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*DIGITALISATION AND GOOD
ADMINISTRATION PRINCIPLES*



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their own accord, or under external pressure, to corrupt computer-systems in other States. In consequence, the manufacturer could not be trusted anymore according to the Court. In absence of a violation of fundamental rights, the Court rejected the claimant's request.

ACCESS TO SOURCE-CODE USED BY THE ADMINISTRATION

Administrative Court of Wiesbaden, judgement 6 K 784/21.WI of 17 January 2022

The Administrative Court of Wiesbaden had to decide whether a teacher could validly request under the Hessian Data Protection and Information Freedom Act the source code of software used by the administration.

The claimant in this case, a teacher at a Hessian school, requested access to the source code of software used by the Hessian Ministry of Education for a platform providing different services, among others the digital administration of classes and courses or self-learning materials for students. The claimant invoked Section 80, paragraph 1, sentence 1 of the Hessian Data Protection and Information Freedom Act granting a right to access official information (amtliche Informationen). Official information is defined in Section 80, paragraph 1, sentence 3 as records serving official purposes. While the Court admitted that a source code could constitute a record, it denied that it served official purposes and justified this reasoning with several arguments. First, the possession of source code was not necessary for the performance of public tasks. The Court illustrated this argument by underlining that the State of Hesse did not possess the Windows source code, although its IT was mainly based on that operating system. The information of the source code was as little necessary to the fulfilment of public missions as details about pens or doors used by the administration. Second, the rationale of Section 80, paragraph 1, sentence 1 was to control State action. And the quality of the administration's equipment was in principle irrelevant to exercising this control (a part from a justified public interest in case of deficient equipment). What mattered to determine the legality of State action was its content, not its physical basis. Third, the exception of Section 82 No. 2, b of the Hessian Data Protection and Information Freedom Act would apply in any case. According to this Section, access to official information must not be granted if it jeopardizes public security. Since the Court considered that the publication of a source code of software used

by the administration would grant individuals with malicious intent access to weaknesses of the software, this publication would endanger the software's IT-security. The Court also considered that the administration's own IT-staff was not sufficiently qualified (due to unattractive working conditions and salaries) to distinguish between security-sensitive and non-sensitive elements of the source code, which would require to hire expensive experts, which could not be refinanced. The Court therefore rejected the claim. An appeal was lodged against this judgement.

ITALY

edited by

Alessandro DI MARTINO, Research Fellow in Administrative Law, University of Naples Federico II

Elio GUARNACCIA, Administrative Lawyer
Alessia PALLADINO, Ph.D in Administrative Law, University of Naples Suor Orsola Benincasa

Luigi PREVITI, Assistant Professor in Administrative Law (RTDA) at University of Palermo

IRREGULARITY OF THE ACT OF APPEAL WITHOUT A DIGITAL SIGNATURE

Council of State's, Plenary Session, No. 6 of 21 April 2022

In this ruling the administrative Council of State's Plenary session confirms the previous cases law, whereby a notified act of appeal without a digital signature constitutes a mere remediable irregularity. Thus, it falls under the scope of application of the Code of Administrative Procedure, pursuant to article 44, paragraph 2. Consequently, the appellant shall re-notify the appeal, even before the judge's order.

In its Plenary session, the Council of State has dwelled on the provisions and principles governing the appeals, including the consumption of the power to appeal.

Dispute arose from the action brought before the Regional Administrative Court of Lazio, by a citizen who contested the order of the State Property Agency (*Agenzia del Demanio*) to make him release the property. The appeal was extended to the decree of the Ministry of Economy and Finance of 29 July 2005, by which the property was assigned to the State Property Agency.

In its judgment of 24 July 2020, No. 8693, the Regional Administrative Court of Lazio seised upheld the appeal, considering the issue as

a question of private law. Therefore, the Ministry of Economy and Finance and the State Property Agency hold an appeal against the decision, by inferring the violation and / or false application of article 2, contained in the Decree of the Ministry of Economy and Finance, enacted on 29 July 2005.

A cross – appeal was held by appellant at first instance. Besides all, he argued that the appeal was filed at Secretariat of State Council only on 29 January 2021, thus beyond thirty-day deadline established for the filing of appeals pursuant to article 94 of the Code of Administrative Procedure. In details, he underlined that the appeal was initially notified without the affixing of the digital signature, but it was subsequently regularized by appellant through a ritual signature and therefore re-notified to the appellant before the expiry of the deadline for proposing an appeal.

This leads up to reflect towards the effective boundaries of the consummation of the power to appeal, which finds a logical prerequisite in the prohibition of splitting appeals.

The State Council Plenary Session rules inapplicability of power consummation to appeal. On the one hand, its filing at the Judge's Secretariat did not follow the first notification. On the other hand, it would be considered just as a repeated notification of the same act, not relevant for the purposes of the ruling.

The Council of State's Plenary session confirms the previous cases law, whereby a notified appeal without a digital signature constitutes a mere remediable irregularity. Thus, it falls under the scope of application of the Code of Administrative Procedure, pursuant to article 44, paragraph 2. Pursuant to article 44 of the Code of Administrative Procedure, the judge should fix a peremptory term for the regularization of the appeal, in accordance with the law.

The autonomous regularization of the appeal by the appellant represents the peaceful application of the principles of fullness and effectiveness of administrative judicial protection (Article 1 of the Code of Administrative Procedure) and of a reasonable duration of the process (Article 2, paragraph 2 of the Code of Administrative Procedure).

Consequently, the appellant shall re-notify the appeal, even before the judge's order.

In conclusion, in response to questions submitted by referring Section, the Courts formulates the following principles of law. Firstly, there is a mere remediable irregularity, with consequent applicability of the regime pursuant to

art. 44, paragraph 2, of the Code of Administrative Procedure, in the case of a notified appeal without a digital signature. Secondly, the appellant can directly re-notify it with the digital signature, even before the judge orders the renewal of the notification. Finally, the deadline for filing the appeal, pursuant to the combined provisions of articles 94, paragraph 1, and 45 of the Code of Administrative Procedure, must start from the date of effective notification of concretely deposited appeal.

INADMISSIBILITY OF THE APPEAL SENT TO AN INAPPROPRIATE PEC ADDRESS

Council of Administrative justice for the Sicilian Region, decision No. 707 of 16 June 2022

The Council of Administrative justice for the Sicilian Region rules that the principles expressed by the Plenary Session of the Council of State No. 6/2022 (whereby a notified act of appeal without a digital signature constitutes a mere remediable irregularity) cannot be extended to unfilled appeals. Thus, the Council of State stated on the mere remediable irregularity of unsigned digital appeal, but correctly filed online, pursuant to the established rules for the Telematic Administrative Procedure (TAP). As a matter of fact, pursuant to the Digital Administration Code and the Code of Administrative Procedure, all the pleadings must be created in digital format, and lodged in the online information system, except in cases of technical malfunctions.

The Council of Administrative justice for the Sicilian Region essentially confirms the principles expressed by the Plenary Session of the Council of State No. 6/2022, whereby a notified act of appeal without a digital signature constitutes a mere remediable irregularity.

There are cues to rethink the core principles of telematic administrative procedure.

At first glance, it has not been drafted in digital format with digital signature, thus violating Code of Administrative Procedure too.

Pursuant to article 136, paragraph 2-bis, all the acts and measures of the judge, the auxiliaries, staff and parties must be signed with a digital signature. In particular, all the judicial acts must be drawn up in the format of an electronic document signed with a digital signature, in compliance with the requirements established by Article 24 of the Code of Digital Administration.

However, in the light of principles established, an appeal fulfilled in non-digital format isn't affected by nullity (pursuant to art. 1 of the

Code of Civil Procedure), thus the judge can assign to the party a peremptory term for its regularization, pursuant to article 44, paragraph 2, of the Code of Administrative Procedure. Nevertheless, the Court has dismissed the duty of regularization on the grounds of procedural economic, since the inadmissibility of the appeal.

Secondly, the Council of Administrative justice for the Sicilian Region observes that the appeal has not been sent to the appropriate PEC address.

In this regard, the Board does not consider the principles expressed by the aforementioned Plenary: actually, the case law examined by the Council of State is about the appeal without a digital signature, but correctly filed electronically, pursuant to the established rules for the Telematic Administrative Procedure (TAP). Moreover, the Board confirms that the judge, due to specific and motivated technical reasons, may authorize any paper copy.

It follows that since the administrative process is an electronic process, all the documents are not only formed, but also deposited, in an almost “exclusively” digital manner, subject to the precise exceptions referred in article 9, paragraphs 8 and 9, of the Decree of 28 July 2021, on the technical-operational rules of the electronic administrative process.

The digital filing must necessarily be sent at the certified email address specifically authorized to receive appeals. Otherwise, the appeal cannot be considered pending at the judicial office as long as it is not assigned a general register number.

For this reason, the Board dismisses the action as inadmissible.

RESPONSIBILITY OF THE ADMINISTRATION FOR MALFUNCTIONING OF IT PLATFORMS

Council of State, sec. VI, No. 829 of 7 February 2022

The Council of State argues that due to the principle of loyal cooperation between the administration and citizens established by Article 1, para. 2-bis, of Law No. 241/1990, the submission of an application on a telematic platform does not replace one that has already been submitted but assumes a supplementary nature. The ambiguity of the underlying instructions of the computer system platform cannot burden the participant in a selective procedure; therefore, the responsibility for the malfunctioning of the machine belongs to the public administration.

The Council of State annulled the first in-

stance decision of the Basilicata Regional Administrative Court, which ruled that the amendment of the titles for participation in a competition notice implied the invalidation of the previous application and not its mere supplementation. In particular, the first instance court based its decision on the principle of the private individual's self-responsibility; by virtue of the latter, the competitor must bear the consequences of the errors and omissions committed, which in the present case relate to the indication of the qualifications in the application. The Council of State reversed the first instance decision and held that the ambiguity of the instructions for application submission led the candidate into error. In such circumstances, it is the public administration that is responsible for the error, and this by virtue of Article 1(2-bis) of Law No 241 of 1990. The violation of the cited rule implies - in application of the principle of self-responsibility - that the consequences resulting from the presence of ambiguous clauses in the rules governing the selection cannot be attributed to the competitor who, in an unconscionable manner, relied on them.

Garante per la protezione dei dati personali (Italian Data Protection Authority), decision No. 224 of 9 June 2022

The Authority stated, for the first time, that the operator of a website that uses Google Analytics services for statistical purposes, without ensuring compliance with the guarantees of privacy protection of the website visitors, violates the requirements set out in the EU GDPR. Indeed, the decision to use Google Analytics services automatically determines the transfer of the data collected by the operator to the USA, which is a country without adequate levels of data protection.

The case concerned the use of Google Analytics (GA) services by a private company, aimed at obtaining statistical information on the activity of visitors to its website.

In particular, using GA, company collected several significant data, such as those relating to the browser, the operating system and the users' device, their IP address (which have long been considered as a personal data) and the date and time of the visit to the website. Information that can easily be associated with email address, phone number and any personal data inserted in the Google account, if a user access to the website through it.

Following a complex investigation, the Authority stated that the use of GA by the operator

of the website entails the transfer of personal data of visitors to Google LLC, which is based in the United States, a third country that does not guarantee a level of privacy protection adequate to the standards of the GDPR (on this point, see Court of Justice, 16 July 2020, C-311/18, Data Protection Commissioner vs Facebook Ireland Ltd and Schrems).

This conclusion is based on the factual circumstance that, without appropriate measures to transfer personal data, US governmental authorities and intelligence agencies could access and use the European users data for various purposes, thus infringing the guidance provided by the European Data Protection Committee through its Recommendations No. 1/2020 of 18 June 2021.

In the light of the negligence nature of the offence and the actions taken to mitigate the harm suffered by the persons concerned, the Authority warned the company and ordered it to take within 90 days, under penalty of sanctions, the additional safeguards necessary to make the processing of personal data of website visitors compliant with the specific guarantees required by European data protection law.

PORTUGAL

edited by

Luís Manuel Pica, PhD candidate in Public Law at The University of Minho (Portugal); Teaching assistant at the Polytechnic Institute of Beja (Portugal) and researcher at JusGov Research Centre for Justice and Governance at University of Minho (Portugal).

Mário Filipe Borralho, Master's student at Law School - University of Lisbon (Portugal), Solicitor, Teaching assistant at the Polytechnic Institute of Beja (Portugal)

THE SIGNATURE OF “STAND-ALONE DOCUMENTS” VS. “CLOSED DOCUMENTS” AND THE THEORY OF THE DEGRADATION OF ESSENTIAL FORMALITIES INTO NON-ESSENTIAL FORMALITIES IN ADMINISTRATIVE PROCEDURE

Judgment of the Administrative Supreme Court of 30 June 2022

Court considered that, even when uploading based on closed files, the submission of bid is only effective with its electronic signature, this being the moment when it is considered complete and submitted to tender, the bidder being finally bound by the commitment made therein. There-

fore, it is not because the documents were not signed before they were uploaded to the platform that the Plaintiff ceased to consider itself bound by what was contained therein, which demonstrates the irrelevance of the failure to sign each document separately in relation to the firmness of the commitment it assumed. Post that electronic signature functions, not in question, have been fulfilled (identifying, finalising or confirming and inalterability) the irregularity resulting from the lack of electronic signature of each separate document is considered to have been “absorbed” by the signature of the whole document containing the commitment to participate in the tender procedure.

Therefore, contrary to what was held in judgment under appeal, nothing can be inferred from the grounds used with regard to the non-application of the so-called 'theory of non-essential formalities' to the situation of the absence of a separate signature for each separate document, on the ground that the non-compliance with the formality that is abstractly invalidating - that is, generating the exclusion of the tender - ceases to be invalid if, in the specific case, the interests or values that the omitted formality was intended to protect have been achieved.

In fact, it is clear that the non-fulfilment of the formality provided for in paragraph 4 of Article 68 of Law 96/2015, namely that when the interested party uploads a proposal file onto the electronic platform, the file must be encrypted and signed, using a qualified electronic signature, always results in the exclusion of the proposal. Theory quoted assumes formality that was omitted in this case and the interests that it intends to safeguard and ensure, as well as the circumstances concretely verified.

In this way, it does not appear that irregularity found compromised the procedure or the intended objectives, since the required formality was eventually remedied by affixing the electronic signature to the entire document submitted on the electronic platform, with the addition of the commitment by tenderer to be bound to the public tender, applying “theory of the degradation of essential formalities into non-essential formalities”, set out in Article 163(5)(b) of the Code of Administrative Procedure.

JUDICIAL ACCESS TO DOCUMENTS DEPOSITED ON ELECTRONIC PLATFORMS FOR THE EVALUATION OF JUSTICE

Judgment of the Administrative Court of