

The Telematic Procedures in the European Union. Introducing a Draft Directive

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SUMMARY: *1. Introduction / Introduzione – 2. Study of a Potential Directive to Institute a Framework for the Telematic Administrative Procedure and the Public Administrations Interface with the Citizen through Electronic Means in the Application of EU Law – 3. The Working Group*

1. INTRODUCTION / INTRODUZIONE

Thirty-three European scholars have participated in a series of conferences on the subject of telematic procedure in European Public Administrations. The working group, who later collected and coordinated all the suggestions, found that the most useful conclusion of this work was to write a final text in the form of a possible EU directive. There are 25 “whereas”: a deliberately large number, as they constitute a veritable report supporting the entire project.

To the specialist in administrative law, it is blatantly obvious that the activity of the public administrations is based on the procedure, defined as a set of rules governing the initiation, investigation, transparency, participation, cooperation among offices and public bodies.

To the scholar of administrative law it is also obvious that the main legal acts of public administrations are the result of a set of complex activities, conducted through the cooperation of various governmental bodies and several offices. Only few minor acts are performed by a single office and a single public official.

However, such awareness did not result in adequate, complete and executable regulation, when the Community and national legislators resolved to regulate the use of ICT in public administrations exclusively by way of dematerialization of documents.

Since the early days, research on the tele-administration (1978) had shown that the purpose of dematerialization was to enable networked management of digitalized procedures.

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Conversely, up to the present moment, the attention of legislators (with some exceptions) has focused on the electronic document, ignoring the essential phase of its creation. That is, the administrative telematic procedure.

As this knowledge is now acquired, or at least it is gaining grounds, it seems highly appropriate that the EU play its role, just as it did for electronic signatures in 1999, of coordinating the various solutions before they are adopted by individual Member States, before creating preset situations that are difficult to remove, with the disastrous effect of making it impossible for the administrations of States to interoperate digitally and telematically among themselves (horizontal interoperability) and with the EU institutions (vertical interoperability). In this situation, the operational difficulties for the European citizen would be self-evident.

The legal basis for intervention, as well as the limits of the Directive, are clearly stated in the whereas of the text, and we refer to them.

We would like to remind the reader of the generalization of the telematic “single point of contact”, already enhanced by the Directive 2006/123/EC on services; the electronic office and the electronic folder (dossier). Many crucial problems are dealt with, such as the technical readability of documents immediately and over time.

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Trentatré studiosi europei hanno partecipato a convegni sul tema del procedimento telematico nelle pubbliche amministrazioni europee e lavorato successivamente coordinando tutti i suggerimenti raccolti. Il gruppo di lavoro ha ritenuto utile concludere i lavori redigendo un testo nella forma di una possibile direttiva comunitaria. I «considerando» sono 25: volutamente numerosi perché rappresentano complessivamente anche una relazione di supporto all'intero progetto.

Per gli specialisti del diritto amministrativo è estremamente ovvio che l'attività delle pubbliche amministrazioni è basata sul procedimento, inteso come un insieme di regole che disciplinano l'avvio, l'istruttoria, la trasparenza, la partecipazione, la cooperazione tra uffici ed amministrazioni.

Per gli studiosi di diritto amministrativo è altrettanto ovvio che i principali atti giuridici della pubblica amministrazione sono il risultato finale di attività complesse, svolte attraverso la cooperazione di più uffici e di più amministrazioni pubbliche. Sono pochi e poco rilevanti gli atti che si compiono ad opera di un solo ufficio e di un solo pubblico funzionario.

Tuttavia questa consapevolezza tra gli specialisti del diritto amministrativo non ha portato ad una disciplina adeguata, completa ed eseguibile, quando il legislatore comunitario ed i legislatori nazionali hanno ritenuto di disciplinare l'uso delle ICT nelle pubbliche amministrazioni, unicamente attraverso la dematerializzazione dei documenti.

Fin dai primi studi sulla teleamministrazione (1978) era stato evidenziato che la dematerializzazione aveva come scopo la possibilità di gestire in rete il procedimento telematico.

Viceversa, fino ai giorni nostri, l'attenzione dei legislatori (salvo qualche eccezione) si è concentrata sul documento informatico, trascurando l'essenziale aspetto delle modalità della sua creazione, ossia il procedimento amministrativo telematico.

Poiché ormai questa consapevolezza è acquisita o si sta comunque diffondendo, sembra estremamente opportuno che, così come avvenne per le firme elettroniche nel 1999, l'UE eserciti la sua funzione di coordinamento prima che le più svariate soluzioni siano adottate dai singoli Stati membri, creando situazioni precostituite, difficili da rimuovere, con il disastroso effetto di impedire l'interoperabilità digitale e telematica delle amministrazioni degli Stati tra di loro (interoperabilità orizzontale) e con le istituzioni dell'UE (interoperabilità verticale). Sarebbero ovvie, in tale situazione, le difficoltà operative del cittadino europeo.

Il fondamento giuridico dell'intervento ed i limiti della direttiva sono chiaramente enunciati nei considerando del testo e ad essi si rinvia.

Si sottolineano al lettore: la generalizzazione del sistema dello sportello unico telematico, già valorizzato dalla direttiva 2006/123/CE sui servizi; l'ufficio elettronico ed il fascicolo informatico. Si affrontano numerosi problemi essenziali, quali quello della leggibilità tecnica dei documenti nell'immediato e nel tempo.

2. STUDY OF A POTENTIAL DIRECTIVE TO INSTITUTE A FRAMEWORK FOR THE TELEMATIC ADMINISTRATIVE PROCEDURE AND THE PUBLIC ADMINISTRATIONS INTERFACE WITH THE CITIZEN THROUGH ELECTRONIC MEANS IN THE APPLICATION OF EU LAW

Preliminary

Having regard to Art. 197 and Art. 298 of the Treaty on the Functioning of the European Union;

Having regard to Art. 41 of the European Charter of Fundamental Rights;

Having regard to the IDABC programme and in particular to the European Parliament and Council Decision 2004/387/EC of 21st April 2004, on the interoperable delivery of pan European e-government services to Public Administrations, and to citizens;

Having regard to the EIF (European Interoperability Framework) plan, still in progress;

Having regard to the European Parliament and Council Directive 2006/123/EC of 12 December 2006 on services in the internal market;

Having regard to the Commission's Decision of 16th October 2009, no. 767, which establishes measures to facilitate electronic procedures through "points of single contact" as per Directive 2006/123/EC of the European Parliament and Council on services in the Internal Market.

Whereas

1. A well regulated administrative procedure is a guarantee of good administration, also as far as efficacy and efficiency, by assuring legitimacy, correctness and rapidity of the Act of the public administration, as well as transparency, impartiality and participation to the decision making process. Modernisation of public offices cannot take place without implementation of digital administration, which – together with organizational change – contributes to the delivery of better quality public services, reduction of waiting times, improving cost efficiency, increasing productivity, transparency, identification of liabilities and democracy of the public power.

2. Electronic administration implies use of information and communication technology in Public Administrations, combined together with organizational change and acquisition of new skills aimed at improving public service, democratic process and strengthening support for public policies.

3. At the present time in history, when most public administrations are setting out radical transformations of their modus operandi from paper based to telematic and paper less, an EU Directive on the telematic procedure is necessary in order to prevent Member States from defining their own individual solutions and thus creating veritable obstacles to European interoperability and to achieving the objectives of the European Union. It is binding in the implementation of the EU legislation; wherever it is not compulsory, it does provide guidelines for other administrative activities.

4. A growing amount of European rules need to be implemented by national Public Administrations and this implies the functional compatibility

of IT administrative and technological solutions; furthermore, the difficulty of establishing a clear distinction between direct and indirect execution of EU law, together with the diffusion of functions shared between the EU and the national administrations to implement EU law, makes it useful to define a series of administrative principles that are applicable at both national and EU level. In particular, joint administrative procedures carried out at the EU level by national and EU administrations (vertical integration and cooperation) and between the administrations of different Member States (horizontal integration and cooperation) requires the use of information technology to achieve the objectives of the European Union in an effective and efficient way.

5. Procedural competences are strictly connected to material or substantial attributions. Since the procedure is indeed the form of the administrative action, and since all administrative action follows procedures that are carried out by institutions by virtue of the competences that are attributed to them, the European Union has the competence for creating rules on the administrative procedure. Furthermore, Art. 298 of the Treaty on the Functioning of the European Union – although referring *strictu sensu* to the European administration – contains in the first paragraph indications on the principles of good administration.

6. Art. 41 of the European Charter of Fundamental Rights recognises the right to a good administration and the corresponding duty of good administration; such duty must be extendable to national administrations when implementing EU law. “Implementing EU law” must mean not only the direct implementation of Treaties, Regulations, Directives, Decisions, but also achievement of the EU objectives through domestic law. As a consequence, when there is a connection between national implementation and the domain of Union competences, the principle of good administration, as regulated by Art. 41 of the Charter, and as interpreted by the European Court of Justice, will be applicable to the procedures managed by national administrations, even when in connection with internal rules of the States.

7. The use of Information and Communication Technologies in administrative procedures implementing EU law must be considered as part of the content of the right to good administration. Therefore the identification of a minimum of principles binding national Public Administrations when they implement the European Union law is allowed.

8. Whenever a Member State is exclusively applying its own domestic law, then it is not bound by the present Directive. In any case the domestic administrative system cannot obstruct but shall contribute towards making the four community freedoms effective (free movement of goods, capitals, services and people) with a front office supported by an efficient back office, mutually complementary.

9. The aims of the Directive impact only minimally on the competences of Member States, as the Directive supplies a limited number of indications, necessary to allow telematic management of the administrative procedure and the interface with the citizen, leaving full autonomy to the individual Member States and domestic Public Administrations regarding substantial competences and the power of self organisation, as this is compatible with both administrative and technological interoperability among Public Administrations in the European Union. The present Directive assumes technological interoperability, which must be guaranteed also across different operating systems.

10. Some aspects of the use of ICTs in the administrative procedure are already regulated by the European Union: electronic signatures, data protection, interoperability and the use of public sector information. Furthermore, the regulation on the use of ICTs in one specific sector of Administrative law, Public Tenders, establishes a good model of telematic administrative procedure: electronically transmitted information, telematic communication among the various administrations (national and EU), electronic signature, electronic protocol, electronic notifications, digitalisation of administrative decisions, electronic access to files, time stamping and interoperability.

11. The rules contained in the European Parliament and Council Directive 2006/123/EC of 12 December 2006 regulating services in the internal market, on the topic of establishment of services in the Member States, are particularly relevant, highlighting the objective of simplifying administrative procedures (whereas nos. 3 and 43), especially through points of single contact (whereas Nos. 46 and 48; Art. 6 and 7), use of information technology in the front office: (Art. 8); and administrative cooperation (whereas 105-109; Art. 28 and subsequent);

12. This modernisation process is worth widening since the objectives listed in Directive 2006/123/CE could be extended to the relations with all

citizens who need acts from the Public Administration, as a general rule. The Commission Decision of 16th October 2009, no. 767, further regulates the profiles of the signatures needed for the telematic management of points of single contact.

13. Doctrine suggests that the management of administrative procedures through the telematic one stop shop is the best solution to guarantee efficiency, efficacy, transparency and democracy in Public Administrations.

14. It seems that further EU regulation is needed, as there is a growing number of cross-cutting Europe-wide services, directed at the citizens of a Member State who work, study, travel, live in another EU member State, such as health services, social services, fiscal services, educational services, population registry; such services require advanced interoperability of homogeneous systems and front offices;

15. As the most important administrative documents are produced through administrative procedures involving a plurality of different offices and administrations, in order to implement a digital administration system, EU rules on electronic documents and electronic signatures (Directive 1999/93/EC; Decision 2009/767/EC) must be integrated with regulation of the activity needed for their production through telematic administrative activity.

16. Diffusion of shared electronic folders will change administrative procedures from 'sequential' to 'star shaped' procedures, following Italian (*procedimento a stella*) and German (*Sternverfahren*) terminology, with great time savings due to the simultaneous nature of the intervention.

17. The Directive takes into account the existence of a digital divide both among citizens and between Public Administrations and plans to resolve these in Art. 4 and in Art. 6. The digital divide among citizens can be eliminated by supplying personalised assistance through a traditional point of service, through which a telematic procedure is initiated and information and supports are supplied to the non-technologically equipped citizens. The digital divide between administrations can be avoided through the principle of subsidiarity.

18. By enabling telematic management of the procedures, and tele-work among offices, implementing digital administration reduces the need for physical movement of citizen and public servants; it enables telematic joint

service sessions; it reduces road traffic, and by de-localising work, it enables tele-working from home.

19. By increasing telematic administrative activity, the present Directive accelerates dematerialisation and increases the amount of information on line, thus increasing promoting administrative transparency; information is essential for the respect and well good functioning of the four fundamental freedoms of the European community. within this view, this Directive reinforces the content of European Parliament and Council Directive 2003/98/EC of 17 November 2003, on the re-use of public sector information, which regulates the general framework for the conditions governing the re-use of public sector documents, in order to guarantee fair, proportionate and non-discriminatory conditions, i, keeping into consideration the link between information and the functioning of the internal market, and between information and the right to know and to participate in public affairs.

20. ICTs facilitate access to information, and to this end the regulation of the electronic front office becomes essential. This is necessary in order to design e-government services, so that they be open to users in other Member States and perfectly accessible whether the service is under the responsibility of local, regional or national Public Administrations, or of a European Institution, when the law of the European Union is applied.

21. The present Directive continues along the lines of European Parliament and Council Decision 2004/387/EC of 21 April 2004 of the , on the interoperable delivery of pan European e-government services to Public Administrations, and to citizens (IDABC); and makes it operative for the particular profile it regulates; Decision 2004/387/EC attempted to create e-Government services through efficient, effective and interoperable information and communication services among Public Administrations, and through interoperable front and back offices, with the aim of safely exchanging , understanding and processing public sector information throughout Europe. One of the horizontal strategies established by the programme and contained in the European decision is the setting up of a portal to offer pan-European and multi-lingual access to on line information and interactive services for citizens, as well as the creation of single point of access to services.

22. The digital administration is founded upon the electronic office, as its base for outbound operations (front office; points of single contact; in-

formation; services) and its internal activity (back office; shared electronic folders), without clear borders between its front and back office.

23. Electronic and telematic services supplied to citizens by national Public Administrations applying the law of the European Union, must be available in a clear, accessible and open way at the electronic office.

24. The constant evolution of hardware, operating systems and software brings to the fore the fundamental issue of readability of electronic documents, both in the immediate and in the course of time: technical specifications must be entrusted to a permanent body, within the EU institutions, which identifies both the specifications and their regular updating. Such body will also supply consulting to any interested Public Administration.

25. The extension of the Directive's principles to EU institutions interacting with Member States' administrations will be defined by regulation.

Normative text

Art. 1 – Definitions

1. «European administrative procedure» means any procedure for the fulfilment and the implementation of European Union Law, also jointly with domestic law.

2. «Citizen» means any natural or legal person interacting with any Public Administration of a Member State.

3. «Electronic office» means the framework for the management of administrative activity of the national Public administrations through the use of ICT. It includes front and back office.

4. «Electronic document» means the electronic representation of legally relevant acts, or data.

5. «Proceeding Administration» means the Public Administration responsible for initiating the procedure, which receives requests from the front-office or which initiates the procedure and coordinates the back office in the exercise of its competences.

6. «Telematic administrative procedure» means the administrative procedure in which the application, the handling, the intermediate acts and the internal communications of the proceeding Administration, as well as the external communications with other concerned subjects, the adoption of the final order, take place through electronic and telematic means, electronic documents and telematic interactions.

7. «Shared electronic folder» means the shared area where the documents regarding an administrative procedure are stored, which can be electronically viewed and added to by the concerned subjects.

Art. 2 – Scope

1. The purpose of this Directive is to establish the legal framework for the application of Information and Communication Technologies in the European administrative procedures in order to facilitate electronic access to proceeding by citizens and to grant efficacy and efficiency to the exercise of the administrative function.

2. The Directive does not impact on the competences of the individual administrative authorities, nor on the regulation of administrative procedures, in compliance with the principle of the autonomy of Member States and their domestic Public Administrations, as its scope is limited to the functional aspects of information technology and administration and, in the field of IT, to the minimum essential requirements for functional interoperability of Public Administrations in the European Union.

3. When the administrations of member states implement domestic law exclusively, without connections with the law of the European Union, the Directive does not impart specific obligations, but it establishes guidelines.

4. Member States can adopt more advanced solutions.

Art. 3 – Electronic office

1. The Public Administrations of Member States, as they implement the Law of the European Union, shall use preferentially Information and Communication Technologies in the exercise of their functions and the initiation, handling and conclusion of administrative procedures.

2. In particular, Member States shall create electronic offices for the exercise of their competences in application of European Union Law. Where already existing, they shall comply with the obligations included in the present directive.

3. The electronic office shall respect the principles of security, liability, integrity, quality of information, accessibility, technical neutrality and interoperability.

4. On the electronic office are based the telematic front office, the telematic one-stop shop and the shared electronic folder, as regulated by the following articles.

Art. 4 – Telematic front office

1. The front office shall contain:

- a) The list of procedures that may be carried out by that Public Administration through electronic means;
- b) The on line application forms;
- c) The alternative option of downloadable forms;
- d) Access to the electronic reference registry according to rules on privacy;
- e) Access to electronic notifications;
- f) Modalities of access to the shared electronic folder;
- g) An indication stating whether the procedure is regulated by European Union Law and whether it can be activated and implemented through electronic means.

2. Public Administrations respond to electronic applications by sending a receipt with the reference number assigned to the electronic document, the credentials for access and any other useful indication. Member States can adopt more advanced solutions, such as a receipt containing an electronic copy of the application, guaranteed by the system's electronic advanced signature and time stamp.

3. The front office supplies all general information necessary to initiate administrative procedures, and , in the management of practical cases, it alerts applicants of any mistake and allows them to modify and correct the application.

4. Procedures initiated by the Administration are communicated to the interested parties through secure electronic systems or through paper-based communications. The communication shall contain instructions for telematic access to the procedure's data.

5. As an alternative to telematic access, and in order to ensure universal access, Public Administrations set up a physical point of service attended by a civil servant who initiates the telematic procedure on behalf of the citizens who are not equipped for electronic access, that so request; such point of service also relates to the applicants in other phases of the procedure.

6. Moreover, the electronic office shall contain an email address to which the citizens can refer any question, query or suggestion.

7. The proceeding administration is responsible for the front office and promotes the activities of the back office, according to the article below.

8. A single national portal orientates citizens for the activation of the procedures by using an intuitive scheme based on life events; until such por-

tal is active, with clear indications, any Public Administration that receives an application in error must alert the citizen and forward the application to the correct concerned administration.

9. In order to facilitate to citizens the access to the electronic offices where electronic services are provided in application of European Union Law, Member States shall maintain a portal-directory of electronic addresses. Member States shall communicate to the European Commission the addresses of national portals in order to organize a European portal of national addresses.

Art. 5 – Telematic point of single contact

1. When a procedure entails the participation of several Public Administrations, the law indicates which administration is responsible (Proceeding Administration). The citizen shall make the application and deliver the documents instituting the proceedings to the Proceeding Administration, which will relate with the other Public Administrations concerned.

2. In the absence of explicit instructions, the Administration at which the citizen makes the application in compliance with the law, shall be the responsible administration.

3. The point of single contact can be set up not only by administrative authorities, but also by Chambers of Commerce and Professional Associations and Institutions or private bodies to which Member States have entrusted this function.

Art. 6 – Responsibility of technical management and responsibility of administrative management

1. The technical structures that manage telematic procedures are set up and managed by proceeding administrations, insofar as their size and scope allows them to achieve full functionality.

2. Whenever an administrative structure is not able to set up the technical requirements for telematic management of the procedures, the greater territorial administration shall provide its needs, by supplying the proceeding administration with a service that enables it to exercise its substantial competences as entrusted by the Law. Such technical support does not entail any substitution of the substantial administrative competences for the benefiting body. Other solutions may be adopted in compliance with the Constitutions of the Member States.

3. The European Commission shall give technical support when requested by Member States.

Art. 7 – Electronic documents of each administration participating to the procedure

1. Each Public Administration that is called to express its will to the citizen, or to another Public Administration, shall produce an electronic document through an internal procedure organised in full autonomy.

2. The citizens concerned can access the telematic procedure of a single Public Administration.

3. The documents transmitted to the point of single contact through electronic means shall possess the requirements on electronic signatures indicated by Decision 2009/767/EC.

4. The final electronic document, concluding the activity competing to a single Public Administration, shall possess the technical requirements for readability listed under Art. 9.

5. Electronic copies of paper documents and of electronic documents archived without advanced signature and time stamp shall be valid when duly electronically signed, in compliance with Art. 5, paragraph 1 of Directive 1999/93/EC.

Art. 8 – Shared Electronic Folder

1. Each proceeding Administration creates a shared electronic folder for each proceeding upon which it has responsibility.

2. The electronic folder is the operative area at the disposal of the Public Administrations involved in the procedure, and the citizens involved shall be able to access it after electronic identification.

3. Public Administrations shall guarantee storage of the electronic applications and documentation in general, so as to guarantee their date marking, non-modifiability and privacy.

4. The shared electronic folder is shared among all offices and Public Administrations involved in the telematic procedure. The data therein shall be available for other means with the consensus of the interested parties, or according to the rules of the law.

5. The shared electronic folder shall contain

- a) Citizens' applications and documents;
- b) The document giving initiation to the procedure *ex officio*;
- c) The reference numbers of any incoming and outgoing documents and of any modification thereof;

- d) The reference numbers of any documents transmitted internally to offices or outgoing to other Public Administrations and associated replies;
- e) Data on any relevant internal activity of the Public Administration;
- f) Decisions and comments of the external Public Administrations that participate to the procedure;
- g) Any other data regarding any activity required by law for the specific procedure;
- h) The final order act or the notation that granting or rejection by failure to reply within the stipulated time limit has taken place.

6. The progress report on the procedure can be obtained from the shared electronic folder after due electronic identification.

Art. 9 – Technical readability of the documents in compliance with the ID-ABAC programme and the European Interoperability Framework plan

1. In the administrative procedure, National Public Administrations comply with the rules, the standards and recommendations contained in the European Interoperability Framework, which indicates the criteria and recommendations on information safety, storage and standardization, and establishes the basis for European Union wide interoperability in the delivery of public services.

2. The electronic documents of Public Administrations shall possess the technical specifications that ensure the widest possible readability, not connected to proprietary operating systems and software.

3. Electronic documents shall be written with software that ensures their readability and the durability of the storage and security rules established as they were acquired and classified.

4. A committee of experts will be charged with establishing the specifications of the documents of the Public Administrations and their readability across time, also by means of their conversion to new generation software. The committee shall ensure the interoperability of telematic administrative procedures.

5. For the purpose of long term archiving of the most relevant final documents the parallel use of paper-based documents is also allowed.

3. THE WORKING GROUP

The Working group involved in the study for the drafting of a shared document, that will be introduced to the EU in order to a possible directive, and coordinated by prof. Duni was composed by experts belonging to the following role: Compiler (who has collaborated to the draft of the final text), Congress rapporteur (who has submitted a written report or an oral intervention at the congresses held in Italy in November 2008 or July 2009 or in Spain in October 2009) and Supporter who supports the need for a Directive on Telematic procedures.

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