

Raad
van State



**Colloquium organized by the Council of State
of the Netherlands and ACA-Europe**

“An exploration of Technology and the Law”

The Hague 14 May 2018

Answers to questionnaire: Austria



Colloquium co-funded by the «Justice » program of the European Union

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 15 September 2017 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.

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.

o Yes

Please provide an example.

Yes, in Austria automated decision-making is used by administrative bodies in several ways.

The authority may accelerate the proceeding by designating through administrative regulation certain administrative offences for which it may impose a predetermined fine of up to 500 euros by use of electronic data processing tool (so-called penalty notice according to § 47 Administrative Penal Act 1991). The person charged with the offence may appeal the fine within two weeks after having been served delivery and submit the evidence in his defence. The appeal may also be filed verbally. It shall be filed with the authority that imposed the fine. If the appeal has been filed in due time, the regular proceeding shall be instituted. The appeal is considered defence in terms of § 40. If the appeal expressly contests only the extent of the penalty notice imposed or the decision on the costs, the issuing authority shall decide. In all other cases the appeal cancels the penalty notice altogether. The penalty notice imposed on basis of the appeal must not be higher than the one of the original ruling. If an appeal is not filed or not filed in due time, the penalty notice shall be enforced.

There also exists the anonymous penalty notice (§ 49a Administrative Penal Act 1991). In case the authority, by administrative regulation, has imposed a predetermined fine and if the report on the offence is based on observations that a law enforcement officer made on duty or on traffic surveillance by means of image-processing technical devices, the authority can impose an anonymous penalty notice without determining a substitute fee. The anonymous penalty notice shall be served to a person that may be assumed by authority with good reason to know or be able to easily find out the identity of the offender either directly or through a representative. The anonymous penalty notice is not an act of prosecution. No appeal is possible against it. It will become ineffective unless the imposed fine is paid within four weeks by using the prescribed form.

Furthermore, in some fields of social security law as well as tax law, decisions are made in an automated way.

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.

There are no consequences for the Supreme Administrative Court, since the decisions are challenged at the Federal Administrative Court, the Federal Fiscal Court or the administrative

courts of the provinces. The decisions of the mentioned courts can be appealed against before the Supreme Administrative Court.

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?

Currently, there is no such debate in Austria. However, we want to refer to a decision of the Supreme Constitutional Court of Austria from 1987 (G110/87), in which it stated that in case a decision, issued by means of electronic data processing, does not contain the name or the signature of a specific official representative neither the principles of rule of law of a decision are infringed nor the constitutionally guaranteed standard of legal protection is reduced, as long as the decision can be assigned to an authority.

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, the topic should be further pursued since it is thoroughly interesting. In this context the question raised is whether a human being or a machine carries out the decision-making of such a decision. We want to point out the jurisprudence of the Supreme Administrative Court, according to which even in cases of decisions issued by means of electronic data processing the single decision must be initiated by a specific official representative (for instance, 2008/15/0205, 2005/14/0014, 2009/15/0002).

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

Please describe your experiences, positive and/or negative.

Digital conduct of proceedings have been very much accelerated in Austria and is well advanced.

There are several ways in which digital forms of legal proceedings are used in Austria, for example by means of electronic legal transactions. Ordinary Courts, which have jurisdiction over civil and criminal cases, have long been making use of electronic legal transactions. Administrative courts of the provinces as well as the Federal Administrative Court and Federal Fiscal Court are also using the electronic legal transaction system.

As to the Supreme Administrative Court, lawyers, tax consultants and accountants are - depending on technical feasibility - obliged to participate in the electronic legal transactions. In case they do not lodge written pleadings by means of the electronic legal transactions, they have to attest that the technical possibilities to use the electronic legal transactions are not available.

It is also possible for individuals to lodge applications for legal aid in connection with petitions for extraordinary review by means of electronic forms using certain tools of e-government for identification such as mobile phone signature or the citizen card. Pursuant to § 13 of the General Administrative Procedure Act 1991 (AVG), which generally regulates submissions to administrative authorities and also foresees in para. 2 that written submissions may be communicated to the authority in any technical feasible form, by e-mail however to the extent that no specific means of communication are provided for the electronic communication between the authority and the persons involved.

The qualified "electronic signature" is one of the core components at the heart of Austria's eGovernment approach. Many application forms require a signature from the person filling it out, which until now had to be signed on paper. With the changeover to electronic services, authenticating the signature has to be carried out electronically. An electronic signature is not just a signature on paper that has been scanned in. It is a mathematical algorithm that is carried out by the sender and recipient, each of which has their own "signature key". Together, these two keys form a unique pair of keys. The following aspects are important for electronic signatures:

- *Authenticity: The message really comes from the given sender and the sender can be uniquely identified.*
- *Integrity: Manipulation of the signature or the signed document can be detected immediately.*

With the invention of the mobile phone signature or card-based citizen card, free tools were created to sign legally binding documents, invoices and contracts electronically with just a

few clicks of the mouse. It is possible to add an electronic signature to PDF documents quickly and securely, which is the legal equivalent of a handwritten signature. The authenticity of the signature and genuineness of the transmitted data can be verified at any time by the sender or recipient (this information can be found at the website: <https://www.digital.austria.gv.at/electronic-signature>).

Electronic delivery also plays an important role as citizens can choose to have official letters from administrative authorities delivered electronically. However, electronic delivery should be seen as an additional service and is not intended to replace delivery of printed documents. After registering with an electronic delivery service, business employees or their representatives can retrieve documents online, 24 hours a day, 7 days a week. Electronically delivered registered mail is held for at least 14 days. Just like conventionally delivered mail, holds can be put on delivery for short periods of time, for example, for holiday periods or sick leave. During this time, any mail that has an expiry date attached to it will not be delivered. However, with electronic delivery, it is possible to pick up mail even while on holiday because the inbox can be checked almost anywhere, thanks to the Internet. In addition to the amount of time saved, electronic delivery also brings further cost reductions. Electronic delivery services can also send non-official documents electronically with proof of delivery. Proof of delivery is carried out via an electronic delivery service. This service is available from delivery service providers that have been approved by the Federal Chancellor. It allows customers (citizens and businesses) to register with their citizen card to confirm that they want to receive administrative documents electronically. Registering with a delivery service is sufficient notice in order to receive administrative documents. However, neither citizens nor public authorities are obliged to use an electronic delivery service if they do not wish. When an authority needs to send a document using a delivery service, the recipient is notified up to two times by electronic means (for example by eMail or short message service) that a document is ready to be collected. A third notification can also be sent out by post. The delivery is confirmed as soon as the document is picked up by the recipient. Proof of delivery is verified when the document is retrieved using the recipient's citizen card, or when an explicit agreement exists that allows documents to be picked up automatically using an automated signature. Confirmation of delivery is also made even if the document is not picked up by the recipient (this and further information can be found at the website: <https://www.digital.austria.gv.at/electronic-delivery2>).

One of the most important developments of eGovernment for public administration is the Electronic File System, called ELAK. It enables seamless communication between public authorities and other governmental service points and shortens reaction and processing time by up to 15 percent (this and further information can be found at the website: <https://www.digital.austria.gv.at/electronic-file-system-elak>). Apart from the Supreme Constitutional Court of Austria, neither ordinary courts nor the administrative courts are using this system. However, the ordinary courts and the administrative courts are developing their own systems that better suit their requirements.

FinanzOnline facilitates the access to the Austrian tax administration for citizens and businesses as well as for the public administration. At the moment, FinanzOnline has more than four million users. Using FinanzOnline, Austrian citizens can, for instance, file their tax return electronically from home. There are also no restrictions to opening hours. And citizens usually get their money back faster. Since 2013, the administrative expenses have been reduced by about 330 million Euros. The whole process – from filling in the form to the delivery of the notice is fulfilled electronically. Data from the previous year can be transferred automatically. A notification service for the tax statement delivery is available in the electronic DataBox. The tax account as well as all process steps can be traced online. Furthermore, the online management of personal data as well as the immediate online tax assessment (also as an anonym calculation) are possible. Businesses process their administrative transactions with the authorities, such as income tax, VAT or corporation tax returns, via FinanzOnline. In

addition, tax agents use FinanzOnline for the tax affairs of 1.9 million clients. FinanzOnline is also the key for numerous other e-government applications – for example for the Business Service Portal and for electronic invoicing (this and further information can be found at the website: <https://english.bmf.gv.at/e-government/portals/fon.html>).

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?

.....

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, the topic should be further pursued since it is thoroughly interesting. In this context it would be interesting to know the national experiences and best practices.

.....

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.

This topic is less relevant for the jurisdiction but rather concerns lawyers since they carry out risk assessments whether to pursue a lawsuit or not.

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?

.....

No

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?

We are not aware of such computer systems.

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?

.....

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?

Generally, if the law requires a written application, however it can also be lodged in an electronic form, except the special regulation states otherwise (§ 13 General Administrative Procedure Act). For example, the regulation for the Supreme Administrative Court concerning electronic legal transactions states in its § 1, that email is not a permissible form to electronically lodge written pleadings at the Supreme Administrative Court. Similar regulation can also be found for the Federal Administrative Court.

The question whether the definition “written” or “in writing” also applies to paperless context can only be answered in the particular case (as an example, see the decision of the Supreme Administrative Court from 11. October 2011, 2008/05/0156, in which the term “written” in the municipal law of Eisenstadt did not include emails).

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

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.

General Administrative Procedure Act 1991 – AVG

Section 3: Communication between the authorities and the persons involved

Submissions

§ 13. (1) Unless provided for differently in the administrative rules and regulations, any submissions, applications, information laid against somebody, complaints, and other reports may be filed with the respective authority in writing, orally, or by telephone. Appeals and submissions with a specific period or determining the duration of a period with a deadline shall be submitted in writing. To the extent the filing of a submission is not practical according to the nature of the case the authority may instruct the applicant to file the submission within an adequate period in writing or orally.

(2) Written submissions may be communicated to the authority in any technically feasible form, by e-mail however to the extent that no specific means of communication are provided for the electronic communication between the authority and the persons involved. Eventual technical requirements or organisational restrictions of the electronic communication between the authority and the persons involved are to be published on the internet.

(3) Deficiencies of written submissions shall not entitle the authority to reject such submissions. However, the authority shall ex officio and without delay see to the rectification of the deficiency and may request the applicant to remedy it within an adequate term with the proviso that the submission will be rejected after futile expiry of this period. In case the deficiency is remedied in due time, the submission is deemed to have been filed correctly from the beginning.

(4) In case of doubt about the identity of the applicant or about the authenticity of the motion al 3 shall apply analogously, with the proviso that the submission after futile expiry of the term fixed shall be deemed to be withdrawn.

(5) The authority is obligated only during office hours to accept submissions in writing or operate receiving appliances and, unless there is a case of imminent danger, to accept oral

submissions or over the phone. The office hours and the hours for the public are to be published on the internet and on the official bulletin board.

(6) The authority is not obligated to process submissions not referring to any particular subject matter.

(7) Submissions may be withdrawn during any stage of the proceeding.

(8) The request to institute a proceeding may be modified during any stage of the proceeding. Such modification of a submission must neither modify the essence of the subject matter nor affect the jurisdiction with regard to subject matter and territory.

(9) (Note: set aside by Federal Law Gazette I No. 10/2004)

.....

o No

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

.....

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?

The question of whether the courts use a strict or rather broad interpretation can only be answered in the particular case.

The rules of procedure of the Federal Administrative Court state in its § 20 (2) that written pleadings can only be lodged within the office hours (as stated in § 20 (1) rules of procedure of the Federal Administrative Court) in a physical way (postally, personally or by means of a messenger) or electronically at the seat of the Federal Administrative Court in Vienna. The Supreme Administrative Court decided, that an appeal lodged with the Federal Administrative Court by means of electronic legal transactions on the last day of the appeal period after the office hours as stated in § 20 (1) rules of procedure of the Federal Administrative Court is delayed.

Contrary to the pictured situation at the Federal Administrative Court, there are no restrictions concerning office hours and lodging of appeals by means of electronic legal transactions with the Supreme Administrative Court and the administrative courts of the provinces.

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, this topic can be further discussed; for instance, the questions of compliance of office hours, the initiation of periods as well as the lodging of appeals in the middle of the night.

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

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

As already mentioned in the question, the tax authorities in Austria do indeed use data analysis to perform targeted audits, more specifically they use certain tax programmes in order to perform automatic plausibility checks. Depending on the results they then perform targeted audits.

.....

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?

.....

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?

.....

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)?

It is not possible to foresee future developments.

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.

Here are some links to e-government in Austria, which may be useful or be of interest:

The ABC Guide of eGovernment in Austria:

https://www.digital.austria.gv.at/documents/333663/355318/eGovernment-ABC-Guide-2017_SigStS.pdf/3af80626-c057-40db-9799-2aa969a8d97d

E-Government Projects of the Federal Ministry of Finance:

<https://english.bmf.gv.at/e-government/projects/e-gov-projects.html>

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.