The Dutch Electronic Administrative Communications Act

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1. The Dutch Electronic Administrative Communications Act

In 2004 the Electronic Administrative Communications Act (*Wet elektronisch bestuurlijk verkeer*) was enacted in the Netherlands.[1] The Act – which came into force on 1 July 2004 — allows certain forms of communication between administrative bodies and citizens (administrative communications) to be conducted electronically. The Act — which amends the General Administrative Law Act (*Algemene wet bestuursrecht*) — aims to remove uncertainties which existed formerly. It also intends to guarantee that this electronic administrative communication will run smoothly.

Until now Dutch legislation contained no general provisions on the use of electronic communication between citizens and administrative bodies, nor on the conditions to be met. Up until now it was, for instance, not clear whether administrative decisions could be published in electronic form, whether an application for a permit could be made by e-mail or whether a draft zoning plan could be published on the web site of a municipality with legal effect.[3] However, from 2002 onwards the Dutch government aims to deal with a minimum of 25% of public services electronically (*programma Overheidsloket 2000*).

The new Electronic Administrative Communications Act offers a general framework for administrative communications and provides a basis for case law, which would otherwise be lacking. For that purpose the Act regulates a) when electronic communications can be conducted electroni-

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[2] Dutch *Official Journal* 2004, 214.

[3] For instance in a non-contentious objection procedure.

cally, b) which conditions electronic administrative communications have to meet in order to be as reliable as conventional administrative communication, and c) in which cases electronic administrative communication can be considered equivalent to other forms of administrative communication.

In this contribution I will briefly discuss the Electronic Administrative Communications Act (hereinafter to be referred to as the EAC Act). The discussion will take place from the perspective of the system of Dutch administrative law and the administrative legal practice that has grown out of it.

Scope of application of the EAC Act

The EAC Act contains general rules for electronic communication between citizens and administrative bodies. It concerns in particular electronic communication of administrative matters within the framework of the primary decision-making process, the objection procedure and the administrative appeal. The possibility to lodge an appeal with the administrative court has not been included in the scheme. Indeed, the Act introduces a new fourth paragraph to Art. 6:4 of the General Administrative Law Act which makes it impossible to lodge an electronic appeal with the administrative court. The EAC legislator thought it still somewhat early for lodging appeals electronically: it was of the opinion that the issue must be seen in connection with the proceedings in civil and criminal law. That seems a sensible move to me.[4]

The EAC Act does not concern the communications with the National ombudsman (including the deputy ombudsmen) either, since the latter — under Dutch administrative law — is not an administrative body. Because of the importance of good and easy access to the National ombuds-

[4] To my knowledge there are as yet (1999) no legal systems in which appeals can be lodged electronically. In California in the United States a project has been started in which it has been made possible by way of experiment to institute an action electronically. See e.g. Anthony Aarons, California leads the way in electronic filing of court docs., *California Lawyer* (January 1999) 24 ff.

man the intention — as for other complaints bodies — is to declare the most important provisions about electronic administrative communication to apply by analogy.

In some respects, for that matter, the Act does more than the title 'Electronic Administrative Communications Act' promises. For instance, the Act also contains rules for electronically performing legal acts which in first instance are not administrative in nature or do not directly concern the communication between citizen and the administration or communication between administrative bodies. It is clear though that fax communication falls outside the scope of the EAC ACT. That does not matter insomuch as precisely in respect of fax communications (and associated specific problems of dispatch and receipt) in the Netherlands balanced administrative case law has been developed which gives adequate support and legal certainty.

Organisation of the EAC Act: equal footing as basic principle

The EAC Act tries — in regulating electronic administrative communications — to evade both Scylla and Charybdis: How to make electronic administrative communication effectively possible while — at the same time — providing the same safeguards as exist at the moment in respect of written administrative communication? This consideration has resulted in the basic principle of *equal footing*. This principle means:

a) that electronic administrative communications with the government will become possible on an equal footing with written administrative communications;
b) that, if the administrative body has made it possible to communicate electronically with a citizen, the citizen can still opt for written administrative communication and,
c) that almost everywhere where the General Administrative Law Act requires a communication to be «in writing», this henceforth also implies electronic communication.

To realise equal footing, the EAC Act assumes a broad concept of «in writing». The concept of «in writing» can in fact be interpreted in various ways. Traditionally it aims to express that the act in question should be on paper in the form of lettered texts. However, the concept of «in writing» can also be interpreted as: reproduction by means of lettered text in some form or other. Within that meaning it is irrelevant what the carrier of the letters/text message is. It can be paper, but also a diskette, a hard disk or any other information carrier. The EAC Act has chosen this broad, dynamic interpretation of the concept of «in writing». A written document within the meaning of this Act can be a text on paper, but it can also be a lettered text in an electronic document. This means for instance that decisions of administrative bodies (within the meaning of Article 1:3 of the General Administrative Law Act) can in principle be both on paper and on an electronic information carrier. Certificates, copies, notices of objection or appeal and written complaints can be sent in principle both on paper and by electronic means. So from now on paper-based, written administrative communication is in most cases also considered to include electronic administrative communications.

This functional approach has also been chosen in the Norwegian General Administrative Law Act.[5] By adopting this strategy both the Netherlands and Norway have linked up with the functional approach of «in writing» of the UNCITRAL Model Law. The UNCITRAL Model Law on electronic commerce stipulates in its article 6 (Writing) that 'Where the law requires information to be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference.'[6]

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[5] ErRegelprosjektet om tilrettekegging for elektronisk kommunikasjon I lovveker. See for the text and explanatory notes to the bill: <http://odin.dep.no/nhd.norks.publ/rapporter/024011-220007/index-dok000-b-n-a.html>.

[6] United Nations Commission on International Trade Law (UNCITRAL), UNCITRAL Model Law on Electronic Commerce with Guide to Enactment (Article 6), 1996: <http://www.uncitral.org/english/texts/electcom/ml-ecomm.htm>. On the application of the functional approach in Dutch property law, see R.E. van Esch, *Electronic data exchange (EDI) and property law* [thesis in Dutch] (W.E.J. Tjeenk Willink; Deventer 1999).

2 General rules for electronic administrative communication

a. Opening up the possibility of electronic administrative communication by an administrative body

The principle of equal footing is expressed in Article 2:14, paragraphs 1 and 2, and 2:15, paragraph 1, of the EAC Act. Article 2:14 regulates the situation in which an administrative body wants to send an electronic message addressed to one or several addressees. This is possible in such case if the addressee has made it known that he or she can sufficiently easily be contacted in this electronic way. When an administrative body on its own initiative wants to address a citizen electronically, it will have to expressly make sure that the addressee can be contacted electronically. A written consent of the addressee is required. The fact that the addressee has an e-mail address or a web site, or has submitted an electronic request (e.g. an electronic tax return), will not be sufficient for this. Certainly when the administrative body intends to send decisions that may adversely affect the addressee it will have to ask his explicit consent for electronic administrative communication.

The main rule of section 2.3 of the General Administrative Law Act, laid down in Article 2:13, makes it clear though that it is not an obligation for the authorities to send messages electronically, but a right. In general citizens will therefore not have a legal action to oblige the administration to send messages electronically, if the administrative body has not opened up this possibility. On the other hand, it is of course thrue that, if an administrative body has itself announced that it is opening the route of electronic administrative communication, or already for some time maintains electronic administrative communication with a citizen, the administrative body is not free to end such use just like that. In certain circumstances the general principles of sound administration, and in particular the general duty of care and the principle of legal certainty, may require an administrative body, once it has taken the path of electronic administrative communication, to continue on such path. In my view, this can even mean that if the administrative body has chosen a certain technical

solution (a system, program or protocol) for electronic administrative communication, it cannot switch to a new solution from one day to the next. In the explanatory memorandum to the EAC Act too little attention is paid to these possible complications, in my view.

Article 2:14, paragraph 2, provides another arrangement for sending electronic messages which are not addressed to one or several addressees. For the administrative communication with such groups the administrative body cannot not solely rely on electronic administrative communication. So there will always have to be a parallel procedure in conventional administrative communication enshrined in paper documents. This is a sensible provision since precisely for larger groups of addressees there can be many differences in electronic accessibility. In addition, in the case of larger groups of addressees there will in most cases not be a possibility for the addressees to make it known that they are electronically accessible, since the groups maybe too large, or as yet the individual addressees may be unknown or insufficiently known.

Once the administrative body has decided to open up the possibility of electronic administrative communication, Article 2:14, paragraph 3, requires that the electronic communication take place in a sufficiently reliable and confidential manner. That is a relative duty of care. According to the same paragraph 3 it depends in fact on the nature and content of the message and on the purpose for which it is used. In the following we will come back to the points of reliability and confidentiality.

b. Sending messages electronically to administrative bodies

Article 2:15 of the EAC Act regulates the mirror situation in which it is not the administrative body, but a citizen who wants to send messages electronically. In that case the citizen can send electronic messages to the administration when the administrative body has made it known that this way is open. This can for instance be done through a message in a brochure, information spot, or free local paper, to the effect that from now on a permit can be applied for or any other decision requested via the In-

ternet or in any other electronic way. The EAC Act however places important restrictions on the possibility of citizens to communicate electronically with administrative bodies. The first restriction is that the administrative body can set further requirements on the use of the electronic gateway. These may be requirements which have to do with the need for uniform treatment and safe administrative communication such as a compulsory address or a compulsory electronic form that can (only) be completed with a certain software program, but also requirements concerning the method and way (the protocol) of communication. For instance, pin codes or electronic signatures can be required. The question is of course how far an administrative body can go in making demands. According to the explanatory memorandum to the EAC Act no unjustified impediments to electronic administrative communication may be raised; they will always have to be functional. The administrative body will have to weigh the interests of uniform, safe, practically applicable, as well as affordable[7] administrative communication against the interest of the citizen.

The administrative body can not only set requirements as regards the use of the electronic method; it can also refuse to accept an electronic message (a) if that would lead to a disproportional burden on the administrative body (Article 2:15, paragraph 2), or (b) if the reliability or confidentiality of this message would be insufficiently guaranteed, in view of the nature and content of the message and the purpose for which it is used (Article 2:15, paragraph 3). This is a very broad power for the administrative body with few conditions attached to it. According to the explanatory memorandum, one should think here of situations in which the administrative body has not opened up the possibility of electronic ad-

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[7] Affordability can be a factor. For instance, the Dutch National ombudsman did not consider it to be improper that the Ministry of Finance issued the program for the electronic tax return only in the MS-DOS version and refused to offer a version for Apple Macintosh systems. After weighing the costs and benefits of developing a tax return program that is suitable for use on an Apple Macintosh computer the tax authorities came to the conclusion that issuing a Macintosh version was not justified. See the ruling of the Dutch National Ombudsman of 27 August 1999, AB [*Administrative Decisions*] (1999) 435.

ministrative communication and is nevertheless faced with an electronic message, or if certain requirements in connection with reliability and confidentiality have not been met. However, on rereading the provision it becomes apparent that the EAC Act in no way restricts the possibility of refusal to these situations. This opens the way for administrative bodies to use this power in an improper way. The future will show whether or not there will be abuse.

In addition to the provisions that conditionally allow for electronic administrative communication, the EAC Act also includes provisions for two distinct aspects that are of interest as regards administrative communication. The first aspect concerns the electronic signature (Article 2:16), the second aspect is the legal verification of the time of dispatch or receipt of electronic messages.

c. Electronic signature

Article 2:16 of the EAC Act settles the issue of the electronic signature. It is clear that in case of electronic administrative communication it is hard to sign in the traditional sense. In Dutch administrative law it is more or less tradition that the authenticity of signatures is not a big issue. Only where it could possibly lead to misunderstandings — e.g. when submitting notices of appeal or objection, or otherwise in case of representation in legal proceedings by or on behalf of others — it happens now and again that an administrative body or (more often) the administrative court wants to check the identity of the applicant. In general the authentication of the petitioner or interested party is not a real issue. There are few administrative provisions for the authentication and there is a widespread informal (lenient) practice. For instance, in the practice of Dutch administrative law it hardly ever leads to problems if a notice of objection or appeal submitted by fax, or copies of petitions or applications, notices of objection or appeal, etc. do not actually bear any original signatures. Administrative bodies in the Netherlands tend to turn a blind eye to missing or possibly non-authentic signatures. Only in tax law, where a lot de-

pends on the (unique) identification of the tax payer, authentication plays a greater role. So in that field, like in other legal systems, a lot of effort has been put into techniques (pin codes, 'shared secrets,' etc.) which make reliable authentication possible.[8]

In Article 2:16 the EAC Act provides that the requirement of signing has been satisfied by an electronic signature[9] if the method used for authentication is sufficiently reliable, in view of the nature and content of the electronic message and the purpose for which it is used. The Articles 15a, paragraphs 2 up to and including 5, and 15b of Book 3 of the Dutch Civil Code apply by analogy unless the nature of the message dictates otherwise. These articles concerning the electronic signature in Book 3 Civil Code are part of the Electronic Signature Act (*Wet elektronische handtekening*) which has been enacted to implement Directive No. 1999/ 93/EC of the European Parliament and the Council of the European Union of 13 December 1999 on a Community framework for electronic signatures (OJ L 13).The requirements of the Civil Code which Article 2:16 refers to have to do with reliability requirements, the definition of electronic signature and person signing and the certification of electronic signatures. Even though the careful regulation of the electronic signature in the EAC Act deserves appreciation in principle, one could still ask oneself what its added value is. In the first place there are few problems with signing in Dutch administrative law. Secondly, Articles 4:5 and 6:6 of the General Administrative Law Act offer a variety of possibilities to quickly solve deficiencies regarding the signature by giving the opportunity to correct or

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[8] In the United States — contrary to what one would expect — electronic signatures are only very recently watertight. In 2001, American tax payers can for the first time make a fully electronic tax return, including an electronic signature consisting of the 'shared secrets': pin code, the gross annual income of the previous year and the social security number. Previously tax payers who used an electronic tax form had to send in a physical signature. See Lesli S. Laffie, News Notes, *The Tax Adviser* (August 2000) 532.

[9] By virtue of Article 15a, paragraph 4, Book 3 Civil Code an electronic signature means: a signature consisting of electronic data that have been attached to or are logically associated with other electronic data and that are used as a means of authentication.

supplement an application or a request. Article 2:16 is therefore a little like the proverbial sledgehammer to crack a nut.

d. Time of dispatch and receipt

When does an electronic message count as sent and when has it been received in a legal sense? That will be a little different for electronic administrative communication, if only in view of the technique, than for written administrative communication on paper which is mostly handled through regular postal delivery or by an announcement in written media. Reference points like posting or a term of receipt related to posting — appearing from a post mark — cannot be used in the case of electronic administrative communication (Article 6:9, paragraph 2, General Administrative Law Act). All the same, in the system of the General Administrative Law Act the terms of dispatch and receipt are of great importance for the commencement of terms of objection or appeal procedures. In my opinion the arrangement chosen in the EAC Act is clear. The Act recognises that electronic administrative communication can take place from point to point (via direct modem administrative communication between sender and receiver), but that it mostly takes place via an intermediary (think of a computer server or internet provider which forwards e-mail messages and suchlike). In line with the system of the idea of 'posting' in e.g. Article 6:9, paragraph 2, General Administrative Law Act, the EAC considers a message 'sent' when it reaches a system of data processing over which the sending administrative body has no control (Article 2:17, paragraph 1). If the administrative body and the addressee use the same system of data processing, the moment at which the addressee can access the message is considered the time of dispatch. The time at which a message has reached the administrative body's system of data processing will apply as the time at which the message is received by an administrative body (Article 2:17, paragraph 2).

The regime for dispatch and receipt of electronic messages is clear, even though a few dangers and problems of providing evidence may be

lurking in the future. The first danger consists of the possibilities of manipulation of time calibration at the message intermediary. Where in the case of posting it can be assumed that the postal authorities only mislay post, but are honest in placing post marks with correct dates, such integrity is less obvious for intermediaries for electronic mail. Especially where organisations which are interested parties in the sense of administrative law are themselves service providers manipulation lies in wait. Furthermore, the possibilities to change the actual time of dispatch into another time by means of hacking are limited, but not imaginary. A second group of problems has to do with the time of receipt. If linked to accessibility for the addressee, a problem threatens there too. How can that be checked and proved? In any case not by an electronic delivery receipt or read receipt: in modern programs for electronic administrative communication they can very easily be switched off by the receiver.

e. Reliability and confidentiality

Reliability and confidentiality of electronic messages play an important role in the EAC Act. Administrative bodies must see to it that electronic messages are sent in a reliable and confidential manner (Article 2:14, paragraph 3). They can further refuse messages addressed to them by electronic means because of inadequate reliability and confidentiality (Article 2:15, paragraph 3). In the legislator's view reliability and confidentiality are open standards which express a differentiated system of more specific principles which each relate to an aspect of the security. In the Netherlands Franken referred as early as 1993 to the principles mentioned here as the principles of sound IT use.[10] It concerns standards that have to do with authenticity of data (do the data indeed originate from the sender?), integrity (are the data complete and have they not been manipulated?), their irrefutability (are they not disputed?), transparency of data (can it be seen whether and when the data have been changed by

[10] See H. Franken, Comments on the automation of administrative decisions, in: *Beschikken en automatiseren* [Automation and making administrative decisions] (VAR series 110; 1993).

whom?), availability (are the data accessible and within reach?), flexibility (how are former and new requirements of use met?) and confidentiality of data (who has — exclusive — access to the data?). Franken developed these principles for electronic decision-making, but they also play a role in electronic administrative communication. For instance, how does a citizen know that a message indeed originates from an administrative body and how does an administrative body know for certain that an electronic application or notice of objection has indeed been sent? Quite sensibly, the EAC Act leaves it to the state of the art (of the techniques used) and the associated insights how to give substance to the standards for reliability and confidentiality. At present the most important techniques for achieving the greatest possible reliability and confidentiality are the electronic signature, the time mark and encryption, but that can rapidly change, certainly since rapid developments take place in digital security techniques. Working out technical security requirements does not fit in well with the General Administrative Law Act itself, so the explanatory memorandum to the EAC Act states. It is better to work out the principles in special provisions, codes of conduct or protocols which have been tailored to a certain situation and include more technical rules.

3. Provisional evaluation

The Electronic Administrative Communications Act will certainly simplify and accommodate electronic administrative communication in Dutch administrative law. In its design the Act is neither progressive nor aggressive in the sense that it directly brings closer an inclusive 'digital' administration. The Act is rather a little conservative: it does no more, nor less, than remove the most important obstacles for electronic administrative communication. Some existing problems are solved and a few future ones are already now removed. The Act and the underlying arguments start from and end at present-day technology. Furthermore, the EAC Act is as much as possible technology independent, which shows a sense of reality: the development of techniques for administrative communication

is super-fast nowadays. With the approach chosen the Act will remain solid.

A point of worry in the Act relates to the usefulness and necessity of the arrangement of the electronic signature. Electronic signatures may play a rôle within the framework of the reliability and confidentiality of electronic administrative communication, but a signature as an expression of authenticity is as such a non-issue in Dutch administrative law. The important issue in administrative law is identification and (stating) authority, and Article 2:16 has not been fully tailored to this. In its present form the provision of Article 2:16 of the EAC Act is in some sense odd. In addition there are still a few other points. For instance, the question remains whether the conduct of a citizen or the latter's failure to send a message allows an administrative body to deduce implicit assent to electronic administrative communication, within the meaning of Article 2:14, paragraph 1, General Administrative Law Act. The explanatory memorandum makes clear that that is not the case, but is the explanatory memorandum the proper place to lay this down? There are furthermore a few questions of dispatch and receipt of which it remains to be seen whether they will give rise to problems. The arrangement as now included in the EAC Act is in itself fairer than the former arrangement for the dispatch and receipt of written paper-based documents in Dutch administrative law. The former system assumed a virtually infallible system of postal delivery. That assumption has fortunately been abandoned for electronic postal delivery systems.