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National Reports

BELGIUM

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USE OF THE ELECTRONIC IDENTITY CARD (EID) AS A LOYALTY CARD

Belgian Data Protection Authority (BDPA) (litigation chamber), decision 06/2019 of 17 September 2019, available on: https://www.-autoriteprotectiondonnees.be/citoyen/publications/decisions, under the "Décision de la Chambre Contentieuse"

The BDPA ruled on the legitimacy of a claim filed by a citizen against a trader who imposed the use of the electronic identity card as a loyalty card.

The BDPA makes reference to the provisions of the GDPR and to the Act of 19 July 1991, relating in particular to eID that provides, since 23 December 2018, the eID's owner may authorize to read or use it and when used as a benefit or service offered to the citizen is subjected to an alternative being offered to the latter. Based on GDPRs' provisions, the BDPA finds that the trader must be found to have committed three offences: infringement of data minimisation (since the data collected include the national register number - included in the identity card barcode, the sex and customer's birthday, not relevant for the purpose intended) (i) breach of the legality principle (the citizen has to submit his identity card in order to benefit from the loyalty programme) (ii) and a breach of the transparency principle (the merchant's privacy policy does not include the requirements imposed by the GDPR) (iii). For these reasons, the Commission instructs the trader to comply with the recorded infringements, fines him EUR 10,000 and orders the publication of its decision on its own website. The decision was appealed before the Market Court, which invalidated it.

Brussels Court of Appeal, Brussels Markets Court, 19th chamber A, judgement of 19 February 2020 (RG n° 2019/AR/1600), available on: https://www.autoriteprotectiondonnees.be/citoyen/publications/decisions

Appeals against the aforementioned decision of the contentious chamber of the Data Protection Authority 06/2019 of 17 September 2019 before the European Court of Justice. This appeal is governed by Article 108(1) of the Belgian Law of 3 December 2017 establishing the Data Protection Authority. The Court cancelled the BDPA's decision.

First, the Court considers that the BDPA could not validly conclude that there had been an infringement of the data- minimisation principle since on the basis of the report of its inspection service showing that the barcode on the identity card was used to find the customer in the client file, it merely 'assumed' that the national register number (or part of the identity card number) was used by the trader.. The Court also finds that the BDPA relied on a provision of the Act of 19 July 1991 (Article 6§4) not in force at the complaint time, with the result that the trader was not required to offer an alternative to the citizen or to obtain his free, specific and informed consent. The Court therefore rejects the BDPA's statement based on this provision of the Act of 19 July 1991, both with regard to the data minimisation's principle and the requirement for valid consent. In relation to consent, the Court stated that the litigation chamber erroneously considered that the customer's consent was not free by being able to benefit from discounts only by means of the loyalty card and therefore the presentation of his identity card, without any other alternative. According to the Court, not showing his identity card does not cause any inconvenience to the client, but only deprives him of the possibility of benefiting from an advantage. In this sense, his consent is therefore not forced. The Court annulled the Authority's decision and ordered it to reimburse the fine paid by the merchant.

USE OF CITIZENS' PERSONAL DATA FOR ELECTORAL PURPOSES

Belgian Data Protection Authority (BDPA) (litigation chamber), decision 04/2019 of 28 May 2019, available on: https://www.autoriteprotectiondonnees.be/citoyen/publications/decisions, under the "Décision de la Chambre Contentieuse"

The BDPA received a claim from two citizens whose e-mail address, provided for a specific purpose, was used by a mayor for electoral purposes.

During an e-mail contact with the mayor con-

cerning an urban planning issue, the claimants' architect copied the e-mail address of his clients too. Ahead of the municipal elections, the mayor replied to this e-mail using the "reply" function to send election propaganda to the plaintiffs. Before the BDPA, the mayor invoked his good faith and the application of the principle of *non bis in idem*, since he had already received a warning for the same facts from the Council for Electoral Disputes, also petitioned by the plaintiffs. The BDPA concluded that he was not dealing with the same facts as those for which the mayor had already been sanctioned, on the basis of Article 4 of Protocol No. 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Furthermore, the BDPA found that, by reusing the complainants' e-mail address for electoral purposes, the mayor was misusing it and was in breach of Articles 5.1.b) and 6.4. of the GDPR. The Authority also emphasises that compliance with the GDPR is a serious obligation to be respected, a fortiori a public office holder, who should lead by example. The BDPA concludes that there has been a serious breach of the GDPR and orders a reprimand, an administrative fine of EUR 2,000 and the anonymous publication of the decision on its website.

Belgian Data Protection Authority (BDPA) (litigation chamber), decision 10/2019 of 25 November 2019, available on: https://www.-autoriteprotectiondonnees.be/citoyen/publications/decisions, under the "Décision de la Chambre Contentieuse"

The BDPA dealt with a similar case in which a mayor sent a letter of electoral propaganda to a citizen of his municipality, using a file of contact details cross-referenced with the municipal list of electors.

Once, the plaintiff joined his neighbour at a meeting with the mayor. The mayor drew up a list of the municipality's citizens who sought him out in his capacity as mayor and sent them, in light of the forthcoming elections, a letter of election propaganda. In its decision, the BDPA stated that it was not competent to rule on an infringement of the internal rules of procedure of the municipal council concerned and that it restricted itself solely to ensure compliance with the GDPR principles. In this regard, the BDPA refers to the purpose principle enshrined in Article 5.1.b) of the GDPR and compares it with a *memorandum* on "Elections" drafted in the early 2000s. This *memorandum* specifically provides that personal data obtained in the framework of an alderman's mandate may not be reused for electoral propaganda, under penalty of processing incompatible with the purposes which these data were collected for. Considering that a mayor crossed a significant number citizens' personal data having consulted him between 2012 and 2018 with the voters' list in order to send them a letter did not fall within the scope of an exception provided for in Article 6.4. of the GDPR, the BDPA decided that the GDPR (Articles 5§1(b) and 6.4.) had been violated. The BDPA also insisted on the mayor's status as a public official to justify the serious nature of his failings and finally issued a warning, ordered him to pay an administrative penalty of EUR 5,000 and ordered the website publication of its decision.

INFRINGEMENT OF THE RIGHT OF ACCESS BY A PUBLIC AUTHORITY

Belgian Data Protection Authority (BDPA) (litigation chamber), decision 05/2019 of 9 July 2019, available on: https://www.autoriteprotectiondonnees.be/citoyen/publications-/decisions, under the "Décision de la Chambre Contentieuse"

The BDPA ruled on the follow-up's lack to the access right exercised by a citizen wishing to know the reasons for his dismissal.

The BDPA refers to the GDPR's provisions and states that the public authority - in this case the Federal Public Service Public Health (FPS Health) - did not respect the complainant's access right, since he was exercising his right in order to be aware of the grounds justifying his dismissal as a member of a medical commission. Despite the Authority's initial decision ordering the data controller to comply with the data subject's request, the BDPA noted that the complainant's access request did not receive an answer. On this basis, the BDPA considers that the FPS Health breached two GDPR's provisions: a breach of the complainant's right of access under Article 15 of the GDPR (i), and a failure to comply with Articles 12(3) and 12(4) of the GDPR, which require the controller to inform the data subject of the action taken on his request (ii). In addition, the litigation chamber emphasizes the "extreme negligence" shown by the controller in handling the complainant's request. For these reasons, it reprimands the FPS Public Health and orders the publication of its decision on the BDPA's website.

Brussels Court of Appeal, Brussels Markets Court, 19th chamber A, judgement of 23 October 2020 (RG n° 2019/AR/1234), available on: https://www.autoriteprotectiondonnees.be/citoyen/publications/decisions

Before the Brussels Markets Court Against, it lodged an appeal against the abovementioned decision of the BDPA (n° 05/2019 of 9 July 2019). The Court annuls the decision for lack of reasoning and misuse of powers.

First, the Court finds that the reasons for the Data Protection Authority's decision are incor-

rect. Indeed, the litigation chamber claims that the FPS Health never replied to the complainant's request for access, even though a document in the case file - a letter sent by the FPS Health to the complainant and the BDPA on 11 June 2019 - proves that a reply was provided. Consequently, the Authority's decision which is based on the fact that the FPS Health never replied to the complainant's request, even though at the time of taking this decision the BDPA was aware of the existence of the letter of 11 June 2019, is unlawful as it is inadequately reasoned. The Court goes on to find that the BDPA exceeded its competence when it considers that the FPS Health was negligent in its handling of the complainant's request. The Court points out that the BDPA's competence is limited to the supervision of the correct application of the GDPR and relevant national legislation. Consequently, by basing its decision on a value judgment as to the manner in which the FPS Health has carried out its tasks, the BDPA is guilty of misuse of power because it takes into consideration elements which are outside its competence. Based on those two elements, the Court annuls the BDPA's decision and orders its judgment to be published on the BDPA's website.

PROCESSING OF TENANTS PERSONAL DATA USING A TAX FORM

Belgian Data Protection Authority (BDPA) (litigation chamber), decision 15/2020 of 15 April 2020, available on: https://www.autoriteprotectiondonnees.be/citoyen/publications-/decisions, under the "Décision de la Chambre Contentieuse"

The BDPA had to rule on the validity of a form through which a municipality asks landlords to collect some personal data regarding their tenants.

The BDPA notes that the form used by the municipality aims at determining whether the tenants qualify for a tax reduction. Therefore, in addition to the identification data (names, …) the owner must collect information on the tenants' status (whether or not they are students) and the amount of any study grant they receive. Finally, the form also provides for the collection of the telephone number of a close relative of the tenants as an "emergency number". The litigation chamber considers that the processing thus set up infringes three principles applicable to the processing of personal data : a breach of the transparency principle under Article 5(1)a) of the GDPR as the municipality does not inform the tenants of the existence of the processing and its purposes (i), a breach of the purpose principle under Article 5(1)b) as the "emergency number" data is collected for public security purposes rather than for fiscal purposes (ii), and a breach of the data minimization principle under Article 5(1)c) since the "emergency number" data is not useful for the pursuit of the tax purpose. Therefore, as these are serious violations of the GDPR's core principles, the BDPA orders processing to be suspended until it conforms to these principles. The BDPA also orders the decision to be published on its website.

UNLAWFUL USES OF FEDERAL DATABASES

Belgian Data Protection Authority (BDPA) (litigation chamber), decision 19/2020 of 29 April 2020, available on: https://www.autoriteprotectiondonnees.be/citoyen/publications-/decisions, under the "Décision de la Chambre Contentieuse"

The BDPA had to rule on the responsibility of a municipality following the unlawful consultation of the National Register by a member of its staff.

The BDPA firstly finds that it is not competent to rule on the unlawful consultation of the complainant's photograph as this is a one-off processing which took place at a date prior to the entry into force of the GDPR. The BDPA, however, declares itself competent to address any irregularities occurring after 25 May 2018 and detected following its investigation of the case. The BDPA points out that the municipality, as controller, is responsible for compliance with the obligations arising from the GDPR according to the principle of accountability under Article 5(2) and Article 24 of the GDPR. Among these, the BDPA particularly emphasizes the security obligation under Article 32 of the GDPR, which specifies the integrity and confidentiality principle set out in Article 5(1)(f) of the GDPR. In application of this principle, together with Article 17 of the Belgian National Register Act, the municipality is bound to set up an access control system for the National Register enabling it to determine the identity of any agent who accesses the Register as well as the purpose for which he or she does so. The BDPA notes, however, that this was not yet the case at the time of its inspection. Therefore, the municipality is guilty of a serious breach of the principles of accountability and data integrity. Although the municipality demonstrates that it has since taken the necessary security measures to ensure that it will eventually comply with the GDPR and national law, the Authority decides to reprimand it and orders the publication of the decision on the Authority's website.

Belgian Data Protection Authority (BDPA) (litigation chamber), decision 34/2020 of 23 June 2020, available on: https://www.autoriteprotectiondonnees.be/citoyen/publications/decisions, under the "Décision de la Chambre Contentieuse"

The BDPA had to rule on the use of data from the Crossroad Bank for Vehicles (CBV) for direct marketing purposes.

The BDPA notes that a private company (Informex) - which is legally associated with the management of BCV - accesses its data for the purpose of supplying them to insurance companies, which then use them to offer personalized insurance premiums to future customers. The processing thus carried out by insurance companies is based on the consent of customers, who agree to enter their license plate number in an online form. Once the license plate number is in its possession, the insurer can link the customers' identity to all the information relating to their vehicle. The BDPA observes that although Informex is legally entitled to access BCV's data, such access is limited to the pursuit of public-interest purposes as set forth in Article 4.4° of the Royal Decree of 8 July 2013. The BDPA also notes that Article 25 of the same Royal Decree formally prohibits the use of data for direct marketing purposes. Referring to the definition it gives of this practice in its Recommendation 1/2020, the BDPA considers that Informex's practice constitutes direct marketing and is therefore illegal. Consequently, the BDPA holds that the processing carried out by Informex infringes both the purpose and the lawfulness principles under Articles 5(1)(b) and 6(1) of the GDPR in that it pursues a purpose prohibited by Belgian law. The BDPA thus orders the FPS Mobility - controller of the CBV - to bring this data processing into conformity with the legislation and decides to publish its decision on its website.

POSSIBILITY TO APPEAL AGAINST DECISIONS REFUSING ACCESS TO THE NATIONAL REGISTER

Council of State, judgment 243.695 of 15 February 2019, available on: http://juridict.raadvstconsetat.be/index.php?lang=fr

The Council of State had to rule on the admissibility of an annulment appeal lodged against a decision refusing access to the National Register.

Before the entry into force of the GDPR, the Privacy Protection commission (PPC) - the predecessor of the BDPA - was responsible for authorizing access to the National Register. In this case, the PPC's Sectoral Committee denied access to a private company active in online betting. The company brought an action for annulment of this refusal decision before the Council of State, the only court with jurisdiction to annul the acts of administrative authorities. The arguments of the parties relate to the qualification of the PPC as an administrative authority, which is a prerequisite for the jurisdiction of the Council of State. The Council of State finally concludes that the PPC is to be regarded not as an administrative authority but as a collateral organ of the Chamber of Representatives for the following reasons: the legislator created the PPC as an organ of the Chamber of Representatives (i), the members of the PPC are appointed by the same body (ii). The Council of State therefore finds that it is incompetent to pronounce the annulment of the refusal decision but nevertheless decides to ask the Constitutional Court for a preliminary ruling in order to determine whether its incompetence constitutes a breach of the equality and non-discrimination principles under Articles 10 and 11 of the Belgian Constitution.

Constitutional Court, judgment 74/2020 of 28 May 2020, available on: *https://www.const-court.be/fr/common/home.html*

The Constitutional Court must rule on the constitutionality of Article 14 of the coordinated laws on the Council of State in that it prohibits any appeal against the decisions of the PPC.

Upon reference for a preliminary ruling on the above-mentioned question, the Court must decide whether Article 14 of the coordinated laws on the Council of State violates the equality and non-discrimination principles under Articles 10 and 11 of the Constitution, in that it gives the Council of State jurisdiction to annul the acts of the administrative authorities but denies it such jurisdiction with regard to PPC's acts. The Court finds, first, that the recipients of decisions refusing access to the National Register are not entitled to any administrative or judicial remedy. It goes on to find that, by virtue of the principle of separation of powers, the PPC - as a collateral body of the Chamber of Representatives - must enjoy the greatest possible independence in the exercise of its political and legislative tasks. The Court considers, however, that such independence cannot justify the absence of any appeal against decisions refusing access to the National Register since, when taking these decisions, the PPC exercises a power which is not linked to the political or legislative activity of the Chamber. Consequently, the Court finds that Article 14 of the coordinated laws on the Council of State is incompatible with Articles 10 and 11 of the Constitution in that it does not allow for appeals to the Council of State for annulment of decisions refusing access to the National Register.

FRANCE

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TRANSPARENCY OF ALGORITHMS

Décision du Conseil constitutionnel, 3 avril 2020, n°2020-834 QPC, Union nationale des étudiants de France, available on: https://www.conseil-constitutionnel.fr/decision/2020/2020834QPC.htm

The communication of administrative documents, and thus of algorithms and source codes, is a constitutional right which the legislator may limit for reasons of general interest and if the limitation is not disproportionate.

Since the Law for a Digital Republic (LDR) of October 7, 2016, source codes and algorithms are considered disclosable documents.

They must be disclosed to "everyone who request" (L. 311-1 Code on Relations between the Public and the Administration – CRPA) and the administration must publish online the rules defining the main algorithmic processing whether they base individual decisions (L. 312-1-3 CRPA).

The issue of disclosing a specific algorithm was widely debated, thus it has been ultimately decided by the Administrative and the Constitutional judge, about the algorithm Parcoursup.

It enables to deploy candidates at university and, more generally, at higher education. In this regard, it processes the application of more than 850,000 candidates per year. The procedure consists of two algorithms: the first is national, the second is local (each institution sets its own parameters).

The question lies in the Law of orientation and success of students (loi ORE), which enables just a partial disclosure of algorithms (A. L. 612-I al. 5 code de l'éducation), despite of provisions contained in the LDR.

Indeed, although the national algorithm is published, the local algorithms are communicated only to candidates who make the request, and once the decision has been taken.

An appeal was therefore lodged against the refusal of communication of the local algorithm by a student union (Unef).

Whether the Administrative Court of Guadeloupe granted the application on February 5, 2019, the Conseil d'Etat then set aside this judgment (CE 12 June 2019, University of the West Indies), considering the refusal lawful.

Finally, a question for a preliminary ruling (QPC) was referred to the Conseil constitutionnel (CC), wherein UNEF asked the CC to declare the refusal to communicate under the ORE Act contrary to the Constitution.

By its decision of April 3, 2020, the CC stated, firstly, a Right to communication of administrative documents as a constitutional right based on article 15 of the Declaration of the Rights of Man and of the Citizen ("The Society has the right to ask account to any public agent of its administration"). Nevertheless, the legislator may impose limitations due to general interest purposes, if they are not disproportionate.

The Conseil stated that in this case the limitation is not disproportionate on the following grounds: firstly, the limitation to the communication is justified by the secrecy of the deliberations; secondly, the limitation is not disproportionate because certain guarantees are provided (upstream information to the public, communication to candidates downstream the procedure).

Nonetheless, the CC under reserve of interpretation stated that such provision, in order to be considered constitutionally legitimate, must not prevent third parties to access information, once the procedure has been completed.

Thus institutions have been invited to publish, at the end of the procedure, the criteria by which they have processed the files, but the CC does not compel them to communicate the exact setting of their algorithm.

In conclusion, in order to preserve public secrets, the Conseil stated that the administration had to disclose to applicants just what is strictly essential for the comprehension of the decision.

Décision du Conseil constitutionnel, 11 mai 2020, n° 2020-800 DC, Loi prorogeant l'état d'urgence sanitaire et complétant ses dispositions, available on: https://www.conseil-constitutionnel.fr/decision/2020/2020800DC.htm

The Constitutional Council validates the processing of personal data aimed at combating Covid-19: the infringement of the right to privacy is justified by the objective of constitutional value of protecting health, and proportionate to this objective.

In its decision of May 11, 2020, which extended the state of health emergency until July 10, the Conseil constitutionnel (CC) validated the processing of health data aimed at struggling the spread of Covid-19 epidemic, by presenting three reservations and censoring two provisions. Two data processing were reviewed by the CC: the SI-DEP, a ministerial processing relating to screening, and Contact Covid which identifies "contact cases" likely to be contaminated, but also invites subjects to wear a mask, to be tested and if necessary, to isolate themselves.

Such processing, however, is not limited to health data of infected people, but also encompasses data of subjects exposed to them.

Claimants assumed that several provisions infringed the right to privacy - since health and identifying data could be collected without the consent of data subjects.

Beforehand, the Conseil reminded that the right to privacy, which follows from Article 2 of the Declaration of 1789, requires that "the collection, recording, conservation, consultation and

communication of personal data must serve the important ground of the public interest, and be adequate and proportionate to the public aim pursued".

In the present case, the Conseil constitutionnel states the infringement of the right to privacy justified by and proportionate to the objective of constitutional value of health protection. Firstly, the Conseil argues that this measure achieves specific purposes, which effectively contribute to the fight against the spread of the virus. In this regard, the data collection has been limited to what was strictly necessary, except for epidemiological surveillance and research against the virus: for these processing, the Conseil assessed to delete the contact number or electronic address referring to data subjects.

Furthermore, the Conseil decries a censorship: data access cannot be extended to social support organisations, without the consent of the data subjects.

Apart, it validates the remaining provisions promoting these "mega-processing", in an attempt to contain the virus spread.

Commission Nationale de l'Informatique et des Libertés, Décision n° MED-2020-015 du 15 juillet 2020 mettant en demeure le ministère des solidarités et de la santé, available on: https://www.legifrance.gouv.fr/affichCnil.do?oldAction=rechExpCnil&id=CNILTEXT000042125452&fastReqId=965192718&fastPos=2

The Stop Covid smartphone app, which allows to determine whether an individual has come into contact with persons infected by the Covid-19 virus, is not RGPD-compliant. The CNIL gives the French Ministry of Solidarity and Health one month to make the necessary adjustments.

The CNIL, following the release of the Stop Covid application - a monitoring application for smartphones that makes it possible to determine whether an individual has come into contact with a person who has contracted the Covid-19 virus - has carried out some checks to verify the compliance of the system implemented with the provisions of the RGPD. Three checks were carried out to verify whether the application met the requirements for protecting users' privacy and personal data. Although these checks showed that the application was working in compliance with data protection provisions and the Commission's recommendations, the CNIL nevertheless found some shortcomings. Firstly, with regard to the first version of the application, it was noted that when a user «claims to have been diagnosed or tested positive for the SARS-CoV-2 virus, his entire contact history is uploaded to the central server managed on behalf of the Ministry of Solidarity and Health, without prior data filtering, based on distance and duration of contact with another user». Although this shortcoming has been corrected for the second version of the application, the CNIL has asked to correct the first version, which is still available among users. Subsequently, although the information provided was generally compliant with the RGPD, the CNIL president considered that the information relating to the categories of data recipients was incomplete: the project owner's assistant, who was also the recipient of identification data, was not mentioned in the section on application confidentiality. Also with regard to the project manager's assistant, some breaches of his obligations under the contract linking him to the data controller were detected. Finally, some shortcomings were noted in relation to the content of the impact assessment carried out. In view of these various shortcomings and in the interest of transparency, the CNIL decided to issue a public notice to the Ministry of Solidarity and Health to make the application compliant within one month.

Tribunal administratif de Marseille 27 février 2020 n° 1901249

Facial recognition systems collect biometric data, as they are subject to the regime of protection of sensitive data and subject to a prohibition of processing. The signature of a form by the pupils is not sufficient to consider that the consent collected is free and informed because of the relationship of authority that exists between the pupils and the heads of the public institutions concerned.

On 27th February 2020, the Administrative Court of Marseille annulled the decision of the Regional Council of Provence Alpes-Côte d'Azur which had launched, on an experimental basis, a test access control device with facial recognition in two high schools. In addition to controlling access to the premises, this system was intended to track the movements of high school students and occasional visitors not identified by the school system. A resolution, approved by the Regional Council, thus established a tripartite relationship between the region, the high schools and the company implementing the system. The CNIL, questioned by the region, had already shown itself to be unfavourable to this experiment which, according to it, appeared «neither necessary nor proportionate» to achieve the desired objectives. The Administrative Court of Marseilles, before various associations, held - in addition to the question of the competence of the PACA region to carry out the experiment - that the contested decision was vitiated by illegality in that it did not respect certain principles relating to the collection of consent, the necessity and proportionality of the treatments implemented. With regard to data processed within the framework of a facial recognition system, the court held that it was biometric data, subject to

the regime of protection of sensitive data and subject to a prohibition of processing. For the administrative judge, the signature of a form did not make it possible to characterise the collection of free and informed consent from pupils, in particular because of the relationship of authority towards the heads of the public institutions concerned. Moreover, with regard to the purposes of the processing, the judge found that the reasons given by the institutions did not make it possible to characterise the «reasons of public interest» required by the RGPD.

GERMANY

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THE INFLUENCE ON THE STAFF COUNCIL'S CO-DETERMINATION RIGHT OF A MINISTRY'S RECOMMENDATION TO IMPLEMENT A NEW ADMINISTRATIVE SOFTWARE

Administrative Court of Düsseldorf, court order 40 K 4082/18.PVL of 6 February 2020[1]

The Administrative Court of Düsseldorf clarified the moment in which the implementation of a new software in the administration triggers the co-determination right of the staff-council.

The co-determination right of the staff council in the state of North-Rhine-Westphalia derives from the North-Rhine-Westphalian Staff Representation Act.[2] The Administrative Court of Düsseldorf ruled in a court order dated 6 February 2020, that a decision on state Ministry level to follow the recommendation of the state's Chief Information Officer to implement a certain software for the Ministry's operations is not subject to the staff council's co-determination right, if the software is only to be implemented by subordinate departments. The software in question was (i) the "Governikus Multi Messenger" granting electronic access to the administration through encrypted emails and other electronic forms of communication, and the (ii) "Lucom Interaction Platform" for project management forms. According to the judges, not even the Ministry's order to such subordinate departments to actually implement the software is subject to this right, if the heads of the subordinate departments have a decision-making scope (*Entscheidungsspielraum*) regarding this implementation. Because in both cases, no decision has been taken yet that creates rights or obligations for the staff, and because their working conditions are not affected yet.

THE REQUIREMENT OF EXPERIENCES IN DIGITAL ADMINISTRATION IN A JOB DESCRIPTION

Administrative Court of Munich, court order M 5 E 19.5164 of 25 May 2020[3]

The Administrative Court of Munich had to rule on the question whether the requirement of experiences in the field of digital administration contained in a job description was to be fulfilled mandatorily.

The Region of Upper Bavaria published in May 2019 a job offer for an administrative position to be occupied by an public servant or a civil employee. The offer mentioned among other requirements also "experiences in the field of modernisation and digitalisation of administration, and e-government". The claimant, who could justify such experiences, applied for the position, but did not obtain it. *In lieu*, the application of a competitor was accepted who did not have such experiences. The claimant therefore challenged before the Administrative Court of Munich the decision to accept the competitor's application on the grounds that the abovementioned requirement was to be fulfilled mandatorily by the candidates. The Court rejected the request considering that the requirement of "experiences in the field of modernisation and digitalisation of administration, and e-government" was too vast to be considered a decisive criteria mandatorily to be fulfilled by applying candidates.

NECESSARY INFORMATION ON THE POSSIBILITY TO LODGE AN OBJECTION ELECTRONICALLY

Administrative Court of Neustadt an der Weinstraße, judgement 5 K 635/19.NW of 14 January 2020[4]

The Administrative Court of Neustadt an der Weinstraße clarified under which conditions the information on legal remedies must contain, next to the possibility to lodge an objection against an administrative act in writing, also the possibility to lodge it electronically.

In the case submitted to the Administrative

[1] Administrative Court Düsseldorf, court order, 6 February 2020, 40 K 4082/18.PVL, *Zeitschrift für das öffentliche Arbeits- und Tarifrecht*, n°5, 2020, 110.

[2] Precisely from the North-Rhine-Westphalian Staff Representation Act (*Personalvertretungsgesetz für das Land Nordrhein-Westfalen*), Section 66, paragraph 1.

[3] Administrative Court Munich, court order, 25 May 2020, M 5 E 19.5164, ECLI:DE:VGMUENC:2020:0525.M5E19.5164.00, *Beck-Rechtsprechungsreport*, 2020, n° 12938.

[4] Administrative Court Neustadt an der Weinstraße, judgement, 14 January 2020, 5 K 635/19.NW, ECLI:DE:VGNEUST:2020:0114.5K635.19.00, *Beck-Rechtsprechungsreport*, 2020, n°3509.

Court of Neustadt, the defendant, a state authority, had issued an administrative decision (*Bescheid*) on fees and costs for fire brigade services that the plaintiff challenged in court. The question arose whether the plaintiff had objected the administrative acts contained in the decision in time, or if the objection was expired. In principle, an objection against an administrative act has to be lodged within a month of its notification.[5] An exception exists where information on legal remedies were not given properly.[6] The plaintiff pleaded that this exception applied, on the grounds that these information had to contain, next to the possibility to lodge an objection against an administrative act in writing, also the possibility to lodge it electronically. The judges reminded that this obligation exists only when the public authority issuing the administrative act has opened an access to receive electronic documents.[7] The defendant did not have opened such an access. It was not obliged either to open such an access. Federal authorities, and state authorities executing federal law, are obliged by the Federal E-Government-Act[8] to open an access for electronic documents. But in the case at hand, the defendant, a state authority, was executing state law and not federal law. The Court ruled therefore that it was not obliged to open an access for electronic documents. Wherefore, the information on legal remedies did not have to mention the possibility to electronically lodge an objection and the plaintiff's objection was expired. The Court dismissed the plaintiff's claims.[9]

Sozialgericht Berlin, court order S 179 AS 4920/19 ER of 21 January 2020[10]

The Sozialgericht Berlin had to rule on a similar question in a different case.

In the case brought before the *Sozialgericht* Berlin, the claimant also pleaded an exception to the 1-month period[11] on the grounds of incomplete information on legal remedies.[12] Contrary to the above-mentioned case before the Administrative Court of Neustadt an der Weinstraße, the defendant had already placed data keys to participate in the "electronic court and administration mail box" (*Elektronisches Gerichts- und Verwaltungspostfach*) a year before addressing the disputed administrative act to the claimant. The administrative act also mentioned an email address of the public authority. The Berlin judges considered that, except if specified otherwise in the administrative act or the information on legal remedies, the simple technical possibility of receiving electronic documents suffices to constitute an access within the meaning of the Social Code, Book 1, Section 36a, paragraph 1. The public authority hence had to include the possibility to lodge an objection electronically in its information on legal remedies. The objection lodged by the claimant after the 1-month period was therefore not expired.

Administrative Court of Neustadt an der Weinstraße, judgement 5 K 1589/18.NW of 17 April 2019[13]

In a prior judgement, the Administrative Court of Neustadt an der Weinstraße defined the extent of the mandatory information on legal remedies to be lodged by electronic communication if the use of electronic communication is complimentary.

The defendant in this case, a state public broadcasting agency (*Landesrundfunkanstalt*), had issued an administrative decision on public broadcasting fees to the plaintiff. During the legal proceedings against this administrative decision before the Administrative Court of Neustadt an der Weinstraße, the judges also had to decide whether the 1 month period[14] applied to lodge an objection or if the exceptional 1 year period was applicable.[15] The plaintiff pleaded that the information on legal remedies was incomplete, because the defendant allowed the electronic lodging of an objection against its decision only by means of *De-Mail*. *De-Mail* is an encrypted email-based communication system between identified communication partners (companies, administration, citizens) whose legal effectiveness is ensured by the Federal De-Mail Act and that runs solely on German servers.[16] The public

[5] According to the Federal Administrative Procedures Act (*VwVfG*), Section 70, paragraph 1.
[6] According to the Federal Administrative Procedures Act (*VwVfG*), Section 52, paragraph 2, sentence 1.
[7] The communication of electronic documents is permitted as far as the recipient has opened an access for such documents pursuant to the Federal Administrative Procedures Act (*VwVfG*), Section 3a, paragraph 1. According to its paragraph 2, the written form can be replaced by the electronic form, except if provided for otherwise by law.
[8] Precisely by the Federal E-Government-Act (*Gesetz zur Förderung der elektronischen Verwaltung (E-Government-Gesetz)*), Section 1, paragraph 1 and 2 and Section 2, paragraph 1.
[9] Administrative Court Neustadt an der Weinstraße, judgement, 14 January 2020, 5 K 635/19.NW, ECLI:DE:VGNEUST:2020:0114.5K635.19.00, *Beck-Rechtsprechungsreport*, 2020, n°3509.
[10] *Sozialgericht* Berlin, court order, 21 January 2020, S 179 AS 4920/19 ER, *info also*, n° 2, 2020, 86 following.
[11] Pursuant to the Social Courts Act (*Sozialgerichtsgesetz (SGB)*), Section 84, paragraph 1, sentence 1.
[12] Pursuant to the Social Courts Act (*Sozialgerichtsgesetz (SGB)*), Section 66, paragraph 2, sentence 1.
[13] Administrative Court Neustadt an der Weinstraße, judgement 5 K 1589/18.NW of 17 April 2019, *Beck-Rechtsprechungsreport*, 2019, n° 10297.
[14] According to the Federal Administrative Procedures Act (*VwVfG*), Section 70, paragraph 1.
[15] According to the Federal Administrative Procedures Act (*VwVfG*), Section 52, paragraph 2, sentence 1.
[16] Information on the De-Mail system in German on : https://www.de-mail.info/.

broadcasting agency was considered by the judges to be an administration within the meaning of the Federal Administrative Procedures Act (*VwVfG*), Section 3a authorising it to communicate electronically. It was however not considered to fall into the scope of application of the Federal E-government Act[17] obliging public authorities to use electronic communication. Since the defendant was authorised, but not obliged to use electronic means of communication, it could freely decide to use them or not. If it chose to use them, it could by deduction also limit the means of electronic communication to certain ones, in this instance to *De-Mail*. The information on legal remedies was therefore not incomplete and the objection expired. The claim was dismissed.

DIGITAL INSPECTION OF RECORDS

Administrative Court of Munich, court order 22 AS 19.40035 of 2 March 2020[18]

The Administrative Court of Munich ruled on the right to digitally inspect records in the context of urban planning approval procedures.

The claimant in this case was the owner of a property situated right next to a plot classified as traffic area. A public transportation company filed with the government of Swabia a planning approval for the construction of a tramway on this plot. Prior to granting the planning approval, the government of Swabia had made available the relevant documents for physical inspection in two cities. The claimant challenged the planning approval before the Administrative Court of Munich, among others by pleading that his right to inspect records had been violated. He invoked that the documents should have been made available not only physically, but also digitally on an appropriate website and this without the claimant having to ask. The Court dismissed the claimant's motion and ruled among others that he had no right to digitally inspect the records. The right to inspect records derives in the planning approval procedure from the Bavarian Administrative Procedures Act.[19] According to these provisions, the inspection of records takes place in general in the offices of the administration, even if the administration can grant exceptions to this rule within its discretionary power. The judges concluded hence that no right to digitally inspect the records arises from these provisions. The right does not derive either from the Bavarian E-Government Act, article 6 paragraph 1, which obliges the administration to conduct administrative procedures electronically on the request of an individual as far as it is economic and appropriate (*zweckmäßig*). The judges considered that, next to a lacking request, an electronic procedure would have been neither economic nor appropriate given that only the claim was attacking the planning approval procedures.

DIGITALISATION OF PERSONNEL FILES

Higher Administrative Court of Münster, court order 1 A 203/17 of 17 December 2018[20]

The Higher Administrative Court of Münster ruled on the right to conserve a paper version of the personnel file next to its digital version.

The defendant, a federal agency, changed its personnel files documentation from a paper to a digital version. For several reasons, the plaintiff, a federal official, requested the conservation of the paper version of his personnel files next to the digital version. He alleged among others (i) that a due and proper transformation of his files into a digital version was not guaranteed, (ii) that it was not clear whether the digital files were entirely and properly secured, (iii) that a separate storage of confidential medical records was not guaranteed, and (iv) that he could not verify himself the integrity of his files, because they contained documents with identical names and because the files were not numbered. After the Administrative Court of Cologne dismissed his claim, [21] the plaintiff applied for an appeal before the Higher Administrative Court of Münster. The latter ruled that a double documentation of personnel files was prohibited, because only one version of the personnel files may exist per public servant.[22] The defendant was authorised by law[23] to introduce a digital version of the files and therefore implicitly authorised to destroy its paper version. Furthermore, without setting general standards for the transformation of personnel files into a digital version, the Court considered that the procedure used by the defendant was sufficient in the case at hand and dismissed the plaintiff's application for an appeal. The Court considered that the printed digital files produced by the defendant proved their successful digital documentation. The index of the files permitted a sufficient transparency. A numbering of the files was not necessary according to the Court. It ruled that the special software from the German

[17] Precisely of the Federal E-Government-Act (*Gesetz zur Förderung der elektronischen Verwaltung (E-Government-Gesetz)*), Section 2.

[18] Administrative Court Munich, court order 22 AS 19.40035 of 2 March 2020, *Beck-Rechtsprechungsreport*, 2020, n° 3218.

[19] Precisely from the Bavarian Administrative Procedures Act, article 72, paragraph 1, half sentence 2 in combination with its article 29.

[20] Higher Administrative Court of Münster, court order 1 A 203/17 of 17 December 2018, *Neue Zeitschrift für Verwaltungsrecht*, 2019, 576.

[21] Administrative Court of Cologne, judgement 15 K 5144/16 of 15 December 2016, *Beck-Rechtsprechungsreport*, 2016, n° 114150.

[22] Pursuant to Federal Public Servant Act (*Bundesbeamtengesetz*), Section 106, paragraph 1, sentence 3.

[23] Pursuant to Federal Public Servant Act (*Bundesbeamtengesetz*), Section 106, paragraph 1, sentence 3.

Telekom, used by the defendant for the digitalisation process and certified by the Federal Commissioner for Data Protection and the State Commissioner for Data Protection and Freedom of Information, sufficiently guaranteed the due transformation of the paper version into the digital one. The plaintiff could not set forth any alleged data loss, although a comparison of the digital version with the paper version would have been possible by the plaintiff. He could not set forth either that his files contained any confidential medical records that would have required a separate storage. His application for an appeal was dismissed.

COMMUNICATION BY NON-SECURED EMAIL

Landessozialgericht Hamburg, judgement L 1KR 76/18 of 7 March 2019[24]

The Landessozialgericht Hamburg had to decide whether the administration was obliged to use non-secured emails in communication with citizens.

The plaintiff had been a member of the defendant, a public health insurance body. He requested by email information on his past sick leaves. The defendant replied, but asked the plaintiff to communicate in the future by post instead of email for data protection reasons. The plaintiff requested the *Sozialgericht* Hamburg to declare that the defendant was obliged to communicate with him by means of simple emails. The *Sozialgericht* dismissed the declaratory action whereupon the plaintiff lodged an appeal before the *Landessozialgericht*. Whereas the latter considered that the administration is authorised to use means of electronic communication by the Federal Administrative Procedures Act (*VwVfG*), Section 3a, and whereas an obligation for the use of electronic communication may result for administrations from the E-government Act, Section 2, the *Landessozialgericht* rejected the appeal on the grounds that the "electronic communication" mentioned in these provisions did not include the communication by simple non-secured email. The defendant was therefore not only not obligated to use emails; it was not authorised to do so either.

ITALY

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ADMINISTRATIVE AUTOMATION: TRASPARENCY AND JUDICIAL REVIEW

Council of State, decision 881/2020 of 4 February 2020, available on: https://https://www.giustizia-amministrativa.-it/, under the "Decisioni e Pareri" section.

The Italian supreme administrative justice organ clarifies the conditions and methods of use of algorithms in the adoption of administrative decisions.

The Consiglio di Stato affirmed the legitimacy of the use of computer algorithms in the adoption of administrative decisions also of a discretionary nature. In fact, algorithms are, under the point of view of the juridical nature, operational tools in the public administration's availability that allow the achievement of institutional purposes through streamlining and accelerating any kind of proceeding. However, the general principles concerning authoritative administrative functions require two conditions to be met: a) the full intelligibility of the operations carried out by the computer; b) the imputability of the choices made by the computer and the responsibilities arising from such choices. Under the first aspect, the software is to be considered a document according to the broad definition of art. 22, paragraph 1, letter d) of the Law. n. 241/1990 with the consequence of its accessibility by citizens. In order to ensure full transparency the public administration must also provide all the information related to the functioning of the system, so as to allow the verification of the adequacy of the tool used and the compliance with the rules established in the administrative decisions on which is based automation. Under the second aspect, it is necessary, according to art. 22 of GDPR, that the automated administrative decisionis referable to a natural person who is an organ of the publica administration and who holds the authoritative power so as to ensure the indispensabile verification of the logic and legitimacy of the choice and of the results of the procedures entrusted to the computer (the so called «principio di non esclusività della decisone automatizzata»).

VALIDITY OF THE FINANCIAL BID UNSUBSCRIBED WITH DIGITAL SIGNATURE

Council of State, section III, decision 1963/2020 of 19 March 2020, available on: https://www.giustizia-amministrativa.it, under "Decisioni e Pareri" section.

The Italian supreme administrative justice organ stated that, in a telematic invitation to tender, the financial bid unsubscribed with the

[24] *Landessozialgericht* Hamburg, judgement L 1KR 76/18 of 7 March 2019, *Beck-Rechtsprechungsreport*, 2019, n° 9541.

economic operator's digital signature is regular if this bid may be due, anyway and unequivocally, to the participant.

The financial bid, unsubscribed with a digital signature but timestamped, is plenty of value.

In this case, the legal representative of the participant company submitted the financial bid after logging in the platform with his access credential. Then, he downloaded and filled in the financial bid form, and finally, he timestamped-it with the time stamp linked with his digital signature and uploaded-it on the e-procurement platform.

The Judges clarify that the timestamped financial bid is inviolable, undamaged, and sure about its origin, and also univocally linked with the participant intentions, as required in the call for tenders.

Substantially, the described authentication and submission process ensures the respect of security and origin requirements expected for the financial bid, and make unjustified the cut off of the participant company because of the lack of digital subscription.

PUBLIC E-PROCUREMENT PLATFORMS: MALFUNCTIONS AND RISK SHARING

Regional Administrative Court of Puglia, Bari, section III, decision 461/2020 of 3 April 2020, available on: https://https://www.giustizia-amministrativa.it/, under the "Decisioni e Pareri" section

The Apulian administrative justice organ, about the cut off of the economic operator that delayed his bid of 10 minutes, because of the malfunction of the e-procurement platform used for the competition, stated that the risks of malfunction of the platform are on the public administration that uses it.

The Contracting Authority should stand for the risks of malfunctions and anomalies of e-procurement platforms and systems, used to perform the competition.

This risk is balanced with the advantages obtained from the public administration, in terms of organization and digital management of documents.

The Judges clarify that the Public Authority has to remedy these malfunctions and anomalies that do not allow the participation of the stakeholder to the competition, for instance asking the participants a documental integration (the so-called "soccorso istruttorio", provided by Italian public contract law).

Besides, when the invitation to tender is attempted from a large number of stakeholders, the contracting authority also should provide e-procurement tools that allow the simplification of the documental acquisition process.

In any case, the public administration has to provide alternative traditional systems to support emergencies, due to the malfunction of the designated e-procurement platform.

DEFINITION OF TELEMATIC TENDER AND PRINCIPLES OF SELF-RESPONSIBILITY AND PROFESSIONAL DILIGENCE OF THE ECONOMIC OPERATOR

Council of State, section III, decision 4795/2020 of 28 Luly 2020, available on: https://https://www.giustizia-amministrativa.-it/, under the "Decisioni e Pareri" section.

The supreme administrative justice body confirms, on the one hand, the definition of "telematic tender", in order to apply the Code of public contracts, and, on the other hand, the principles of self-responsibility and professional diligence related, always, to the economic operator.

The telematic specification indicated the following steps for the formulation and telematic transmission of the economic offer are: a) compilation of the offer scheme by the competitor in "off line" mode, i.e. directly on the competitor's computer, without sending any file to the system (or platform, *i.e.* the operator's server); b) affixing of the digital signature on the "excel" sheet duly filled in, then affixing the certified time stamp within the deadline set by the tender law; c) insertion in the system - in the specific field of the "economic offer" section - of the identification number (serial number) of the time stamp previously affixed to the digitally signed economic offer file; d) at the opening of the "upload" period (data transfer/upload), transfer to the system (or platform), by the competitor, of the file generated and saved on his computer. According to the judgment in question, the procedure subject to litigation is to be considered as falling within the telematic tenders, which - as already established by the same Section III of the Council of State (decision 4050/2016 of 3 October 2016) - are characterized compared to the traditional tenders for «the use of an online platform of e-procurement and digital communication tools (digital signature and PEC), which in fact make the process more efficient, faster and safer than the traditional one, based on the paper submission of documentation and bids. The phases of the tender follow a temporal succession that offers a guarantee of correct participation, inviolability and secrecy of the offers: the digital signature in fact guarantees the certainty of the signatory of the offer and the temporal marking guarantees the certain date of signature and the univocity of the same. By means of the signature and time stamping, which must be done before the mandatory deadline for participation, and the transmission of the offers exclusively during the next phase of the time window, the

correct participation and inviolability of the offers is guaranteed. The systems provide, in fact, the verification of the validity of the certificates and the date and time of marking: the reliability of the digital signature and time stamp algorithms guarantee the security of the sending / receiving of offers in a closed envelope. In the telematic tender, the preservation of the offer is entrusted to the same competitor, ensuring that it is not, in the meantime, modified by imposing the obligation of signature and marking within the deadline set for the submission of bids. Signature and marking correspond to the "closing of the envelope". The Tender Timing indicates to the company not only the peremptory deadline for "closing the envelope", but also the period and related upload deadline (transfer of data to the server of the contracting company). At the end of the upload period, the offers in closed envelope are available in the system; when the offers are opened, the system automatically draws up the ranking list, also taking into account the technical scores awarded by the Commission, ranking list that is published with the indication of the offers received, the overall technical and economic score awarded and the best price. In addition, none of the managers of the tender can access the documents of the participants, until the date and time of the meeting of the tender, specified during the creation of the procedure» (see, in the same sense, Council of State, section V, decision 539/2017 of 21 November 2017; *Idem*, section III, decision 4990/2016 of 25 November 2016; Regional Administrative Court of Emilia Romagna, Bologna, section II, decision 450/2017 of 14 June 2017).

The judgment also dwells, moreover, on the need for the operator's compliance with the principles of self-responsibility and professional diligence, to nothing, as any statements of material error by the staff responsible for uploading tender documents: the economic operator must always «equip itself with personnel with adequate computer skills and, therefore, able to understand the meaning of the concept in question and to take care of the requirements described» in the telematic specifications.

OBLIGATION OF COMMUNICATION OF THE CERTIFIED E-MAIL TO THE MINISTRY OF JUSTICE BY A PUBLIC ADMINISTRATION

Regional Administrative Court of Calabria, Catanzaro, section I, decision 585/2020 of 15 April 2020, available on: https://https://www.giustizia-amministrativa.-it/, under the "Decisioni e Pareri" section

A Hospital has been sentenced to communicate to the Ministry of Justice the address of PEC (certified electronic mail) for the notification of judicial acts, as the law of the sector does not leave any margin of discretion and the communication requires the use of minimal administrative resources.

The Administrative Court affirms that the obligation to communicate the PEC (certified electronic mail) address to the Register of Public Administrations at the Ministry of Justice, pursuant to art. 16, paragraph 12, d.l. 18 October 2012, 179, converted in Law 17 December 2012, n. 221, is aimed at simplifying the service of judicial documents to public administrations and, taking into account that lawyers are among the persons who have access to the list kept by the Ministry of Justice, it is undeniable that those who exercise this profession are holders of a relevant legal position, differentiated from other subsidiaries and homogeneous with respect to compliance with the obligation remained unfulfilled. For this reason, the judgment recognizes procedural legitimacy to associations or committees representing the category of lawyers.

THE RELATIONSHIP BETWEEN PEC AND DIGITAL SIGNATURE IN APPLICATIONS FOR PARTICIPATION IN AN ADMINISTRATIVE PROCEDURE

Regional Administrative Court of Puglia, Lecce, section II, decision 825/2020 of 27 July 2020, available on: https://https://www.giustizia-amministrativa.it/, under the "Decisioni e Pareri" section

A typical case in the Italian Public Administration is ordering the sending of requests and telematic declarations for the participation in administrative procedures using in a differentiated way, and often wrong, the instrument of PEC (certified electronic mail) and digital signature. The judgment clarifies these legal-informatics steps.

On the subject of telematic sending of questions and declarations, for some time now jurisprudence has been confronted with the problem of equating, or not, the digital signature with the simple sending of the application or documentation by PEC (therefore without a digital signature). In the Italian law the main reference rule is contained in art. 65 of the Digital Administration Code (Legislative Decree n. 82/2005). In addition to further detailed regulations (art. 4, paragraph 4, of the Prime Ministerial Decree of 6 May 2009; art. 61 of the Prime Ministerial Decree of 22 February 2013; Circular of the Presidency of the Council of Ministers - Civil Service Department n. 12/2010). In particular, taking into account the above mentioned legislation, the communication tool consisting of certified electronic mail (PEC), as well as the use of digital signature, allows, under certain conditions, to attribute the legal authorship of a document to its author. With judgment no. 825 of 27 July 27 2020, the Administrative Court of Puglia, Lecce

- Second section correctly noted that in order to recognize equivalence between the two instruments (digital signature and PEC) the application for participation in an administrative procedure must be sent from the PEC box in the name of the citizen (in the case of trial the circumstance was proven by the certified mail operator's certificate) and, in addition, the system must correctly produce the complete receipts of acceptance and delivery of computer documents received in the destination box of the Administration (another aspect proven in court).

Regional Administrative Court of Law of Bari, section III, decision 798/2020 of 3 June 2020, available on: https://https://www.giustizia-amministrativa.it/, under the "Decisioni e Pareri" section

The Regional Administrative Court of Law of Bari pronounces on the problems of transmission in public tenders via telematic platform.

The Regional Administrative Court of Law of Bari takes on the issue of the exclusion of Pro Iter Group Stable Consortium from the selective procedure called by the Metropolitan City of Bari about «Bari the lorries traffic road that should connect the A14 motorway to the port of Bari, called 'Levant Gate Road'». The Consortium, as indicated, was unable to complete the process of submitting the offer via the telematics platform indicated therefore, by the Metropolitan City of Bari. The Consortium requested to the platform handler an extension of the deadline due to the malfunctio to the system, which would have allowed him to complete the process, subsisting the preclusive reasons to partecipate in the selection procedure (Article 79, paragraph 5, Legislative Decree 50/2016). The platform sent an e-mail to the applicant highlighting the error and then acknowledging the problem. The platform handler should have, on the basis of the principle of loyal cooperation, immediately identified the causes of the system blocking and worked towards the assisted finalization of the sending procedure, even after the expiry time, thus notaltering, in any way, considering the applicant's in time production of the documentation, the regularity of the procedure neither the parity.

The platform handler undertakes, as expected by th Disciplinary, the role of structur expressly deputated to "trouble solving issues related to the use of the platform".

In accordance with the established principles, which are also based on the jurisprudence of the Council of State, a competitor who has taken care of loading the tender documentation on the telematics platform within the time set for this operation, cannot be excluded from selective procedure, if the failure to finalize the submission is due to a system malfunction, ascrivble to the operator (cfr.: Council of State, section III, decision 86/2020 of 7 January 2020, Council of State, section V, decision 7922/2019 of 20 November2019).

When it is not possible to determine whether the mistake is referable to the transmitter or rather the transmission has been damaged by a defect of the system, the Case law esthablishes that the injury falls in any case on the Institution that has called for, organized and managed the tenders on the telematics platform(cfr.: Council of State, section III, decision 481/2013 of 25 January 2013).

PORTUGAL

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E-MAIL COMMUNICATIONS IN LAWSUITS

Judgment of the Supreme Court of 19/06/2019, available on: https://jurisprudencia.csm.org.pt/ecli/ECLI:PT:STJ:2019:1418.14.7TBEVR.E1.A.S1.D4, integral-text, under the "Supreme Court".

The Supreme Court of Justice ruled that sending pieces of proceedings, when done via e-mail and betting the digital signature, equivalence to sending to the fax, and, whenever there is no doubt of the veracity of the same, in the light of the principle of trust be admitted even if there is insufficient of some of the required formalities.

The Supreme Court of Justice refers to the possibility that procedural actors have to use electronic means of communication in the context of relations established with the organs of sovereignty as are the Courts. The filing of the judicial appeals, until the year 2018, was carried out either by fax, delivery to the judicial secretariat or sent by post. However, the non-application, at the time, the provisions of the Code of Civil Procedure regarding the obligation of electronic processing stipulated by DL n.º280/2013, of August 26, should be to apply the provisions of DL n.º.642/2004, of June 16, which enshrines the form of presentation to court of procedural acts sent by e-mail. This diploma, allows in its Article 2 and 3 the sending of the procedural documents through the e-mail of the representatives, taking them as if they were sent by post, being subject to the legal provisions. Among the expected actions is to validate the acts by applying the proven digital signature of the representative or, alternatively, valid as if it were the same sent by fax, in accordance and grounds of DL n.º. 28/92

of February 27, in this case, the originals of the documents sent when requested by the court must be delivered. However, since the documents have been sent in this way and there are technical difficulties with the Court's apparatus, and after confirmation of good receipt by the registry of the court and order for admission of appeal by the Judge, the documents sent via e-mail must be admitted in the light of the principle of trust, living up to the old saying "must prevail the substance over the form", so that even if not fully verified all the formal obligations required, if the court comes to admit the combination of electronic communications and the veracity of the documents sent, the communication should be considered as valid and admitted the appeal under prevalence of the substance of the right.

ELECTRONIC PROCESSING IN ADMINISTRATIVE AND TAX JUDICIAL PROCEEDINGS

Judgment of the Central Administrative Court of the South of 20/02/2020, available on: http://www.dgsi.pt/jtca.nsf/170589492546a7fb802575c3004c6d7d/3205041bc08272b08025851f004cf94d?OpenDocument, full text by the "Central Administrative Court of the South".

The Central Administrative Court of the South ruled that in the administrative and tax proceedings handled electronically and whose digital signature will not be staked on the documents and can be resolved later retroactively retroactive to the submission data, if after the court's request made for timely.

Since mid-2017, the procedure for administrative and tax proceedings has been regulated by Ordinance nº. 380/2017 of 19 December, which approved the System for the electronic processing of proceedings in the administrative and tax courts (SITAF), requiring them to be processed only electronically. For the purposes of processing, the judicial appeals of administrative and tax proceedings are considered only to be carried out on the date of digital signature committed by the legal representative, and only gains relevance after the party's opposition. In the words of the court, it was intended with the electronic processing of administrative and tax proceedings, "to make justice more agile, fast and transparent, having an instrumental character, without being able to lose sight of the fact that the procedural act was practiced". All this is because it is the Code of Procedure in the Administrative Courts (Articles 7 "- promotion of access to justice" and Article 8 – "principle of cooperation and good procedural faith", or the Code of Administrative Procedure ("principles applicable to the electronic administration"), it follows that the electronic processing of cases should be considered as a way of facilitating citizens' access to justice, simply it, *i.e*. facilitating access to the process by users of the process, principally the parties. That is to say, if the validation of the same are made later, even after the timely period for filing the appeal, it should be considered as valid, retroactive to the date of submission of the documents, and should not be considered solely the date of the application of the digital signature of the document. It is intended, therefore, that the legal formalities inherent in the electronic procedural procedure are not to be configured as an inflexible and technically time-consuming requirement, and that if the technical failure is superfluous and does not imply an increase or decrease in the means of defense of the parties, it will be necessary to configure as acceptable the supply of the technical failure of the acts committed timely. Thus, the saying "of the prevalence of the substance in the form" prevails, and the formalities cannot impede the normal functioning of the law and the activity of the courts.

ELECTRONIC SIGNATURE IN TENDERING

Judgment of the Administrative Court of Appeal (North) of 15/05/2019, available on: http://www.dgsi.pt/jtcn.nsf/89d1c0288c2dd49c802575c8003279c7/b8e86e909d73be8c80258570004c48b1?OpenDocument, full text by the "Administrative Court of Appeal".

The Administrative Court of Appeal (North) ruled that within a tendering process, although all files must be signed with a qualified electronic signature, if a document has only a handwritten signature the proposal cannot be rejected because the platform will provide the necessary qualified certificate after the files' final submission.

All tendering propositions must be submitted through the applicable platform ("anoGov"), and each document must be signed with a qualified electronic signature, in accordance with the Code of Administrative Procedure and Article 68 of Law 96/2015, of 17 August. Firstly, all files which comprise the proposition must be encrypted and signed with a qualified electronic signature, followed by an overall qualified electronic signature at the time of the final submission of the documents. However, according to already settled administrative case law, this formality has been deemed as non-essential, in accordance with the theory of non-essential formalities foreseen under the Administrative Procedure Code, meaning that its omission does not preclude the purposes which the legislator meant to produce or protect. Also, bearing in mind that a qualified electronic signature has the equivalent legal effect of a handwritten signature, the court ruled the appeal to be unfounded – although one of the documents had only a handwritten signature, it was enough to ensure the identity of its author as

well as its will. Additionally, the platform itself was able to provide the additional necessary requirements, by ensuring the integrity and inalterability of the documents, through a receipt and a qualified certificate, which is issued by the platform itself along the process of registration and authentication when accessing the platform.

PROFESSIONAL QUALIFIED DIGITAL CERTIFICATE IN TENDERING

Judgment of the Administrative Court of Appeal (South) of 10/10/2019, available on: http://www.dgsi.pt/jtca.nsf/170589492546a7fb802575c3004c6d7d/5328633c680352dd8025849300335515?OpenDocument, full text by the "Administrative Court of Appeal".

The Administrative Court of Appeal (North) ruled that when submitting different documents and files for tendering, through the appropriate platform, a professional qualified digital certificate shall have the same legal effect as a qualified digital signature.

All tendering propositions must be submitted through the applicable platform, and each document must be signed with a qualified electronic signature, in accordance with the Code of Administrative Procedure and Law 96/2015, of 17 August. Moreover, the signature must belong to either the company or a legal representative with powers to bind said company to a legal contract. Following the use of a professional qualified digital certificate on behalf of one of the candidates, its proposal was ruled invalid on grounds of being in violation of article 7º of the Decree of Law 290-D/00, of 2nd August and article 54º of Law nº 96/2015, of 17th August. Yet, the Administrative Court of Appeal determined that said certificate was enough to determine that the person signing had legal powers to bind the company to the tendering procedure, when submitting all required documentation on the platform, making it unnecessary to require additional documents which attested to the powers of the legal representative.

SPAIN

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NATIONAL E-GOVERNMENT STRUCTURE

Tribunal Constitucional, Plenary Session, judgement 55/2018 of 24 May 2018, appeal number 3628/2016, Legal ground Eleventh, available on: https://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/25660#complete_resolucion&completa

Constitution-compliant interpretation provided by the Constitutional Court about Administrative Procedure Law disposition which establishes certain requirements for sub-central authorities to create their own solutions for the electronic register of representation powers, electronic register, single electronic file, data mediation platform and general electronic access point for the Administration.

This important Court decision analyses the appeal of unconstitutionality lodged by the Region of Catalonia against a large number of the dispositions contained in Act number 39/2015, of 1st October, about the Common Administrative Procedure of Public Administrations, through which it has been implemented the last and most important impulse of the e-Government in Spain in its external dimension, that is, in its interrelation with the citizens. Given the impossibility of addressing in this review the innumerable questions that are addressed in it, we focus on the analysis that the Constitutional Court makes of the doubts of constitutionality raised against the Second Additional Provision of Act number 39/2015, which takes place in the eleventh of its Legal grounds. The aforementioned additional provision proposed a solution for spending review or rationalisation of expenditure by obtaining economies of scale from organisation at a national level through a framework. In this context, a priori, the following tools —electronic register of representation documents, electronic register, single electronic file, data mediation platform and general electronic access point for the Administration—used by all territorial levels would be those developed by the State, unless the subcentral public bodies justified to the Ministry of Finance and Public Administration that they can provide a more efficient service and in compliance with the requirements of the National Interoperability Scheme, the National Security Scheme, and their technical development standards.

In view of this, the Court, after stating that the central State could try to implement e-Government solutions in a coordinated manner with the principles of efficiency (Art. 31.2 of Spanish Constitution and 7 of "Organic" Act number2/2012), budgetary stability (Art. 135 of Spanish Constitution and 3 of "Organic" Act number 2/2012) and financial sustainability (Art. 4 of "Organic" Act 2/2012), establishes the need to respect, as an unavoidable limit: its compatibility with the autonomy constitutionally recognised to the regions (arts. 2, 137 and 156 of Spanish Constitution and Statutes of Autonomy) and to the local authorities (arts. 137, 140 and 141 of Spanish Constitution), clarifying that 'the design, creation and maintenance of "e-

Government services" is a central aspect of the "power of self-organisation" inherent to their autonomy'. On this point, the Court concludes that the requirement to comply with mandates for efficiency, budgetary stability and financial sustainability, since these are constitutional mandates which apply at all government levels, does not infringe these principles of autonomy and self-organisation. However, if the motivation of the compliance with these limits must be made before a Ministry so that it allows an administrative control of the action of the regional and local entities, in this case the autonomy of these subcentral powers will be transgressed in an unconstitutional manner.

Consequently, in application of the principle of conservation, the Court provides a constitutional-compliant interpretation about the analysed provision: the only obligation that would arise from it to sub-central powers would be to justify the fulfilment of the mandates of efficiency, budgetary stability and financial sustainability, as well as to communicate this justification to the State, but without this implying authorisation to exercise any kind of administrative control. Therefore, the only possible control in this point will be the jurisdictional one.

Tribunal Constitucional, Plenary Session, judgment 132/2018 of 13 December 2018, appeal number 3774/2016, Legal ground Sixth, available on: https://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/25815#complete_resolucion&fundamentos

The Constitutional Court confirms the constitutionality of the article in Act number40/2015 which establishes the obligation of all administrations to adopt technological solutions developed by other ones that allow them to meet their needs, unless they could justify the higher efficiency of this own development.

This case analyses the appeal of unconstitutionality held by the Government of the Region of Catalonia against a large number of the provisions of Act number 40/2015, of 1th October, about the Legal System of the Public Sector, through which it has been implemented the last and most important impulse of the e-Government in Spain in its internal dimension. Given the impossibility of addressing the innumerable questions raised in this appeal, we focus on the analysis that the Constitutional Court makes of the doubts of constitutionality raised against the article 157.3, which takes place in the sixth of its Legal grounds.

In this provision, after establishing the obligation of all national administrations to make available to others the software they have developed or acquired through contracts by which they become owners of intellectual property rights, the third paragraph states that, before acquiring or developing their own application, they must consult a general catalogue managed by the State in order to verify whether there are solutions available that can totally or partially meet their needs as well as to any new or existing application to be developed, improved or updated, provided that the technological requirements of interoperability and security allow it. If so, the use of the existing application shall be compulsory, unless an adequate justification is provided in terms of efficiency in accordance with Article 7 of "Organic" Act number 2/2012, of 27 April, on Budgetary Stability and Financial Sustainability.

In view of this obligation, the Constitutional Court reiterates its position exposed in Judgment 55/2018 establishing that the requirement of these parameters of efficiency does not infringe the autonomy and self-organisation of the substate subjects as far as the respect of these conditions constitutes a requirement emanating from the constitutional text itself. Consequently, the Court considers that in the event that a technological tool was already implanted in another Administration, the development or acquisition of a different and independent tool with the same purpose will require the motivation from the perspective of efficiency requirements. Specifically, it should be justified that this way of proceeding does not undermine the public accounts nor does exceed the limits of deficit, public debt and arrearage and that the resulting net profits (not only economic) exceed those derived from using any of the applications available in the general catalogue.

NOTIFICATIONS AND E-GOVERNMENT

Tribunal Superior de Justicia de Cataluña, Contentious-Administrative Chamber, Section 1, judgement 579/2018 of 15 June 2018, appeal number 613/2015, available on: http://www.poderjudicial.es/search/indexAN.jsp

Determination of cases in which the lack of alert through the e-mail address or electronic device of the private, about the availability of electronic notification in the corresponding institutional site prevents the consideration of a tacit rejection of them by the own acts of the competent administration.

In this case, the appeal raised against the administrative decisions confirming the provisional settlement corresponding to the corporate income tax for the year 2011. These decisions establish that the deadline for an appeal has elapsed, given that this period began from the date of the presumed rejection of the electronic notification, that is, ten calendar days from its availability according to art. 43 of Act number 39/2015. It is noted that all the acts related with the provisional settlement procedure were made available to the

private through its institutional enabled e-mail address. Of these, the first four notifications made about procedure steps progress, received an alert of availability via the e-mail associated the aforementioned institutional site according to the possibility given by art. 41.6 of Act number 39/2015. However, this alert was omitted in regard with the administrative decision, where the amount that private must pay was finally fixed. In view of this, the appellant argues that it is impossible to apply an alleged rejection of the notification on 16th October 2013 and, therefore, that it is not appropriate to consider that the period concerning to first administrative appeal, lodged on 19 February 2014, was exceeded.

In the light of this, the Judgement is based on the premise that Supreme Court case law establishes that, according to 41.6 Act number 39/2015, Administration would not be obliged to send an alert about the availability of the notification as condition for the validity of the second one, being only a possibility. About this topic, see Judgement of the Supreme Court number 1927/2017, 3rd Chamber, of the Contentious-Administrative, 2nd Section, of 11th December, appeal number 2436/2016, where it is also analysed the structure of electronic notification already existing prior to the entry into force of the LPAC. For an in-depth analysis of this two-phase structure, see Judgement of the Supreme Court 47/2018, 3rd Chamber, of the Contentious-Administrative, 2nd Section, 17th January, appeal number 3155/2016 and Judgment of the High Court of the Region of Aragon 158/2017, 2nd Chamber, of the Contentious-Administrative, 2nd Section, 5th April, appeal number 227/2016.

Nevertheless, the Catalonian Court notices in this case special circumstances described in this manner: 'the action of the Administration through a system that alerts the private [sending an e-mail indicating the existence of a new notification in the DEH -institutional site-] generates a legitimate expectation in regard with the existence of a notification from the AEAT [the Spanish Tax Agency] pending access. This legitimate expectation makes it important and relevant that the private did not enter his D.E.H. -institutional site- in view of the fact that he had not received an alert at his e-mail address, as had been the case up to that point. In other words, it was an attitude that was to be expected from the taxpayer, and the fact that he did not enter his D.E.H. cannot be considered negligent'.

According with this assessment, the absence of the alert regulated in art. 41.6 of Act number 39/2015 gets a meaning and an effect in a way that is not possible to appreciate the existence of an alleged rejection of the notification. Significance that will not derive neither from the alert itself nor from its own regulation, but from the general principles that must govern the actions of the Administration, and more specifically those set in art. 3.1.e) of Act number 40/2015.

Tribunal Constitucional, Plenary Session, judgement 6/2019 of 17 January 2019, appeal number 3323/2017, available on: https-://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/25838

There is an obligation of legal practitioners to consult their professional electronic letterbox located on the corresponding institutional site on their own initiative, without the absence of any alert of the availability of notification in their mail or electronic device having any effect in this respect.

In this case, the Constitutional Court analyses, firstly, the compliance byLexNET —the system implemented in Spain for procedural notifications between legal practitioners and jurisdictional bodies— of all the technical requirements to comply with the demands and guarantees formulated by the Spanish procedural Law - hereinafter, LEC. The Court bases its review according to the principle of effective judicial protection expressed by the art. 24 of the Spanish Constitution, such as traceability and/or immutability of the content, reliable identification of the sender and the addressee, date of dispatch and access, proof of availability and certainty in the calculation of procedural deadlines.

Subsequently, it is stated that «Article 149 of LEC, a precept that defines the acts of communication in civil proceedings - and in other jurisdictional orders in a supplementary manner - distinguishes six types of these acts, none of which is the 'alert' of notification contained in the subsequent Article 152.2 third paragraph LEC. In view of this, Article 152.2 of the LEC 'does not configure the "alert" as an act of communication, but only as information provided about the availability of an act of communication».

The Constitutional Court concludes that, given that LEC separates acts of communication from their corresponding alerts, it cannot be considered that the absence of the latter may prevent the notification from being considered fully valid. Consequently, 'the alert represents a procedural act carried out by the judicial office, of an accessory nature, which helps or facilitates knowledge of the fact that an act of communication has been made, but to which effective access the notification does not contribute, but rather requires the use of the electronic channel enabled specifically for the professional'.

The Court also states that with the abovementioned alert the legislator was not really seeking to reinforce 'the level of attention of those who represent the parties in court', who 'by virtue of their activity, have always had to be diligent in receiving and forwarding acts of communication concerning their clients, whether

on paper or electronically'. Thus, the alleged 'disproportionate burden' of appearing electronically, on their own initiative, at LexNET site would not be such, but rather 'the natural consequence of the exercise of a continuous professional activity, that is, the normal state expected'. So that 'due to his work and dedication, the professional can be expected to access his institutional letterbox daily or almost daily, nothing else'. This situation would mean that there is no breach of legitimate trust under Article 152 of the LEC. With respect to the asynchrony in the implementation of technological solutions in the different geographical areas and/or the use of diverse tools, the Court determines that the performance in different territories -regions or provinces- by the professional 'will always be a free option', with the 'consequent responsibility to rationalise then their work', while, in addition, highlights that the way to operate of the different platforms is 'similar'.

ELECTRONIC SUBMISSION, COMMUNICATIONS AND NOTIFICATIONS IN PUBLIC PROCUREMENT

Tribunal Catalán de Contratos del Sector Público (administrative review body), decision n. 87/2020 of 26 February 2020, appeal number N-2019-360, available on: https://contractacio.gencat.cat/web/.content/contacte/tccsp/resolucions/2020/resolucio-num-087-2020.pdf

For admission of bids extemporarily submitted it is for the claimant to prove the malfunction of the procurement platform. In any case, to 'upload' or to 'send' documents of the offer is not equivalent to 'submit', as for this, it is necessary a valid signature of the offer and its reception by the contracting authority.

The action is brought by the company EINA. In a procurement procedure carried out electronically with the platform VORTAL, the deadline for submission was established on 18 June 2019 at 6.00 p.m.. However, the act of opening of the envelopes determined the extemporaneity of the presentation of the applicant's offer (18 of June of 2019 to the 18:24:26 hours) without the enterprise having manifested difficulties in the presentation through the platform VORTAL.

The 16th of July 2019, EINA sent an email to the contracting authority opposing its exclusion and claiming that on the 18th of June 2019, at 4.24 p.m., all documentation was sent, but that there were problems with the electronic platform VORTAL at the end of the process of sending documentation, and attached to these effects a screenshot of the 5.57 p.m. of the day 18th of June 2019 where you see the notice of "loading".

The key of the controversy lies therefore on whether or not there was an abnormal operational malfunction on the platform which would allow to admit the proposition out of time. The court affirms that this is a purely technical issue, and consequently the decision shall be based on the criterion of the contracting authority based on the technical report of the VORTAL team, which argues that '*there was no inherent malfunction on the operation of the Platform*'. Furthermore, the VORTAL technical team provides another document with the schedule followed by EINA's submission that contradicts the claimant's facts: (1) creates the offer at 17:15:54. (2) charges documents between 17.23.24 and 17.25.47; (3) signs the platform documents between 18.21.58 and 18.23:15; (4) send the offer at 18:24.26.

The court argues that it is to the claimant to demonstrate the failure of the electronic platform, and therefore prove worn the sequence alleged by VORTAL and the contracting authority. In the present case, it is not demonstrated.

Finally, the fact that some of the information have been charged in the platform before the deadline, cannot be taken as a valid submission. To 'upload' or to 'send' documents of the offer is not equivalent to 'submission', as for this, it is necessary a valid signature of the offer and its reception by the contracting authority.

Therefore, the court considers that the enterprise is correctly excluded from the public tender.

Tribunal Administrativo Central de Recursos Contractuales (administrative review body), decision n. 74/2020 of 23 January 2020, and decision n. 348/2020 of 5 March 2020, appeal number 1462/2019, availables on: https://www.hacienda.gob.es-/tacrc/resoluciones/año%202020/recurso%201462-2019%20val%20303-2019%20(res%20-74)%2023-01-2020.pdf, and https://www.hacienda.gob.es/tacrc/resoluciones/año%202020/recurso%200003-2020%20(res.%20348)%20-05-03-2020.pdf

The contractor does not have the right to communicate electronically with the Administration during the performance stage or to the deliverables of the contract. During these stages paper documents can be required.

In the procurement documents, the technical specifications expressly mention the paper support in different sections. The claimant alleges that constitutes an infringement of article 14 of Act 39/2015, which establishes the right of natural persons to choose at all times the means (paper or digital) to communicate with the Public Administrations for the exercise of their rights and obligations. But this rights just provided for administrative procedures, whereas in the present case the requirement to present certain documentation to the contractor is part of the obligations that must be accomplished by the undertaking in performance of the contract. The Court states,

therefore, that when it comes to public procurement, the use of electronic computer and telematic means in the corresponding procedures as regulated in the sixteenth and following additional provisions of the Spanish Public Procurement Act, does not include the obligation to use electronic means to deliver the documentation that must be provided as part of the service to the contractor.

Therefore and although the requirement of this paper based formats may currently sound meaningless, such wording of the technical specifications does not violate any legal provision.

Similar conclusions are reached in the decision n. 348/2020, in which the Court determines that the obligation to present paper copies concerns only the way in which the object of the contract provision has to be delivered –the project for the execution of the work prepared–, which has nothing to do with the way in which the interested parties interact with the Administration, given that, in contractual relationships, which happens to be the case, it is for the Administration itself to indicate in the procurement documents the support in which the project prepared by the contractor has to materialize.

Tribunal Administrativo Central de Recursos Contractuales (administrative review body), decision n. 433/2020 of 19 March 2020, appeal number 107/2020, available on: https://www.hacienda.gob.es/tacrc/resoluciones/año%202020/recurso%200107-2020%20val-%2030-2020%20(res%20433)19-03-2020.pdf

The periods allowed for appeals and remedies must be interpreted as starting from the notification made through e-mail, and not from the postal service notification

The administrative court analyses the extemporaneity of the appeal as a cause of inadmissibility. The court argues that the period of 15 days provided by the law has not been respected by the appellant, since it must be counted from the moment the e-mail notification is made, or at least from the publication in the tender platform, without it being admissible to pretend to wait for the postal service notification to indicate the *dies a quo* of the calculation of the term.

Therefore, the communication via e-mail produces its effects even if that communication indicates that other notifications have been sent to all the bidders by other means.

Tribunal Administrativo Central de Recursos Contractuales (administrative review body, decision 1053/2018 of 16 November 2018, from the), appeal number 832/2018, available on: https://www.hacienda.gob.-es/tacrc/resoluciones/a%C3%B1o%202018/recurso%200832-2018%20ib%2058-2018%20-(res%201053)%2016-11-2018.pdf

The cases in which the expected size of the envelopes exceeds the maximum permitted by the Contracting Platform used and the material impossibility of having the necessary electronic means to carry out an electronic tender fall within the cases contemplated in the Additional Provision number 15.3.c) of the Spanish Public Procurement Law which transposed the art. 22.1.c) of Directive 2014/24/EU.

In this decision, the Central Administrative Court for Public Procurement establishes that the practical impossibility of using the electronic platform to upload some of the documents due to its excessive size falls among the exceptions found in the Fifteenth Additional Provision of on Public Procurement Act 9/2017 - henceforth, LCSP - regarding the obligation of economic operators to submit their bids by electronic means within a public tender. Specifically it would fit into that which expressly provides for the case of 'material practical impossibility of disposing of the technology means which allows the entire electronic processing of the tender'. This exception would be able in those cases where the administration couldn't have acquired the technology required. However, these circumstances should be adequately expressed in the report referred to in Article 336.1.h) of the LCSP. As far as this motivation will be included within the administrative file, it could be considered an exception to the general rule of using electronic tendering.

This criterion contrast with the Article 12.1 of Act nº39/2015, which states the obligation of administrative bodies to settle the necessary electronic means, as well as with Additional Provision Sixteenth Section 1, letter h) of the LCSP which allows a two-phase presentation of tenders, the first one consisting on the presentation of an electronic fingerprint of documents that fulfil the legal requirements.

Likewise, this decision contrasts with the previous decision of the Administrative Court for Public Procurement of the region of Castilla y León, number 104/2018, 22nd October, in which it is noted that 'the alleged difficulties in the implementation of electronic contracting within the time period envisaged by the LCSP, although understandable and true, cannot obstruct the application of the LCSP, nor do they impose the use of a specific electronic platform; and finally, because the electronic presentation of bids does not require "specialised office equipment which is not generally available to contracting bodies" but, on the contrary, the LCSP obliges them to have tools and systems which, with the specific requirements demanded in its 17th additional provision, allow bids to be presented electronically'.

TRANSPARENCY OF ALGORITHMS

ALLOCATING PUBLIC FUNDS: THE SOURCE CODE

Consejo de Transparencia y BuenGobierno (CTBG) (Administrative Independent body), decision 701/2018 of 18 February 2019, administrative file number: R/0701/2018; 100-001932, available on: https://www.consejodetransparencia.es/ct_Home/Actividad/recursos_jurisprudencia/Recursos_AGE/2019/128_particular_35.html

The source code of an algorithm deciding over allocation of public funds cannot be disclosed as it is protected by intellectual property rights.

Civio, a Spanish NGO for the defence of democracy, requested a Ministry to access information regarding an algorithm that was being used by the Spanish Administration to allocate subsidies to tackle energetic poverty. Concretely, Civio demanded access to:

- The technical specifications of the algorithm.
- The result of the tests performed to verify that the application meets the functional specifications.
- The source code of the application.
- Any other deliverable that allows to know the operation of the application.

The Ministry did not answer, so it was for the Council for Transparency and Good Governance to decide (CTGG). The CTGG provided for access to the technical specifications and the performance test, but denied access to the source code invoking the exception for intellectual property rights contained in the Spanish Act for Transparency and Good Governance, as they consider the source code falls within the notion of intellectual property rights protected by Article 4 of the WIPO Copyright Treaty (WCT), Article 10 of the TRIPS Agreement of the World Trade Organization, or Article 1 of Directive 91/250/ EEC.

This resolution was appealed before the judiciary and the sentence is currently pending. Further information can be found onthis website.

PRINCIPLE OF DIGITAL NEUTRALITY AND THE DEVELOPMENT OF PUBLIC APPLICATIONS

Tribunal Superior de Justicia de la Comunidad de Madrid, judgement 590/2019 of 18 September 2019, appeal number 979/2016, available on: http://www.poderjudicial.es/search/AN/openDocument/840b37ce5ca1d163/20191031

The principle of technological neutrality does not require compatibility with each and every one of the computer systems, but only with (i) those that are widely used and (ii) those that use open standards.

The Professional Association of land registrar has created an application to be used by the Land Registry for processing graphic representations of real estate properties. This would allow to contrast them with their descriptions contained in the official documents, and could prevent trespassing, as well as it would ease the verification of limitations to the domain that may derive from urban, environmental or administrative classification and qualification of the terrain.

The claimant alleges the infringement of the principle of technological neutrality given that the application will not be compatible with the 'external' systems for managing property records.

However, the court alleges that the Professional Association of land registrar has made the necessary tools for interoperability available to the existing external operators, and the claimant does not prove the real incompatibility of the software approved by the appealed resolution.

But even if incompatibility could be proved, the court clarifies that the principle of technological neutrality does not oblige to ensure complete compatibility with each and every one of the software that the human mind can design, but only with (i) those solutions that are widely used – in this case, the court expressed some doubts about whether the use of external applications by 199 Registrars out of 1103 can be considered as 'widely used'– and (ii) those that use open standards. Therefore, the decision of a particular Registrar to develop its own system, and therefore to achieve technological independence by requiring application for homologation based on the use of free software, must not be confused with the concept of technological neutrality. The principle of neutrality does not require the software developed by the Public Administrations to be compatible with each and every one of the systems and tools but rather that they use open or widely used standards to ensure access to the greatest number of citizens.