

affaires à caractère transnational existe déjà et va, à la faveur d'une intégration européenne croissante, connaître un surcroît d'intérêt, sans doute moins pour les entreprises commerciales que pour les particuliers. L'e-justice peut ainsi apporter une contribution significative à la construction européenne et adapter notre système juridique aux réalités du XXI<sup>e</sup> siècle.

## A Vision of e-Justice<sup>1</sup>

Thomas HOEREN

*Professor at the University of Münster (Germany)*

The vision of e-Justice seeks to create justice which is fully accessible electronically, without restriction. A new strategy, yet to be developed, could improve cooperation between judicial authorities at both national and European levels and thus contribute to a global justice network within the European Union.

To achieve these objectives, the legislature has created, in Article 91c of the German Basic Law (GG), the legal basis for a standardised computer system at the federal level for the entire German judicial system. In April 2010, a Computer Planning Council was established, as the central body for federal cooperation on Information and Communication Technology (ICT). Its mission is to create a common IT infrastructure for all computer networks, and to develop binding but transparent standards for electronic communication between the authorities concerned, the courts, lawyers and citizens.

In addition to existing computer applications used in the field of justice, such as the online procedure for the Order for Payment, the National Justice Portal, together with judicial and administrative mailboxes, hereafter EGVP<sup>2</sup> ([www.egvp.de](http://www.egvp.de)), additional solutions for the judicial system are currently sought. Among other such applications can be mentioned the "Voice and Video over Internet Protocol" (VoIP), broadband video links, e-mediation, speech recognition and digital shorthand, full recording of

1. The term is used by: B. BLECHINGER, *Moderne Justiz Elektronischer Rechtsverkehr*, ZRP 2006, 56; U. SCHERF, H. P. SCHMIESZEK and W. VIEFHUES, *Elektronischer Rechtsverkehr, Kommentar und Handbuch*, 2006; R. GUISE-RÜBE, *Die Bedeutung und die Chancen des elektronischen Rechtsverkehrs als Teil der Justizautomatisation*, JurPC Web-Dok. 103/2005, available online: [www.jurpc.de/aufsatz/20050103.htm](http://www.jurpc.de/aufsatz/20050103.htm); S. HÄHNCHEN, *Einführung: Was ist elektronischer Rechtsverkehr?*, JurPC Web-Dok. 151/2007, Paragraph 15, available online: [www.jurpc.de/aufsatz/20070151.htm](http://www.jurpc.de/aufsatz/20070151.htm)

2. In German, EGVP stands for "elektronischen Gerichts-und Verwaltungspostfach".



online visits, electronic service of court documents and electronic communication with the courts, and the introduction of automated paperless proceedings, combined with more powerful and comprehensive databases<sup>3</sup>.

The concept of e-Justice describes the application of ICT to all administrative procedures in the justice system. The most important role of e-Justice is to ensure rapid and secure electronic information exchange<sup>4</sup>, related electronic judicial transactions (hereafter EJT<sup>5</sup>), and the electronic communication of justice.<sup>6</sup>

## I – ONLINE COMMUNICATION BETWEEN THE PARTIES, THE JUDICIARY AND THE LAWYERS

As with any electronic form of communication, EJT can also be an open door to certain hazards, the extent of which it is difficult to predict. It is therefore all the more essential that EJT should be based on secure, confidential processing and exchange systems, which inspire trust in users. This is especially true in the case of legally binding electronic communication with the judiciary, such as the filing of complaints and other procedural statements, or the transmission of judicial decisions and messages concerning case files.

Electronic application is rather unusual in Germany, whereas in Austria, for example, electronic claims are the legal norm. Even as early as 2001, approximately 75% of all claims and 50% of all enforcement orders were filed electronically.<sup>7</sup>

### A. Data security and electronic signatures

In civil cases, the issue of data security is a critical element. The loss of electronic submissions could have dramatic consequences and would destroy confidence in e-Justice. The use of encryption techniques and certified electronic signatures thus helps to ensure the security of the proceedings in civil litigation.

3. *E-Justice: A Tool for Citizens, Practitioners and Business*, available online: [http://www.europarl.europa.eu/meetdocs/2004\\_2009/documents/dv/752/752580/752580en.pdf](http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/752/752580/752580en.pdf)

4. U. BERLIT, *E-Justiz: Chancen und Herausforderungen in der freiheitlichen demokratischen Gesellschaft*, JurPC Web-Dok. 171/2007, p. 2, available online: [www.jurpc.de/aufsatz/20070171.htm](http://www.jurpc.de/aufsatz/20070171.htm)

5. In German, "elektronische Rechtsverkehr" or ERV.

6. D. HECKMANN, in *JurisPK-Internetrecht*, Chapter 6: "Justizkommunikation", paragraph 1 et seq.

7. T. DEGEN and M. BREUCKER, *Anwaltsstrategien im elektronischen Rechtsverkehr – Mahnverfahren Klageverfahren, Signatur, Register*, Boorberg, 2007, paragraph 53.

Under Article I, paragraph 2 of the Digital Signature Act (*SigG*), all electronic signature processes are considered signatures, regardless of their level of security. They are all permitted, unless special provisions are required by other specific procedures (Articles 126, paragraph 3, and 126a of the Federal Civil Code *BGB*, Articles 1 et seq. *SigG*).

The possibility of electronic signature has existed for many years, but it is rarely used in the normal course of business, due to its complicated and, above all, necessarily reciprocal nature. The electronic signature is used to identify the author of a document and, at the same time, to encrypt its content, so that it can no longer be read by third parties. There are several possibilities to make an encrypted message readable again.

In the so-called **symmetric method**, both sides agree on a password, or 'secret' code, known only to them, with which the message can be decrypted. The difficulties are obvious: disclosure to third parties, faulty exchange of the common key for whatever reason, absolute necessity of reciprocity, no possibility of a general exchange unless the exchange procedure is repeated, which presents the same risks every time.

The **asymmetric method** works differently, however. There are two keys: the public key and the private key. The public key is for everyone and the private key is known only to its possessor and is accessible only to that person. The sender of an electronically signed message can encrypt it using the recipient's public key, which is accessible to everyone, and the recipient alone will be able to decrypt it with the private key (which is on the signature card) in order to read the message. This ensures that only the intended recipient can read the message. If the recipient responds, it will be with the public key of the original sender of the message, who will be the only person with access to the private key needed to decrypt it. The signature process using private keys allows the unambiguous identification of the signer and ensures the integrity of the document.<sup>8</sup>

As can be seen, this process is in some degree an obstacle to the ease of electronic communication. Nevertheless, and in the opinion of the legislature, electronic signatures and associated encryption are both necessary to the successful use of EJT.

As a tool of e-Justice, the use of EJT is considered by lawyers to be a source of both risks and challenges. The binding nature of electronic communications directly concerns lawyers, who have a duty of confidentiality. The principle of confidentiality (as laid out in Article 43a of the Federal Code for the Legal Profession *BRAO*, Article 2 of the Professional Code for Lawyers *BORA*, Article 57 of the German Tax Advisory Act *StBerG*, Article 43 of the Public Accountants Act *WPO*, and Article 203 paragraph 1 of the German Penal Code *StGB*) requires that, at the very

8. G. SCHMALER, *Der elektronische Rechtsverkehr im Notariat*, available online: <http://www.network.net/dav/vortrag-koeln0306.pdf>



least, confidential e-mails should be electronically signed.<sup>9</sup> For ordinary correspondence, this solution would also be useful if the communication contains information pertaining to the lawyer-client relationship, as would be the case, for example, for the sending of invoices. In such a case, the electronic signature would be of considerable assistance. In such circumstances, an electronic invoice can be created, using the signature card, thus providing an alternative to printed invoices.<sup>10</sup>

Comprehensive use of paperless exchanges is yet to come. Even those law firms which already use EJT have still not abandoned traditional methods of communication. In some firms<sup>11</sup>, EJT are treated as regular mail. Electronic mailboxes are emptied at certain times, and documents are printed, stamped and filed away. The advantage of the method lies in the time saved, but only if the data are forwarded electronically to the client. In all other cases, the method is time-consuming and requires considerable resources. Many tasks are thus performed in duplicate, with the costs being borne exclusively by the legal firm.

### B. The EGVP: a secure but complicated system

The electronic judicial and administrative mailbox (EGVP) is simply an extended mailbox, to which only previously registered participants may gain access. The software consists of an input and an output tray, as found in regular e-mail applications. For all sent messages, it is possible to track precisely the date and time of sending, together with the identity of the recipient, and the content of the message. As soon as a message has been sent, secure proof of successful access to the relevant judicial service is available<sup>12</sup>. Before sending, messages are signed using a signature device (card reader and signature card). The electronic signature replaces the hand-written signature with full legal effect, while also making immediately visible any slight changes that might have taken place in the message after sending. In fact, only the so-called "electronic envelopes"<sup>13</sup> and not the files themselves are thus signed.

The data that are transmitted to the jurisdiction must be able to be opened and processed. The selection of the software required is particularly important. With the use of several different software programs, there is

9. T. DEGEN, *E-Justiz und E-Government als Web 2.0-Angebote für Rechtsuchende und Verfahrensbeteiligte*, available online: <http://www.online-agb.de/index.php?id=145>

10. T. DEGEN and J. DEISTER, *Computer- und Internetrecht, Vertragsgestaltung E-Commerce und Datenschutz*, 2009, paragraph 483 et seq.

11. T. WINKLER and C. PUSTEJOVSKY, *Bericht über erste Erfahrungen mit dem elektronischen Rechtsverkehr*, available online: <http://www.rechtsanwaltskammer-freiburg.de/rak/fileadmin/dokumente/EGVP-kurz-Bericht.pdf>

12. *Ibid.*

13. *Ibid.*

a risk that the signatures may not be detected<sup>14</sup> and sometimes the files transmitted are rendered unreadable.

The use of EGVP requires high initial investment and substantial maintenance costs. It requires dedicated programs and smart cards, and the user may need to purchase new computer equipment, offering greater storage capacity. This is all the more annoying for the user in that the EGVP has not yet reached its full technical maturity.

Some reports suggest that sending large documents (over 2 MB) generates frequent transmission errors. This is all the less acceptable as the maximum size permitted for messages, which can hold up to 100 files, is 30 MB.<sup>15</sup>

In addition, the advantage of the EGVP, consisting in never having to dash to the late-night collection box at a post office, is considerably less advantageous when, in the course of 'last-minute' proceedings, on attempting to transmit the findings, a delivery failure message is received to inform the sender that: "Due to system maintenance, our service will be unavailable from 6.00 pm on 16 June 2011 to 8.00 am on 20 June 2011."<sup>16</sup>

Furthermore, the EGVP is often considered to be insufficiently integrated into the judicial process. In the example above,<sup>17</sup> the findings instituting proceedings, intended for the jurisdiction of the orders for payment ("Mahngericht"), were not forwarded by electronic means to the court, but were rather sent by regular post, and a printed paper copy was filed in the proceedings in the traditional manner. This not only leads to unnecessary expenditure of time, it also sabotages the uninterrupted chain of communication with the judiciary.

Even the introduction of a new version, EGVP 2.7.0, has recently caused serious problems, referred to by the EGVP steering committee as an "unfortunate chain of circumstances". First, the new software encountered major installation problems. After this breakdown had been resolved, only limited use of the EGVP was possible. Messages sent in the evening could not be transmitted until the following morning. It was necessary in some cases to repeat the sending process several times. In fact, the EGVP remained unusable for two whole days, requiring a great deal of time and patience from the users. The EGVP steering committee officially apologised in a letter<sup>18</sup> to all users of the EGVP and explained the problems that had occurred. Whether this will have sufficed, however, to regain the trust of the users is a question that remains to be answered.

14. *Ibid.*

15. *Ibid.*

16. T. LAPP, *EGVP - Wir sind dann mal weg*, available online: <http://blog.beck.de/2011/06/15/egvp-wir-sind-dann-mal-weg>

17. T. LAPP, *EGVP funktioniert nicht mal innerhalb der Justiz*, available online: <http://blog.beck.de/2011/09/06/egvp-funktioniert-nicht-mal-innerhalb-der-justiz>

18. *Entschuldigung des Lenkungskreises EGVP*, available online: <http://www.egvp.de/EGVP-Update-2.7-Entschuldigung-egvp-de.pdf>



### C. Parties to the proceedings without legal representation

Electronic communication for citizens without legal counsel is still not guaranteed in a satisfactory manner.

E-Justice must always be centred on human beings, who must be included in the judicial process, which must also have their needs as its final aim. A citizen is guaranteed the right to effective judicial protection by Article 19, paragraph 4 of the German Basic Law (GG). In the field of e-Justice, one of the basic rules is that 'electronification' must not create unreasonable barriers to access for the litigant<sup>19</sup>. The function of the judiciary in a constitutional state is precisely to guarantee effective judicial protection for its citizens. This mission, entrusted to the judiciary under the German Basic Law (GG), must in no way be impeded.<sup>20</sup>

In addition, it should be noted that e-Justice may become a dehumanised system. It may deprive some citizens, those unable defend themselves through lack of adequate knowledge of the judicial system, of the possibility of personal communication or contact with the judge, thereby destroying their confidence in the judicial system.

These obstacles would be eliminated if every citizen had the opportunity of electronic access to the judiciary. This could for example be achieved by providing every citizen with an electronic address. Citizens without their own computers could gain access to this e-mail function<sup>21</sup> in public areas specially created for this purpose. In addition, in any contract, could be included a commitment to specify the e-mail addresses of the parties, and to use them in the event of a dispute over the implementation of the contract.<sup>22</sup> Furthermore, the new ID card could be used to meet the requirement of integrity and authenticity of the data. Through this electronic proof of identity via internet, all remaining questions relating to the integrity and authenticity of data would thus be solved.

Public confidence in the system is of crucial importance. If every electronic communication with a public body or jurisdiction generates the fear of installing Trojan horses on the home or office computer, at the initiative of the State, for surveillance purposes, the appeal of electronic communication with the administration and the jurisdictions will inevitably lessen.<sup>23</sup> E-Justice thus inadvertently contributes to the controllability of

19. U. BERLIT, in J. BRANDT and M. SACHS, *Handbuch Verwaltungsverfahren und Verwaltungsprozess*, 3rd edition, 2009, p. 1180.

20. M. SECKELMANN, in F. BIELER and G. SCHWARTING, *E-Government*, p. 33 et seq.

21. *E-Justice: A Tool for Citizens, Practitioners and Business*, available online: [http://www.europarl.europa.eu/meetdocs/2004\\_2009/documents/dv/752/752580/752580en.pdf](http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/752/752580/752580en.pdf)

22. *E-Justice: A Tool for Citizens, Practitioners and Business*, available online: [http://www.europarl.europa.eu/meetdocs/2004\\_2009/documents/dv/752/752580/752580en.pdf](http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/752/752580/752580en.pdf)

23. G. BRITZ, "Von der elektronischen Verwaltung zur elektronischen Verwaltungsjustiz", *DVBL*, 2007, pp. 993-997.

the people by the State. This is the negative aspect of the "digital world",<sup>24</sup> which can only be countered by ensuring the complete security of ICT applications.

### II - PROCEEDINGS IN COURT VERSUS ELECTRONIC PROCEEDINGS

The electronic hearing, as an integral part of the vision of e-Justice, offers a number of advantages. Among these may be mentioned the acceleration of the proceedings by an earlier date for the hearing, a reduced caseload for judicial officers, and a significant reduction in travel time and cost, which is particularly advantageous if one of the parties is in another country.

Despite these advantages, absolute reliance on electronic proceedings alone would be unthinkable, if such reliance caused German Basic Law (GG) or other general legal principles to be violated. This refers in particular to the principles of orality, immediacy, and publicity of the debates.

The principle of orality, closely related to the guarantee of a public hearing, in accordance with Article 169 of the German Code on Court Constitution (GVG) and Article 6 of the European Convention on Human Rights, finds its extension in the principle of immediacy (see Articles 285 and 355 of the German Code of Civil Procedure ZPO)<sup>25</sup> and implies that, pursuant to the Code of Civil Procedure (ZPO), the parties must engage in oral debate before the relevant jurisdiction in any proceedings and in the case of any form of appeal.<sup>26</sup> In the same way, the decision of the court must, in principle, be based on the oral debates alone.<sup>27</sup> The substance of the rule of orality, which remains a cardinal principle of the trial,<sup>28</sup> lies precisely in the fact that, at the hearing, the elements of the dispute are discussed contradictorily in the simultaneous presence of both parties.

Even if tailored to the needs of the parties, who are the direct beneficiaries of the fundamental principles mentioned above, purely electronic proceedings would inevitably be prejudicial to the rules of orality and immediacy,

24. U. BERLIT, *E-Justiz: Chancen und Herausforderungen in der freiheitlichen demokratischen Gesellschaft*, JurPC Web-Dok. 171/2007, p. 3, available online: [www.jurpc.de/aufsatz/20070171.htm](http://www.jurpc.de/aufsatz/20070171.htm)

25. R. GREGER, in R. ZÖLLER, *ZPO Kommentar*, 28th edition 2010, § 128 paragraph 1; P. HARTMANN, in A. BAUMBACH, W. LAUTERBACH, J. ALBERS and P. HARTMANN, *ZPO*, 68th edition 2010, § 128 paragraph 1; K. REICHOLD, in H. THOMAS and H. PUTZO, *ZPO*, 30th edition 2010, § 128 paragraph 1.

26. P. HARTMANN, in A. BAUMBACH, W. LAUTERBACH, J. ALBERS and P. HARTMANN, *ZPO*, 68th edition 2010, § 128 paragraph 4; OLG Zweibrücke. U. v. 19.5.1982 - Az. 2 U 2/82, OLGZ 83, 329.

27. BGH, U. v. 2.2.1999 - Az. VI ZR 25/98, NJW 1999, 1339; LG Saarbrücken, E.v. 17.12.1992 - Az. 2 S 165/92, NJW-RR 1993, 830.

28. P. HARTMANN, in A. BAUMBACH, W. LAUTERBACH, J. ALBERS and P. HARTMANN, *ZPO*, 68th edition, 2010, Transl. § 128 paragraph 3 et seq.



if either of the parties, unassisted by a lawyer, was unable to adopt the correct written form of expression, for they would then be at a greater disadvantage with electronic proceedings than with conventional proceedings.

On the other hand, the right of access to court (Article 103 of the German Basic Law *GG*), a fundamental principle of the law of the State, remains unaffected by electronic proceedings.

This principle requires that plaintiffs should have the practical capacity to submit their claims and to justify them. The German expression "*Gehör*" and the French "*accès au juge*" both seem to presuppose an oral debate. However, unlike the principle of orality, the right of access to court can be guaranteed by means of written access to the judge.<sup>29</sup> Therefore, this principle does not contain the right to an oral trial, which explains the absence of violation of the right of access to court if the hearing takes place by written rather than by oral means, despite current procedural norms.<sup>30</sup> However, it is essential for the litigant to have been given the opportunity to produce a written argument.<sup>31</sup>

The principle of publicity gives the public the opportunity to observe the conduct of the hearing.<sup>32</sup> As long as publicity is assured, it does not matter whether the hearing takes place in the courthouse, in other rooms or outdoors (e.g. during a site visit).<sup>33</sup>

If electronic hearings are compared to the technique of videoconferencing, under Article 128 of the German Code of Civil Procedure (*ZPO*), and for which the principle of publicity is not for the place of recording,<sup>34</sup> but of viewing, then the following problem is encountered: an electronic hearing removes the notion of the courtroom, which is replaced at most by the place of recording. A solution could be found, however, with the existence of a virtual courtroom. A section of the website could offer a virtual space for the court hearing, allowing access to recorded debates by specific links. The internet consultation of online hearings, however, whether through videoconferencing or in writing, should be limited in duration to that of the trial.

The possibility of subsequent consultation would violate the principle itself and would also be in contradiction with existing legislation, as stated in the second sentence of Article 169 of the German Code on Court Constitution (*GVG*). It is also debatable whether even the mere live broadcast of electronic discussions is not in itself contrary to law. The second

29. R. GREGER, in R. ZÖLLER, *ZPO Kommentar*, 28th Edition 2010, § 128 paragraph 1.

30. BayVerfGH, E. v. 7.12.1990 – Az. Vf32 – VI/90, NJW 1991, 2078; a.A. OLG München, B. v. 26.11.1982 – Az. 25 W 2472/82, MDR 1983, 324.

31. BGH, B. v. 28.8.2003 – Az. I ZB 5/00, WRP 2003, 1444.

32. BVerfG, B. v. 15.3.1960 – Az. 2 BvR 166/60, NJW 1960, 765.

33. RGZ 157, 344.

34. H. SCHULTZKY, Videokonferenzen im Zivilprozess, NJW 2003, p. 313.

sentence of Article 169 of the *GVG* forbids audio, television and video recordings of the proceedings for the purpose of public display or disclosure of their contents.

Under the precise wording of the law, only audio and video recordings are included in the ban. However, a purposive interpretation of the intent and scope of the text could include in the ban the live broadcast of electronic discussions, particularly with regard to the personal rights of the parties, which require even greater protection in the specific setting of a trial.<sup>35</sup>

Nevertheless, electronic discussions should not be governed by rules different from those of conventional hearings and the protection of individual rights does not require exceptional reinforcement in such a case. If such protection has been, to date, sufficiently guaranteed by the prohibition of continuous recording of the discussions for distribution to the public, then the ban will also constitute an adequate standard of protection in the case of electronic debates.

It is clear that electronic access to on-going court proceedings via internet is not really comparable with genuine audio-visual recording. Whereas, in the latter case, the recordings of the proceedings are stored permanently for the purpose of public display, the recording in the case of an electronic hearing is stored only temporarily, and is never intended for public broadcasting. The scope of the second sentence of Article 169 of the *GVG* is therefore not affected.<sup>36</sup>

### III – THE COMPATIBILITY OF E-JUSTICE WITH THE INDEPENDENCE OF THE JUDGE

As a matter of principle, e-Justice has to be efficient, thus leading to a reduction in the workload of the judiciary, especially that of judges. The use of ICT in the judicial system is however often perceived as a burden. Some judges considered that the new computer applications impeded their independence, which is guaranteed under German Basic Law (*GG*).

E-Justice is in fact closely related to the constitutionally guaranteed independence of the judiciary (Article 97 of the German Basic Law *GG*). The Litigation Service for the Judiciary (*Dienstgerichtshof für Richter*) at the Court of Appeal of Hamm<sup>37</sup> ruled in favour of a judge, finding that,

35. C. LÜCKEMANN, in R. ZÖLLER, *ZPO*, 28th edition 2010, § 169, paragraph 15.

36. BGH U. v. 4.02.1964 Az: 1 StrR 510/63, BGHSt 19, 193; OLG Schleswig, B. v. 6.05.1992, Az: 2 Ws 128-92, NSStZ 1992, 399; OLG Bremen, B. v. 10.01.2007, Az: Ws 233-234/06, NSStZ 2007, 481.

37. OLG Hamm, B. v. 20.10.2009 – Az: 1 DGH 2/08.



under the principle of independence granted by Article 97 of the GG, magistrates were authorised to organise their workload as they saw fit, and could therefore refuse to work with a computer.

More generally this means that, although it is acceptable to provide judges with ICT access, they are under no obligation to implement it, to the exclusion of all other alternatives. The Litigation Service (*Dienstgericht des Bundes*) of the German Federal Court of Justice (BGH) issued a decision of principle,<sup>38</sup> simply asserting that judges had the basic right for their opinion to be taken into account, in a way that is not discretionary, in the allocation of the personal resources and material means required for the performance of their function.<sup>39</sup> Judges cannot assert claims under any other law regarding this matter.

This analysis also seems convincing. For judges, the implementation of ICT not only facilitates and lightens the burden of their judicial functions, it also assists in the exercise of discretion, especially with regard to the sometimes overwhelming wealth of legislation applicable to the case. In addition, the judges' independence as guaranteed under Article 97 of the German Basic Law (GG) is not a "*privilege that allows the judge to oppose all reform*".<sup>40</sup> The legal status of judges is not guaranteed simply in order to please them,<sup>41</sup> but rather to protect them from any form of outside influence in the exercise of their judicial functions. Similarly, the right of citizens to obtain justice is also guaranteed.<sup>42</sup>

#### IV – PROCESSES WITHIN THE JUDICIAL SYSTEM

Among the processes included in the judicial system are in-house processing circuits (workflow), electronic file management and computer archiving.<sup>43</sup>

The challenge of e-Justice at this level is the seamless technical treatment of information, including the interconnection of registers and databases, the continuous provision of information and the long-term and incontestable archiving of electronic court records and binding decisions.

Ensuring seamless information processing depends not only on organisational and technical requirements, but also on the willingness of the

38. BGH, U. v. 21.10.2010 – Az: RiZ (R) 5/09, available online: <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=059976ac67dd25f39bbc9f66d8426d9c&nr=54374&pos=0&anz=1>

39. BGH, U. v. 25.09.2002, Az: RiZ(R) 2/01, NJW 2003, 282.

40. H. SCHULZE-FIELITZ, in: H. DREIER, *Grundgesetz*, Bd. III, 2000, Art. 97 Paragraph 54.

41. M. BALLHAUSEN, *IT und Justiz*, Chapter 3, III. 2. a).

42. See for further information: C. HILLGRUBER in T. MAUNZ and G. DÜRIG, *Grundgesetz*, 58. Supplement 2010, Art. 97 paragraph 4.

43. See Susanne HÄHNCHEN, *Einführung: Was ist elektronischer Rechtsverkehr?*, JurPC Web-Dok. 151/2007, paragraph 16, available online: [www.jurpc.de/aufsatz/20070151.htm](http://www.jurpc.de/aufsatz/20070151.htm)

parties to implement it. Regarding this point, the opinions of users vary widely. While some parties to the trial already work with electronic records, others still regard paper documents as the leading medium used in their domain.

The issue of seamlessness also arises from the fact that certain acts or documents, by their nature or size, will not support uninterrupted computer processing (e.g. cases involving construction rights with building plans or documents which need to be stored as originals). The emergence of so-called hybrid documents is thus inevitable. These will continue to exist, for some time yet, as a *de facto* result of e-Justice.

Electronic processing has many advantages. With suitable management and adequate program design, the information contained in electronic records could, for example, be structured according to a scheme to facilitate the judicial analysis of their contents. By linking the different elements of a case, both with the relevant judicial standards, and with the appropriate case law and doctrine, the system of decision support would also serve in knowledge management.<sup>44</sup>

The information transmitted electronically to the jurisdiction could be taken into account without any additional data entry, and used directly throughout the remainder of the proceedings. The inbox could, for example, be set up so that, on the basis of information received, other processes could be implemented, such as resubmission at set dates, advance on costs, etc.

With regard to electronic file management, it should be noted that converting a document from paper to electronic format, or vice versa, is prone to error. This is all the more dangerous in that proper record-keeping is essential for confidence to subsist in the documents on file.<sup>45</sup>

Similarly, for electronic records, the guarantee of stability over time may still be improved. The long-term archiving of data is a key issue. In the absence of sufficiently long experimentation in this area, issues relating to technical design and storage methods remain for the present unanswered. The migration of existing storage devices and the compatibility of data formats represent major risk factors.

Integrity and confidentiality form the first commandment, which applies to all procedures within the judicial system, but also to e-Justice as a whole. In other words, it is essential to ensure treatment of personal data that nevertheless respects privacy.

44. *E-Justiz/Zweiter nationaler IT Gipfel* pp. 5-6, available online: <http://files.messe.de/cmsdb/007/12233.pdf>

45. U. BERLIT, *E-Justiz: Chancen und Herausforderungen in der freiheitlichen demokratischen Gesellschaft*, JurPC Web-Dok. 171/2007, p. 2, available online: [www.jurpc.de/aufsatz/20070171.htm](http://www.jurpc.de/aufsatz/20070171.htm)



In Germany, all individuals have the right to determine the fate of their personal data. This constitutional right was clarified in 1983 by the Federal Constitutional Court (*BverfG*)<sup>46</sup> and covers all personal data, whatever the degree of importance. In its interpretation, the Federal Constitutional Court found that, because of the opportunity for interconnection and data-processing options offered by ICT, even data considered insignificant by the person concerned may acquire a new dimension or value, unsuspected by its owner, so that no data may be considered insignificant.

As a result, the transition to electronic judicial file management therefore entails that the highest standards of security should be respected for case management. Such a view seems essential in the case of judicial records, precisely because of the extreme sensitivity of the personal data they contain.

### Conclusion

For the implementation of e-Justice, each step in the judicial process must be seen as a link in an unbroken chain. If e-Justice fails in a given area, it will also be doomed to failure in other areas.

E-Justice will only be meaningful if it is conceived of as a comprehensive whole, with seamless deployment of the electronic media involved. The practical implementation of e-Justice must be user-friendly, making it accessible even to novices without IT skills. It must in no way deprive any litigant of access to court, or even make such access more difficult.

Such risks, however, seem quite unlikely to occur with e-Justice. On the contrary, the possibility of electronic access to court proceedings provides, in itself, a much easier means of gaining access to court than is currently the case. Proceedings for which the parties were previously forced to travel long distances may now be conducted in a manner that is both simpler and certainly less expensive, if electronic means are available.

It is also important not to lose sight of the public service aspect of justice. This argument for localisation works in favour of the German economic area. The need for justice in proceedings with a cross-border element already exists and, with increasing European integration, this need can only grow, possibly even more for individuals than for commercial enterprises. E-Justice can thus make a significant contribution to European development, while adapting our judicial system to the realities of the twenty-first century.

46. BVerfG, U. v. 15. 12. 1983, Az. 1 BvR 209, 269, 362, 420, 440, 484/83.

## Vision der E-Justiz<sup>1</sup>

Thomas HOEREN

*Professor an der Universität Münster (Deutschland)*

Die Vision der E-Justiz: Es soll eine umfassend und uneingeschränkt elektronisch erreichbare Justiz geschaffen werden. Eine neu zu entwickelnde Strategie soll die Zusammenarbeit der Justizbehörden auf nationaler sowie auf europäischer Ebene verbessern und somit zu einer Vernetzung des Justizbereiches auch in der Europäischen Union beitragen.

Um den Zielen gerecht zu werden hat der Gesetzgeber in Artikel 91c GG eine Grundlage für die bundeseinheitliche IT in der Justiz geschaffen. Im April 2010 folgte dann die Einrichtung eines IT-Planungsrates als zentrales Gremium für die föderale Zusammenarbeit in der Informationstechnik. Seine Aufgabe besteht in Bildung der gemeinsamen IT-Infrastruktur für die IT-Netze, sowie der Herausarbeitung der verbindlichen und transparenten IT-Standards für die elektronische Kommunikation zwischen den beteiligten Behörden, Gerichten, der Anwaltschaft und den Bürger.

Neben den bereits funktionierenden IT-Anwendungen in der Justiz wie dem online-Mahnverfahren, dem bundeseinheitliche Justizportal sowie dem elektronischen Gerichts- und Verwaltungspostfach<sup>2</sup> ([www.egvp.de](http://www.egvp.de)), wird nach weiteren IT-Lösungen für die Justiz gesucht. Zu solchen gehören u.a. Voice- und Video-over-Internet-Protokoll (VoIP), schnelle Videolinks, E-Mediation, Stimmerkennung und digitale Stenografie, integrale Online-Besucheraufzeichnung, die elektronische Zustellung von Schriftstücken und die elektronische Kommunikation mit Gerichten, papierlose Verfahren

1. Zu den Begrifflichkeiten B. BLECHINGER, *Moderne Justiz Elektronischer Rechtsverkehr*, ZRP 2006, 56; U. SCHERF, H. P. SCHMIESZEK, W. VIEFHUES, *Elektronischer Rechtsverkehr. Kommentar und Handbuch* 2006; R. GUISE-RÜBE, „Die Bedeutung und die Chancen des elektronischen Rechtsverkehrs als Teil der Justizautomatisation“, JurPC Web-Dok. 103/2005, abrufbar unter [www.jurpc.de/aufsatz/20050103.htm](http://www.jurpc.de/aufsatz/20050103.htm); S. HÄHNCHEN, „Einführung: Was ist elektronischer Rechtsverkehr?“, JurPC Web-Dok. 151/2007, Abs. 15, abrufbar unter: [www.jurpc.de/aufsatz/20070151.htm](http://www.jurpc.de/aufsatz/20070151.htm).

2. Im Folgendem „EGVP“.