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Automated administrative procedure and right of access to source code

SUMMARY: 1. Introduction. – 2. Automated procedure: preliminary remarks. – 3. Right to access: preliminary remarks. – 4. Automated procedure and right of access to the source code. – 5. Tentative conclusions.

1. The aim of this work is to reflect on how a classical instrument of administrative law, i.e. the right of access to administrative documents (ex article 22 law 241/90), can be exercised, in case of automated administrative procedures, with respect to the source code of a software, and to discuss a number of problems raised by this issue.

Firstly, I offer a reconstruction of essential elements of the automated procedure and of the classic right of access. Secondly, also based on the most recent Italian case law, I focus on some problematic issues, including a) whether the source code can be qualified as an administrative document according to access' regulation and b) whether the source code and the related software – as protected by the intellectual property laws – can be subject to the right of access. This case opens a more general discussion on the methodology and the extent of the automation of administrative decisions, and how to adapt, through the example of the right of access, classical legal tools to innovations due to IT technologies.

2. First of all, it should be noted that when we talk about automation, we are referring to an activity carried out by a computer. [507]

Therefore, automated administrative procedures may be defined as all the cases in which the machine replaces the Administration in decision making processes. [508]

The fact that computers replace men, or public servants in the case of the Administration, obviously does not mean that human action completely disappears. As explained by Pubusa[509], human intervention remains essential in order to initiate automated administrative procedures. The Public Administration decides what the computer should do and elaborates instructions in the form of a program, which is therefore an expression of a human decision – in this case, of a public decision enacted by the Administration.

"Program" is also a central concept in administrative procedures, being composed by instructions based on logical rules that together form the algorithm. Through the program's instructions, the machine is able to reproduce a set of logical steps which elaborate the decision

507 For a general reconstruction see R. BORRUSO, *Computer e diritto*, Milano, 1978.

508 There is a vast literature on this subject: cf. *ex multis* D. MARONGIU, *L'attività amministrativa automatizzata*, Sant'Arcangelo di Romagna, 2005. U. FANTIGROSSI, *L'automazione e la pubblica amministrazione*, Bologna, 1993. A. USAI, *Le elaborazioni possibili delle informazioni. I limiti alle decisioni amministrative automatiche*, in G. DUNI (edited by), *Dall'informatica amministrativa alla teleamministrazione*, Roma, 1992, p. 55 e ss., P. OTRANTO, *Decisione amministrativa e digitalizzazione della P.A.*, in *federalismi.it*, 2017. (cf. https://www.federalismi.it/ApplOpenFilePDF.cfm?artid=35595&dpath=document&dfile=17012018100422.pdf&content=Decisione%2Bamministrativa%2Be%2Bdigitalizzazione%2Bdella%2Bp%2Ea%2E%2B-%2Bstato%2B-%2Bdottrina%2B-%2B).

509 Cf. F. PUBUSA, *Diritto di accesso e automazione, Profili giuridici e prospettive*, Milano, 2006.

(based on data already provided, *inputs*). We can already observe that the most complex issue consists in translating the law into an algorithm, since the "will" determining an administrative decision or a legal rule has to be both completely and correctly represented to be lawful. [510]

When debating the possibility of automating the administrative activity, we might first consider that the operation is not so hard. One could think that the automation of the administrative activity is anything different from an 'automatic' application of the law, the latter being the application of an abstract norm to a concrete case. Being 'automatic', this operation could easily be carried out by a program realized for that purpose (a series of inputs, which are elaborated according to the rules of the programme, should be provided to the machine).

As a matter of fact, it is a much more complex operation, requiring some specific precautions for the following reasons: firstly, because the law should always be interpreted[511]; secondly, because the relationship between law and administrative activity, and, ultimately, between the principle of legality and administrative action, is not clear cut. Indeed, the law can regulate the activity of the administration according to a principle of substantial legality and, thus, limit the options of the available political decisions of the Administration. On the contrary, the law could also allow leeway for the Administration and thus a margin of discretion in the discipline of the concrete case according to a principle of formal legality. In this second scenario, constituting an example of discretionary activity of the Administration, the latter has to make an assessment and balance involved interests. Of course, different possible outcomes could be reached in carrying this activity. Nevertheless, in case of administrative discretionary activity, there is the assumption that the Administration is in the best position to effectively assess and pursue the public interest. It follows that the automation of discretionary administrative activity is challenging: while the identification of public and private interests and the resulting various solutions could be performed by the machine, the choice of the best solution for the concrete case should a prerogative of the human being.[512]

The paper argues that the automation for the entirely administrative activity subject to the principle of substantive legality is possible, but poses some difficulties in relation to the interpretation of the applicable norm or the circumstances in which a rule, even if precisely and correctly interpreted, refers to indeterminate extra-legal concepts. Therefore, we can conclude that

510 Cf. D. MARONGIU, *L'attività amministrativa automatizzata*, p. 11: «A relevant problem is how communication between legal and IT experts should take place when the software is realized, if it is necessary to identify formal procedures when public servants communicate to the programmers, to guarantee a the perfect "translation" of the natural language to the programming language» (translation mine) [«una problematica posta in evidenza è come debba avvenire la comunicazione fra giuristi e tecnici informatici al momento dell'ideazione del *software*, se cioè occorra individuare procedura formali nel momento in cui i funzionari comunicano ai programmatori le determinazioni che dovranno essere assunte mediante automazione, a garanzia della perfetta "traduzione" del linguaggio naturale al linguaggio di programmazione»].

511 Cf. F. PUBUSA, *Diritto di accesso e automazione, Profili giuridici e prospettive*, cit. p. 139 ss. For a general reconstruction see G. SARTOR, *Le applicazioni giuridiche dell'intelligenza artificiale,* Milano, 1990.

512 In this paper we decided not to take into consideration evolution of the AI in reproducing human reasoning. See *ex* multis F. AMIGONI, V. SCHIAFFONATI, M. SOMALVICO*, Intelligenza artificiale,* in *Enciclopedia della scienza e della tecnica*, Roma, 2008, S. CIVITARESE MATTEUCCI, L. TORCHIA, *La tecnificazione*, in L. FERRARA, D. SORACE, *A 150 anni dall'unificazione amministrativa italiana.* vol. IV, , in *Inf. Dir.*, 2008.

there is a close link between the application of the principle of substantial legality to administrative activities and the potential for automation in administrative procedures.

3. It would be challenging to contain in one paper a thorough analysis of the entire set of rules governing the right of access in the Italian legal system: there is a vast literature on the subject, to which we refer. [513]

For the purposes of our discussion, it is more appropriate to consider selected aspects related to the exercise of this right, especially in light of the regulation introduced by the law no 15 of the 11th February 2005.

Within the law 241 of 1990, the right of access is placed at the end of the regulation of the administrative procedure. As such, it constitutes a tool to balance the need for celerity in the administrative action and the protection of those subjective legal positions. Law 241 provides devices to exert the public function with efficiency, efficacy, and cost saving, while at the same time offering suitable tools to protect private interests, either directly or indirectly. Specifically, it offers tools that license access, both in the course and at the conclusion of the procedure, to the documentation employed by the administration to evaluate private and public interests and reach the final decision. This cognitive accessibility is achieved through the right of access. In this respect, the right of access constitutes a relevant public interest to the effect that it is enforced nation-wide on the same level. The extent to which the right of access is licensed by the Constitution still constitutes, however, a matter of dispute. Whereas its connection with article 97 is uncontroversial, scholars and case law still discuss whether the right of access can also be connected with the right of information ex art. 21, or better with article 24. The latter is also grounded on the fact that full knowledge of the administrative action is the condition and grants the effectiveness of the judicial protection.

4. We can assume that there is the possibility that an automated administrative decision is vitiated by 'invalidity': indeed "the invalidity of an administrative act is a consequence of the act's non-conformity compared to its legal model, to the punctual regulation of its conditions, of its procedural rules and to the effects expected with its adoption". [514]

Since the early studies on the administrative automated procedures, scholars have observed that one of the main expectations arising from this new type of procedures was the potential significant reduction of invalidities of administrative acts (e.g. breach of the principle of impartial treatment). It is undeniable that this was a reasonable expectation. However, it is equally undeniable that new and unknown invalidities may occur precisely because of the automation: they could be

513 Cf. *ex multis*, L. MAZZAROLLI, *L'accesso ai documenti della Pubblica Amministrazione. Profili sostanziali*, Padova, 1998.

514 Continued: « […] The invalidity of an administrative act is a consequence of the non-conformity of the act to its legal model and to the punctual regulation of its conditions, of the effects and ways of the procedure for its adoption» (translation) [«l'invalidità di un atto amministrativo è conseguenza della non conformità dell'atto rispetto al suo modello legale ed alla regolamentazione puntuale dei suoi presupposti, dei sui effetti e dei modi di essere del procedimento previsto per la sua adozione»] Cf. A. Masucci, *Procedimento amministrativo e nuove tecnologie. Il procedimento amministrativo elettronico a istanza di parte*, Milano, 2011, p. 107.

related to the instructions provided by the Administration, to wrong algorithms or software operations, or to the processing of the individual automated act. [515]

It is suggested that invalidities of administrative acts resulting from administrative automated procedures could be divided in two groups:

First, invalidities related to how the software's structure and operation. In this case, the invalidity would affect all acts adopted with the same program. Second, invalidities of individual automated acts.

In order to acknowledge the existence of invalidities of both traditional administrative decisions - adopted by administration employees and officials - and automated ones, it is necessary to have full knowledge of the relevant law (and therefore of instructions provided by the Administration for the program), and for the software's functioning itself.

The aim of this section is to investigate the relationship between automated procedure, right of access and the scope of the relevant judicial protection.

As a matter of fact, the right of access can be exercised for the purpose of a possible subsequent judicial protection. As a starting point, our analysis should focus on whether article 22 of the law 241/90, which provides the right to access, could apply in relation to an automated administrative procedure. Notably the question would be whether this provision could be applied to gain access to the programme used for the administrative procedure. Thus, the first issue would be what part of a programme could be accessed and whether there should be any limits attached to access.

In order to answer these questions, a case study could provide useful insights. Back in 2016, the Italian Ministry of Education, University and Research (MIUR) decided to instruct a private company to elaborate a ranking to determine the location on the national territory of newly-recruited teachers. Consequently, teachers were asked to fill in an online application according to the methods indicated in the order 241/2016, which identifies rules concerning the mobility of teaching staff for the 2016/2017.

A group of teachers appealed the decision of MIUR on grounds of alleged breach of the principle of fairness, and brought an action in order to have access to the source code of the software that produced the ranking. Following the request of access to the programme used by MIUR, the applicants were provided only with a generic description of the software's function but not the code itself. The Administration relied on two arguments:

515 Another interesting aspect, which goes beyond the scope of the present paper, is which kind of judicial control could be exerted on automatic decisions. see *ex multis* F. SAITTA, *Le patologie dell'atto amministrativo elettronico e il sindacato del giudice amministrativo,* in *Rivista di diritto amministrativo elettronico,* 2003, A.G. OROFINO, *La patologia dell'atto amministrativo elettronico: sindacato giurisdizionale e strumenti di tutela*, in *Foro amm*., 2002, p. 2257 e ss. See also the decision no. 152 of Consiglio di Stato, sez. VI, 7 February 1995: «the administrative act which relies on automated procedures is not different from the ordinary administrative one, and scrutiny over its validity does not differ from the general rules, which require, first, the assessment of whether the act and its effect conform to the applicable rules, and, second, whether the claimant has suffered an actual and direct damage from the alleged violation". Translation from "l'azione amministrativa che si avvalga dell'informatica non si differenzia in nessun modo da quella ordinaria, e lo schema logico - giuridico da applicare nel caso di sindacato giurisdizionale si identifica con quello generale che esige la verificazione della conformità dell'azione e dei suoi effetti alla norma che li disciplina, in relazione alla circostanziata denuncia, da parte del soggetto che invoca tale sindacato, di una lesione personale, diretta ed attuale».

a. The source code of the algorithm should not be qualified as an administrative document under article no. 22 of the law no. 241 of 1990 (d);

b. The source code and the related software constitute intellectual works and are protected by the intellectual property laws.

The first point to be addressed is whether the software can be qualified as an administrative document ex. art. 22 l. 241/90 (d). [516]

As a preliminary observation, it is worth pointing out that most scholars interpret letter. d) of article 22 (as modified by the law no. 15 of the 11th February 2005, see p. 2), providing for the notion of administrative document, in a considerably extensive way, in the light of the substantial administrative nature of the document rather than its origin. In fact, it is settled administrative case law that the criterion of the origin of the document itself is relative and can be rebutted. The only relevant fact is whether the document concerns an activity of public interest. Thus, also private law acts can be qualified as administrative when they pursue the public interest.

It is the *ratio* of the law (article 22) that must be investigated to identify its extensive scope: the aim is to make knowable every act that made a contribution to form the will of the administration (it is not surprising therefore that exclusion's cases from the right of access are specific disciplined by article 24 of law 241/1990).

Some scholars and the established case law[517] therefore consider relevant the document due to the information it contains. To this effect, the document would be the object of access because it is the only reliable instrument (compared to others, e.g. to an oral will expressed by a public servant) to verify the information held by the Administration.

In the light of the above, the following question arises: is legitimate the request of access to the source code of the software used by the Administration?

Many objections could be raised to an affirmative answer: first of all, the software, due to its nature, is not intelligible by the public servant, nor directly elaborated by him. Moreover, it may be argued that the Administration adopts ex ante its decisions, and, therefore, that the software plays an auxiliary role, merely reproducing the will of the Administration.

Nevertheless, two considerations should be carefully analysed: Firstly, it is through the software that the content of the decision is realized and subsequently applied. It cannot be considered a mere execution, since the software performs those passages which previously were responsibility of the public servant. Secondly, the discretionary choice of the Public Administration to employ innovative instruments (in this case, the choice to use a software to manage a procedure) cannot result in a limit and should not place obstacles to the accessibility of the administrative act or of the procedure used.

516 Cf. l. d) art. 22 l. 241/90: «For "administrative document", any graphic, photographic or electromagnetic representation or any other form of the content of acts, including internal acts or acts not related to a specific administrative procedure, held by a public administration and concerning activities of public interest, regardless of the public or private nature of their substantial discipline» (translation mine) [«per "documento amministrativo", ogni rappresentazione grafica, fotocinematografica, elettromagnetica o di qualunque altra specie del contenuto di atti, anche interni o non relativi ad uno specifico procedimento, detenuti da una pubblica amministrazione e concernenti attività di pubblico interesse, indipendentemente dalla natura pubblicistica o privatistica della loro disciplina sostanziale»].

517 See G. TARANTINI, *Pubblicità degli atti e diritto di accesso*, in B. CAVALLO (edited by), *procedimento amministrativo e diritto di accesso*, Napoli, 1993. G. ARENA, *l'accesso ai documenti amministrativi*, Bologna, 1991.

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When examining the highlighted questions in relation to the MIUR case, the administrative court (Tar Lazio, III-bis section) has held, first, that the source code of the software used by the MIUR could be qualified as an "administrative document" under l. d) art. 22 l. 241/90. [518]
A second problematic issue raised by the Administration is related to the protection of the intellectual property of the software. This matter can open a more general discussion about the possibility for the Public Administration of choosing open source software or specifically produced by the Administration.

Leaving aside the question of why the Administration has chosen - legitimately or not - to resort to a company in order to implement the software, the matter remains as to whether the right of access can be denied due to the protection of the copyright of an intellectual work (we assume that the software integrates the requirements of creativity and originality that allow the IP protection).

The applicable provision in this context is article 24 of of law 241/90, regulating the exemptions of the right of access.

In this respect, it is worth mentioning that the aim of copyright protection legislation is to preserve the economic advantage from the author or for the owner. Yet, the economic advantage of the author or the owner can be balanced with the interest protected by the right of access. Notably, the administrative court in the MIUR case has observed: «Neither copyright nor intellectual property preclude basic reproduction, but preclude, instead, only a reproduction which allows economic exploitation. The access does not damage the right to the exclusive economic use of the work, since there is a duty to make appropriate use of the information obtained with the access to the “document”, that is exclusively a functional use to the interest claimed with the request for access. The interest is represented by the protection of the rights of the claimants, as this constitutes not only the function for which access is allowed, but, at the same time, also the limit of use of information obtained. Whoever obtains access will be directly liable to the software owner » (translation from original).[519]

Another ground used to justify the refusal of access by the Public Administration is article 6 of law 97/2016, where the limits to the civic access are identified, because letter c) indicates also the economic and commercial interests of a natural or legal person, including intellectual property, copyright and trade secrets. We do not have the possibility to reconstruct the civic access regulation here[520]: we can just observe how the constitutive differences between the so-called "documental" access ex article 22 of 241/90 and the civic access made the reference to civic access’ limits made

518 Tar Lazio, sez. III-bis del 22 March 2017 no. 3769.

519 «Né il diritto di autore né la proprietà intellettuale precludono la semplice riproduzione, ma precludono, invece, al massimo, soltanto la riproduzione che consenta uno sfruttamento economico e, non essendo l'accesso lesivo di tale diritto all'uso economico esclusivo dell'opera, l'ostensione deve essere consentita nelle forme richieste da parte dell'interessato, ossia della visione e dell'estrazione di copia, fermo restando che delle informazioni ottenute dovrà essere fatto un uso appropriato, ossia esclusivamente un uso funzionale all'interesse fatto valere con l'istanza di accesso che, per espressa allegazione della parte ricorrente, è rappresentato dalla tutela dei diritti dei propri affiliati, in quanto ciò costituisce non solo la funzione per cui è consentito l'accesso stesso, ma nello stesso tempo anche il limite di utilizzo dei dati appresi, con conseguente responsabilità diretta dell'avente diritto all'accesso nei confronti del titolare del software».

520 Cf. D.U. GALETTA, *Accesso civico e trasparenza della Pubblica Amministrazione alla luce delle (previste) modifiche alle disposizioni del D. Lgs. n. 33/2013*, in *federalismi.it*, 2016.

by the Administration ineffective: indeed, in classical access – as seen in paragraph 2 – there is a direct interest in protecting a qualified legal position, which could justify higher knowledge.

5. In the MIUR case, the administrative court authorizes access to the software source code (related to the teachers' mobility procedure 2016/2017). Regardless of the solution adopted by the court and the effects[521] of this decision, some (tentative) conclusive remarks arise. First, it is useful to read the preliminary technical evaluation[522] carried out on the code after the access: it is of course a preliminary evaluation and it was made upon motion of a party (even if it raises some interesting issues on programming methods) but it suggests a central reflection. In the context of the technical evaluation, the experts assess how the way in which the code was provided does not allow to execute it and to test the functioning and it invalidates the order of extension of the court. [523] It could be argued that it is precisely the use of automation that makes more difficult to understand the functioning of the mobility procedure; in this way it would be carried out in fact the risk noted by the court: "the use of innovative tools by the administration for the management of its procedural activity [...] could produce a limit to the cognitive accessibility by the recipient of the act". Indeed, in our opinion, the problem does not arise in a different way when the access request is promoted towards a "classical" document. This leads to a more generic methodological consideration: instead of creating new tools in light of technological innovations, efforts should be made to adapt already existing notions.

In the second place, a comparative perspective is also required, in order to understand how other national legal systems have dealt with similar problems. Indeed, the case at hand is an excellent example of the need to assess at least the best practices on the European level (consider for instance the case of France and its regulation to access in case of automated administrative decisions). [524]

521 As a result of the mobility procedure, were presented a very large number of applications.

522 The preliminary technical evaluation (June 2017) was required by claimants on the software after the delivery by the Administration.

523«It is clear that the lack of clarifications, as well as the lack of the files indicated in the code, in the database, of the files that the software uses as well as the technical specifications, configures a conduct that is not transparent, despite the order of extension by the court. These omissions irreversibly affect the possibility of a complete control on the concrete work of the algorithm and, therefore, on the way in which it has determined the positions of teachers on the national territory» (translation mine) [«È evidente che la mancanza di tali precisazioni, così come la mancanza dei file richiamati all'interno del codice, del database, dei file che il software utilizza in lettura e scrittura dei dati (non tanto nei contenuti quanto nella forma) nonché delle specifiche tecniche, configura una condotta poco trasparente, nonostante l'intervenuto ordine di ostensione dei dati e degli atti da parte del TAR, nei confronti del Ministero. Tali omissioni inficiano in maniera irreversibile la possibilità di un completo controllo sulle concrete modalità di utilizzo dell'algoritmo e, quindi, sulle modalità che hanno determinato lo spostamento degli insegnanti sul territorio nazionale»], preliminary technical evaluation of the software 4 June 2017.

524 Decret no. 2017-330, March 2017.

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A final note concerning the relationship between organizational autonomy and automated procedures. The assumption that the choice of the administration to automate its procedures lies within the administration's power has widely gone unchallenged. However, it is questionable whether this entail a certain degree of ambiguity, for example concerning the interpretation of the law, and whether a more uniform choice on the national level should be pursued instead.

GIULIA PINOTTI