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# AUTOMATION OF ADMINISTRATIVE ACTS: AN EXAMPLE OF THE GERMAN ADMINISTRATIVE PROCEDURE ACT


## Abstract

The subject of this paper is an analysis of the 2016 amendment to the German Administrative Procedure Act (*Verwaltungsverfahrensgesetz*), which introduced fully automated administrative acts. The purpose of the discussion is to evaluate the current status of the law on issuing automated acts and to identify the risks associated with the automation of administrative acts.



## KEYWORDS

Artificial Intelligence, public administration, automation of administrative acts

**SŁOWA KLUCZOWE**

sztuczna inteligencja, administracja publiczna, automatyzacja aktów administracyjnych

## I. INTRODUCTION

It is an unquestionable truism to claim that automation and digitization carry enormous innovative potential and a wide range of possibilities. It is, therefore, not surprising that these developments are equally of interest to legislators in the process of devising the basis for the operation of state structures, including public administration. The progressive advancement of artificial intelligence has propelled automation in public administration to become the subject of increasingly vigorous scholarly and social debate, as well as the centrepiece of legislative activity aimed at implementing instruments in administrative processes which enable the automatic issuance of administrative decisions. It is not surprising, either, that, after the successful implementation of automation processes in the private sector, the idea of process automation has also become more prevalent in the discourse around the reform of public administration, and in particular those of its areas where this could bring about significant relief for administrative structures, whilst generating substantial financial savings. It should be noted that automation has the potential to achieve measurable benefits by actualizing the principle of expeditiousness of proceedings and thus help attain measurable savings of personal and public resources.[1]

The foregoing is related to the development of modern technology, which played a key role as an operational instrument in discharging the basic functions of the state, including public administration, during the pandemic caused by the COVID-19 virus. It was the advancement of technology, together with identified both contemporary and future needs, that drew attention to the possibilities of using new technologies in the area of automation of many activities, including administration in the broadest sense, where, until recently, the participation of the human factor seemed indispensable and necessary.

However, the automation of administration processes engender not only benefits but also risks. The dehumanization and anonymity of adjudication give rise to significant problems related to the need to comply with elementary principles

[1] Heribert Schmitz and Lorenz Prell, *Neues zum E-Government. Rechtsstaatliche Standards für E-Verwaltungsakt und E-Bekanntgabe im VwVfG* (2016) 18 Neue Zeitschrift für Verwaltungsrecht 1273.

in administration, and thus necessitate careful and controlled implementation and application.

The Polish legislator is facing the problem of increasing automation in administrative procedures, which is part of the digitization of administration, or, more aptly, its next stage. Changes in this regard can already be observed in the legislative area, for example, in the provisions of the Administrative Procedure Act, or the Law on Enforcement Proceedings in Administration.[2] Nevertheless, Germany is undoubtedly spearheading innovation in this regard, having previously introduced pertinent regulations. It is therefore worth taking a deeper look at these solutions and evaluating them in the context of the challenges faced by the Polish legislature.

The aim of this paper, for the sake of brevity, is not to present and evaluate all manifestations of automation of administration in German law, but only to analyse this phenomenon with regard to administrative proceedings (*Verwaltungsverfahrensgesetz*),[3] with a particular focus on the 2016 amendment to the same, which was introduced in parallel with a revision to the Tax Law (*Abgabenordnung*) and the Tenth Book of the Social Code (SGB X). The primary objective of this study is to assess the current state of the law on the issuance of automated acts and to identify challenges that will inevitably be faced when legislating on an automated administrative act.

## II. SOCIO-ECONOMIC JUSTIFICATION FOR THE AUTOMATION OF GERMAN ADMINISTRATIVE PROCEDURE

On 17 June 2016, the Federal Council approved a resolution of the Bundestag to amend the tax law.[4] A recommendation of the amending bill and a report of the Finance Committee indicated that in view of the social and economic changes taking place at the time, the increasing digitization of all areas of life, and the projected demographic crisis leading ultimately to an aging population, technical and organizational modernization and an adjustment of legal regulations are nec-

[2] See Piotr Rączka and Seweryn Sasin, 'Automation of Administrative Enforcement Proceedings Using the Examples of the Administrative Enforcement Act for the Free State of Saxony (SächsVwVG) and the Polish Act on Administrative Enforcement Proceedings (EgzAdmU)' in M. Löhnig and others (eds), *Poland in Good Constitution? Contemporary Issues of Constitutional Law in Poland in the European Context*, vol 5 (Böhlau Verlag 2023) 237.

[3] Verwaltungsverfahrensgesetz in der Fassung der Bekanntmachung vom 23. Januar 2003 (BGBl. I S. 102), das zuletzt durch Artikel 24 Absatz 3 des Gesetzes vom 25. Juni 2021 (BGBl. I S. 2154) geändert worden ist, i.e. German Administrative Procedure Act as amended (VwVfG).

[4] Documents on the legislative procedure are available at <http://dipbt.bundestag.de/extrakt/ba/WP18/712/71245.html> accessed 10 September 2023.

essary in order to maintain a tax procedure that efficiently fulfils its tasks.[5] One of the changes introduced by virtue of this amendment was § 35a added to the German General Administrative Procedure Act (VwVfG), i.e. a provision facilitating fully automated issuance of administrative acts.

In the aforementioned report, the positive effects associated with the introduced regulation were contended to entail a reduction in the bureaucratic burden, increased profitability and efficiency due to the more widespread use of information technology, as well as simpler and easier management of the tax procedure. The report also made an estimate of the financial impact of those changes. However, presenting all the costs associated with the amendment mentioned in the report could appear misguided, given that the amendment of the tax law in question conjoined the introduction of automation of administrative acts into the administrative procedure with amendments to other statutory provisions. Nonetheless, one cannot ignore the fact that, according to the report, sending 80% of tax certificates electronically will allow savings of EUR 19,504,000.

Considering the above, it is also worth referring to other studies proving the cost-effectiveness of providing administrative services digitally and the economic viability of implementing automation. The cost-effectiveness of implementing automation is also illustrated by a report drawn up by the National E-Government Competence Center e.V. (NEGZ) report, which indicated that automating the issuance of parking permits in a municipality with a population of about 250,000 would save about EUR 750,000.[6]

In addition, a published expert report commissioned by the National Standards Review Board shows that an efficient e-government system would save companies EUR 1 billion a year, and in public administration as much as EUR 3.9 billion.[7] Moreover, the implementation of automation processes is closely correlated with the digitization of administration. It is germane, therefore, to the discussion to cite a study by the National Standards Control Board[8] (*Der Nationale*

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[5] Deutscher Bundestag Drucksache 18/8434. Beschlussempfehlung und Bericht des Finanzausschusses (7. Ausschuss) zu dem Gesetzentwurf der Bundesregierung – Drucksache 18/7457 – Entwurf eines Gesetzes zur Modernisierung des Besteuerungsverfahre (German Bundestag Paper No. 18/8434. Resolution Recommendation and Report of the Finance Committee (7th Committee) on the Federal Government's Draft Law – Paper No 18/7457 – Draft Law on the Modernization of the Taxation Process).

[6] Benjamin Fadavian and others, ***Data Driven Government*** (2019) 4 Berichte des NEGZ <www.regioit.de/Portals/0/Dokumente/sonstige-dokumente/negz-kurzstudie-data-driven-government.pdf?ver=WeJ1EFtyYQv2OmSi_rlOQA%3D%3D> accessed 26 March 2023.

[7] McKinsey, *Mehr Leistung für Bürger und Unternehmen: Verwaltung digitalisieren. Register modernisieren* (im Auftrag des Nationalen Normenkontrollrats 2017) 10, 16, 55 <www.normenkontrollrat.bund.de/Webs/NKR/SharedDocs/Downloads/DE/Gutachten/2017-nkr-gutachten-registermodernisierung.pdf?__blob=publicationFile&v=2> accessed 20 September 2023.

[8] This is an advisory body to the federal government that, since 2006, has been reviewing the transparency and intelligibility of the presentation of bureaucratic costs resulting from information

*Normenkontrollrat*), according to which citizens in Germany could save some 84 million hours a year if administrative services were provided digitally.[9]

However, the support for implementing automation in administration was not underpinned exclusively by financial reasons. German academic writers surmise that public administration will face serious challenges in the future, such as the reduced availability of qualified employees in government offices. Staff shortages, as the outcome of demographic changes, will force public administration to provide their services with fewer employees.[10] This, in turn, necessitates measures to be introduced in administrative procedures that would reduce workload in public offices.

In this context, it should be noted that the German legislator also argued for the introduction of automation as a response to demographic problems associated with the ongoing aging of the German population. Indeed, imminent demographic problems are closely correlated with potential personnel shortages in the administration. The implementation of automation is thus intended to be an adequate response to the forecasted staffing problems in government offices.

In conclusion, it should be emphasized that the motives of the German legislator in the analysed scope were not only financial ('cost-saving') but also directed *pro futuro*, which, to a large extent, testifies to their rationality. Indeed, the anticipation of social changes and the appropriate adaptation of legal regulations to upcoming challenges should be assessed positively.

## III. IMPLEMENTATION OF AUTOMATION IN ADMINISTRATIVE PROCEDURE

As already indicated in the introduction, the framework of this paper does not allow a comprehensive discussion of the amendments made for the purpose of automation in tax law, in particular, the changes made precisely to the German Tax Law and the Social Code. For these reasons, the discussion has been limited to the automation of issuance of administrative acts in light of the changes made to the German Administrative Procedure Act.

obligations and total follow-up costs in all bills and regulations since 2011 as well as regulations drafted by the federal government.

[9] McKinsey (n 7) 55.

[10] Jan Etscheid, 'Automatisierungspotenziale in der Verwaltung' in Resa Mohabbat-Kar, Basanta Thapa and Peter Parycek (eds), *(Un)berechenbar? Algorithmen und Automatisierung in Staat und Gesellschaf* (Kompetenzzentrum Öffentliche IT 2018) 126 <www.oeffentliche-it.de/documents/10181/14412/(Un)berechenbar+-+Algorithmen+und+Automatisierung+in+Staat+und+Gesellschaft> accessed 10 September 2023.

The primary amendment to the administrative procedure provisions made in 2016 was § 35a added to VwVfG. The provision is hailed among academics as a 'milestone' in the wide-ranging reform of public administration.[11]

It is worth noting that what may accentuate the role and significance of § 35a VwVfG is that in the German Administrative Procedure Act it immediately follows § 35 VwVfG, which provides definitions of an administrative act.[12] The newly added § 35a VwVfG is worded as follows: 'An administrative act can be generated through a fully automated, digital process when envisaged by a legal provision and if there is no discretion (*Ermessen*) or *Beurteilungsspielraum* – room for independent appreciation on behalf of the administration'.[13] The commentators point out that § 35a VwVfG serves as a basic norm (*Grundnorm*).[14]

As can be seen from the cited regulation, § 35a VwVfG in its content refers directly to the concept of 'administrative act' stipulated in § 35 VwVfG. It should be concluded that the relevant provisions for administrative acts apply to § 35a VwVfG.[15] Importantly, an administrative act issued in an automated manner, as provided for in the provision under review, should be distinguished from an electronic administrative act referred to in § 37 VwVfG. The regulation in § 37 VwVfG concerns the form of the electronic document that an administrative act may take, not the procedure involved in issuing the same in an automated manner.[16]

At this juncture, it is proper to quote the reasoning used in the parliamentary committee report relating to the amendment to VwVfG. It propounds that § 35a VwVfG:

(1) will clarify the nature of fully automated acts as administrative acts within the meaning of § 35 VwVfG (*Klarstellungsfunktion*),

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[11] Elena Buoso, 'Fully Automated Administrative Acts in the German Legal System' (2020) 1(1–2) European Review of Digital Administration & Law 113.

[12] Nadja Braun Binder, 'Weg frei für vollautomatisierte Verwaltungsverfahren in Deutschland' (September 2016) Justletter IT

[13] The original wording is: 'Ein Verwaltungsakt kann vollständig durch automatische Einrichtungen erlassen werden, sofern dies durch Rechtsvorschrift zugelassen ist und weder ein Ermessen noch ein Beurteilungsspielraum besteht' (translation by the authors). The term *Beurteilungsspielraum* refers to the margin of appreciation with respect to the legal conditions that define the situations to which administrative powers apply. It can also be translated as margin of judgment or margin of assessment.

[14] Mario Martini and David Nink, 'Wenn Maschinen entscheiden... – vollautomatisierte Verwaltungsverfahren und der Persönlichkeitsschutz' (2017) 36(10) Neue Zeitschrift für Verwaltungsrecht – Extra 1, 8.

[15] <https://dserver.bundestag.de/btd/18/084/1808434.pdf> accessed 20 September 2023.

[16] Ulrich Stelkens, § 37 VwVfG in Paul Stelkens, Heinz J Bonk and Michael Sachs (eds), *Verwaltungsverfahrensgesetz: Kommentar* (9th edn, CH Beck 2018) no 64; Nadja Braun Binder, 'Vollautomatisierte Verwaltungsverfahren, voll automatisiert erlassene Verwaltungsakte und elektronische Aktenführung' in Margrit Seckelmann (ed), *Digitalisierte Verwaltung, Vernetztes E-Government* (2nd edn, Erich Schmidt Verlag 2019) 321.

(2) will limit the implementation of full automation only to relevant procedures and acts (*Begrenzungs- uns Warnfunktion*),
(3) will allow the legislature to select procedures and acts suitable for full automation (*Kompetenzzuweisungsfunktion*).[17]

However, the implementation of changes aimed at automating the issuance of administrative acts required the introduction of further regulations that would help avoid dangers resulting from the unreasonable automation of this process. First and foremost, risks were seen in the possibility of having the procedural rights of parties to administrative proceedings (their right to participate) limited, as well as in the possibility of violating the obligation to thoroughly clarify the facts in pending administrative proceedings (*Untersuchungsprinzip*).[18]

The response to such concerns was an amendment to, inter alia, § 24 VwVfG. The German parliament, as part of the 2016 amendment in question, amended § 24 VwVfG by adding a third sentence thereto, which reads as follows: ‘If an authority uses automatic devices to issue administrative acts, it must take into account factual information of the person concerned that is relevant to the individual case and that would not be taken into account in an automatic procedure’.[19]

The amended § 24 VwVfG avoids a situation where the issuance of an automated administrative act would not involve a consideration of individual circumstances of an administrative case relevant to the content of the decision to be issued. Thus, the German legislator recognized that the implementation of automation in cases with similar or identical factual circumstances poses a risk of overlooking individual, unusual circumstances, which, in turn, could constitute a violation of the rules of administrative procedure.[20]

The German legislator’s implementation of a peculiar ‘guarantee mechanism’, involving the obligation for the adjudicating authority to take into consideration, when deciding an administrative case, relevant information that otherwise would

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[17] Beschlussempfehlung und Bericht des Finanzausschusses (7. Ausschuss) zu dem Gesetzentwurf der Bundesregierung zu Art. 20 Nr. 1, Bundestag Drucksache 18/8434 del 11.05.2016. See Stelkens, in *Verwaltungsverfahrensgesetz* (n 16) § 35a VwVfG, no 1; Alexander Windoffer, § 35a VwVfG in Thomas Mann, Christoph Sennekamp and Michael Uechtritz (eds), *Verwaltungsverfahrensgesetz: Großkommentar* (2nd edn, Nomos 2019) no 1.

[18] Filip Geburczyk, ‘Zautomatyzowane wydawanie decyzji administracyjnych w prawie niemieckim’ in Maciej Kruś, Lucyna Staniszewska and Marek Szewczyk (eds), *Kierunki rozwoju jurysdykcji administracyjnej* (1st edn, Wolters Kluwer Polska 2022) <https://sip.lex.pl/#/monograph/369521833/121?keyword=geburczyk&tocHit=1&cm=SREST> accessed 25 March 2024.

[19] The original text reads: ‘Setzt die Behörde automatische Einrichtungen zum Erlass von Verwaltungsakten ein, muss sie für den Einzelfall bedeutsame tatsächliche Angaben des Beteiligten berücksichtigen, die im automatischen Verfahren nicht ermittelt würden’.

[20] Alexander Schmid, ‘Der vollständig automatisierte Erlass eines Verwaltungsakts (§ 35a VwVfG) sowie die Bekanntgabe eines Verwaltungsakts über öffentlich zugängliche Netze (§ 41 Abs. 2a VwVfG)’ part 1 (2017) 3 Juris PraxisReport no 2.

not be taken into account in the automated procedure, is evidence of the legislator's rationality and should be assessed in a strongly positive way.

It is also significant that the German parliament, with respect to administrative acts issued in a fully automated administrative procedure, waived the requirement to offer reasons therefor. According to amended § 39(2)3 VwVfG, a statement of reasons is not obligatory, among other things, in situations in which an authority issues a decision using automatic means (*automatische Einrichtungen*), and provided that a statement of reasons is not required under the circumstances of a particular case.[21] It appears that the intention of the legislator here was to introduce a regulation that allows omitting the statement of reasons in acts issued in mass cases with a similar or even identical state of facts, as well as in cases that are not complex.

## IV. ADMISSIBILITY OF APPLYING § 35A VWVFG

The use of an automated procedure when issuing administrative acts is, nevertheless, significantly restricted in § 35a VwVfG. First of all, it should be emphasized that the regulation under review makes it clear that § 35a VwVfG does not provide a legal basis in its own right for issuing administrative acts in an automated manner. Based on a plain reading of this provision, an administrative act may be issued automatically only if the law permits it. Therefore, the German legislator, when adding § 35a to VwVfG, limited its application to cases regulated by law. Consequently, its application requires an additional legal basis for issuing a fully automated administrative act. Such legal basis can, therefore, be a provision of a statute, as well as a provision contained in a regulation.[22]

In accordance with the scope of the Administrative Procedure Act set forth in § 1 VwVfG,[23] the provisions of this law apply to the administrative activities of federal authorities and federal states[24] when they act under federal law (in accordance with the division of administrative powers stipulated in Article 83 (*GrundGesetz*).[25] VwVfG shall be applied where:

(1) an operating public law entity (authority) at a federal or national level is concerned;

[21] Geburczyk (n 18).

[22] Nadja Braun Binder, 'Vollständig automatisierter Erlass eines Verwaltungsaktes und Bekanntgabe über Behördenportale – Anmerkungen zu den §§ 24 Abs. 1 Satz 3, 35a und 41 Abs. 2a VwVfG' (2016) 21 Die Öffentliche Verwaltung 891.

[23] See § 1 VwVfG.

[24] Buoso (n 11) 117.

[25] Ferdinand Kirchof, Art. 83 Grundgesetz in Theodor Maunz and Günter Dürig (eds), *Grundgesetz: Kommentar* (89th edn, CH Beck 2020) no 128.

(2) that authority undertakes juridical actions within the realm of public law;
(3) the laws of the federation do not envisage provisions identical or contradictory in their content;
(4) actions of the authorities impact the outside world as they are taken with a view to issuing an administrative decision or concluding a public law contract, save for exceptions stipulated in § 2 VwVfG;
(5) public law administrative activity of the said authority is not regulated, at a national level, by procedural laws issued by central government.[26]

The principle of subsidiarity is a key feature of VwVfG and embodies a compromise reached in the wake of a dispute over the scope of federal law in connection with the constitutional division of legislative powers between the *Länder* and the Federation.[27]

In essence, it is the legislator who, after analysing the nature of cases decided in administrative acts, is competent to decide whether § 35a VwVfG[28] should apply in each category of cases.

It is also worth noting that the legislative decision as to which procedures can be automated must meet the requirements of EU law. In particular, one must have regard to restrictions under the General Data Protection Regulation (GDPR). Article 22(1) GDPR on 'automated individual decision-making, including profiling' imposes a number of requirements related to such procedures.

Article 22(1) GDPR introduces a general prohibition on automated decisions in relation to the three cases generally indicated in para 2, i.e. where:
(a) the decision is necessary for entering into, or performance of, a contract between the data subject and a data controller;
(b) the decision is authorised by Union or Member State law to which the controller is subject and which also lays down suitable measures to safeguard the data subject's rights and freedoms and legitimate interests; or
(c) the decision is based on the data subject's explicit consent.

Thus, Article 22(2)(b) GDPR, which gives the national legislator leeway to introduce legal grounds exempting from the prohibition of automated decision-making, will generally apply to automated decision-making in administration, provided that the law of a Member State provides for 'suitable measures to safeguard the data subject's rights, freedoms and legitimate interests'.[29] Although

[26] Franz Mayer, *Postępowanie administracyjne Republiki Federalnej Niemiec* in *Postępowanie administracyjne krajów zachodnich: Teksty i komentarze* (Ossolineum 1986), cited after Agnieszka Kubiak, 'Republika Federalna Niemiec' in Zbigniew Kmieciak (ed), *Postępowanie administracyjne w Europie* (2nd edn, Wolters Kluwer Polska 2010).

[27] Kubiak (n 26) 310.

[28] Ariane Berger, 'Der automatisierte Verwaltungsakt: Zu den Anforderungen an eine automatisierte Verwaltungsentscheidung am Beispiel des § 35a VwVfG' (2018) Neue Zeitschrift für Verwaltungsrecht 1260.

[29] Igor Gontarz, *Automatyczny akt administracyjny na gruncie RODO* in Czesław Martysz (ed), *Skuteczność w prawie administracyjnym* (Wolters Kluwer Polska 2022).

Article 22(2)(b) GDPR does not require that these 'suitable measures' include the safeguards set out in Article 22(3) GDPR, those safeguards, it appears, must nevertheless be referred to in order to achieve the purposes of this provision.[30] They shape and delineate the standard for a safeguard to be observed by data subjects where the data processor makes automated decisions. The VwVfG provisions do not require an administrative authority issuing an automated administrative act to inform the data subject thereof, nor does the data subject have an express right to demand a comprehensive human intervention beyond individual fact-finding, which raises reasonable concerns about failure to provide adequate safeguards as mandated in Article 22(2)(b) GDPR.[31]

Some legal scholars and commentators believe that the provision contained in § 35a VwVfG does not meet the requirements of Article 22 GDPR, whilst also stressing that it is still possible to achieve this objective in a sectoral law specifying which procedures will be subject to automated processing.[32]

In addition to the stated positive premise of a specific legal basis for issuing administrative acts automatically, § 35a VwVfG formulates two other negative conditions. According thereto, the issuance of a fully automated administrative act is excluded if the administrative act is issued under administrative discretion (*Ermessen*), or within the margin of judgment (*Beurteilungsspielraum*).[33] The provision thus refers to two separate institutions actualized at different stages of application of a norm of substantive administrative law.

It should be noted that administrative discretion is a concept that originated in the German system[34] and is actualized at the final stage of applying the law, namely when its legal effect is determined.[35] This happens when a legal norm

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[30] Lee A Bygrave in Christopher Kuner, Lee A Bygrave and Christopher Dockley (eds), *The EU General Data Protection Regulation (GDPR*): *A Commentary* (Oxford University Press 2020) 537.

[31] Gerrit Hornung, § 35a VwVfG in Friedrich Schoch and Jens-Peter Schneider (eds), *Verwaltungsverfahrensgesetz: Kommentar* (CH Beck 2022) paras 20–24; Gabriele Britz and Martin Eifert, '§ 26 Digitale Verwaltung' in Andreas Voßkuhle, Martin Eifert and Christoph Möllers (eds), *Grundlagen des Verwaltungsrechts* (CH Beck 2022) para 91; Martini and Nink (n 14) 1, 8.

[32] Mario Martini, 'Transformation der Verwaltung durch Digitalisierung' (2017) 11 DÖV 8.

[33] German administrative law differentiates between what is called *Beurteilungsspielraum* and *Ermessen*. While the former concerns the material requirements of a norm, the latter becomes relevant only from the viewpoint of legal consequences which ensue once a norm is actualized (*Rechtsfolgenseite*).

[34] Daria Danecka, 'Dyskrecjonalność w dyskursie administracyjnoprawnym, czyli…?' in Krystian Ziemski and Maria Jędrzejczak (eds), *Dyskrecjonalność w prawie administracyjnym* (Seria Prawo 188, Wydawnictwo UAM w Poznaniu 2015) 110; German concepts of administrative discretion are discussed in more detail in Małgorzata Mincer, *Uznanie administracyjne w doktrynie zachodnioniemieckiej* (1977) 83 Zeszyty Naukowe UMK, Prawo XV-Nauki Humanistyczno-Społeczne.

[35] Currently, the Polish commentary on administrative law is dominated by reporting on or a narrow approach to the matter of administrative discretion, based essentially on the concept

that forms the basis for the issuance of an administrative act allows the adjudicating authority to choose between the various legal effects prescribed and envisaged thereby. Thus, with reference to the division of administrative acts into non-discretionary and discretionary[36] (*Gebundene und Ermessensregelungen*),[37] as accepted in German and Polish legal writings, the application of § 35a VwVfG has been restricted to non-discretionary acts only.

On the contrary, the concept of *Beurteilungsspielraum* is typically equated with all forms of discretion available to an adjudicating authority at earlier stages of the decision-making model of applying law, in particular at the stage of determining the content of a legal norm (e.g. relative freedom to determine the meaning of vague terms) or establishing the facts.[38]

Exceptions to the applicability of automatic issuance of administrative acts relate to cases for the settlement of which, in the opinion of the legislator, an assessment by the human (official) is necessary, which, as a consequence, may lead to a differentiation of decisions issued in similar cases based on the same legal basis.

espoused in Małgorzata Mincer, *Uznanie administracyjne* (Wydawnictwo Naukowe UMK w Toruniu 1983) passim.

[36] Katarzyna Gębala, *Uznanie administracyjne w systemie prawa niemieckiego* (2011) 1 Państwo i Prawo 73.

[37] The distinction between non-discretionary and discretionary acts is endorsed by many writers, notably Eugeniusz Ochendowski, who assumed that there is a division of acts based on discretion and those issued within the scope of strict statutory bindingness. See Eugeniusz Ochendowski, *Prawo administracyjne* (Toruń 2006) 207; Krystian Ziemski did not relate discretion to any decision-making leeway accorded to administrative entities. Concurring with Małgorzata Jaskowska, this author assumed that discretionary acts are those issued under the conditions of possibility accorded to a given administrative body within which, at the stage of subsumption, a decision is reached; see Krystian Ziemski, 'Formy prawne działania administracji publicznej' in Jerzy Posłuszny (ed), *Aktualne problemy administracji i prawa administracyjnego* (WSAiZ w Przemyślu 2003) 196–98, cited after Krystian Ziemski '*Formy prawne w sferze działań zewnętrznych administracji publicznej'* in Roman Hauser, Zygmunt Niewiadomski, Andrzej Wróbel (eds), *Prawne formy działania administracji*: *System Prawa Administracyjnego*, vol 5 (1st edn, CH Beck 2013) Legalis.

[38] Zbigniew Kmieciak and Joanna Wegner-Kowalska, 'O ułomności formuły sądowej kontroli uznania administracyjnego' (2016) 5 Przegląd Prawa Publicznego 18: 'The concept of the scope of administrative assessment (*Beurteilungsspielraum*) was developed in the middle of the 20th century in Germany. It relates to the limited ability of administrative authorities to examine and supervise the application of undefined concepts. According to O. Bachof, the possibility granted to public administration by the legislature to categorize certain states of facts as falling within a given indefinite concept means granting the administration its own (not subject to valuation and judicial oversight) area of decision-making, called the evaluative scope' (translation by the authors of this paper). Cf. Maria Jędrzejczak, *Władza dyskrecjonalna organów administracji publicznej* (CH Beck 2021). See also Mincer, *Uznanie* (1983) (n 35) 119–34; Mincer, *Uznanie* (1977) (n 34). See also Zofia Duniewska and others (eds), *Instytucje prawa administracyjnego: System Prawa Administracyjnego*, vol. 1 (2nd edn, CH Beck 2015).

At this point, it should be noted that there is extensive discussion among German administrative law scholars and commentators on the appropriateness of limiting the issuance of automated administrative acts as defined in § 35a VwVfG. This is because, according to some scholars, the decisive parameter 'should be the current development of computer technology'.[39] 'Only deterministic algorithms currently correspond to decision-making norms of the public administration and allow their translation into computer language'.[40] 'Deterministic instructions guarantee the traceability of decisional steps and the predictability of the measure, which constitute requirements not yet met by AI'.[41]

Limiting the issuance of automatic administrative acts to situations where there is no administrative discretion is reasonable. It is rightly emphasized in the literature that: 'Indeed, the use of discretion or discretionary latitude by authorities is a cognitively complex activity that carries the risk of arbitrariness and, consequently, in the case of their automation, also the risk of exposing individuals to decisions that are not grounded in the law'.[42] This is because, in the case of discretionary acts, the authority enjoys a certain amount of freedom in choosing how to decide, whereas their freedom is absent in the case of non-discretionary acts. Non-discretionary acts generally lack flexible, soft actions, which are based on relatively and subjectively determined principles of equity. In addition, in the case of non-discretionary acts, the authority's decision must keep within the parameters (confines) specified by the relevant provision (provided that the statutory prerequisites for its issuance are fulfilled).

The consequence of adopting the regulations under review is that the issuance of acts in certain categories of cases will not be subject to automation.[43] Such cases should include those involving an investigation of complex facts or requiring contemplation of variables that are difficult to translate into numerical data (such as, for example, consulting services or organizational choices related to the operation of facilities, oversight of sanitary and hygienic requirements and granting of awards).[44] Furthermore, it will be impracticable to issue an administrative act automatically when the procedure provides for the obligatory participation of third parties or consultation of other administrative authorities.[45]

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[39] Annette Guckelberger, 'E-Government: Ein Paradigmen wechsel in Verwaltung und Verwaltungsrecht?' in Ute Sacksofsky (ed), *Gleichheit, Vielfalt, technischer Wandel* (De Gruyter 2019) 265.

[40] An algebraic translation of legal instructions was conducted in Francesco Volpe, *Ammissioni e autorizzazioni* (1st edn, Giappichelli 2018), cited after Buoso (n 11) 118.

[41] Buoso (n 11) 118.

[42] Geburczyk (n 18).

[43] Buoso (n 11) 118.

[44] This category may also include non-discretionary administrative acts that are not suitable for full automation; see Guckelberger (n 39) 265.

[45] Braun Binder, 'Vollautomatisierte Verwaltungsverfahren' (n 16) 320.

Based on § 35a VwVfG, scholars include the following cases among those that may be subject to automation pursuant to 35a VwVfG:[46] building permits (in the most straightforward cases); exemptions from certain obligations in the building permit procedure when specific conditions laid down in the regulations are met; pecuniary benefits (e.g. *Kindergeld*)[47] or sanctions based on simple calculations (e.g. traffic offences); the issuing of certificates and identity documents; acts issued in the context of mass proceedings in which the procedural requirements for the active participation of a party are reduced to a minimum (e.g. tax proceedings, proceedings for permits for access to restricted traffic and parking zones for residents).[48] In these types of cases, automation may significantly bolster the principle of legal certainty on account of predictability resulting from the repetition of facts determining the issuance of identical decisions. However, attendant risks should also be pinpointed, namely a potential defective outcome of the case where 'unusual' circumstances arise.

Notwithstanding the above, there are also critical voices of commentators, according to which such formulated prerequisites for the admissibility of the use of automation in the process of issuing administrative acts do not correspond to the realities of administrative practice.[49] The critics claim that the content of § 35a VwVfG ignores the institution of so-called self-bindingness in administration (*Selbstbindung der Verwaltung*) derived from Article 3 of the German Constitution,[50] which boils down to the obligation not to deviate from the established practice of adjudicating cases where the same factual and legal circumstances are involved.[51] The institution of administrative self-bindingness supports the 'standardisation' of discretionary acts. In is argued that self-bindingness in administration as regards discretionary decisions is not only possible but even desirable in the context of ensuring transparency of administrative actions and equal treatment guarantees.[52] However, in view of the risks expounded in this paper, it appears the foregoing opinion should not be accepted as a basis for extending the scope of automation in issuing administrative acts.

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[46] Berger (n 28) 1263; Braun Binder, 'Vollautomatisierte Verwaltungsverfahren' (n 16) 317. For more examples, see also Hanno Kube, 'E-Government: Ein Paradigmenwechsel in Verwaltung und Verwaltungsrecht?' in U Sacksofsky (ed), *Gleichheit, Vielfalt, technischer Wandel* (De Gruyter 2019) 306; Stelkens, in *Verwaltungsverfahrensgesetz* (n 16) § 35a VwVfG, no 46.

[47] A fixed monthly amount allocated for each child to German tax residents, regulated by the Bundeskindergeldgesetz (BKGG) of 11 October 1995 (Bundesgesetzblatt 1995 I 3177).

[48] For example, with regard to controls on electronic devices under the Elektro und Elektronikgerätegesetz of 20 October 2015 (Bundesgesetzblatt 2015 I 1739). See Schmitz and Prell (n 1) 1274.

[49] Geburczyk (n 18).

[50] Grundgesetz für die Bundesrepublik Deutschland, BGBl. 23 May 1949, s 1546.

[51] Eberhard Schmidt-Aßmann, *Das allgemeine Verwaltungsrecht als Ordnungsidee* (Springer 2006) 53ff.

[52] Stelkens in *Verwaltungsverfahrensgesetz* (n 16) 1205.

Other opponents claim that the assumed benefits, which were the reason for the implementation of the legal solutions under review, are actually being cancelled out. There is a real risk of a rapid increase in the number of administrative and judicial appeal procedures against administrative acts issued automatically, which could, as a consequence, ultimately lessen the positive effect, i.e. improvement and streamlining of the administrative system in dealing with administrative cases.[53]

## V. DISCRIMINATION AND LACK OF TRANSPARENCY

When making a comprehensive assessment of the regulation related to the automated issuance of administrative acts, it is impossible to ignore other non-legal risks flagged in the legal writings, in particular the emergence of what is called a 'black box' where an algorithm is used to issue an automated act. After all, automated systems very often depend on the principle of black box, that is a non-transparent mechanism that performs mathematical operations, not always comprehensible to humans, using a large amount of data.[54]

The use of 'self-learning algorithms' is undermined by the black box problem. Unlike conventional algorithms, self-learning algorithms can optimize and 'evolve' on their own. The manner and direction of this evolution may not be transparent to the programmers themselves.[55]

This black box issue has led to the development of Explainable Artificial Intelligence (XAI). XAI is defined as self-explanatory systems that reveal the reasoning behind the results of AI models.[56] According to some researchers, an XAI system should: '(1) explain the output of an AI system; (2) using partially or fully automated methods; (3) to clearly defined stakeholders; (4) in a relevant and accurate manner'.[57]

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[53] Martin Stegmüller, 'Vollautomatische Verwaltungsakte – eine kritische Sicht auf die neuen § 24 I 3 und § 35a VwVfG' (2018) 37(6) Neue Zeitschrift für Verwaltungsrecht 353.

[54] Frank Pasquale, *The Black Box Society: The Secret Algorithms that Control Money and Information* (Harvard University Press 2015).

[55] Ulrich Stelkens, 'Der vollständig automatisierte Erlass eines Verwaltungsakts als Regelungsgegenstand des VwVfG' in Hermann Hill, Dieter Kugelmann and Mario Martini (eds), *Digitalisierung in Recht, Politik und Verwaltung* (Nomos 2018).

[56] Balint Gyevnar, Nick Ferguson and Burkhard Schafer, 'Bridging the Transparency Gap: What can Explainable AI Learn from the AI Act?' in Kobi Gal and others (eds), *Proceedings of ECAI 2023, the 26th European Conference on Artificial Intelligence* (vol 372 Frontiers of Artificial Intelligence, IOS Press 2023) 964.

[57] ibid.

At this juncture, it is worth adding that current tools that enable observers to identify the causal relationship between a variable input and a specific outcome are unavailable to deep neural networks. Additionally, the complexity of many AI-based systems exacerbates the difficulty of representing the causal factors that have led to a decision in a way that is understandable to the average person.[58] Creating a legal framework for XAI that is functional from a technological point of view and, at the same time, provides citizens with guarantees of transparency, is a significant legislative challenge.

The issue of transparency in AI has been a topic of discussion both in public and academic circles for several years. The black box effect poses a threat to fundamental rights. To mitigate this, the EU legislator has introduced a number of requirements in the proposed Artificial Intelligence Act to ensure the transparency of AI systems. Transparency of the code, data, and AI development process are essential elements for effective human oversight.[59]

It should be noted that the German Federal Financial Services Supervisory Authority (BaFin) has published a study outlining the supervisory principles for the use of Artificial Intelligence algorithms in the financial sector.[60] However, the recommendations presented in the publication can be applied to the use of algorithms in other sectors; the study provides also guidelines for the use of algorithms in decision-making processes. The document endorses the principle of 'putting the human in the loop', which requires employees to be 'sufficiently involved in the interpretation and use of algorithmic results when reaching decisions'.[61]

In the context of the subject under discussion, one should also note the possibility of discrimination in the operation of the system issuing automated decisions. It should be emphasized that some researchers believe that the risk of discrimination is reduced *de lege ferenda* not only by the obligation to justify a decision issued in an automated manner, but also by the use of control mechanisms consisting of testing and certification of the automated system.[62]

Pertinently, there is also a probability of technical problems related to the disclosure of software and attempts to circumvent the same if, as a result of com-

[58] Thomas Wischmeyer, 'Artificial Intelligence and Transparency: Opening the Black Box' in Thomas Wischmeyer and Timo Rademacher (eds), *Regulating Artificial Intelligence* (Springer 2020) 89.

[59] Ben Green, 'The Flaws of Policies Requiring Human Oversight of Government Algorithms' (2022) 45 Computer Law & Security Review.

[60] BaFin, *Big Data and Artificial Intelligence*: *Principles for the Use of Algorithms in Decision-Making Processes* (15 June 2021) 12 <www.bafin.de/SharedDocs/Downloads/EN/Aufsichtsrecht/dl_Prinzipienpapier_BDAI_en.html> accessed 15 January 2024.

[61] ibid.

[62] Martini and Nink (n 14) 14.

pliance with the requirement for transparency, one finds out 'how the algorithm works'.[63]

The statutory restriction on the possibility of issuing an automated administrative act in cases where there is no administrative discretion (*Ermessen*) or margin of judgment (*Beurteilungsspielraum*) goes some way to offset the identified risks, including in particular the possibility of discrimination, but does not guarantee that the acts issued will not have discriminatory effects.[64]

## VI. CONCLUSIONS

In conclusion, the added § 35a VwVfG is viewed as a milestone on the path towards the automation of processes in public administration. On the one hand, it is a response to the development of modern technologies and, on the other hand, an attempt to ensure the proper operation of public administration by addressing and pre-empting imminent problems stemming from the shortage of qualified civil servants, as one of the outcomes of the projected demographic crisis resulting from the population aging. Undoubtedly, potential staff shortages in administration pose a serious challenge, and the modernization, digitization and automation of public administration are liable to constitute an adequate response of the authorities to the signalled demographic problems, whilst producing tangible benefits in the process. Once implemented in the administrative procedure, the solution also raises hope for a significant reduction in the costs of public administration operations, especially those incurred during standard administrative procedures.

Attendant legal restrictions on the automatic resolution of administrative cases, as provided for in the wording of § 35a VwVfG, causing the application of the provision in question to proceedings in simple cases (*unechte Massenverfahren*), i.e. where it is possible to establish the legal effect on the basis of the undisputed facts of the case,[65] should be viewed positively. It is for this reason why such restrictions help, in a certain time perspective, verify the correctness of the chosen trajectory of administrative transformation without taking considerable risk.

[63] ibid 10.

[64] Buoso (n 11) 121.

[65] Lorenz Prell in Johann Bader and Michael Ronellenfitsch (eds), *Verwaltungsverfahrensgesetz mit Verwaltungs-Vollstreckungsgesetz und Verwaltungszustellungsgesetz: Kommentar* (CH Beck 2016).

Automation in public administration certainly promotes expeditiousness, cost savings and human resources.[66] It is important not to ignore the real risks accompanying automation, such as the inability of new technologies to take into account individual circumstances surrounding a given case or a significant limitation of the parties' active participation in ongoing procedures. It should also be emphasized that automated acts issued without the participation of the human factor may not be compatible with the changing state of the law or the dynamic evolution of the courts' jurisprudence.[67] Moreover, legal scholars and commentators point out that there is a high risk related to transparency and the possibility of discriminatory decisions when using AI, which is a potential peril also accentuated by EU restrictions on automatic decision-making (e.g. Article 22(2)(b) GDPR).

The risks of automation identified in this paper illustrate the breadth of the issue of automation in administration, which explicitly affects society, politics and economics.

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[66] Christian Djefall, 'Das Internet der Dinge und die öffentliche Verwaltung – Aufdem Weg zum automatisierten Smart Government' (2017) 13 Deutsches Verwaltungsblatt 808, 813; Windoffer, in *Verwaltungsverfahrensgesetz: Großkommentar* (n 17) 746.

[67] Jan Ziekow, 'Das Verwaltungsverfahrensrecht in der Digitalisierung der Verwaltung' (2018) 16 Neue Zeitschrift für Verwaltungsrecht 1169, 1171.

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