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“An exploration of Technology and the Law”

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Answers to questionnaire: Italy



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An exploration of Technology and the Law

Technological advances are changing society more profoundly (and more rapidly) than ever before. This could have far-reaching implications for legislation and case law in the near future or even today.

A debate is now under way in various European countries about recent and future technological advances, including the development of self-driving cars, the increasing use of big data and the emergence of self-learning supercomputers, such as IBM's Watson. The fundamental question being asked is what social impacts these developments will have.

A debate is also going on among Europe's administrative courts and legislative advisory bodies about the relationship between these accelerating technological advances and the law, which is not evolving at the same pace. Precisely where and to what extent these developments intersect with the work of administrative courts and legislative advisory bodies is a theme we aim to address at the ACA Colloquium on 15 May 2018. This is unlikely to be the last time that the ACA will need to consider the relationship between technology and the law. Therefore another aim of the meeting will be to think about an agenda for the future and how we can keep up with developments as they unfold.

Given the breadth of the subject area and the limited time available at the Colloquium, the theme of technology and the law needs to be clearly delineated and specified. To this end, we would like to know which specific topics within this broad theme each country considers relevant.

Below you will find a number of exploratory questions relating to five potential themes that I have identified: digital decision-making, digital proceedings, digital dispute settlement, technology-neutral legislation and digital enforcement. These are followed by two open questions to encourage you to share your ideas on other relevant topics that we might discuss at our Colloquium on 15 May next year.

I would be grateful if you would send me your response by at the latest. After analysing the responses and selecting the definitive topics, we will send you a second, more comprehensive questionnaire in October.

Digital decision-making

The use of 'Big Data' and algorithms enables decisions to be taken more rapidly and more frequently, for example on whether to issue permits, award grants or pay benefits. Critics warn of 'government by robots' that is hard to keep in check, while proponents argue that such technology will improve the justification and efficiency of decision-making.

Administrative authorities own and manage an enormous quantity of digital data; so, in Italy, it is under consideration the possibility of utilization of "Big Data" to realize public interests.

The Plan for the digital transformation of public administration - DAF (2017-2019), approved by the Presidency of the Council of Ministry, is the official document which has to guide and support the Public administration in its digital transformations and, inter alia, in gathering and using the data of public bodies. Of course, it is necessary to guarantee the privacy of the citizens, by assuring the anonymousness of these data.

The Code of the digital administration (legislative decree 82/2005, n. 82 deeply emended by legislative decree n. 179/2016 and n. 217/2017) has recently provided a project for the development of a **National Digital Platform**, with the goal to guarantee the knowledge and the use of all the data of public administrations (art. 50 ter).

This mean that the Public administration will take its decisions using all the knowledges it has on a certain matter, in an integrated system, it will guarantee "intelligent" public services, will be able to foresee predicable scenarios and will address its resources better.

An example, among many, of use of big Data for public interests is the following.

In the city of Bari (Puglia) a new project called M.U.S.I.C.A. (Urban monitoring through innovative solutions in continuous evolution) has been tested. It collects different digital information in the sectors of energy, environment, security and mobility. The idea is to realize an "Urban control center".

Sources of the information are the municipality data or the social networks.

This project would be an useful instrument for the municipality government, in order to control all that happens in the city and to help the municipal Government in the decision-making process.

This project has won a prize at the Forum PA 2017.

1. Do administrative bodies in your country make use of automated decision-making? By 'automated decision -making' we mean decisions based on automated files or computer models.

- Yes, in Italy Public administrations make use of automated decision-making.

Please provide an example.

It is to be mentioned preliminary that the "automated decision-making" is well known and studied by scholars (in Italian: "atto amministrativo informatico") since the early 2000s but Italian legislation does not provide a definition of automated decision-making, yet.

The CAD (Code of the digital administration, enacted by legislative decree n. 82/2005, n. 82 recently deeply emended by legislative decree n. 179/2016 and n. 217/2017) provides only a definition of "administrative digital document", of "digital proceeding" and "digital file", but does not rule the automated decision- making properly.

Nevertheless, there are many pieces of legislation, in specific sectors, which regulate the possibility for administrative bodies to make us of automated decision-making.

It is under discussion whether the public bodies can decide to make use of automated decision making, in presence of bound activity, even if there is no a specific legislative provision which allow them to do that ¹

According to the GDPR (Guidelines on Automated individual decision-making and Profiling) ² definitions, there are decisions 'based solely' on automated processing (This means that there is no human involvement in the decision process) and decisions not 'based solely' on automated processing, because a human being reviews and takes account also of other factors in making the final decision.

Italian administrative bodies in various sectors, such as for example taxation, welfare, and healthcare, very often make use of automated decision - making in the sense that there are digital systems collecting data and software analysing them in order to discover relationships or risk profiles and to define predicable models.

Therefore, the administrative bodies take into account these analyses before enacting an administrative decision.

In such cases, which are the majority, the decision is not based solely on automated processing, because a human being (a public functionary) takes into account the results of the automated processing and evaluates them together with other factors. Automated files and computer models are only supporting the human operators.

Nevertheless, there are sometimes administrative decisions based solely on automated processing.

For example, the new code about public contracts (legislative decree n. 50/2016) states at article 56 that contracting authority may use automated decision making in proceedings for awarding contracts for public supplies and services in the sense that all the procedure is ruled by automated instruments and the contract is awarded with IT tools.

Moreove, we can mention that in many public competition procedures, the admission tests are marked only by computer.

Another recent example, which has been examined by the administrative Courts, is the transfer of teachers all over the country, which may be carried out electronically, on the basis of an algorithm.

The examples are many.

Please also indicate what consequences automated decision-making has for you when assessing decisions in a judicial capacity and/or what particular aspects you have to consider when drafting advisory opinions on legislative proposals relating to this topic.

¹ For example, the TAR, Lazio-Roma, sez. III bis, decision 22nd March 2017, n. 3769, has stated that is up to the administration to decide wether making use of automated decision process or not.

² Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679 adoped on 3th october 2017 defines profiling as:

any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict aspects concerning that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements;

GDPR defins also Automated profilin as: "the ability to make decisions by technological means without human involvement. (...) Automated decisions can be made with or without profiling; profiling can take place without making automated decisions. However, profiling and automated decision-making are not necessarily separate activities. Something that starts off as a simple automated decision-making process could become one based on profiling, depending upon how the data is used.

There is no a wide case law about this topic, yet.

We can mention one ruling of the administrative Court of Rome, for example, which has stated that the use of automated decision-making must guarantee transparency and complete access to the algorithms used by the administration³.

Nevertheless, scholars have studied how administrative judges should assess administrative decisions adopted making use of automated decision-making.

In case of automated decision making based solely on automated processing, administrative decisions should be completely bound, so – in theory - judges should only asses the good functioning of the IT tools and control that all the conditions and requirements provided by the law are met. A malfunctioning of the computer machine may affect the legitimacy of the administrative decisions.

The automated decision making process involves very important aspects of protection of privacy, which must be taken into consideration while drafting advisory opinions on legislative proposals relating to this topic.

o No

Is there a public debate in your country on this issue? Is the introduction of such a system under consideration? What advantages and disadvantages have been identified?

Do you consider this topic suitable for a more detailed exchange of ideas at the Colloquium and, if so, what aspects of this topic warrant discussion?

Yes, of course it could be interesting to discuss about the automated decision-making and to know how it is ruled in other countries.

The main problem to be investigated is probably when and at what conditions the automated decision making can substitute the human decision making in administrative law and what kind of guarantees must be assured to private persons involved in such procedures.

Moreover, another topic, which could deserve to be studied, is that the realization of automated decision-making instruments needs the help of technicians. So, it would be interesting to discuss how the contribution of these experts, who often are not public servants, can be regulated in order to guarantee the rule of law instead of the “rule of technology”.

³ TAR, Lazio-Roma, sez. III bis, decision 22nd March 2017, n. 3769

Digital proceedings

An increasing number of countries now permit (or require) proceedings to be conducted digitally. The benefits of such a system are usually emphasised (e.g. efficiency gains), but how do digital proceedings relate in practice to principles such as access to the courts?

2. Are digital (paperless) forms of legal proceedings used in your country? Is it possible in your country to conduct proceedings digitally, for example online? If so, is this optional or mandatory?

o Yes

According to the above mentioned Code of digital Administration (CAD), in Italy, all the administrative proceedings shall be conducted digitally and the administrative decision shall be digitally signed.

According to the CAD, digital administration means, first of all, the use of digital instruments in the administrative procedures (communications between administration and citizens by certificated e-mail, submission of requests through the public administration website, possibility to conduct an administrative proceeding online, digital signature of administrative documents, ect.).

The Code has recently provided a "Charter of digital citizenship" which means that Italian citizens have the right to have digital access to data and to administrative documents and have also the right to have a unique digital identity in the relationship with all the public administrations (the so called SPID). They have the right to make payments to the administrations in electronic way and to have a digital domicile. All the communications between public administration and citizens shall be given by certified e-mail and the administrative bodies involved in an administrative proceeding shall give their advice digitally (so called conferenza di servizi telematica).

Of course, the digitalization of administrative proceeding permits to accelerate and simplify administrative activity; nevertheless it is to be told that although the majority of public administrations have an elevated standard of digitalization, there are still some public bodies which have not reached a satisfying target, yet (think of the municipalities of small villages).

Finally, it is important to underline that in Italy also civil trial and administrative trial are completely digitalized (so called PCT and PAT) and tax trial is partially digitalized and it will be completely digitalized quite soon.

In particular, it was as late as on 1st January 2017, however, that digital administrative trial was implemented.

This reform has left procedural rules unchanged, while leading to nearly complete digitalization of procedural documents. This objective was attained by attributing legal value exclusively to digital documents, and no longer to paper ones.

In a nutshell, the newly adopted system provided for the elimination of conventional paper documents, which, however, could still be used by way of support or under emergency circumstances.

Nowadays, therefore, the use of ITC tools is mandatory in Italian administrative proceedings and it is applicable to all cases regardless of the issue in contention, or the nature of the parties. Digitalization permeates all the steps of the trials, all the documents and the obligations complied with by the parties involved, judges and courts, that can and must be carried out by digital means. Indeed, procedural documents are drafted, signed, notified and filed by digital means, and this also applies to the drafting and publication of decisions

Please describe your experiences, positive and/or negative.

Since the administrative proceedings must be conducted digitally, administrative judges, in their daily work, deal with digital administrative decisions and with a digital administrative trial.

The positive effects of the telematic administrative trial is that basically this has allowed a judge to have immediate access at any given time to all the documents relating to the files on his or her docket, as these can now be accessed from a remote distance with the use of any internet connection, which allows to drafting, digital signature, and submission of judicial provisions electronically to the courts' registry. At the same time, attorneys can also manage long distance lawsuits. They can use the electronic system to file and submit the legal documents to initiate a lawsuit. They also have access to all the documentation related to their case, and can follow all the various phases of the procedure and carry out their various compliance duties without having to physically go to the courts' offices, except to attend their hearings.

More generally, the positive effects of digitalization of public administration is that administrative proceedings are generally faster and investigation easier and more complete because advices by other administrations are given by certificated e-mail in the due time and the access to data and information online is simpler.

Nevertheless, if citizens involved suffer from a digital divide, difficulties may arise in the procedure. As for the administrative trial there is an office at each Court that citizens can address to get free legal assistance when fulfilling the obligations related to telematic administrative proceedings.

Moreover, sometimes there are problems with regard to the validity of communications by e-mail because of malfunctioning or human mistakes.

o No,

Would you like to see the introduction of digital proceedings in your country? Is this under consideration? Is there a public debate on this issue? What advantages and disadvantages have been identified?

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Do you consider this topic suitable for a more detailed exchange of ideas at the Colloquium and, if so, what aspects of this topic warrant discussion?

Yes.

In particular, it could be interesting verify whether the digitalization of administrative procedures could bring to simplification and uniformity of administrative procedures, in order to consent the interoperability among the databases, and how this can be combined with the autonomy of administrative bodies.

Moreover, it is to consider how the structure of administrative proceeding may change, with its digitalization. In Italy, scholars say that digitalization should transform the administrative proceeding deeply: it will change from the "sequential model" (organized step by step) to the "star model" (in which all the contributions of private and public participants are to be given at the same time and shall be simultaneously examined).

Finally, it might be evaluated the risk for the security of countries in case of use of the "cloud technology" for the storage of administrative sensible data.

Digital dispute settlement in the public sector without involving the courts

If a party knows in advance that they have virtually no chance of winning a case, there is little point in instituting proceedings. Computer programs can analyse tens of thousands of judgments and use the results to predict the outcome and the chance of success or failure.

3. In your country, are you aware of parties using computer systems within the public domain in the settlement of disputes prior to possible court proceedings? Examples may include systems that predict the outcomes of new cases on the basis of case law analysis, allowing parties to decide whether or not to pursue legal proceedings or settle out of court.

Yes

Please provide an example. Is it only parties to proceedings that make use of such systems, or do the courts also use them to assist them in reaching judgments? Is there any debate in your country on the use of such systems, for example in relation to fundamental rights and legal protection?

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No

Such systems are not at work in our country. There is not a public system that predict the outcomes of new cases based on case law analysis, nor – as far as we know – do lawyers utilise private similar systems before filing an action.

Would you like to see such systems introduced? Is this under consideration? Is there a public debate in your country on this issue? What advantages and disadvantages have been identified?

As far as we know, there is not a public debate on this issue in our country.

Do you consider this topic suitable for a more detailed exchange of ideas at the Colloquium and, if so, what aspects of this topic warrant discussion?

It might be interesting to know if, in other countries, there are such systems and how they work.

Technology-neutral legislation

If a statutory definition contains the words 'written' or 'in writing', does the definition also apply in a paperless context? If a self-driving car causes an accident, who is liable? The software manufacturer?

4. Does your country have experience of legislation framed in a way that is technology-neutral or that otherwise takes account of future technological developments?

o Yes

Article 68 of the CAD states that public bodies shall respect the principle of technological neutrality.

So, for example, digital administrative acts and digital administrative proceedings, according to article 20 Code of digital Administration, are equivalent to written acts and proceedings.

Moreover, the CAD states that the digital domicile might be not only an address of certificated e-mail (so called PEC), but all the electronic services of qualified delivery, respecting the EIDAS regulation standard. The same happens, according to CAD provisions, regarding the digital signatures.

Please provide an example in the context of your legislative advisory role and indicate whether or not the legislation in question succeeded in this regard, and why.

o No

Does the lack of such legislation cause problems in your society or in other respects? Please provide an example.

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5. How do the courts (administrative or otherwise) in your country deal with legislation that is framed in terms of specific technologies? Do they apply strict interpretations in such cases or is it possible, or even customary, to apply a broader interpretation in order to resolve a problem? Is there any form of debate on this topic, for example with regard to fundamental rights?

Administrative courts, generally, do not apply strict interpretations in case the legislation is framed in terms of specific technologies, but apply a broader interpretation, according to EIDAS Regulation (regulation UE n. 910/2014) and to the principle of technological impartiality.

For example, the technical regulations of the administrative trial provides that the claim shall be digitally signed according to the PAdES standard. In some cases in which the claim was digitally signed according to a different standard (CAAdES) the Administrative Courts said that

the signature was not null but only irregular, because the CAdES format is recognized as an efficient instrument, with identical effects of the PAdES format⁴.

Another example, the Code on administrative trial provides that any claim and defence, must be digitally signed. However, in case the acts was not digitally signed, they are not null but only irregular and must be regularised by the party within a period specified by the judge⁵.

The debate about this topic, nevertheless, actually is not very wide.

Do you consider this topic suitable for a more detailed exchange of ideas at the Colloquium and, if so, what aspects of this topic warrant discussion?

Yes, of course.

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⁴ Tar Napoli, sez. IV, 4th April 2017, n. 1799; Cons. Stato, Sez. III, 27th November 2017, n. 5504; T.A.R. L'Aquila, Sez. I, 27th June 2017, n. 278; T.A.R. Brescia, Sez. II, 27th September 2017, n. 1174; T.A.R. Catanzaro, Sez. I, 9 November 2017, n. 1704; T.A.R. Napoli, sez. I, ord. 31th January 2018, n. 673.

⁵ Cons. Stato, Sez. IV, 4th April 2017, n. 1541; T.A.R. Reggio Calabria, ord. caut., 26th April 2017, n. 69; T.A.R. Napoli, sez. VII, 12th June 2017, n. 3201; T.A.R. Sardegna, sez. I, 12th September 2017, n. 580; Cons. Stato, sez. III, 11th September 2017, n. 4286.

Digital enforcement

More and more European countries are using digital data to enforce a range of legislation. In the Netherlands, digital data is used for a variety of purposes, such as vehicle speed checks on motorways and in lorries (by means of a tachograph), corporate and private tax returns filed online, and risk profiles developed by law enforcement authorities. In terms of fundamental rights and other such issues, what are the legal boundaries of digital enforcement?

6. Do you know of cases in your country where automated data analyses are used for enforcement-related purposes, for instance to identify risk profiles? Perhaps the tax authorities use data analysis from various sources, for example, to perform targeted audits?

Yes. Data base and automated data analysis are used by public administrations for identifying risk profiles.

Please provide an example. What specific angles of approach do you, as a legislative adviser and/or administrative judge, consider important in this regard?

For example, in tax sector, all the indexes of capacity of expense are considered in order to verify the real richness of taxpayers (the purchase of a car, of a boat, of a flat, the bank count, ect. ect.).

Database and automated data analysis are used also for the elaboration of the so called sector studies, which are useful to identify the average income of a specific profession and, consequently, to determine the minimum tax to be paid.

From the point of view of the administrative judge, it would be important to control the way in which such data analysis is carried out by the administrative authority.

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No

Is the introduction of digital enforcement under consideration? Is there a public debate in your country on this issue? What advantages and disadvantages have been identified?

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Do you consider this topic suitable for a more detailed exchange of ideas at the Colloquium and, if so, what aspects of this topic warrant discussion?

Yes, it would be very interesting to discuss this topic at the Colloquium.

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Open-ended question for administrative jurisdictions

Are there technological developments (other than those already mentioned) that you believe will soon have far-reaching consequences for administrative courts (particularly developments you have already encountered or expect to encounter)?

Please list these developments in order of importance and explain why you consider them significant. Please also indicate whether you would like to discuss one or more of these topics in more detail in The Hague.

As far we know, no.

Open-ended question for legislative advisory bodies

Are there technological developments (other than those already mentioned) that you have already encountered or expect to encounter and believe will soon have far-reaching consequences for the legislative process and legislative advisory bodies in general?

Please list the developments in order of importance and explain why you consider them significant. Please also indicate whether you would like to discuss one or more of these topics in more detail in The Hague.

As far we know, no.