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

“An exploration of Technology and the Law”

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**Answers to questionnaire: Romania - Legislative
Council**



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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 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.

Yes

Please provide an example.

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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.

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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?

An Agency for Romania's Digital Agenda was established as a specialized body of the central public administration, which has the following objectives:

- implementation at national level and operation of computer systems that provide e-Government services;**
- implementation of regulations on e-Government specific activities (in line with the Strategy on Romania's Digital Agenda);**
- operation of interfaces between the information systems of public institutions and citizens or the business environment, as a gateway to public electronic services provided by the public administration.**

At the same time, there are also debates on this issue at the level of the IT community, with a strong emphasis on cognitive technologies provided by large vendors such as Amazon, IBM or Microsoft.

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, since recent PwC's 2017 Digital IQ Survey studies show that before 2030 30% of the public sector and defense jobs will be robotic, using machine learning algorithms (more generally the artificial intelligence). It is necessary to assess the impact on the legislative process and judicial proceedings of the use of cognitive services in the technological environment provided by cloud computing, big data and machine learning.

It must be kept in mind that decisions based on the implementation of algorithms may be non-transparent, generally by invoking intellectual property related grounds. Independent auditing of algorithm-implemented functions may be a necessary step in the effort not to cover certain illegal procedures in the process of algorithmization of some functionalities. For example, the algorithms that serve the electronic voting process should not alter the legal provisions.

Any draft legislation on this subject should be considered in the light of certain guarantees such as:

- the accuracy of input data;**
- the possibility of complaints by the interested parties against the automatically delivered result;**
- the flexibility of the software so that exceptions are allowed;**
- the security of processed data.**

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.

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- 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?

Digital services, artificial intelligence and cognitive services that define Government 3.0 combine the government services, the citizens' experience and the intelligent technologies for the purpose of increasing citizens' confidence in public policies.

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?

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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

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?

Human-Based Computation (HBC) is a field in computer science where a machine performs certain functionalities by transferring tasks to human operators (micro works). It is basically about solving some cases based on a human-machine relationship.

HBC may include a CrowdCrit component that can critically analyze a specific case proposed by a human operator. An example is the "Mechanical Turk", an allegory implemented by Amazon in the Human Computation TurKit toolkit.

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?

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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

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.

Certain legal provisions may be considered as formulated in a technology-neutral manner, for example in matters of civil liability.

o No

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

However, unless otherwise stated, the words "written" or "in writing" refer only to texts written on paper, especially when the signature of the author of the document is required in order to produce legal effects (unless otherwise stated, that signature must be handwritten).

An example could be found in the area of contraventions, where such an issue was related to the signature required for the lawfulness of the minutes concerning the contraventions, in case of those contraventions sanctioned by the *Government Ordinance no. 15/2002 on the application of the tariff for using and the tariff for crossing the national road network in Romania*.

In this respect, by Decision no. 6/2015, the High Court of Cassation and Justice (the panel competent to judge the appeal in the interest of the law), using the arguments of logical and systematic interpretation of the legal provisions, found that there was a logical and legal incompatibility between, on the one hand, the support on which the written act (the minute) was communicated to the sanctioned person and, on the other hand, the extended electronic signature, allegedly applied to that act in order to ensure its authenticity.

It is true that the extended electronic signature attached to an electronic document (for which the written form is required by law *ad validitatem*) fulfills the same function as the handwritten signature on the printed paper-based document. In addition, the extended electronic signature provides additional guarantees of uniqueness, identity, security and integrity and therefore cannot be repudiated by its author. But these functions are only recognized when the document to which it is attached is also transmitted and received by the recipient of the communication in an electronic format.

Otherwise, when the document is received by its addressee in paper form, the authenticity of the document, when the written form is required by law *ad validitatem*, is ensured only by applying on that document the handwritten signature of the agent (*in solemnibus forma dat esse rei*).

In conclusion, the High Court of Cassation and Justice established that "in the interpretation and application of the provisions of the *Government Ordinance no. 2/2001 regarding the legal regime of contraventions*, correlated with the provisions of *Law no. 455/2001 regarding the electronic signature*, the minutes describing and

sanctioning the abovementioned contraventions, communicated to the sanctioned persons on paper, are deemed to be null and void in the absence of an handwritten signature of the agent”.

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?

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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. Taking into account its consultative function, this topic (especially point 4) is of the highest interest to the Legislative Council.

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?

o 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?

Intelligent auditing systems as well as big data and machine learning applications are not yet applied on a large scale. The applications based on artificial intelligence, big data and cognitive computing have created the possibility of developing audit standards so that impartial diagnostic analyses are generated. Thus, in principle, both intelligent audit applications and fraud detection applications might be used, for example, for the purpose of investigating the claims filed for the recovery of damages.

An example could be the *Law no. 184/2016 on the establishment of a mechanism for the prevention of conflict of interests in the public procurement contracts*, which provides an *ex ante* verification mechanism for the situations that may give rise to conflicts of interest in the procedures initiated through the electronic public procurement system, so that they are removed without affecting those procedures.

The Prevention System takes the information collected automatically into integrity forms from its interconnection with the Electronic Public Procurement System (SEAP) and makes it possible to issue notifications of potential conflicts of interest. In order to identify potential conflicts of interest and validate the notifications issued by the system, the integrity inspectors from the National Integrity Agency (ANI) perform the analysis of the Prevention System information and data by monitoring the system. If, as a result of a specific analysis, the integrity inspectors from ANI detect elements of a potential conflict of interest, they must send the integrity warning issued by the Prevention System within 3 working days after receiving the completion of Section II of the integrity form.

The lack of an integrity warning or the lack of a measure taken by the head of the contracting authority / entity as a result of an integrity warning does not prevent the conduct of procedures for the identification, assessment and investigation of civil, disciplinary, administrative, contraventional or criminal liability against the persons who violated the law.

o 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?

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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.

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.

A topic of interest for the Romanian Legislative Council that could be discussed in The Hague is the use of software programs or the intention to create such programs, meant to support the legislative process in ACA-Europe Member States, as well as the opportunity to implement such programs under the co-ordination and financing of the European Union.

An example would be a software that would ensure, at least partially, the compliance with the rules of legislative technique while drafting a new piece of legislation, such as a software that automatically generates the form of the introductory part of the amended articles. Another example would be a software that would generate, automatically or with minimal human intervention, the consolidated text of the amended piece of legislation.