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Chapter Five: The United States

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Chapter 5

THE UNITED STATES

5.1 INTRODUCTION

Federal administrative law in the United States differs quite substantially from the administrative law we know in the civil law systems of Europe. This makes it complicated to undertake a comparative survey on how US federal government agencies and departments use electronic forms of communication. In order not to get entangled in the details concerning the differences between the US administrative law and most of the European administrative law systems, the present survey will be limited to comparing the way some important federal government agencies do or do not use information and communication technologies and concepts (ICT) to improve their services. Two major federal government agencies were studied: the Internal Revenue Service (IRS), and the United States Patent and Trade Mark Office. These agencies will serve as illustrations of the attitudes towards and the policies and realities of ‘e-government’ at the federal level in the United States. They will also provide a good insight into the structure and functioning of federal administrative law and the most recent developments, for example e-filing and electronic signatures.

5.2 PRESENT PRACTICE

5.2.1 Approaches and policies related to e-government

Ever since information and communication technologies became available, federal agencies have used them for different purposes. The federal government agencies’ and departments’ most important motives for using ICT were to facilitate their own working processes by making them more effective and cost-efficient and consequently, to enable them

to improve their services to the public. The federal government agencies and departments are the most important actors in the field of federal administrative law. Up until the 1990s, the main focus was on the internal organization of the agencies; ICT was predominantly used to improve the internal working processes of agencies and departments. The advent of more sophisticated communication technologies and the growth of the Internet prompted a more client-oriented, external attitude. The concept of 'e-Government'¹ which emerged, uses ICTs not only for static information dissemination, but as a basis for the development of interactive and integrated digital services such as, electronic filing, on-line applications for permits and licenses, paperless acquisitions of electronic government services and the tailoring of information to the public. The National Performance Review report of September 1993 on *Reengineering Through Information Technology*, Accompanying Report of the National Performance Review, contained the requirement to implement electronic government. Al Gore's 1997 report *Access America* contained the initiatives to accomplish this requirement. The electronic government idea in the United States is based on the concept of integrated service delivery (ISD) which, in a broad sense, denotes the convergence of government services under *one* interface which is accessible to citizens.² In the US a characteristic of this ISD concept is the citizen-focused view

¹ According to the definition given in the Deloitte Research report, *At the Dawn of e-Government; the Citizen as Customer*, <<http://www.dttus.com/pub/ggovt/gegovt.htm>> (15 May 2001), e-government means: "the use of technology to enhance the access to and delivery of government services to benefit citizens, business partners and employees", p. 1, New York, 2000. See also Jeff Breen, *At the Dawn of e-Government; the Citizen as Customer*, *Government Finance Review*, October 2000, p. 15 ff. This is a distinctly different definition than the one Jörn von Lucke gives in his contribution 'Electronic Government in der Welt' in: Heinrich Reinermann (Hrsg.), *Regieren und Verwalten in Informationszeitalter*, Heidelberg 2000, p. 186. Von Lucke sees e-Government as (in a free translation from German) the integrated management and redress of societal processes, problems and issues using IT. His definition is somewhat more government-oriented.

² See the Report of the Intergovernmental Advisory Board and the Federation of Government Information Processing Councils in cooperation with the Office of Intergovernmental Solutions, Office of Government-wide Policy U.S. General Services Administration, *Integrated Service Delivery; Governments Using Technology to Serve the Citizen*, August 1999, p. 5. Published at <http://www.gsa.gov/attachments/GSA_PUBLICATIONS>extpub (20 July 2001).

of technology and the desire to provide government services on the citizen's terms bypassing bureaucracy and the red tape plaguing government at all levels. Most US government agencies and departments are a long way from achieving truly citizen-oriented government services. The 1999 Report *Integrated Service Delivery* (Governments Using Technology to Serve the Citizen) of the Intergovernmental Advisory Board and the Federation of Government Information Processing Councils concludes that US agencies and departments use a wide variety of approaches to benefit from state-of-the-art ICTs. However, integrating electronic interactive services under one interface is still in progress. One of the emerging trends in the US is that ISD is being targeted towards specific citizens' groups like seniors and students. Another trend is a definite increase in electronic government services on-line.³ The US government was definitely not a clear leader in the early stages of e-government as an editorial review in the *Government Finance Review* put it.⁴ The highly decentralized and varied operational practices of the different governmental agencies and departments are key factors for this leeway.

5.2.2 IRS present practice in electronic communication⁵

The IRS (the US tax authority) is a government agency that in comparison with other US government agencies or departments, very actively employs ICT and new forms of electronic communication to improve its services to the public. The continuing introduction and integration of ever more state-of-the-art computer technology have proven to be extremely useful to tax planners and preparers.⁶ Especially the practice of electronic filing (e-filing) and electronic payment of taxes via electronic funds trans-

³ See the *Integrated Service Delivery*-report, p. 3.

⁴ Digital Government on the Internet; Rating e-Gov Websites, *Government Finance Review*, October 2000, p. 54.

⁵ The following paragraphs are based on interviews with the IRS (Mr. M. Mundaca, legal counselor IRS, April 12, 2001) and the USPTO (Ms. K. Byars and L. Beressord, April 13, 2001).

⁶ See Mehmet C. Kocakulah and Galen M. Gower, Modernizing the Bureaucracy: Government Information Systems and Technology, *National Public Accountant*, 1999, p. 24-41.

fer (EFT)⁷ have made the entire tax process much more dependent on improving the level of information technology to meet the increasing needs and complexity of the tax environment. One of the main missions of the IRS is to increase e-filing to 80% of the total tax returns. These missions were imposed upon the IRS by the IRS Restructuring and Reform Act of 1998 (IRSRA '98). This Act obliges the IRS to:

1. Make paperless filing the preferred and most convenient means of filing Federal tax and information returns;
2. Achieve the goal of electronically filing at least 80% of all such returns by 2007; and
3. Encourage the private sector through cooperation to increase the e-filing of such returns.

The IRSRA '98 also created the Electronic Tax Administration Advisory Committee (ETAAC), which annually reports the progress of the IRSRA '98 goals to Congress. The IRS' plans are truly ambitious, especially considering the fact that in 1998 only 10% of all the tax returns were filed electronically. A major obstacle for smooth and expedient e-filing was overcome this year. Taxpayers who filed electronically were obliged to send an (additional) paper copy of a form verifying their identity.⁸ This year the IRS will now allow a self-selected, five-digit personal identification number (PIN), together with two 'shared secrets' (tax liability and prior year adjusted gross income) and the taxpayer's name and Social Security number.⁹ This will together constitute a valid signature.¹⁰ This kind of electronic communication however, only applies to the first part of the IRS' communication with the taxpayers, i.e. the filing of the initial tax return-file. All other forms of communication between the IRS and its clients are paper-based. At present, strict rules and policies on confidentiality and privacy leave no other options. The IRS is looking into the possibility of using 'waivers' whereby clients will forfeit some of their

⁷ The electronic payment of taxes was given a new incentive in 1996 when a new Electronic Federal Tax Payment System (EFPTS) was set up.

⁸ Up until 2001 taxpayers had to file a paper copy of Form 8453, U.S. Individual Income Tax Declaration for Electronic Filing.

⁹ See Stuart Kahan, Sign in, Please!, *Practical Accountant*, October 2000, p. 64-66.

¹⁰ See Lesli S. Laffie, News Notes, *The Tax Adviser*, August 2000, p. 532.

privacy and confidentiality rights in order to enable the IRS to communicate with them electronically.

A specific type of electronic communication is available from the IRS website.¹¹ Different forms for e-filing together with all kinds of information may be downloaded from the IRS website.

5.2.3 USPTO present practice in electronic communication

The primary services of the USPTO include processing patents and trade marks and disseminating patent and trade mark information. Through the issuance of patents, the USPTO encourages technological advancement by providing incentives to invent, invest in, and disclose new technology worldwide. Through the registration of trade marks, the USPTO assists businesses in protecting their investments, promoting goods and services, and safeguarding consumers against confusion and deception in the marketplace. The USPTO also uses ICT very actively to promote and improve its services. First of all, the USPTO uses ICT to enable clients to file applications for patents and to register trade marks electronically. USPTO initiated the full production of its electronic patent application filing system (EFS) in October 2000. Patent applications are confidential by statute. Thus, the agency also offers filers a customer number and digital certificate to sign the application, and uses a digital certificate to ensure that EFS transmissions are encrypted from the applicant's computer all the way to USPTO's electronic mailroom. The agency uses the latest public key infrastructure (PKI) technology to guarantee the security of electronic applications. EFS has a built-in validation function to help applicants adhere to USPTO rules and to avoid mistakes of form that can cause delays. EFS is – according to the USPTO – a major step toward fully automating and improving the quality of patent application processing.¹²

A similar e-filing system already existed for the filing of trade mark registering requests: the Web-based Trademark Electronic Application System (TEAS). TEAS allows trade mark filers to fill out an application

¹¹ Located at <<http://www.irs.ustreas.gov/>> (10 April 2001).

¹² See the press release of October 27 2000 Doors Open to Electronic Patent Filing; USPTO will accept patent applications for inventions over the Internet, published on the USPTO website at <<http://www.uspto.gov/web/offices/com/speeches>> (25 July 2001).

form and check it for completeness over the Internet. More than 23,000 applicants have used TEAS successfully to file their trade mark applications since this service went on-line in October 1998. E-TEAS has two components. Using e-TEAS, a customer can submit an application directly to the trade mark examining operation over the Internet, paying by credit card or through an existing PTO deposit account. The applicant can also use PrinTEAS to print out a completed application for mailing to the PTO, paying by cheque, money order or through a deposit account.¹³

Another important digital communication USPTO service is the Trade-mark Electronic Search System (TESS). TESS allows the public to search and retrieve, via an Internet browser, the 2.6 million plus pending, registered, abandoned, cancelled or expired trade mark records found in PTOs' X-Search system. PTOs' X-Search is the same database and search system used by PTOs' examining attorneys for examining trade mark applications. TESS replaces the on-line trade mark search database that PTO made available to the public in August 1998.¹⁴

USPTO manages to deliver almost all of its services electronically. Not only can applicants use electronic application forms, but all other interested parties may search and visit the public records of the USPTO. In 1999 § 2.33 section d of the (37 CFR, part II) Trademark Law Treaty Implementation Act was amended in order to make electronic signatures of electronic trade mark and patent files possible. The USPTO was quite successful in digitalizing its services. The 2000 annual report shows that e-filing is very popular and exceeds expectations.¹⁵

5.3 LEGISLATIVE ACTION AND INITIATIVES FOR ELECTRONIC COMMUNICATION

At present there are only few federal provisions on electronic communication. The concept of an electronic decision does not appear in federal leg-

¹³ URL for the e-TEAS system: <<http://www.uspto.gov/teas/index.html>> (9 April 2001).

¹⁴ See the press release of February 29 2000 PTO Introduces New Trademark Electronic Search System, published on the USPTO website at <<http://www.uspto.gov/web/offices/com/speeches>> (25 July 2001).

¹⁵ See the annual report for 2000 at <<http://www.uspto.gov/web/offices/com/annual/2000>> (25 July 2001).

isolation. However, this does not mean that electronic decision-making does not exist. The IRS, for instance, handles a great deal of tax returns using ICTs. Legislation of a general nature regarding electronic communication is only found in the Electronic Signatures in Global and National Commerce Act (ESIGN), enacted by Congress on June 30, 2000. ESIGN facilitates the use of electronic records and signatures in interstate or foreign commerce and can be used to remove uncertainty about the validity of contracts entered into electronically. Under the Act, businesses that are required to provide or make available information to consumers in writing may provide consumers with that information using electronic records only if the consumer affirmatively consents, in a manner that reasonably demonstrates the consumer's ability to access the electronic record. ESIGN is not only applicable in the private sector but also has a bearing on relations in the public sector. In the foregoing paragraph we already signalled the IRSs' and USPTOs' initiatives to acknowledge and validate electronic signatures. This led to legislative action only in the case of the Trademark Law. The IRS' acceptance of e-signatures was not a matter of law, but a matter of fact.

Another important federal legislative project related to electronic communication is the Paperwork Reduction Act of 1995.¹⁶ The goals of this Act are to, amongst other things, a) minimize the paperwork burden for persons and companies resulting from the collection of information by or for the Federal Government, b) ensure the greatest possible public benefit from and maximize the utility of information created, collected, maintained, used, shared and disseminated by or for the Federal Government; c) coordinate, integrate, and to the extent practicable and appropriate, make uniform Federal information resources management policies and practices as a means to improve the productivity, efficiency, and effectiveness of Government programs, including the reduction of information collection burdens on the public and the improvement of service delivery to the public; d) provide for the dissemination of public information on a timely basis, on equitable terms, and in a manner that promotes the utility of the information to the public and makes effective use of information technology; e) ensure the integrity, quality, and utility of the Federal statistical system; and f) ensure that information technology is acquired,

¹⁶ 44 U.S.C. 3501 et seq.

used, and managed to improve performance of agency missions, including the reduction of information collection burdens on the public. One of the practical implications of this 1995 Act is the promotion of e-filing. The aforementioned IRS Restructuring and Reform Act of 1998 (IRSRA '98) applies the paper reduction principles from the 1995 Act to the functioning of the IRS.

Other important legislative developments as regards the issue of electronic communication are the Electronic Freedom of Information Act Amendments of 1996 which amends the Freedom of Information Act.¹⁷ These amendments stipulate that for records created on, or after November 1, 1996, within one year after such date, each agency must make such records available, including by computer telecommunications or, if computer telecommunication means have not been established by the agency, by other electronic means. Other records had to be digitalized by the end of 1999.

5.4 ADMINISTRATIVE LAW IN THE UNITED STATES

5.4.1 General characteristics of the administrative system

Federal administrative law is very diverse in the US. Administrative law at the federal level includes an entire range of actions by government with respect to the citizen or by the citizen with respect to the government, except for those matters dealt with by the criminal law and those left to private civil litigation where the government's participation is in furnishing an impartial tribunal with the power of enforcement.¹⁸ Quite simply, administrative law concerns the limitations of the powers and actions of administrative agencies.¹⁹ Ever since the beginning of the 20th century a great deal of new agencies²⁰ have been established and vested with pow-

¹⁷ 5 U.S.C. § 552, as Amended By Pub. L. 104-231, 110 Stat. 2422.

¹⁸ A. Friendly, *New Trends in Administrative Law*, 6 Md., *Bar J.*, No. 3, 1974, p. 9.

¹⁹ See Ernest Gellhorn and Ronald M. Levin, *Administrative Law and Process*, third ed., St. Paul Mn. 1990, p. 8.

²⁰ The concept of an agency is however much older. The first one was established by the Act of July 31, 1789, to estimate the duties payable on imports and to perform other related duties.

ers emanating from different Acts. This empowerment of agencies by Statute Acts is called 'delegation'. Throughout the modern era of administrative regulation, agencies have been delegated varying powers. Some of these powers are assigned on an industry-wide basis, as with the Interstate Commerce Commission, or the Nuclear Regulatory Commission, other agencies are charged with enforcing certain norms of conduct throughout the economy, as is the case with the Federal Trade Commission. The specific Act that empowers an agency is called an agency organic Act.²¹ Delegations may involve different powers. Many agencies, for instance, operate under statutes that give them *legislative power* to issue rules which control private behaviour (including criminal or civil penalties in case of violations). Statutes may also delegate *executive power* to an agency, for instance, to investigate potential violations, issue licences,²² etc. Even judicial powers to *adjudicate*²³ particular disputes over whether an individual or company has failed to comply with the governing standards may be granted by an agency organic Act.

Agencies are typically governed by a specific agency organic Act which lays down the bulk of the substantive law applicable to the functioning of the agency. Apart from these specific substantive norms, general administrative rules also apply. Most of them are to be found in the Public Administration Act (APA) enacted in 1946. The APA sets a uniform standard for administrative procedure in much of the national government's bureaucracy.

The point of reference for the judicial review of administrative acts by agencies in the administrative law system of the USA is not, as is the case in many continental law systems, the administrative decision, rule or order, but the agency and the way it has (ab)used its powers. The central concepts in the APA are therefore 'agency' which is defined in § 551 of the APA and 'judicial review' in Chapter 7 of the APA. § 706 of the APA defines the scope of review as follows:

²¹ See Kenneth Culp Davis and Richard J. Pierce jr., *Administrative Law Treatise*, third ed., Boston/New York, Toronto/London 1994, p. 2.

²² See § 551, S8 of the Public Administration Act (APA).

²³ See § 554 APA.

Sec. 706. Scope of review

To the extent necessary to reach a decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall:

1. compel agency action unlawfully withheld or unreasonably delayed; and
2. hold unlawful and set aside agency action, findings, and conclusions found to be:
 - a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
 - b) contrary to constitutional right, power, privilege, or immunity;
 - c) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
 - d) without observance of procedure required by law;
 - e) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
 - f) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

The judicial review of agency action is exercised by the ordinary courts. They can – in ordinary cases – be addressed when all administrative remedies (such as hearings, etc.) or avenues have been exhausted and when the litigant has sufficient standing, i.e. sufficient interest in an issue to bring suit.

5.4.2 Interaction between civil law and administrative law

The interaction between civil law and administrative law in the US is very intense. The US administrative law system developed on the basis of US civil law and has strong roots in the common law tradition. Over the last decades however, administrative law in the US has specialized dramatically. Administrative law now has its own standing and is treated more

and more like ‘public law’ is in (European) continental law systems.²⁴ Most administrative litigation, however, is – ultimately – handled by the ordinary courts and a great deal of applicable principles and legislation stem from civil law origins. The scope of this survey does not allow one to go into this myriad of principles and provisions in any detail. The scope of review of Chapter 7 of the APA. § 706 of the APA provides an accurate insight into the ‘administrative principles’ applicable to administrative actions.

5.5 REQUIREMENTS OF THE SYSTEM RELEVANT TO ELECTRONIC COMMUNICATION: IRS AND USPTO AND ADMINISTRATIVE LAW

Both the IRS and the USPTO are federal agencies that exercise powers under organic agency acts. The Internal Revenue Code²⁵ of 1986 (IRC) is one of the most important codes within the IRS. The IRC grants various powers to the IRS ranging from the authority to assess tax returns (Chapter 63) to arranging hearings before levies,²⁶ giving licenses²⁷, etc. The most important Act for the USPTO is the Patent Code²⁸ that gives the USPTO different responsibilities in the process leading up to the (refusal to) issue of patents and the registration of trade marks.²⁹

The APA does not have any specific provisions regarding electronic communication between agencies and their clients. Most of the law re-

²⁴ See Richard J. Pierce, Syney A. Shapiro and Paul R. Verkuil, *Administrative Law and Process*, third ed., New York 1999, p. 6-9.

²⁵ US Code Title 26.

²⁶ Sec. 6330. Notice and opportunity for hearing before levy.

²⁷ Sec. 7001. Collection of foreign items.

²⁸ US Code Title 35 contains the basic authorities for the administration of patent laws, derived from the Act of July 19, 1952, and subsequent enactment.

²⁹ There are however more codes and statutes relevant to the work of the USPTO, for instance 15 U.S.C. 1051-1127 that contains provisions of the Trademark Act of 1946 that govern the administration of the trade mark registration system of the Patent and Trade Mark Office, 15 U.S.C. 1511 that states that the Patent and Trade Mark Office is under the jurisdiction and supervision of the Department of Commerce, and 44 U.S.C. 1337-1338 that contains authority to print patents, trade marks, and other matters relating to the business of the Office.

garding electronic communication is to be found in the specific Acts (e.g. the IRSRRA '98 or the Trademark Law Treaty Implementation Act that were dealt with in the former paragraphs). Federal Acts of a general nature relating to electronic communication are the Freedom of Information Act as amended in 1996 (obliging federal agencies to supply most of their records, accessible under the Act, in an electronic format) and the Privacy Act.³⁰ The Privacy Act of 1974 contains provisions that forbid agencies from disclosing any information which is contained in a system of records to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains.³¹ Furthermore, it obliges them to keep track of disclosures of records, to amend personal records at the request of the individuals to whom the record pertains, to maintain all records which are used with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination, etc.³² These provisions, of course, also have a bearing on the electronic forms of communication, for instance in the case of e-filing. The Privacy Act of 1974 is not especially aimed at regulating electronic communication. At the federal level the Electronic Communications Privacy Act (ECPA) is an Act that is especially geared to electronic communication. It was adopted in 1986 to address the legal privacy issues that were evolving with the growing use of computers and other new innovations in electronic communications. The impact of the ECPA on electronic communication between agencies on the one hand, and citizens on the other, is however marginal. Most of the ECPA's provisions are on surveillance. The ECPA clarifies what constitutes invasion of privacy when electronic surveillance is involved. The ECPA extends privacy protection outlined in the earlier legislation to radio paging devices, electronic mail, cellular telephones, private communication carriers, and computer transmissions. The privacy between the IRS and taxpayers is safeguarded by the principle of confidentiality protected by section 6103(a) of the Internal Rev-

³⁰ 5 U.S.C. 552a.

³¹ See § 552a section b.

³² See § 552a sections c, d, e, f and following.

enue Code. This section prohibits the disclosure of taxpayer returns and return information (subject to certain limited exceptions).³³

5.6 PROBLEMS UNDER THE PRESENT ADMINISTRATIVE SYSTEM IN THE LIGHT OF ELECTRONIC COMMUNICATION

One of the problems under the present administrative system seems to be the status of e-mail communication. Both in the case of the IRS and the USPTO not all of the legal details seem to have been elaborated. Legal problems do not directly occur when a first application or tax return (first e-file moment) is submitted but when the agency needs to reply (by confirming the receipt of the e-file) or the citizen is informed of the agency's decision. The IRS admits that it would like to send more documents by e-mail than it is able to at the moment, but privacy and confidentiality requirements prohibit the extended use of e-mail communication in this respect. The IRS is currently investigating the possibilities of 'waivers' whereby taxpayers waive a number of privacy and confidentiality rights in exchange for expedient e-mail communication with the tax authorities. The spokesperson in the interview however, did have a strong reticence towards 'waivers'. It is, in his view, a sign of weakness on behalf of the IRS not to be able to safeguard all privacy and confidentiality demands in e-mail communications. A real solution would be preferable. The USPTO encounters similar problems. They do send electronic filing receipts and send final decisions by electronic mail. The electronic filing receipts do not have any legal standing. Final decisions are sent by ordinary or electronic mail, depending on the recipient's desire. This does not give rise to many problems. Time-limits and deadlines for lodging objections begin to run at the moment the final decision – or any other message – is sent by the USPTO, not at the moment when the addressee receives the message.

³³ Section 6103 does contain certain limited exceptions to its bar on the disclosure of confidential information. For example, sections 6103(h)(4)(B) and 6103(h)(4)(C) provide that third-party taxpayer information can be provided in situations where the treatment of an item reflected on the taxpayer's return is *directly related* to the resolution of an issue in the proceeding in which the information is sought or where there is a *direct transactional relationship* between the party seeking the information and the taxpayer and that relationship *directly affects* the resolution of the issue.

The USPTO informed the interviewer for this survey that US Courts still – as a rule – do not accept briefs or documents in electronic format or by e-mail. This is considered to be a failed opportunity. Some experiments however are underway to also imply Courts in the e-government plans.³⁴

5.6.1 Case law

No case law on the admissibility of e-filing or case law relating to electronic communication by the USPTO or IRS was found during this research project.

5.7 AMENDING ADMINISTRATIVE PROCEDURE LAW

In the former paragraphs, notably in section 5.3, the legislator's approach to new forms of communication was outlined. The following trends and developments could be concluded for both the IRS and the USPTO:

- a) The general Public Administration Act (APA) does not touch upon the subject of electronic communication. Regulatory provisions relating to electronic communication even in substantive administrative law can hardly be found. The legislative attitude to the advent of the electronic age in administrative law seems to be a predominantly practical one. Both the IRS and the USPTO have managed to upgrade their services by using different forms of electronic communications without substantial changes to the law. The IRS Restructuring and Reform Act of 1998 (IRSRA '98) does not really constitute an exception to this practical approach.
- b) Especially for the IRS the privacy and confidentiality rules are very strict and do, to some extent, obstruct expedient and smooth electronic communication. The general privacy regime for both the IRS and the USPTO can be found in the Privacy Act of 1974 (see § 2.3 of this survey). Privacy in the relations between the IRS and taxpayers is safeguarded by the principle of confidentiality protected by section 6103(a) of the Internal Revenue Code. In this survey no distinct set

³⁴ See Anthony Aarons, California leads the way in electronic filing of court docs., *California Lawyer*, January 1999, p. 24.

of unwritten principles on careful communication was encountered in the case studies into the IRS and the USPTO.

- c) The problem of (electronic) identification of e-filers did, in the case of the USPTO, result in limited secondary legislative action. As we noticed earlier on in this survey in 1999 § 2.33 section d of the (37 CFR, part II) Trademark Law Treaty Implementation Act was amended in order to make electronic signatures of electronic trade mark and patent files possible. In the case of the IRS the problem of electronic signatures was resolved technically by accepting electronic tax returns that bear an electronic signature consisting of a pin-code and two 'shared secrets'.

The conclusion which can be drawn from this is that the legislative attitude towards electronic communication in administrative federal law is expectant. The law is only amended when this is strictly necessary. Practical solutions seem to be preferred over and above legislative ones.

5.8 ELECTRONIC COMMUNICATION VERSUS TRADITIONAL COMMUNICATION

In American administrative law paper-based communication is still the normal way of doing business. Although the administrative law system allows for some forms of electronic communication, e.g. in the form of e-filing, and notwithstanding the paper-reduction policies and the e-government initiatives, electronic communication does not have the same legal standing as paper-based communications have. The way agencies and departments have been trying to tackle this leeway in electronic communication up until recently is to mimic the features of paper-based communication electronically (e-filing and e-signatures using paper-based authentications). The ultimate legal recognition of electronic communication still seems to be a long way off.

5.9 CONCLUSIONS AND MAIN FINDINGS

Drawing conclusions based on the case studies of the IRS and USPTO is, on the one hand, very difficult because the US federal administrative law

system differs to a great extent from most European administrative law systems. Some developments are however interesting for the issues at hand. First of all, the US government has official policies on both paper reduction and e-government which have (had) substantial consequences for the introduction, handling and status of electronic communication in administrative law. As a result of these policies both the IRS and USPTO are very actively trying to make their services available to the public electronically. The USPTO has nearly managed to make all of its services available electronically. Most of the electronic communication concerns the initial stages of the agency's or department's decision-making process. In most cases e-filing has been made possible. Subsequent communication, in most cases, is still paper-based due to privacy or confidentiality restrictions. The IRS is looking into the possibilities of allowing their clients to waive their rights of full confidentiality and privacy protection in exchange for more expedient electronic communication. The USPTO engages in 'electronic' follow-up communication if the client has indicated his/her desire to do so.

The approach to the problem of electronic communication in federal administrative law seems to be predominantly practical. The legislative attitude towards electronic communication in administrative federal law is expectant. The law is only amended when this is strictly necessary, e.g. in the case of allowing electronic signatures for trade mark applications. Practical solutions seem to be preferred over and above legislative ones.