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Answers to questionnaire: Belgium

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FIRST ANSWERS BELGIAN STATE COUNCIL TO THE PRELIMINARY QUESTIONS

<u>Digital decision making</u>

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

   Please provide an example

   It is for example quite common that an application for a permit, registration, subsidy, … will not be introduced and hence be treated if the applicant does not fill in the required information or upload the required documents on an internet tool.

   But even furthergoing examples appear: e.g. an automatic extension of the duration of environmental permits on the basis of the outcome of an online tool called "depositionscan" (against which no administrative appeal was available) was provided for in the Articles 12 and 164 of the Flemish Parliamentary Act ("Decreet") of December 8, 2015 "houdende diverse bepalingen inzake omgeving, natuur en landbouw en energie".

   There also seems to be a strong trend towards the automatisation of the identification of those who should receive financial benefits (e.g. scholarships or compensation for inconvenience caused by public works) and actively notifying those persons of that fact.

   For example a Flemish Regional regulation ("Besluit van de Vlaamse Regering") of May 12, 2017 'tot uitvoering van het decreet van 15 juli 2016 houdende toekenning van een hinderpremie aan kleine ondernemingen die ernstige hinder ondervinden van wegenwerken in het Vlaamse Gewest'", article 20 and 21) contains provisions

regarding the automatic identification and notification of small businesses who are eligible to receive subsidies as compensation of revenue lost because of hindrances caused by public works. These businesses are identified on the basis of a comparative analysis of a business directory database and a government geographic database. The decision to pay out the aforementioned subsidy is however still made by a human public servant (article 26 of the aforementioned regulation).

In tax law, data are also automatically generated to prepare administrative decisions or to perform risk analysis using a datawarehouse[1].

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.

It is generally acknowledged that automated decision-making raises <u>privacy issues.</u> Automated decision-making is, therefore, in essence prohibited by Article 12*bis* of the Belgian Privacy law. Any legal decision or decision that has a substantial impact on a person may not be taken solely on automatically generated data meant "to establish certain aspects of his or her personality" (the Law of December 8, 1992 "tot bescherming van de persoonlijke levenssfeer ten opzichte van de verwerking van persoonsgegevens)"[2]. This principled prohibition of automated individual decision-

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[1] See e.g. Article 5 of the Law of August 3, 2012 "houdende bepalingen betreffende de verwerking van persoonsgegevens door de Federale Overheidsdienst Financiën in het kader van zijn opdrachten".

Tax-on-web is a digital tool enabling tax payers to digitally receive, complete and file an - already partially completed - tax return.

[2] Art. 12*bis*:

<u>Dutch version:</u>

"Een besluit waaraan voor een persoon rechtsgevolgen verbonden zijn of dat hem in aanmerkelijke mate treft, mag niet louter worden genomen op grond van een geautomatiseerde gegevensverwerking die bestemd is bepaalde aspecten van zijn persoonlijkheid te evalueren.

Het in het eerste lid vastgestelde verbod geldt niet indien het besluit wordt genomen in het kader van een overeenkomst of zijn grondslag vindt een bepaling voorgeschreven door of krachtens een wet, decreet of ordonnantie. In die overeenkomst of in die bepaling moeten passende maatregelen zijn genomen ter bescherming van de gerechtvaardigde belangen van de betrokkene. Minstens moet hem de mogelijkheid geboden worden om op nuttige wijze zijn standpunt naar voren te brengen."

<u>French version:</u>

"Une décision produisant des effets juridiques à l'égard d'une personne ou l'affectant de manière significative ne peut être prise sur le seul fondement d'un traitement automatisé de données destiné à évaluer certains aspects de sa personnalité.

making is also enshrined in Article 22 of the EU Privacy Regulation[3]-[4]. However, this prohibition is not absolute and the question will be how to interpret Article 22.2 and 22.3 of this Regulation.

Although it may sometimes be difficult to understand the scope of this principled prohibition of automated decision-making, it appears that in Belgium questions will essentially revolve around the right to good administration, including the right to be heard and the obligation of the administration to give reasons for its decisions (e.g. Article 41 EU-Charter) and the existence of an effective judicial review of automated decision making. For instance, can automated decision making be reconciled with the existing standards for judicial review, in particular the need to state reasons ? "Computer says no", is a conclusion, not a statement of reasons. However, automated decision-making at the moment only seems to be used in cases where administrative bodies possess little if any margin of discretion when making decisions (e.g. when granting a financial benefit: deciding whether or not the conditions to receive said benefit have been met or not). In those cases judicial oversight in general tends to be limited to a check whether or not the administrative body correctly decided that the

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L'interdiction prévue à l'alinéa 1er ne s'applique pas lorsque la décision est prise dans le cadre d'un contrat ou est fondée sur une disposition prévue par ou en vertu d'une loi, d'un décret ou d'une ordonnance. Ce contrat ou cette disposition doivent contenir des mesures appropriées, garantissant la sauvegarde des intérêts légitimes de l'intéressé. Il devra au moins être permis à celui-ci de faire valoir utilement son point de vue."

[3] Article 22Automated individual decision-making, including profiling

1. The data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her.

2. Paragraph 1 shall not apply if the decision:

(a) is necessary for entering into, or performance of, a contract between the data subject and a data controller;

(b) 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) is based on the data subject's explicit consent.

3. In the cases referred to in points (a) and (c) of paragraph 2, the data controller shall implement suitable measures to safeguard the data subject's rights and freedoms and legitimate interests, at least the right to obtain human intervention on the part of the controller, to express his or her point of view and to contest the decision.

4. Decisions referred to in paragraph 2 shall not be based on special categories of personal data referred to in Article 9(1), unless point (a) or (g) of Article 9(2) applies and suitable measures to safeguard the data subject's rights and freedoms and legitimate interests are in place.

[4] It would also be interesting to understand whether whether this principled prohibition is deemed necessary to protect human dignity.

conditions required by law were met or were not met. There does not seem to be an appreciable difference in judicial assessment depending on whether that specific conclusion was reached by a human public servant or was reached through automatic means. In both cases the decision-making process needs to be transparent enough to enable judicial oversight. This would seem to require that a decision reached through automated decision-making be motivated in language and terms easily understandable to people without advanced ICT-training. A motivation consisting of a reference to computer code unreadable by humans would not seem to pass muster in the light of the principle of explicit motivation of administrative decisions as enshrined by a Belgian law of July 29,1991.

Automated decision making also raises questions on delegation of legislative and regulatory decision making, on the quality of the electronic data and computer models, on the quality of the evaluation and assessment in the individual decision making. Without such guarantees one may argue that using digital data could entail new unnoticed discriminations. Implicit biases that can be strengthened by using seemingly innocuous statistical variables. For example, selection on the basis of a number of objective socio-economic criteria may result in exclusion of people with a migrant background.

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.

To our knowledge the introduction of an advanced and general automated decision making system is not under consideration. The impact of artificial intelligence is however being debated in legal journals[5], financial magazines[6] and by the bar associations[7]. Last summer there was a major incident, with the mass screening of

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[5] See e.g. X, "Artificiële intelligentie in het recht: eerst stappen, dan lopen", *Juristenkrant* nr. 339, December 7, 2016.

[6] See e.g. Trends, September 28, 2017.

[7] "L'ordre des barreaux francophones et germanonphone de Belgique" has even a website devoted to legal questions on the topic : www. incubateur.legal. It's mission statement in la Tribune n° 120 of September 21, 2017 sounds as follows: "Comme annoncé durant la Tribune du 30 juin dernier, l'Incubateur vise à placer l'avocat au cœur de l'innovation. Le digital est une vague irrésistible qui impacte tous les secteurs de la société, en ce compris les avocats. Or ceux-ci sont aujourd'hui trop peu sensibilisés par rapport aux conséquences profondes que le digital entraîne sur notre profession. Les missions de l'Incubateur sont de diffuser la connaissance du digital parmi les avocats, promouvoir l'innovation au sein de la profession et partager l'information vers le monde extérieur. " (see http://mailchi.mp/avocats/la-revolution-numerique-est-en-cours-1323477#1).

Tomorrowland ticket holders, resulting in both judicial decisions and a public debate. *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?*

Article 12bis of the Belgian Privacy Law is a transposition of Article 15 of the European privacy Directive[8], which will be replaced by Article 22 of the Privacy Regulation[9]. It would be interesting to compare case law or advisory opinions on how to interpret and apply this Article.

An interesting topic for discussion would seem to be the aforementioned question of the explicit motivation of automated decisions. Going forward, are judges and courts expected to possess advanced ICT-knowledge to be able to understand how a certain decision was reached by automated decision-making? Or is the burden on the administrative bodies using automated decision-making to provide sufficient transparency and insight into their automated decision-making processes?

We do notice that legislation and regulation is amended in order to bring the legislation in line with new ICT-developments and possibilities (e.g. the Flemish Regional regulation of February 10, 2017 "betreffende elektronische berichten voor de scheepvaart en het systeem voor de uitwisseling van maritieme informatie van de Europese Unie (Safeseanet)"). Often the argument is made that large delegations to administratieve bodies are acceptable because of the technical character of the matter.

However, is this really so? Does regulation or decision making become technical because it has been translated into an electronic tool?

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[8] Automated individual decisions

1. Member States shall grant the right to every person not to be subject to a decision which produces legal effects concerning him or significantly affects him and which is based solely on automated processing of data intended to evaluate certain personal aspects relating to him, such as his performance at work, creditworthiness, reliability, conduct, etc.

2. Subject to the other Articles of this Directive, Member States shall provide that a person may be subjected to a decision of the kind referred to in paragraph 1 if that decision:

(a) is taken in the course of the entering into or performance of a contract, provided the request for the entering into or the performance of the contract, lodged by the data subject, has been satisfied or that there are suitable measures to safeguard his legitimate interests, such as arrangements allowing him to put his point of view; or

(b) is authorized by a law which also lays down measures to safeguard the data subject's legitimate interests.

[9] See *supra*.

Moreover what to do with *de facto* regulation and decision making? The architecture of the electronic tools might result in *de facto* regulation or decision making where e.g. an online tool might refuse to enter an application because certain data has not been provided by the applicant ("computer says no"), even if this is not required by the regulatory framework.

And what to do with the *de facto* restriction on the right to a judge? This *de facto* restriction might be due to many different factors: concerned individuals will tend to believe that online information or an online tool are in conformity with the regulatory framework; an administrative contact person or appeal might not be provided for; if the latter is provided the administrator might collude himself in believing that online information or an online tool is in conformity with the regulatory framework (or can not be altered), a concerned individual might not even be aware an automated decision has been taken, etc.

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?*

YES

Please describe your experiences, positive and/or negative.

The Council of State seems to be an early adopter and a forerunner in the field of digital legal proceedings in Belgium. Digital legal proceedings were introduced in a new article 85*bis* of the general procedural regulation in January 2014 and entered into force on February 1, 2014.

The use of digital proceedings is fully optional. The decision to make use of digital proceedings is however irreversible for the concerned party (e.g. when a claimant decides to file a case digitally, he cannot revert to paper-based proceedings in a later stage of the procedure).

The use of digital proceedings does not require the purchase of any specialised software. A free, secure and easily accessible website (e-ProAdmin, https://eproadmin.raadvst-consetat.be) has been set up by the Council of State, allowing anyone to initiate proceedings and to deposit or consult documents relating to their case.

Use of digital proceedings is not limited to solicitors or legal professionals. Any person in possession of a valid Belgian electronic identity card (eID), an electronic identity card reader (price range 10 - 25 euro) and a computer connected to the internet can use the aforementioned website.

The use of digital proceedings is limited to the filing of documents and replaces traditional paper-based communication between the Council of State and the parties (having opted for the digital proceedings (e.g. notification of the documents filed by another party or the date when the Council of State will hear the case or of the judgment).

The website for digital proceedings features no integrated platform enabling the parties to communicate directly with each other, or with the registry office or the magistrates of the Council. Such direct communication tends to happen through e-mail or in case of the registry office by telephone.

The hearing of a case still happens in the traditional real-life courtroom even when digital proceedings have been used. The general procedural regulation at this time does not allow for a court hearing through digital means (e.g. videoconference).

The Auditor's reports and the judgments of the Council of State are deposited and notified to the parties (having opted for the digital proceedings) on the e-ProAdmin website. These parties are alerted by e-mail.

The fundamental right of access to the court does not seem to be limited in any substantial way by the introduction of digital proceedings since the use of that form of proceedings is fully optional. Parties, neither citizens nor administrative bodies, are in no way obliged to use digital proceedings. There are no financial barriers (e.g. no special court dues or fees) attached to the use of digital proceedings. Furthermore digitally filed cases in no way take precedence over paper-based proceedings.

Some positive aspects of digital proceedings that come to mind:

- documents submitted by the parties are easily searchable and one can usually easily quote (copy-paste) directly from documents submitted by the parties, thereby decreasing the time needed to handle cases;
- a *de facto* improvement of access to the court as parties are no longer limited by the opening hours of the post office to initiate proceedings or submit documents;
- immediate confirmation and certainty that parties have submitted their arguments or documents in a timely manner;
- Cost savings for the court and therefore the taxpayer as documents deposited on the e-ProAdmin website no longer need to be printed and sent to the parties (having opted for the digital proceedings) by post.

Some (although possibly temporary) negative aspects of digital proceedings:

- the system requires a substantial investment of time and resources to set-up and maintain; additional computer equipment is also required to enable judges to simultaneously see the digital documents and draft a report or judgment;
- before the Belgian State Council mixed proceedings (i.e. proceedings in which not all the parties opted for the digital proceedings) are still possible and entail additional costs and work for the State Council (e.g. copying the documents deposited on the e-ProAdmin website);
- The tendency still exists to print digital documents (and is probably inevitable for certain documents) - this has to be done and paid by the State Council.

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?

At first glance this seems to be a subject that lends itself to an interesting comparative analysis of positive and negative experiences. However, the other questions seem to lend themselves more to an interesting debate, as this point is rather related to the specific situation of each country.

3. *In your country, are you aware of parties using computers systems with 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.*

We are aware of parties using legal databases containing court decisions in an attempt to predict the outcome of legal proceedings, on the basis of legal precedent[10]. A Ghent based law firm also developed an automatic claim platform ("automatisch schuldvorderingsplatform Unpaid") that won the innovation price of the Financial Times.[11] They also launched a programme to assess automatically whether or not a firm is in conformity with the new Privacy Regulation.

However, we are currently not aware of computer systems giving a success rate estimation. The question has been submitted to some legal offices.

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[10] https://www.tijd.be/ondernemen/technologie/Prestigieuze-prijs-voor-Gentse-advocaten-die-advocaten-overbodig-maken/9939619 ; see also: https://www.tijd.be/nieuws/archief/Gentse-advocaten-lanceren-chatbot-voor-juridisch-advies/9929588 .

[11] *Ibidem*.

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 can be ascertained the introduction of a public domain computer system for *a priori* dispute settlement is not currently under consideration in Belgium.

The Council of State case law is in the public domain and is made available in easily searchable pdf-file format on the website of the Council of State (judgments since September 1994, http://www.raadvst-consetat.be/?lang=nl&page=caselaw).

The Council of State also maintains a subject-structured database of case law, freely accessible to the public both in Dutch and French ('JuriDict', http://juridict.raadvst-consetat.be).

Possible advantages of the introduction of such a system would seem to be:

– filtering and largely eliminating routine cases based on settled jurisprudence from the case load of the courts;
– improved allocation of time and resources both for parties and judges.

Possible disadvantages of the introduction of such a system would seem to be:

– possible *de facto* hindrance of access to the courts, especially if not legally trained parties were to start using such a system by themselves instead of putting their case in front of a legal professional or a solicitor first (e.g. "computer says 'no', so why bother consulting a lawyer", while the case might have merits not obvious at first sight to a person who is not legally trained);
– stagnation of jurisprudence, parties might shrink back from calling settled case law into question.

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?

At first glance this seems to be a subject that would lend itself to an interesting discussion, especially if we look at it through the lens of access to justice. However, we wonder whether this topic is directly relevant for the functioning of the Courts themselves.

4. 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?

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

YES

Flemish legislation, for instance, has to be "digital friendly"[12]. This implies that several aspects have to be taken into account when drafting new legislation. This includes the question whether or not the legislation is technology neutral and an assessment of the legal risks and costs[13]. Models concerning a "signature or authentification" and "notifications" can be found on the website of the Flemish authorities to help legislative drafters.

Recently, the Council of State had to give a legislative advisory opinion on the new Law of July 21, 2016 on digital archives (transposing EU-directive nr. 910/2014)[14]. In

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[12] https://overheid.vlaanderen.be/informatiemanagement/digitaalvriendelijke-regelgeving.

[13]*Ibidem*: "Digitaalvriendelijke regelgeving hanteert vijf principes:

- *neutraliteit*: de regelgeving moet zowel papieren als digitale communicatie toelaten
- *technologieneutraal*: om toekomstvast te zijn moet er ruimte zijn voor technologische ontwikkelingen
- *risicoanalyse*: breng de risico's op juridische betwistingen inzake de authenticiteit en integriteit in kaart
- *efficiëntie*: de regelgeving moet leiden tot beter ingerichte processen
- *kost*: de opgelegde eisen inzake digitale communicatie moeten haalbaar zijn

Wat neutraliteit betreft, is het niet mogelijk om voor natuurlijke personen in een niet-professionele hoedanigheid digitale communicatie te verplichten. Dit is wel mogelijk voor bijvoorbeeld bedrijven die een subsidie aanvragen.Risicoanalyse is een onmisbare stap bij de opmaak van digitaalvriendelijke regelgeving, net zoals bij substitutie en analyse van de rol van de handtekening.Niet alle processen vergen hetzelfde beveiligingsniveau op het vlak van authenticatie of onweerlegbaarheid. Onaanvaardbare risico's moeten gemitigeerd worden. Even belangrijk is dat aanvaardbare risico's geaccepteerd worden.

Het accepteren van bepaalde risico's is noodzakelijk om efficiënte digitale processen in te richten."

[14] The Law of July 21, 2016 "tot uitvoering en aanvulling van de verordening (EU) nr. 910/2014 van het Europees Parlement en de Raad van 23 juli 2014 betreffende de elektronische identificatie en vertrouwensdiensten voor elektronische transacties in de interne markt en tot intrekking van Richtlijn 1999/93/EG, houdende invoeging van titel 2 in boek XII "Recht van de elektronische economie" van het Wetboek van economisch recht, en houdende invoeging van de definities eigen aan titel 2 van boek

legal literature it is said that the new legislation (with its digital signing, stamps and digital notices) comes very close to blockhain[15].

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.

The Council of States argued already in 2001 that it is contradictory to require a digital transfer of data but to take a post stamp as proof of the date of communication. The drafters explain that the digital data still have to be transferred via floppy-disk sent by the post until a datawarehouse becomes functional. The Council of State proposes to specify this more explicitly and adapt the legislation accordingly.[16]

Besides questions of legal certainty and legality most legal opinions deal with privacy issues. In a recent opinion the Council of State argued that the drafters had to specify in the law what information could be held in the datawarehouse on education[17].

XII en van de rechtshandhavingsbepalingen eigen aan titel 2 van boek XII, in de boeken I, XV en XVII van het Wetboek van economisch recht".

[15] X, "Artificiële intelligentie in het recht: eerst stappen, dan lopen", *Juristenkrant* nr. 339, December 7, 2016.

[16] State Council, legislative advisory opinion n° 31.081/3 of June 5, 2001 "over een ontwerp van koninklijk besluit 'houdende bepaling van de regels volgens welke bepaalde minimale psychiatrische statistische gegevens moeten worden medegedeeld aan de Minister die de Volksgezondheid onder zijn bevoegdheid'": "Suivant l'alinéa 3, les données doivent être transmises électroniquement. Cette disposition paraît être contredite par l'article 6, § 6, qui dispose que dans certaines circonstances 'le cachet de la poste' fera foi quant à la date à laquelle les données ont été communiquées.
Lorsque son attention fut attirée sur ce point, le fonctionnaire délégué a déclaré : 'Par la "transmission électronique de données', on entend que les données sont transmises sur disquette et non sur une liste imprimée. La disquette est toutefois envoyée par la poste. A l'avenir, il ne s'agira plus de transmettre ces données sur disquette envoyée par la poste, mais d'opérer cette transmission dans le cadre du 'Datawarehouse', dont la mise en place bat son plein"(traduction).
A la lumière de cette explication, il est recommandé de préciser l'article 4, alinéa 3, en énonçant, par exemple, que les données sont transmises "sur un support électronique". Dès la création du 'Datawarehouse', il faudra ensuite adapter les articles 4, alinéa 3, et 6, § 6."
[17] State Council, legislative advisory opinion n° 57.186/1 of April 1, 2015 "over een voorontwerp van decreet 'betreffende het onderwijs XXV'" : "Het komt dus aan de decreetgever toe om in voldoende duidelijke bewoording nader te preciseren welke gegevens precies in het Datawarehouse Onderwijs en Vorming kunnen worden verzameld."

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

Legislation that is not technology neutral might give rise to a distortion of competition, and might hamper technological innovations.[18]

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?

There is probably no uniform approach. As far as the interpretation of fundamental rights is concerned one may assume that most judges are familiar with the theory of evolutive interpretation, developed by the European Court of Human Rights. On the other hand the Belgian constitution requires that certain legal topics, like tax legislation or penal law, are adopted by a formal law that is sufficiently precise (material and formal principle of legality).

In general the courts in Belgium, including the Council of State, tend to be somewhat conservative when confronted with new technologies and therefore tend to apply rather strict interpretations (e.g. the media recently reported on a case in which a civil court of appeal invalidated the sale of a house because the offer to buy the property had been made by e-mail, which according to the court was not a valid medium by which to make such an offer[19]).

However when a fundamental right is called into question by this tendency toward restrictive interpretation, the Council of State has shown itself in the past to be more flexible. An example not really related to ICT-technology but still somewhat illustrative of this tendency to be more flexible when fundamental rights are in danger can be found in the case law regarding the requirement to file a case using registered mail. Although the general procedural regulation stipulates that when using classic

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[18]See   e.g.
 http://economie.fgov.be/fr/modules/activity/activite_1/20170504_seminaire_normes_et_politiques_pu bliques_.jsp and guide "Référer aux normes dans les réglementations techniques ".

[19] « Rechter oordeelt dat verkoop van huis via mail juridisch niet geldig is » , published on March 8, 2017 on http://deredactie.be/cm/vrtnieuws/binnenland/1.2911512

paper-based proceedings cases can only be filed by registered mail, the Council of State has in recent years accepted many forms of delivery of paper documents beside registered mail, as long as the delivery method used provides a clear way to ascertain the date on which the documents were sent and thereby determine the admissibility *ratione temporis* of the documents.

It would however be quite a stretch to imagine the Council of State accepting e-mail as a valid means of filing cases. Indeed, in 2016 the Council of State annulled a procedural regulation for a lower administrative court, which required the filing of cases by e-mail.[20] The Council was of the opinion that e-mail is an insecure means of data transmission and does not provide certainty of the date on which the petition was sent to the administrative court.

This approach of the judicial section of the Council of State, contrasts somewhat with recent legislative evolutions. Encouraged by possible cost reductions or enhanced efficiency, legislation of various departments is being reviewed to allow, for instance, for digital notices with a digital receipt[21]. The legislative section of the Council of State does not always formulate fundamental objections to digital innovations[22], although it has warned that the "digital gap" may not lead to discrimination of citizens who do not have digital access[23], that digital proceedings may not be imposed, and that certain guarantees must be given to avoid discrimination[24].

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[20] State Council Judgement n° 233.777 of February 9, 2016, Orde van Vlaamse Balies e.a.

[21] See for instance, the various "potpourri" legislation of the department of justice or recent tax legislation. The third "potpourri" law even introduced the electronic assigment by the bailiff ("gerechtsdeurwaarder"). A digital platform has been developed for the follow-up (see www.sam-tes.be/e-betekening).

[22] See e.g. State Council, legislative advisory opinion n° 58.701/1 of March 1, 2016 "over een wet van 21 juli 2016 'tot uitvoering en aanvulling van de verordening (EU) nr. 910/2014 van het Europees Parlement en de Raad van 23 juli 2014 betreffende de elektronische identificatie en vertrouwensdiensten voor elektronische transacties in de interne markt en tot intrekking van Richtlijn 1999/93/EG, houdende invoeging van titel 2 in boek XII "Recht van de elektronische economie" van het Wetboek van economisch recht, en houdende invoeging van de definities eigen aan titel 2 van boek XII en van de rechtshandhavingsbepalingen eigen aan titel 2 van boek XII, in de boeken I, XV en XVII van het Wetboek van economisch recht'".

[23] State Council, legislative advisory opinion n° 58.416/2/3 of December 11, 2015 "over een voorontwerp van wet 'houdende internering en diverse bepalingen inzake justitie'" (so-called "Potpourri III") and referring to the judgment 106/2004 of June 16, 2004 of the Constitutional Court on the abolishment of the paper version the Belgian State Gazette ("Moniteur belge/Belgisch Staatsblad).

[24] *Ibidem*.

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

The role of advisory bodies in the implementation of technology-neutral legislation could be a suitable topic. What legal arguments should be made? Does such technology-neutral legislation always provide more legal certainty? Should technology-neutral legislation not be confined to non-ethical issues?

Digital enforcement

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

YES

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

Recent draft legislation allows social inspectors to go "mystery shopping", i.e. pretend to be a potential client or a potential employee, when there are "objective indications of discrimination, supported by datamining and datamatching results" (proposed Article 42/1, § 1, van het "Sociaal Strafwetboek" (Social Penal Code).

The Belgian Council of State advised to define "datamining" and "datamatching". Indeed, the absence of supporting "datamining" or "datamatching" results could affect the legal validity of the prosecution. It was, therefore, of the utmost importance to understand those terms. Without proper definitions legal certainty would be affected[25].

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[25] State Council, (draft) legislative advisory opinion n° 62.045 "over een voorontwerp van wet 'houdende diverse bepalingen inzake werk".

As long as the automated data analysis does not infringe on fundamental rights such as privacy and equality before the law, there do not seem to be any major objections against the use of such systems from the viewpoint of an administrative judge. If such systems allow for more effective and easier identification of infringement of the law, all the better.

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?

Using "datamining" and "datamatching" for prosecution purposes or legal enforcement could certainly improve efficiency and effectivity. It may, however, also entail new unnoticed and indirect discriminations. It is therefore, important to understand how these techniques work and to ensure transparency. Is it sufficient to require adequate definitions and respect for the existing privacy rules? If human intervention is required, what does that exactly mean?

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.

1. Current state of affairs

The introduction of digital proceedings and the filing of documents in pdf-format has already opened the door to a more efficient and faster handling of cases by the Council of State. In the past judges or their staff had to manually summarize or retype the opposing arguments of the parties. These can now often be copied *verbatim*. The same goes for documents relating to the case (e.g. a contested administrative decision motivated over many pages can now be easily copied and does not have to be manually retyped). This has a non-negligible positive impact on the time required to handle a

case.

Of course, one can also argue that summarizing the arguments of the parties enables the judge to cleary identify the facts and questions to be answered.

2. Future prospects

2.1. Daily functioning as an administrative judge

In the long run <u>machine learning and AI</u> will probably have an impact on the daily functioning of an administrative judge.

It is for instance possible tot imagine AI summarising the opposing arguments of the parties and even writing the first drafts of judgements in routine cases. Also basic legal analysis of cases could be performed by AI (e.g. compiling relevant legislation and summarizing relevant jurisprudence).

The performance of these tasks by AI will allow judges to focus on the most essential aspect of their office: forming opinions and judging cases. The time required to handle individual cases could decrease to little more than the time required to form the judgement.

One can also imagine AI taking over certain routine supportive tasks currently preformed by paralegals under the supervision of judges, such as classifying jurisprudence in databases and compiling and summarizing the case law of other high courts (e.g. in the Belgian context: the case law of the Constitutional Court and the Court of Cassation). This would free up the time of paralegals to do more substantive work in support of the court or to review the work done by AI.

The introduction of <u>videoconferencing</u> as a way of hearing parties might lead to far greater flexibility in the scheduling of hearings (e.g. a hearing might take place at eight in the evening with all concerned persons (judges, registrar, parties) working from home).

2.2. Organisation of the Council of State as a whole

The increasing use of digital proceedings will probably lead to less paper being used and less non-legal and administrative staff being required for the daily workings of the court (e.g. less need to retype case documents). On the other hand, it is likely that more ICT staff will be required.

Machine learning and artificial intelligence can also have a positive impact on the backlog of cases faced by the Council of State. As mentioned under the previous heading, these technologies will probably decrease the time required to handle individual cases to little more than the time required to form the judgement.

Other possible uses of AI that might impact the organisation of the court as a whole could be (in random order):

- seeking out divergences in jurisprudence and bringing those to the attention of the court for resolution in future cases;
- the attribution of cases to individual judges: AI could automatically balance all relevant elements such as case load, previous cases and current cases, relevant legal experience and knowledge;
- in the Belgian multilingual context: one can imagine that certain translation work could be shifted to AI and machine learning based systems, with the role of human translators moving to supervision and proofreading of automatically generated translations;
- scheduling of hearings: AI might optimize different dates for different judges and, as far as possible, also the different parties;
- digitizing and making available online the older (pre September 1994) case law of the State Council (e.g. book scanning robots capable of scanning over 250 pages/minute are currently under development, it would take such a system less than a day to digitize the +/- 45.000 older judgments currently not available in digital format, AI could then perhaps be used to index and classify this older jurisprudence in the existing State Council case law database; it has to be acknowledged however that the present project of scanning of the old legislative advisory opinions of the State Council (see also below) shows that sometimes the quality of old documents is a problem);
- the screening of new cases by the registry office: checking whether all required documents have been submitted by the claimant (e.g. in case of a corporation, the articles of association need to be enclosed with the petition) could be moved to machine learning based systems with humans only intervening in dubious cases where AI cannot come to a firm decision by itself.

These uses of AI and machine learning can, as already mentioned, in the long run also have an impact on the composition of the staff of the Council of State, with less non-legal and administrative staff being required (with the exception of course of ICT-staff). This could then result in the Council of State hiring more paralegals and legal attachés to support the judges in actual legal work.

Of course, it is impossible to predict now whether and when all the above prospects can effectively be realised, and what the real consequences will be on the organisation of the State Council. As usual, the proof of the pudding will be in the eating.

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 the topics in more detail in The Hague.

1. Current state of affairs: digitalizing data and optimizing workflows

Within the Council of State: Legislative files are digitalized by the Council of State in pdf-format. If the file introduced by the legislative body or government is only in paper, the Council of State makes a digital copy. All scanned documents have a text layer, based on OCR (optical character recognition). This is important because it allows full-search in the entire document.Within the Council of State, legal assistants called "documentalists" complete this file by making a documentation note. This note is a digital note in which you mostly find links to relevant legislation and case law. A more limited paper version of this documentation is also distributed because certain, if not most, magistrates still like to work with paper versions. The whole legislative file and legal search robots are accessible at home via a digital platform (filemaker/Bucobu).

External relations: Currently two phases of the interaction with other players are digitalized.
1. Legal advisory opinions are sent to the legislative body or government who asked for the legal opinion only by email. The Council of State does not any longer send a paper version.
2. All legal opinions are published on the website in conformity with a bill from 2016 (the Law of Augustus 16, 2016 'tot wijziging van de wetten op de Raad van State, gecoördineerd op 12 januari 1973, met het oog op de bekendmaking van de adviezen van de afdeling wetgeving")[26].

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[26] http://www.raadvst-consetat.be/?lang=nl&page=adv_search

The Council of State has also developed the Reflex database[27]. This database is cross-linked with the internal database and other external sources and aims at giving an up to date state of the legislation.   This is the "Kruispuntbank van de Wetgeving/Banque carrefour de la législation".

Optimizing Workflows: Governments have recently been asking whether it could be possible to have an integrated legal information system. The aim is to digitialize the whole legislative drafting process from start to publication. Recently the president of the Council of State has declared that he wants to build on the experience of the judicial section of the Council of State to use and adapt existing concepts like authentication, delegation and digital receipts.

2. <u>Prospects</u>

2.1. <u>Daily functioning as a legislative magistrate</u>

We are currently in the first phase of adapting to the digital revolution by digitalizing all data and optimizing workflows. The Belgian Council of State is already using digital files and digital search engines. It is to be expected that a further improvement will not have a disruptive effect on the daily functioning.

Literature concerning AI and the law is, however, also predicting a second and a third phase of digitalisation.

In the second phase AI will probably be able to select and submit relevant legal sources. It is difficult to predict how this might change our profession. It will, however, certainly have an impact. Today, many lawyers make the difference by their good searching skills. Future lawyers will more and more rely on AI, which will not only help to work faster, but also may increase the number of documents searched. It is quite possible that AI will allow more than before to search and select relevant foreign legislation and case law. This may have a substantive impact on legal opinions.

In the third phase, AI will probably be able to process information and draw up basic reports. Draft legal opinions on repetitive legislation, like for instance, the acquiescence with certain tax treaties may be written by AI. One may even wonder whether it could be possible for AI to predict the legal questions asked by the auditors to the drafters. This might help (new) auditors to prepare their legal reports.

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[27] http://reflex.raadvst-consetat.be/reflex/?page=chrono&lang=nl

2.2. Organisation of the Council of State as a whole

As stated before, the increasing use of digital proceedings will probably lead to less paper being used and less non-legal and administrative staff being required for the daily workings of the court (but most likely more ICT staff).

Machine learning and AI might be used to take over the following tasks of the legislative section:

-analyse and correct if necessary draft legislation with respect to the used legislative techniques ("wetgevingstechniek")

-seek out old legislation that could be abolished in the light of newer legislation;

-coordinate legislation (integrate diverse laws into codes or streamline legislation);

-compile and maintain legislative databases (e.g. keep track of changes to legislation and relevant jurisprudence);

-seeking out divergences in legisprudence and bringing those to the attention of the Council of State for resolution in future cases;

-the attribution of legislative files to individual magistrates: AI could automatically balance all relevant elements such as case load, previous cases and current cases, relevant legal experience and knowledge;

-in the Belgian multilingual context: differences between various language versions could be automatically detected and translation costs greatly reduced;

-AI might make a first analysis of the transposition of EU-Directives and EU-legislation

-the screening of new files by the registry office: checking whether all required documents have been submitted will probably be moved to machine learning based systems with humans only intervening in dubious cases where AI cannot come to a firm decision by itself.

Most authors predict that some legal jobs will be eliminated: those which involve the sole task of searching documents or other databases for information and coding that information[28]. However, according to the same authors other jobs will be created, including managing and developing AI computers (legal engineers), writing algorithms for AI computers and reviewing AI-assisted work-product. This leads to the conclusion that lawyers could in the future use less time data gathering and more analyzing results. The use of AI and machine learning can in the long run have an impact on the composition of the staff of the Council of State, with not only a decrease in the required

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[28] S. Miller, The future of artificial intelligence, Above the law.

non-legal staff but also a different profile for the non-legal staff. This could result in the Council of State hiring more ICT staff and more paralegals and legal attachés to support the judges in actual legal work.

Of course, the *caveat* made above for the administrative juridictions - the proof of the pudding is in the eating - also applies here.

3. Legislation generated by the aid of computer programmes

The Flemish government provides local authorities an internettool "interactieve reglementengenerator (IRG),[29] that helps local authorities to generate local traffic regulations and for the Flemish government to obtain relevant standardized information. It would be useful to exchange experience and good practices on computer tools to draft legislation, and on potential future developments.

October 14, 2017

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[29] http://www.mobielvlaanderen.be/overheden/artikel.php?id=1472.