options have been used only in a few areas.[16] For this reason, the federal legislator passed the Online Access Act ("*Onlinezugangsgesetz*"; OZG), which came into force in 2017 and obliged the federal and state governments to offer certain administrative services digitally via an administrative portal by the end of 2022 (Section 1 OZG). This interconnected concept is also reflected in the SDG Regulation. The plan was to create online access to 575 service bundles. However, administrative services that were not suitable for legal, economic or factual reasons were excluded, such as waste disposal[17] or preventive police measures. The coronavirus pandemic was another catalyst for digital administration. However, it must be noted that the objectives pursued with the OZG were not achieved. Of the planned services,[18] only a fraction had been digitalized by the deadline.[19] Some of the federal states are more successful than others in the transformation towards digital administration. In Bavaria, for example, according to Article 20(1) of the Bavarian Digital Act ("*Bayerisches Digitalgesetz*"; BayDiG), administrative procedures are generally to be carried out digitally.

At the same time, there is no general obligation to communicate electronically or to issue electronic administrative acts at either federal or state level. Meanwhile, electronic communication is already a basic principle in some areas in which companies operate, for example when awarding public contracts.[20] The basic obligation to submit an advance VAT return to the tax office electronically by remote data transmission was deemed constitutional by the Federal Fiscal Court,[21] which was justified by the hardship rule. A

15 European Commission, SWD(2021) 130 final, p. 14.

16 Bettina Spilker, 'E-Government – Anforderungen an das Verwaltungsverfahren', *Neue Zeitschrift für Verwaltungsrecht,* 2022, pp. 681 and 685.

17 Siegel 2019, p. 907; Thorsten Siegel, 'Auf dem Weg zum Portalverbund – Das neue Onlinezugangsgesetz', *Die Öffentliche Verwaltung,* 2018, p. 188.

18 *See* at https://www.it-planungsrat.de/fileadmin/beschluesse/2018/Beschluss2018-22_TOP2_Anlage_OZGUmsetzungskatalog.pdf.

19 Jonas Botta, '"Digital First" und "Digital Only" in der öffentlichen Verwaltung', *Neue Zeitschrift für Verwaltungsrecht,* 2022, p. 1247 with further references.

20 *See* Section 97(5) Act against Restraints of Competition ("*Gesetz gegen Wettbewerbsbeschränkungen*"); Section 9(1) "*Vergabeverordnung*"; VgV]. Furthermore, EU-wide announcements are also made using standard electronic forms (*see* Section 10a VgV). In addition, certain tax returns, for example, must be submitted electronically, *see* Section 150(1) AO and Section 18(1) Value Added Tax Act ("*Umsatzsteuergesetz*"; UStG). An exception from this can be granted upon request in cases of hardship [Section 150(8) AO; Section 18(1) UStG].

21 Ruling from 14.3.2012 – XI R 33/09; ruling from 14 February 2017 – VIII B 43/16.

case of hardship exists in particular if taxpayers are unable or only able to use electronic access to a limited extent due to their personal capabilities [Section 150(8) AO]. The provision of information for the census must also be carried out electronically in accordance with Section 23(1) Census Act 2022 ("*Zensusgesetz 2022*"), although exemptions are available in cases of hardship.

Section 1a(1) OZG also stipulates that company-related administrative services are to be offered exclusively in digital form ("digital only") five years after the Act came into force in the summer of 2024. However, exemption may be granted if the user can show a legitimate interest. Therefore, in individual cases where it is justified, analogue access to the administration is still possible for companies.

In some cases, however, there is an obligation for citizens without hardship regulations to communicate digitally with administrative authorities. This applies, for example, to the implementation of the Student Energy Price Allowance Act ("*Studierenden-Energiepreispauschalengesetz*"; EPPSG). According to Section 1 EPPSG, students enrolled at German universities on a specific cut-off date received a one-off payment of 200 euros upon application. This allowance was granted in response to rising energy prices. The federal states implemented this law. The state of Saxony-Anhalt created an Internet portal through which applications could be submitted. This portal, in turn, mandated the use of the federal government's online account ("*BundID*") to submit an application. There was no other way to receive the energy price allowance. Applying digitally was therefore made mandatory; there was no other way for applicants to receive the money, even if they met the statutory requirements. This is a violation of Section 2(5) OZG, which foresees that the use of user accounts is voluntary. Furthermore, the system was also considered to be contrary to fundamental rights. The mandatory processing of personal data was not necessary and there was no corresponding legal basis, meaning that Article 8(1)-(2) CFR and the right to informational self-determination derived from Articles 1(1) and 2(1) of the German Constitution were violated.[22]

22 Landesbeauftragter für den Datenschutz Sachsen-Anhalt (State Commissioner for Data Protection in Saxony-Anhalt), '*Digitalisierung ja, aber nicht zwangsweise*', press release dated 27 June 2024, at https://datenschutz.sachsen-anhalt.de/landesbeauftragte/presse mitteilungen/pm-lfd-27062024; Datenschutzkonferenz (Data Protection Conference), Statement by the Conference of Independent Data Protection Supervisory Authorities of the Federal and State Governments dated 3 February 2023, pp. 4 *et seq.*

The application for Corona emergency aid for freelance artists in the Free State of Bavaria was also only possible digitally. This was deemed lawful by administrative courts.[23] The Administrative Court of Würzburg did not consider the "digital discrimination" within the meaning of Article 3(1) GG invoked by the plaintiff to be arbitrary because it made administrative work more effective and a distribution can be made promptly in the event of short-term liquidity bottlenecks.

Some university applications for degree courses are also only possible digitally. Furthermore, in some municipalities, appointments can only be made digitally and bank transfers also.[24] Finally, public administration only allows for the electronic transmission of application documents in some cases.[25] This means that in certain areas in Germany, an obligation to use administrative services digitally already exists.

2.3. Nudges to Use the Digital Access to Administration

As there is currently no general obligation to use digital administration at either European or national level, the question arises as to how citizens and companies can be encouraged to use digital services voluntarily. To this end, legislators can provide incentives, *i.e.,* favor the digital use of administrative services digitally over analogue use (so-called nudges). Such advantages would be, for example, the charging of reduced administrative fees for online applications, the extension of deadlines, pre-filled electronic application forms or prioritized processing of online administrative procedures.[26] Of course, this does not change the voluntary nature of digital administration, but such incentive systems must also be put to the test in terms of fundamental rights.

The obligation to activate the eID function, which is being discussed (at least in Germany), is not entirely relevant to this topic, but should also be

23 Verwaltungsgericht Würzburg (Administrative Court of Würzburg), judgment of 18 January 2021 – W 8 K 20.814; *see also* Bayerischer Verwaltungsgerichtshof (Bavarian Administrative Court), decision of 5.8.2020 – 6 CE 20.1677.

24 Destatis, *Knapp 6% der Bevölkerung im Alter von 16 bis 75 Jahren in Deutschland sind offline,* at https://www.destatis.de/DE/Presse/Pressemitteilungen/Zahl-der-Woche/2023/PD23_15_p002.html#:~:text=Knapp%206%20%25%20der%20Menschen%20im,Bundesamt%20(Destatis)%20weiter%20mitteilt.

25 Meinhard Schröder, 'Rahmenbedingungen der Digitalisierung der Verwaltung', *Verwaltungsarchiv,* 2019, p. 336.

26 Martin Eifert, *Electronic Government,* Nomos, Baden-Baden, 2006, p. 40; Spilker 2017, p. 683.

addressed here. This does not expressly mean an obligation to use it, but rather that all citizens would have to activate the function. This is based on the consideration that the biggest hurdle is the effort involved in activation, which is disproportionate to the added value for citizens. Furthermore, few people are aware of the possibility of digital administration and users are dissatisfied. However, if citizens were obliged to activate it, at least some of the hurdles would be removed and they would also use the administrative services digitally.[27] As far as can be seen, an obligation to activate has not been discussed at EU level in the context of the regulatory procedure for the eIDAS Regulation. However, this would also be a viable path towards greater administrative digitalization.

2.4. Interim Conclusion

Mandatory e-Government is not being sought at either European or German level. Precise specifications for mandatory e-Government at Union level for the implementation of Union law are likely to be ruled out for reasons of competence alone; rather, this would be the responsibility of the Member States within their procedural autonomy. For administrative procedures carried out at European level, there is also no obligation for citizens to communicate digitally. Nevertheless, the respective developments reveal that on the one hand – particularly at European level – the conditions for a purely digital administration are gradually being created. At a national level, it is observable in Germany that purely digital access to administrative services is already possible in some cases.

This is likely to increase, because resources can be saved through digital administration. This applies in particular to benefit administration and specifically to legal claims, *i.e.,* when there is no discretion or scope for assessment.[28] The authorities can save on personnel resources in this context because only the infrastructure needs to be created and then automated decision-making systems check eligibility requirements. Digitalized administrative services in this area are likely to increase.[29] EU secondary legisla-

27 Mario Martini, 'Transformation der Verwaltung durch Digitalisierung', *Die Öffentliche Verwaltung,* 2017, pp. 449 *et seq.*

28 *See* Section 35a VwVfG; Section 31a SGB X.

29 Nadja Braun Binder, 'Vollautomatisierte Verwaltungsverfahren im allgemeinen Verwaltungsverfahrensrecht?', *Neue Zeitschrift für Verwaltungsrecht,* 2016, p. 963; Annette Guckelberger, 'Automatisierte Verwaltungsentscheidungen: Stand und Perspektiven', *Die Öffentliche Verwaltung,* 2021, p. 570.

tion in particular, which provides for a lot of benefit administration, for example in the area of the common agricultural policy,[30] is likely to be well suited to being offered purely digitally for reasons of efficiency. However, a digital obligation can of course also be considered in the context of administrative intervention, for example regarding communication with the respective authority. Here too, digital data enables faster processing.

Consequently, three constellations must be examined for their compatibility with the fundamental rights of the CFR. All of them can apply to companies or citizens. *(i)* Firstly, the compatibility of a situation – admittedly unlikely in the near future – in which all digitizable administrative services are only available in digital form needs to be examined. *(ii)* It should then be examined whether individual administrative services can be offered completely digitally, which is particularly suitable for simply structured mass procedures. Of course, the assessment of fundamental rights in individual cases will depend on the administrative service offered digitally. However, such a case-by-case assessment cannot be made; rather, the conflicts with fundamental rights should only be outlined as guidelines. In both cases, a distinction must be made as to whether there are hardship provisions. A hardship provision is a rule that provides for an exemption from the digitalization obligation on request if its application is personally unreasonable. If this is the case, there should be no official discretion. However, unreasonableness must be examined by the authorities. Grounds for this may be digital illiteracy or the lack of electronic devices. *(iii)* Finally, it needs to be discussed whether there are fundamental rights limits to nudges towards the use of digital government services.

3. Compatibility with Fundamental Rights

First of all, the applicability of the CFR is determined by Article 51(1) CFR; the first half of the first sentence states that it applies to the institutions, bodies, offices and agencies of the Union. Although the (executive) agencies of the EU, among others, perform independent administrative tasks, the Member State administrations bear the main burden for the implementation of Union law. According to the second half of the first sentence, the Member States are obliged to respect fundamental rights when they implement Union law. This refers to primary law, in particular the fundamental freedoms,

30 *Cf.* Article 38 *et seq.* TFEU.

and secondary law, with the legislative implementation of directives and the administrative enforcement of regulations being particularly relevant. Data protection issues must be measured against the CFR on the basis of the GDPR[31] and Directive 2016/680.[32] Finally, there is an obligation to observe the CFR in relation to tertiary law. The Member States are also bound when they have discretion in implementing EU law.[33]

3.1. Compatibility with Human Dignity

The possible legislative measures outlined in the previous chapter may violate human dignity (Article 1 CFR). The absolute limits of the permissible use of technology can be found in human dignity. The entire personality of a person cannot be forcibly registered and catalogued by state authorities.[34] Even if all digitally possible administrative services would only be available digitally, this would not deprive citizens of their subject quality. Consequently, human dignity does not include a right of defence against compulsory e-Government in one of the three forms described above.[35]

However, it is worth considering whether the *status positivus* of human dignity may be affected by the digitalization of administrative services without a hardship clause. That means the dimension as the individual's right to demand an action from the state.[36] The *status positivus* has a particular impact on social benefits law. According to a CJEU ruling, human dignity can

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31 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

32 Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA. *See* Botta 2022, p. 1249.

33 Hans D. Jarass, *Charta der Grundrechte der Europäischen Union, 4th edition,* C.H. Beck, München, 2021, Art. 51, margin no. 26 with further references.

34 *Cf.* BVerfGE 27, 1 (6); Sebastian J. Golla, 'In Würde vor Ampel und Algorithmus – Verfassungsrecht im technologischen Wandel', *Die Öffentliche Verwaltung,* 2019, pp. 675 *et seq.*

35 *Cf.* Botta 2022, p. 1250.

36 Just to name one source: Walter Frenz, *in* Matthias Pechstein *et al.* (eds.), *Frankfurter Kommentar EUV/GRC/AEUV, 2nd edition,* Mohr Siebeck, Tübingen, 2023, Art. 1 CFR, para. 41 *et seq.*

be relied on to derive a fundamental right of asylum seekers to receive the minimum benefits provided for in secondary legislation after lodging an asylum application and before being transferred to the responsible Member State.[37] In particular, this means that the State must create appropriate conditions in order not to violate human dignity.

If these conditions, such as accommodation, could only be applied for in digital form, the question arises as to whether this would already be a violation of human dignity. The fact that the majority of asylum seekers have access to digital services is an argument against this. Internet cafés or public Wi-Fi hotspots could be used if necessary. Furthermore, human dignity in its *status-positivus* dimension could be understood in such a way that it includes only a substantive entitlement, but requirements regarding procedural implementation cannot be derived from human dignity. However, the fact that a mandatory online application can *de facto* prevent access to benefits that are intended for living a dignified life substantiates a violation of human dignity. This is all the more true as some asylum seekers are (digitally) illiterate and would therefore be unable to claim the benefits. However, this is a problem of equality law. It is therefore not possible to derive from human dignity an obligation to provide for such exceptions from mandatory e-government in the area of those (social) benefits provided for under EU law that enable a dignified life.

The same applies to the European Pillar of Social Rights proclaimed by the European Parliament, Council and European Commission. Paragraph 20 states that everyone should have the right of access to essential services. It is unclear whether this includes analogue access. However, this provision is in any case not legally binding.[38]

3.2. Access to Services of General Economic Interest (Article 36 CFR)

A different result could arise with regard to Article 36 CFR. This is because the Union "recognizes and respects access to services of general economic interest as provided for in national laws […]." However, according to prevailing opinion, this article does not include a subjective right, especially in

37 Judgment of 27 September 2012, *Case C-179/11, Cimade and GISTI,* ECLI:EU:C:2012:594, para. 56; *see also* Judgment of 27 February 2014, *Case C-79/13, Saciri and others,* ECLI:EU:C:2014:103, para. 35; Judgment of 2 December 2014, *Case C-148/13, A and others,* ECLI:EU:C:2014:2406, para. 72.

38 *Cf.* nos. 17 *et seq.* of the preamble to the Proclamation.

view of the wording.[39] It is also unclear whether the norm only addresses the Union or also the Member States.[40]

3.3. Compatibility with the Fundamental Right Personal Data Protection

In what follows, I will analyze prescriptions addressed to individual regarding digital administration in the form of the fundamental rights restriction test.

(i) Interference. Article 8(1) CFR protects personal data, *i.e.,* all information relating to an identified or identifiable natural person. The authorities interfere with the scope of protection when they process data, *i.e.,* in particular when they store, use, disclose or erase it.[41] The respect for private life guaranteed in Article 7 CFR is closely related to this; the two fundamental rights guarantee a uniform substance.[42]

Nudges to use administrative services digitally indirectly ensure that personal data is processed. However, the mere incentive does not constitute an interference with Article 8(1) CFR; rather, it raises tensions in terms of equality law (*see* Section 3.4.). In contrast, any obligation to use digital communication channels with the state interferes with the fundamental right because it obliges the individual to disclose data. This also applies to the analogue use of administrative services, especially because the transmitted data via an analogue channel may be digitalized. However, the obligation to transmit data electronically is an additional obligation, as the (automated) data processing possibilities are different.[43] Moreover, the digital transmission process also generates more data, for example about the type of device used.[44] The interference is also independent of the existence of a hardship clause. This is because the requirements of the provision have to be met and the citizen has to apply for it.

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39 Johanna Wolff & Kristin Rohleder, *in* Jürgen Meyer & Sven Holscheidt (eds.), *Charta der Grundrechte der Europäischen Union, 6th edition,* Nomos, Baden-Baden, 2024, Art. 36 para. 12 *et seq.* with further literature; other view: Bernd Lorenz, 'Das Recht auf ein analoges Leben', *Zeitschrift für das Recht der Digitalisierung, Datenwirtschaft und IT,* 2022, pp. 936 *et seq.*

40 Id.

41 Jarass 2021, Art. 8, para. 9.

42 *See e.g.* Judgment of 6 October 2020, *Cases C-511/18, C-512/18 and C-520/18, La Quadrature du Net and others,* ECLI:EU:C:2020:791.

43 Botta 2022, p. 1250.

44 Thilo Weichert, 'Gegen Digitalzwang – ein Recht auf eine analoge Alternative', *Neue Juristische Online-Zeitschrift,* 2024, p. 1540.

(ii) Justification. The fundamental right to personal data is not guaranteed without restriction: any interference with it can be justified. However, this only applies if it does not interfere with the essence of the right [Article 52(1) CFR]. The CJEU has not yet defined the essence of the right to personal data. However, an interference with this is subject to stringent requirements and would only be considered in the case of a comprehensive surveillance program, for example.[45] Even the complete digitalization of all digitizable administrative services without a hardship clause would not constitute such an interference.

The legitimate aim of the total or partial obligation to communicate digitally with authorities is to make administration more effective.[46] Of course, in each individual case a distinction would have to be made and the digitalized administrative activity would have to be examined in detail. Digitalization pursues different objectives. Firstly, administrative services become more cost-effective and less personnel-intensive, since the (partially) automated processing leads to relief effects (*see* already under Section 2). This is ultimately based on the principle of sound financial management, which is also codified in the TFEU,[47] according to which the most favorable balance between the use of funds and the achievement of objectives must be achieved. Second, administrative services are usually provided more rapidly, although there may be exceptions. Finally, the quality of the administrative services can also be improved; however, this also varies from case to case. It is questionable whether a legal interest can be found behind the last two dimensions mentioned in EU primary law. The right to good administration under Article 41(1) TFEU comes into consideration here. It explicitly states that the matter must be dealt with within a reasonable period of time. The standard only addresses institutions, bodies, offices and agencies of the Union. But it is also a general principle of EU law.[48] Furthermore, digitalized administration enables the state to make its relationship with its companies and citizens more transparent and interactive.[49] Finally, digitalized administration can also reduce costs for citizens and businesses. Overall, these are legitimate objectives.

45 Jürgen Kühling, *in* Frankfurter Kommentar 2023, Art. 8 para. 41.

46 *See also* Digitalisation and Administrative Law, European Parliament resolution of 22 November 2023 with recommendations to the Commission on Digitalisation and Administrative Law, 2021/2161(INL), p. 6.

47 Articles 310(5) and 317(1) TFEU.

48 Judgment of 8 May 2014, *Case C-604/12, N,* ECLI:EU:C:2014:302, paras. 49 *et seq.*

49 EU eGovernment Action Plan 2016–2020. Accelerating the digital transformation of government, COM(2016) 179 final, p 4.

The mandatory digital use of administrative services is also in line with the necessity principle. It is true that more administrative staff could be employed to achieve the objectives. However, there is legislative discretion in this respect. This is all the more true since the speed of automated decision-making simply cannot be achieved by humans.

However, it is questionable whether the legitimate objectives are proportionate to the interference with fundamental rights that this causes. In this respect, a distinction must be made between the quality and quantity of the data that must be submitted digitally. The more sensitive the data and the more data that must be submitted digitally, the greater is the interference. Nevertheless, no right of defence against digital administration can be derived from the fundamental right to personal data. This is because Article 7 *et seq.* CFR primarily protect how the data is stored and processed. If, in individual cases, a data protection-compliant organization of further administrative action is ensured, the obligation to use digital administrative access does not violate this fundamental right.[50]

3.4. Unequal Treatment

3.4.1. "Digital Only" for Some or All Administrative Services

(i) Unequal treatment. Firstly, exclusively digital administrative access discriminates against those who do not have the appropriate hardware and/or software. This may be for financial reasons or due to the technical scepticism of those concerned.[51] The latter is probably particularly high in Germany due to the collective consciousness resulting from two totalitarian regimes.

Those who lack digital literacy are also at a disadvantage. This particularly includes those with a low level of formal education and older people. The latter, who are also often visually impaired, are not discriminated against directly, but indirectly.[52] There is therefore unequal treatment within the meaning of Article 21(1) CFR. According to the provision, no one may be

50 *Cf.* Botta 2022, p. 1250.

51 Id. p. 1251; Weichert 2024, p. 1538.

52 Dirk Heckmann, 'Grundrecht auf IT-Abwehr? – Freiheitsrechte als Abwehrrechte gegen aufgedrängtes E-Government', *Zeitschrift für das Recht der Digitalisierung, Datenwirtschaft und IT,* 2006, pp. 6 *et seq.;* Schulz 2021, p. 382; Weichert 2024, p. 1538.

treated unequally. In this context, this means that a lack of financial resources to purchase hardware or software may also lead to unequal treatment. The same applies to people with disabilities.[53]

Finally, forcing businesses to use only digital access, as is the case in Germany (*see* Section 2.2), puts them at a disadvantage compared to citizens. In addition, and this should only be mentioned in passing, it interferes with the freedom to conduct a business and, where applicable, the freedom to choose an occupation (Articles 15 *et seq.* CFR).

(ii) Justification. The unequal treatment of those who do not (or do not wish to) have digital access weighs little against the legitimate aims outlined above. Those treated unequally are likely to be a small group. For example, 95% of households in Germany used the internet in 2024.[54] Moreover, they can gain access in other ways, such as through internet cafés or by using public Wi-Fi hotspots.[55]

However, indirect unequal treatment based on age, lack of financial assets or disability weighs heavily. This affects a great number of people. The ease of technical access to administrative services must also be taken into account. The more technical skills are required, the fewer citizens possess them and the greater the intensity of unequal treatment. If "digital only" were applied to all services that could be digitalized, the majority of administrative services would no longer be available to citizens. Complete switchover therefore constitutes unjustified discriminations.

If some services can only be accessed digitally, it would be necessary to consider which services would be covered. This will depend on the importance of the digitalized administrative service and the target audience. What is clear is that digital-only access to essential services violates the CFR. Compulsory use of technology could negatively affect social services on which socially disadvantaged citizens depend. Unequal treatment in this area would be difficult to justify. This may be different, for example, in the case of digital-only applications to universities. The crucial factor here is that the applicants concerned are usually young and therefore digitally savvy and have a high level of education.

It would be possible to mitigate the intensity of the interference, if authorities would provide digital access options at their branches[56] and, if neces-

53 *Cf.* Weichert 2024, p. 1542.
54 Statista, Share of internet users in Germany in the years 1997 to 2024.
55 Verwaltungsgericht Würzburg (Administrative Court of Würzburg), decision of 13 July 2020 – 8 E 20.815, para. 32.
56 Botta 2022, p. 1251.

sary, also offer assistance there.[57] Also, hardship clauses would have a mitigating effect. With them, it would be possible to receive administrative services in analogue form for citizens, who do not have the necessary digital skills and/or the technology. With such hardship regulations, digital-only administrative services would also comply with fundamental rights.

The need for hardship clauses may change in the foreseeable future. The higher the level of digital literacy and the more widespread the hardware in the groups mentioned, the lower the intensity of the interference.[58] Nevertheless, there will always be a group, albeit a small one, that is excluded by exclusively digital offerings.[59] It would also be necessary to examine the degree of technical sophistication required for the digital access in question. The easier the digital access, the lower the intensity of interference.

The unequal treatment of businesses can be justified. This is because, as participants in business transactions, they are already technically equipped and have the know-how to transmit data electronically. The digital transformation is so far advanced that a hardship clause is not necessary.[60] However, for reasons of proportionality, the possibility of analogue access must be granted at least in emergencies, *i.e.,* in particular in the event of an Internet breakdown, cyber-attacks or similar.[61] Finally, it would be worth considering hardship clauses for micro-enterprises.

3.4.2. Nudges for the Use of Digital Communication Channels

It should also be discussed whether incentives for citizens to use digital channels also violate equality rights. Such regulations treat citizens unequally, depending on whether they use analogue or digital services. This particularly affects older citizens, see above. Various forms of unequal treatment are conceivable, such as reduced fees or faster processing, *see* Section 2.4.

The legitimate purposes of the incentive to use digital procedures are again those mentioned above, in particular the costs. In addition, the indi-

57 *Cf.* Heckmann 2006, p. 7.
58 Id. p. 6.
59 *Cf.* Weichert 2024, p. 1538.
60 *Cf.* Jonas Botta, Stellungnahme zum Entwurf eines OZG-Änderungsgesetzes (OZG-ÄndG), BT-Drs. 20(4)303 C, p. 9.
61 *Cf.* Annette Guckelberger, 'Gutachterliche Stellungnahme für den Ausschuss für Inneres und Heimat des Deutsches Bundestages' (sic!), Sachverständigen-Anhörung am 9. Oktober 2023 zum Entwurf eines Gesetzes zur Änderung des Onlinzugangsgesetzes, BT-Drs. 20(4)303 J, p. 7.

rect aim is also to ensure that more digital administrative services are used. These purposes also predominate, as both the order of processing and the costs are likely to correlate in principle with the processing effort involved.[62] Consequently, fundamental rights limits are only to be drawn where the unequal treatment is particularly pronounced, for example if the fee for an analogue administrative service is a several times greater than that the for digital administrative service.

3.5. Interim Result

As a preliminary conclusion, it can be stated that digital-only access for citizens to all administrative services that can be digitalized is compatible with fundamental rights only if there is a hardship clause. In the case of individual administrative services that can only be accessed digitally, the specific nature of the service must be taken into account. The more essential the service, the less likely it is to be compatible with the CFR without a hardship clause. On the other hand, a digital only obligation could be introduced for companies, provided that there is a hardship clause for technical problems. The mere privileging of the digital procedure is unproblematic from the perspective of equality law.

4. Ideas for Reform

In the legal policy debate, various ideas for reform need to be addressed, some of which have already been implemented and some of which have been formulated as demands. Firstly, there is a proposal at European level in a legislative resolution of the European Parliament on European administrative procedural law. The European Parliament recommends that "analogue alternatives to digital services should always be provided and offered clearly to citizens and companies, and a human contact point should be physically and remotely available to support citizens […]."[63] This goes beyond what is required by fundamental rights, see above. As far as can be seen, however, the Commission has not yet submitted a proposal.

62 *Cf.* Martini 2017, p. 450.

63 Digitalisation and Administrative Law, European Parliament resolution of 22 November 2023 with recommendations to the Commission on Digitalisation and Administrative Law, 2021/2161(INL), p. 9.

At national level, legislation already exists that prevents a digital-only access to administrative services, for example in France[64] Also, in Germany at state level different regulations exist. For example, the constitution of Schleswig-Holstein provides in Article 14(2): "Within the scope of its powers, the state shall ensure personal, written and electronic access to its authorities and courts. No one may be disadvantaged because of the type of access" (own translation). The first sentence of this provision is a state objective provision and not a fundamental right. Accordingly, multi-channel access to the state authorities and courts must be created, with scope for implementation.[65] According to the wording, this should also apply to companies. By contrast, sentence 2 contains a subjective right in the form of a requirement for equal treatment. It is argued that incentives intended to make the use of digital alternatives attractive to citizens or companies are therefore excluded because they constitute discrimination.[66] On the other hand, however, it should be noted that this requirement of equal treatment can be weighed against other legitimate objectives.[67] Overall, the added value of this provision is therefore low. The Free State of Bavaria has taken a different approach. Pursuant to Article 20(2) BayDIG, at least a hardship provision must be provided for when implementing digital administrative procedures.

There are also reform ideas at civil society level. Recently, an association published a petition for a life without digital restrictions.[68] In addition, an initiative led by the "Zeit-Stiftung" has published a proposal for a CFR.[69] Article 3(2) of this Charter states that no one may be denied access to goods and services or be excluded from participation in public life through the use of automated processes. This does not necessarily include purely digital access to administrative services, as an automated process does not have to take place.

It is clear that regulation would only be necessary for those aspects that are not already excluded by fundamental rights. Three possible regulations

64 Weichert 2024, p. 1540.

65 Christian Hoffmann & Sönke E. Schulz, 'Schleswig-Holsteins digitale Verfassung – Digitale Basisdienste, elektronischer Zugang zu Behörden und Gerichten und digitale Privatsphäre in der Schleswig-Holsteinischen Landesverfassung', *Zeitschrift für Öffentliches Recht in Norddeutschland,* 2016, pp. 392 *et seq.*

66 Id. pp. 394 *et seq.*

67 Botta 2022, p. 1252.

68 Digitalcourage, Petition gegen Digitalzwang, at https://digitalcourage.de/blog/2024/petition-fuer-recht-auf-ein-leben-ohne-digitalzwang-gestartet.

69 *See* at https://digitalcharta.eu/wp-content/uploads/DigitalCharter-English-2019-Final.pdf.

are conceivable. Either a regulation that provides for an analogue access to all administrative services that can be digitalized. This is the direction taken by the regulation proposed by the European Parliament. Alternatively, a regulation is perceivable, which, similarly to the BayDIG, at least provides for hardship cases for all digitalized administrative services. Finally, a provision inspired by the constitution of the state of Schleswig-Holstein, which excludes incentives for the use of digital access alone, is conceivable.

5. Conclusion and Outlook

European law creates the conditions for offering exclusively digital administrative services in the Member States and does not contain a general right of defence against this, at least not yet. In Germany, some administrative services are already offered exclusively in digital form, although this is still the absolute exception for citizens. By contrast, digital-only services for businesses are common in some areas, although there are hardship regulations. Finally, there can be incentives that privilege digital access.

The digital-only provision of essential administrative services to citizens is not compatible with the CFR. However, the situation is different if there are hardship clauses. Finally, digital access may be privileged from a fundamental rights perspective.

Existing legislation could be used as a blueprint for a regulation to be created in the future. However, it is still unclear how extensive the protection against compulsory digitalization should be. If the European legislator wishes to provide for a guarantee of analogous administrative access in the implementation of Union law, this would have to be explicitly included in the CFR or in secondary law. The parallel provision of analogue and digital access would conflict with the goal of rendering administration more effective. At the end of the day, it is conceivable that digital administration could prevail without any obligation, simply because it is easier to use and faster.