Fully Automated Administrative Acts in the German Legal System*

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ABSTRACT The introduction of the fully automated administrative act in the German General Administrative Procedure Act (*Verwaltungsverfahrensgesetz*) in 2016 was a milestone of a wide-ranging public administration reform. According to § 35a VwVfG, an administrative act can be generated through a fully automated, digital process when it is envisaged by a legal provision and if there is no discretion or room for independent appreciation on behalf of the administration. The new regulation has opened up for interpretive debates among scholars about prerequisites and limits of admissibility of fully automated administrative acts.
The automation of administrative proceedings provides several advantages, but it also counts incisive negative consequences and problems.

1. *The introduction of the fully automated administrative act in the General Administrative Procedure Act* (**Verwaltungsverfahrensgesetz**)

Full automation of the public hand is an idea that dates back in time: The State as a machine was a nineteenth-century hypothesis[1] but it wasn't until the 1950s of the last century that the automation of the public administration began being politically and scientifically debated in Germany[2].

The topic went under the limelight with the rise of Artificial Intelligence and the possibilities it offers in terms of an autonomous elaboration of the decision-making processes[3]. While automation provides self-evident advantages as far as celerity and savings of personal and public resources are concerned - not to mention those related to neutrality and objectivity in administrative choice[4] - it has also proven a crucial operative instrument during the pandemic, when a sudden shortage of personnel and the need to process an increased amount of work had to be met[5].

The possibility of allocating all acts of administrative procedure to a computer program was foreseen by the German legislator in 2016, when an article in the General Administrative Procedures Act (*Verwaltungsverfahrensgesetz*, from now on *VwVfG*) on fully automated[6] issuing of administrative acts was introduced: § 35a *VwVfG*.

The new regulation belongs to the reform of tax procedures, introduced by the *Gesetz zur Modernisierung des Besteuerungsverfahrens*[7],

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[1] As outlined by A. Berger, *Zu den Anforderungen an eine automatisierte Verwaltungsentscheidung am Beispiel des § 35a VwVfG*, in *Neue Zeitschrift für Verwaltungsrecht*, 2018, 1263.

[2] At least since the 1950s and with an exponential increase in the 1990s: K. Zeidler, *Über die Technisierung der Verwaltung: eine Einführung in die juristische Beurteilung der modernen Verwaltung*, Heidelberg, Müller, 1959, 18; H.P. Bull, *Verwaltung durch Maschinen: Rechtsprobleme der Technisierung der Verwaltung*, II ed., Hamm, Grote, 1964, 67; S. Simitis, *Automation in der Rechtsordnung, Möglichkeiten und Grenzen*, Heidelberg, Müller, 1967, 23; M. von Berg, *Automationsgerechte Rechts und Verwaltungsvorschriften*, Koln-Berlin, Grote, 1968, 12; A. von Mutius, *Zu den Formerfordernissen automatisierter Verwaltungsentscheidungen*, in *Verwaltungsarchiv*, vol. 67, 1976, 116; P. Lazaratos, *Rechtliche Auswirkungen der Verwaltungsautomation auf das Verwaltungsverfahren*, Berlin, Duncker & Humblot, 1990, 35; R.M. Polomski, *Der automatisierte Verwaltungsakt*, Berlin, Duncker & Humblot, 1993, 22; N. Luhmann, *Recht und Automation in der öffentlichen Verwaltung*, II ed., Berlin, Duncker & Humblot, 1997, 76; G. Britz, *Elektronische Verwaltung*, in *Grundlagen des Verwaltungsrechts*, vol. 2, II ed., W. Hoffmann-Riem, E. Schmidt-Assmann and A. Voßkuhle (eds.), München, Beck, 2012, § 26, no. 18; A.B. Kaiser, *Intelligente Verwaltungsmaschine – intelligente Maschinen in der Verwaltung: Die Diskussion über die Verwaltungsautomation in den 1950er und 1960er Jahren*, in *Eine intelligente Maschine?*, P. Collin and C.G. Lutterbeck (eds.), Baden Baden, Nomos, 2009, 233; T. Siegel, *Der virtuelle Verwaltungsakt*, in *Verwaltungsarchiv*, vol. 105, 2014, 241. See also, resuming, H. Kube, *E-Government: Ein Paradigmenwechsel in Verwaltung und Verwaltungsrecht?*, in *Gleichheit, Vielfalt, Technischer Wandel*, U. Sacksofsky (ed.), Berlin-Boston, De Gruyter, 2019, 289 ff. especially 290.

[3] M. Martini, *Digitalisierung als Herausforderung und Chance für Staat und Verwaltung*, publication of *Deutsches Forschungsinstitut für öffentliche Verwaltung*, Universität Speyer, 2016, 4; L. Guggenberger, *Einsatz künstlicher Intelligenz in der Verwaltung*, in *Neue Zeitschrift für Verwaltungsrecht*, 2019, 844; A. von Graevenitz, „*Zwei mal Zwei ist Grün*" – *Mensch und KI im Vergleich*, in *Zeitschrift für Rechtspolitik*, 2018, 238.

[4] H. Schmitz and L. Prell, *Neues zum E-Government. Rechtsstaatliche Standards für E-Verwaltungsakt und E-Bekanntgabe im VwVfG*, in *Neue Zeitschrift für Verwaltungsrecht*, 2016, 1277; M. Martini and D. Nink, *Wenn Maschinen entscheiden… vollautomatisierte Verwaltungsverfahren und der Persönlichkeitsschutz*, in *Neue Zeitschrift für Verwaltungsrecht – Extra*, n. 10, 2017, 1; H. Kube, *E-Government*, 307.

[5] On this topic: G. Carullo, *Digitalizzazione dei controlli ai tempi del coronavirus*, in *Ceridap*, n. 1, 2020, 7.

[6] For a definition of the term, see U. Stelkens, *§ 35a VwVfG*, in *Verwaltungsverfahrensgesetz*, IX ed., P. Stelkens, H.J. Bonk, and M. Sachs (eds.), München, Beck, 2018, no. 21.

[7] In force since 1.1.2017 and published in *Bundesgesetzblatt*, 2016, I, 1679.

which is based on the principle of parallelism of procedural disciplines. Such principle, peculiar to the German federal system, is applied to the so-called three pillars: tax proceedings, procedures for attribution of social benefits, and general administrative law, which residually concerns the rest of the administrative procedures[8]. As the principle provides for homogeneous procedural rules in those areas, two *pendants* in the Social Benefits Code (§ 31a *Zehntes Buch Sozialgesetzbuch - Sozial-verwaltungsverfahren und Sozialdatenschutz - SGB X*)[9] and in the *VwVfG* were added -quite hastily according to some commentators[10]- to the provision that introduces a fully automated tax procedure in the Tax Code (§ 155 (4) *Abgabenordnung - AO*).

Tax administration is a pioneering field of fully automated administrative acts - along with the automated processing of payment orders in § 689 (1) *Zivilprozessordnung (ZPO)*[11]-, although some partially or fully automated measures were already employed in other areas of the PA. One can mention the regulation of traffic lights (since 1924!)[12]; dynamic speed limits, the opening of emergency lanes, and general lane directions in German highways currently elaborated in real time by algorithms of Virtual Traffic Guidance Centers (*Virtueller Verkehrsbeeinflus sungsanlagen*) and qualified as ordinances

(*Allgemeinverfügungen*)[13]; sanctions for traffic violations; administrative measures in water systems management, building permits law and social security[14].

According to § 35a *VwVfG* „an administrative act can be generated through a fully automated, digital process when envisaged by a legal provision and if there is no discretion or room for independent appreciation on behalf of the administration"[15].

The provision concerns a fully automated administrative act issued without human intervention, which must be distinguished from the electronic administrative act, already legislated by § 37*VwVfG* as the electronic format for the act, which is unrelated to its issuance procedures[16].

The provision must also be distinguished from the mere notification of administrative acts in electronic format, set out by § 41 (2) *VwVfG*[17], i.e. the „measures issued with the help of automation" introduced by the *VwVfG* since the original version in 1976 at § 28 (2), § 37 (5) and § 39 (2)[18].

Although § 35a *VwVfG* only concerns administrative acts with direct and external legal effect („*Verwaltungsakte*" or in Italian „*provvedimenti amministrativi*") as defined by § 35 *VwVfG*[19], it constitutes a „milestone"[20] in a wide-ranging public administration reform, which according to § 1 Law on Online Access to

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[8] On these aspects, in connection with the introduction of § 35a *VwVfG*, see H. Schmitz and L. Prell, *Neues zum E-Government*, 1273; M. Stegmüller, *Vollautomatische Verwaltungsakte – eine kritische Sicht auf die neuen § 24 I 3 und § 35a VwVfG*, in *Neue Zeitschrift für Verwaltungsrecht*, 2018, 353. See also C. Fraenkel-Haeberle, *Fully digitalized administrative procedures in the German legal system,* in this Volume, Issue 1-2, 106.

[9] On these provisions in relation to § 35a *VwVfG,* see N. Braun Binder, *Vollautomatisierte Verwaltungsverfahren, voll automatisiert erlassene Verwaltungsakte und elektronische Aktenführung*, in *Digitalisierte Verwaltung, Vernetztes E-Government*, II ed., M. Seckelmann (ed.), Berlin, Schmidt, 2019, 313 and 317; E-W. Luthe, *Der vollständige automatisierte Erlass eines Verwaltungsakts nach § 31a SGB X*, in *Zeitschrift für das aktuelle Sozialrecht*, 2017, 250; U. Stelkens, *§ 35a VwVfG*, no. 5.

[10] A. Berger, *Zu den Anforderungen*, 1261, criticizes as „inconsistent" this genesis which has led to a considerable variety of formulations and (theoretically parallel) procedures; in the same sense, i.e. considering the introduction of § 35a *VwVfG* as „surprising" part of the reform of tax law, see A. Guckelberger, E-*Government: Ein Paradigmenwechsel in Verwaltung und Verwaltungsrecht?*, in *Gleichheit, Vielfalt, Technischer Wandel*, U. Sacksofsky (ed.), Berlin-Boston, De Gruyter, 2019, 235 ff. especially 263.

[11] A. Schüler, *§ 689 ZPO*, in *Münchener Kommentar zur Zivilprozessordnung mit Gerichtsverfassungsgesetz und Nebengesetzen*, VI ed., T. Rauscher and W. Krüger (eds.), München, Beck, 2020, no. 4.

[12] The first traffic light was installed at Potsdamer Platz in Berlin in 1924: M. Curter, *Erster Verkehrsturm am Potsdamer Platz*, in *Berlinische Monatsschrift*, vol. 10, 1999, 77.

[13] See M. Martini and D. Nink, *Subsumtionsautomaten ante portas? – Zu den Grenzen der Automatisierung in verwaltungsrechtlichen (Rechtsbehelfs) Verfahren*, in *Deutsches Verwaltungsblatt*, 2018, 1128 ff. especially 1130, footnote 12; M. Stegmüller, *Vollautomatische Verwaltungsakte*, 356. More examples in U. Stelkens, *§ 35a VwVfG*, nos. 22 – 23. As observed by N. Braun Binder, *Vollautomatisierte Verwaltungsverfahren*, 311, these traffic control systems are a more consistent example for § 35a *VwVfG* than traffic lights, because they are based on real-time processing (investigation) of traffic data and weather conditions, where traditional traffic lights generally run according to predetermined time schedules.

[14] M. Martini and D. Nink, *Wenn Maschinen entscheiden*, 1.

[15] The original words are: „*Ein Verwaltungsakt kann vollständig durch automatische Einrichtungen erlassen werden, sofern dies durch Rechtsvorschrift zugelassen ist und weder ein Ermessen noch ein Beurteilungsspielraum besteht*".

[16] U. Stelkens, *§ 37 VwVfG*, in *Verwaltungsverfahrens gesetz*, IX ed., P. Stelkens, H.J. Bonk, M. Sachs (eds.), München, Beck, 2018, no. 64; N. Braun Binder, *Vollautomatisierte Verwaltungsverfahren,* 321.

[17] U. Stelkens, *§ 41 VwVfG*, in *Verwaltungsverfahrens-gesetz*, IX ed., P. Stelkens, H.J. Bonk, M. Sachs (eds.), München, Beck, 2018, no. 116; H. Schmitz and L. Prell, *Neues zum E-Government*, 1277-1280.

[18] U. Stelkens, *§ 35a VwVfG*, no. 19.

[19] I.e. „any order, decision or other sovereign measure taken by an authority to regulate an individual case in the sphere of public law and intended to have a direct, external legal effect".

[20] N. Braun Binder, *Vollautomatisierte Verwaltungs-verfahren,* 311.

Public Services (*Onlinezugangsgesetz – OZG*)[21], covers all administrative services, administrative acts and the so-called informal administration[22].

2. *The role of § 35a* VwVfG *in German administrative legal system: comparing legislator aims with legal scholars' interpretation*

According to the explanatory report of the parliamentary committee that examined the new regulation, § 35a *VwVfG* pursued three aims: 1) to clarify the nature of fully automated acts as administrative acts in accordance with § 35 *VwVfG* (*Klarstellungsfunktion*); 2) to limit full automation to suitable procedures and acts only, at the same time admonishing the future legislator (*Begrenzungs- uns Warnfunktion*); and 3) to bestow on the legislator only the choice of procedures and acts suitable for full automation (*Kompetenzzuweisungsfunktion*)[23].

The new provision has been criticized for its modest innovative content, as fully automated administrative acts are already allowed by the law, and a redundant rule would open up for interpretive controversies[24].

In addition, the German administrative law expressly applies a general principle of informal procedure (§ 10 *VwVfG*)[25] and the resulting rule of informality for administrative acts, unless otherwise stated and within the scope of § 35 *VwVfG*[26]. As is well known, such approach

belongs to a juridical system whose tradition is grounded in functionality rather than in formality of procedures, as is the case of the French and Italian systems. However, both approaches share the need for the procedural steps of administrative decisions to be traced so as to be reproducible and demonstrable, as required by the Rule of Law applied to administrative activity[27].

Although the aforementioned cases of fully automated administrative acts already existed in the legal system and were admitted by the jurisprudence[28], a substantial amount of scholars considers that the new general provision is relevant both in the doctrine of administrative law and in that of administrative science[29].

2.1. *§ 35a* VwVfG *within the systematic context of German administrative law: the rift between administrative decision and human will*

From a systematic point of view, § 35a *VwVfG* may have the primary function of clarifying that administrative acts are admissible even without the acting administrative organ's human will[30].

§ 35 *VwVfG* describes an administrative act as „any order, decision or other sovereign measure taken by an authority to regulate an individual case in the sphere of public law and intended to have a direct, external legal effect"[31]. According

[21] In the context of a PA reform, as in I. Mergel, *Digitale Transformation als Reformvorhaben der deutschen öffentlichen Verwaltung*, in *Der moderne Staat*, 2019, n. 1, 162; C. Fraenkel-Haeberle, *Fully digitalized administrative procedures,* 110.
[22] A. Berger, *Zu den Anforderungen*, 1263.
[23] *Beschlussempfehlung und Bericht des Finanzausschusses (7. Ausschuss) zu dem Gesetzentwurf der Bundesregierung zu Art. 20 Nr. 1*, Bundestag Drucksache 18/8434 del 11.05.2016. See U. Stelkens, *§ 35a VwVfG*, no. 1; A. Windoffer, *§ 35a VwVfG*, in *Verwaltungsverfahrensgesetz*, II ed., T. Mann, C. Sennekamp and M. Uechtritz (eds.), Baden Baden, Nomos, 2019, no. 1.
[24] M. Stegmüller, *Vollautomatische Verwaltungsakte*, 355. *Contra*, J. Ziekow, *Das Verwaltungsverfahrensrecht in der Digitalisierung der Verwaltung*, in *Neue Zeitschrift für Verwaltungsrecht*, 2018, 1170.
[25] The reference to § 10 *VwVfG* is a further supporting argument of the admissibility of the fully automated procedure (and the related measures) even before the introduction of § 35a *VwVfG*: L. Prell, *§ 35a VwVfG*, in *Verwaltungsverfahrensgesetz*, XLVIII ed., J. Bader and M. Ronellenfitsch (eds.), München, Beck, 2020, no. 1. The connection between the two concepts is pointed out by U. Stelkens, *§ 35a VwVfG*, no. 4. The author notes that today's law contained in § 35a *VwVfG* would have found a systematically more consistent position in the surroundings of § 10 *VwVfG*.
[26] P. Badura, *Die Form des Verwaltungsaktes,* in *Verwaltungsverfahren*, W. Schmitt Glaeser (ed.), Stuttgart et al. *Verwaltungsverfahren*, Boorberg, 1977, 205 ff. especially 206; E.J. Eberle, *The West German Administrative Procedure Act: A Study In Administrative Decision Making*, in *Dickinson Journal Of International Law*, vol. 3, n. 1, 1984, 67 ff. especially 74; M. Martini and

D. Nink, *Wenn Maschinen entscheiden*, 2; U. Stelkens, *§ 37 VwVfG*, no. 47; J. Ziekow, *Das Verwaltungsverfahrens recht,* 1171.
[27] See the report of the working group composed of the presidents of the German Federal Supreme Administrative Court and of the Higher Administrative Courts of the *Länder „Anforderungen der Verwaltungsgerichtsbarkeit an die Führung elektronischer Verwaltungsakten"* of 18th February 2011, in *JurPC – Internet Zeitschrift für Rechtsinformatik und Informationsrecht*, Web-Dok. 66/2011. See also U. Berlit, *Aktuelle Rechtsprechung zu eGovernment und eJustice, ibid*., Web-Dok. 176/2015, § 42; Id., *Elektronische Verwaltungsakte und verwaltungs gerichtliche Kontrolle*, in *Neue Zeitschrift für Verwaltungsrecht*, n. 4, 2015, 197.
[28] *Bundesverwaltungsgericht* sent. 23.9.2010 – 3C 37/09 in *BVerwGE* 138, 21 ff. especially 26, on virtual traffic control.
[29] H. Schmitz and L. Prell, *Neues zum E-Government*, 1273; A. Berger, *Zu den Anforderungen*, 1260; J. Ziekow, *Das Verwaltungsverfahrensrecht*, 1170.
[30] H. Schmitz and L. Prell, *Neues zum E-Government*, 1275; Id., *§ 35a VwVfG*, no. 7; A. Berger, *Zu den Anforderungen*, 1262; J. Ziekow, *Das Verwaltungsverfahrensrecht,* 1170; U. Stelkens, *§ 35a VwVfG*, no. 28. Considering the two hypotheses to be different, identifying the will of the programmer as a substitute for that of the official authority in the individual proceedings: M. Stegmüller, *Vollautomatische Verwaltungsakte*, 354. Pointing the insignificance of the requirement of will, having the legislative prerequisites, H. Kube, *E-Government*, 303.
[31] „*Verwaltungsakt ist jede Verfügung, Entscheidung oder andere hoheitliche Maßnahme, die eine Behörde zur Regelung eines Einzelfalls auf dem Gebiet des öffentlichen Rechts trifft und die auf unmittelbare Rechtswirkung nach*

to the traditional interpretation of this provision the expression of human will characterizes the concept of administrative act and its substantial effects[32].

Interestingly, scholars refer to § 42a *VwVfG* on tacit consent (literally fictitious authorization – *Genemigungsfiktion*) as a precedent, in which a rift between the concept of administrative act and the necessity for the human volitional element in the administrative organ was already acknowledged[33]. It is worthwhile underlining, in this respect, the difference between the concept of tacit consent in Italian law, where the will of the organ that „decides not to act" is not necessarily lacking[34], and the corresponding

German tool. This difference may help to explain the caution of the German system in applying tacit consent in administrative law.

The proximity between the two provisions leads the authors to identify the already foreseen cases of tacit consent as further possible cases of automated acts (and *vice versa*)[35], believing that the legislator's reflections on the aspects of general theory, democratic legitimacy of administrative action and, ultimately, of constitutional legitimacy should coincide[36].

In the same systematic perspective, the authors emphasizing the necessity for the introduction of § 35a *VwVfG* observe that, without it, the provisions on the inquisitorial principle in the proceedings (§ 24 *VwVfG*) and on giving reasons for administrative acts (39 *VwVfG*) would hinder the fully automated act as general administrative tool, always requiring the intervention of a human element in the procedure[37].

3. *Prerequisites and limits of admissibility of fully automated administrative acts: the need of sector-specific regulations*

The legislator of 2016 has specified one precondition and two restrictions for fully automated administrative acts.

First of all, § 35a *VwVfG* is not directly applicable but requires a further statutory basis allowing for fully automated administrative acts

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außen gerichtet ist".

[32] U. Stelkens, *§ 35 VwVfG*, in *Verwaltungsverfahrensgesetz*, IX ed., P. Stelkens, H.J. Bonk, and M. Sachs (eds.), München, Beck, 2018, no. 69.

[33] H. Schmitz and L. Prell, *Neues zum E-Government*, 1273; U. Stelkens, *§ 35a VwVfG*, no. 28; Id., *§ 42a VwVfG*, in *Verwaltungsverfahrensgesetz*, IX ed., P. Stelkens, H.J. Bonk, and M. Sachs (eds.), München, Beck, 2018, no. 3.

[34] It must be mentioned that the scheme of tacit consent in Italy is often paired to a sanctioning function for administrative *inertia*. In this case the will of the administrative body is obviously excluded. See, on these aspects, F.G. Scoca, *Il silenzio della pubblica amministrazione*, Milano, Giuffrè, 1971, 272; A. Travi, *Silenzio assenso ed esercizio della funzione amministrativa*, Padova, Cedam, 1985; Id., *Silenzio-assenso e legittimazione ex lege nella disciplina delle attività private in base al d.P.R. 26 aprile 1992 n. 300*, in *Foro amministrativo*, n. 2-3, 1993, II, 608; F. Brignola, *Silenzio della pubblica amministrazione (diritto amministrativo)*, in *Enciclopedia giuridica*, Roma, Treccani, 1992; V. Cerulli Irelli, *Modelli procedimentali alternativi in tema di autorizzazioni*, in *Diritto amministrativo*, 1993, 66; A. Pajno, *Gli articoli 19 e 20 della legge n. 241 prima e dopo la legge 24 dicembre 1993 n. 537. Intrapresa dell'attività privata e silenzio dell'amministrazione*, in *Diritto processuale amministrativo*, n. 1, 1994, 22; F.G. Scoca and M. D'Orsogna, *Silenzio, clamori di novità*, in *ibid.*, n. 3, 1995, 393; V. Parisio, *I silenzi della pubblica amministrazione: la rinuncia alla garanzia dell'atto scritto*, Milano, Giuffrè, 1996, 127; P.G. Lignani, *Silenzio (diritto amministrativo)*, in *Enciclopedia del diritto*, III update, Milano, Giuffrè, 1999, 978; B.E. Tonoletti, *Silenzio della pubblica amministrazione*, in *Digesto delle discipline pubblicistiche*, Torino, UTET, 1999, 179; G.B. Mattarella, *Il provvedimento*, in *Trattato di diritto amministrativo*, S. Cassese (ed.), Milano, Giuffrè, 2003, 899; G. Fonderico, *Il nuovo tempo del procedimento, la DIA e il silenzio-assenso*, in *Giornale di diritto amministrativo*, n. 10, 2005, 1017; L. Giani, *Articolo 20. Silenzio assenso*, in *La pubblica amministrazione e la sua azione. Saggi critici sulla legge n. 241/1990 riformata dalle leggi n. 15/2005 e n. 80/2005*, N. Paolantonio, A. Police and A. Zito (eds.), Torino, Giappichelli, 2005, 411; R. Giovagnoli, *Il tempo dell'azione amministrativa*, in *Le nuove regole dell'azione amministrativa dopo le Leggi n. 15/2005 e n. 80/2005*, F. Caringella, D. De Carolis and G. De Marzo (eds.), Milano, Giuffrè, 2005, 149; A. Cioffi, *Dovere di provvedere e silenzio-assenso della pubblica amministrazione dopo la legge 14 maggio 2005 n. 80*, in *Diritto amministrativo*, n. 1, 2006, 100; G. Morbidelli, *Il silenzio-assenso*, in *La disciplina generale dell'azione amministrativa*, V. Cerulli Irelli (ed.), Napoli, Jovene, 2006, 265; A. Romano, *A proposito dei vigenti artt. 19 e 20 della l. 241 del 1990: divagazioni sull'autonomia dell'amministrazione*, *ibid.*, n.

2, 2006, 489; W. Giulietti, *Art. 20. Silenzio assenso*, in *Codice dell'azione amministrativa e della responsabilità*, A. Bartolini, S. Fantini and G. Ferrari (eds.), Roma, Neldiritto Editore, 2010, 485; M. Renna and F. Figorilli, *Silenzio della pubblica amministrazione. I) Diritto amministrativo*, in *Enciclopedia giuridica*, XVIII update, Roma, Treccani, 2011, 1; M.A. Sandulli, *L'istituto del silenzio assenso tra semplificazione e incertezza*, in *Nuove autonomie*, 2012, 435; E. Scotti, *Silenzio-assenso*, in *L'azione amministrativa*, A. Romano (ed.), Torino, Giappichelli, 2015, 653; F. Volpe, *L'annullamento del silenzio-assenso e della s.c.i.a. Riflessioni di teoria generale a seguito dell'abrogazione dell'art. 21, comma 2, legge 7 agosto 1990, n. 241*, in *Giustamm.it*, 2015, 1; P. Marzaro, *Silenzio assenso tra Amministrazioni: dimensioni e contenuti di una nuova figura di coordinamento 'orizzontale' all'interno della 'nuova amministrazione' disegnata dal Consiglio di Stato*, in *Federalismi.it*, n. 19, 2016, 2; G. Tropea, *La discrezionalità amministrativa tra semplificazioni e liberalizzazioni, anche alla luce della legge n. 124/2015*, in *Diritto amministrativo*, 2016, 107; M. D'Orsogna and R. Lombardi, *Il silenzio-assenso*, in *Codice dell'azione amministrativa*, II ed., M.A. Sandulli (ed.), Milano, Giuffrè, 2017, 965; N. Paolantonio, *Comportamenti non provvedimentali produttivi di effetti giuridici*, in *Diritto amministrativo*, F.G. Scoca (ed.), Torino, Giappichelli, 2019, 329; M. Calabrò, *Silenzio assenso e dovere di provvedere: le perduranti incertezze di una (apparente) semplificazione*, in *Federalismi.it*, n. 10, 2020, 21.

[35] U. Stelkens, *§ 42a VwVfG*, no. 5a; Id., *§ 35a VwVfG*, nos. 24, 29 and 46. *Contra* A. Guckelberger, *E-Government: Ein Paradigmenwechsel*, 266.

[36] M. Martini and D. Nink, *Subsumtionsautomaten ante portas?*, 14.

[37] H. Schmitz and L. Prell, *Neues zum E-Government*, 1274.

in the different areas of administrative activity. Therefore, the implementation of fully automated administrative acts demands for further regulatory specifications, according to the scheme of programmatic general clauses - which was originally adopted in the Italian Administrative Procedure Act no. 241 of August 7th, 1990 for administrative agreements (Art. 11). Most of the provisions of the *Verwaltungsverfahrensgesetz* are directly applicable, however, unless an exception is made in the sector-specific law; this scheme is described in general terms in § 1 *VwVfG*, according to which all its provisions are generally applicable to federal administrations and to the *Länder* administrations when acting under federal law (in accordance with the division of administrative powers as set out in § 83 *GG*[38]). This regulatory structure, as an exception to the general rule of § 1 *VwVfG*, once again establishes a connection between § 35a *VwVfG* and § 42a *VwVfG*.

Thus an intervention on behalf of the sector-specific legislator is required in order to identify which measures (and procedures) are suitable for full automation[39], disenfranchising the executive power and avoiding an uncontrolled cascade-digitization[40].

Further legal regulation is also necessary to meet the conditions imposed by the European Union legislator in the General European Regulation on Data Protection n. 679/2016. Art. 22 GDPR about „automated individual decision-making, including profiling" provides „the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects" concerning the data subject „or similarly significantly affects him or her". This shall not apply if the decision „is authorized by Union or Member State law to which the controller is subject and which also lays down suitable measures to safeguard the data subject's rights and freedoms and legitimate interests", according to Art. 22, (2) (b) GDPR[41].

While such identifying function, according to the report of the parliamentary committee, was seemingly demanded by the legislator to ordinary law[42], the phrasing in use (*Rechtsvorschrift*) does not restrict the field to ordinary law, but it in

facts includes the secondary legislation. Secondary regulations of the *Bund*, the *Länder* or municipalities[43] have therefore considerable room to identify administrative acts suitable for full automation, possibly in search for simplification criteria related to the workforce or other factors that may elude the guarantees of ordinary legislation[44].

3.1. *The prohibition of fully automated administrative acts in case of administrative discretion or margins for independent administrative appreciation*

The second regulatory content of § 35a *VwVfG* limits the type of administrative power that could be exercised[45]. A fully automated administrative act is only admissible if it lacks administrative discretion (*Ermessen*) and there is no margins for independent administrative appreciation (*Beurteilungsspielraum*)[46].

Noticeably, the German legislator has chosen a formulation which, at first reading, might seem unnecessarily elaborated. Indeed one would reckon the phrase "in absence of discretionality and appreciation margins" (in German: "*weder ein Ermessen noch ein Beurteilungsspielraum besteht*") as corresponding to the "emanation of a non-discretional measure" (in German "*gebundene Entscheidung*"). In fact, a more thorough analysis reveals the phrasing as a conceptual rift rather than the legislator's preference for highly articulated speech. The eventualities in which the PA acts in absence of discretionality and appreciation margins are sometimes completely different than those in

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[38] F. Kirchof, *Art. 83 Grundgesetz,* in *Grundgesetz Kommentar*, LXXXIX ed., T. Maunz and G. Dürig (founders), München, Beck, 2020, no. 128.
[39] A. Berger, *Zu den Anforderungen*,1262.
[40] An automatization according to the „watering can principle" (*Gießkannenprinzip*) as expressed by A. Berger, *Zu den Anforderungen*, 1262. See also H. Schmitz and L. Prell, *Neues zum E-Government*, 1274.
[41] More widely in M. Martini and D. Nink, *Wenn Maschinen entscheiden*, 3-7; A. Berger, *Zu den Anforderungen*, 1264; U. Stelkens, *§ 35a VwVfG*, no. 60; L. Prell, *§ 35a VwVfG*, no. 11a.
[42] *Supra*, Section 2.

[43] On the application of § 35a *VwVfG* in the administrative systems of the *Länder*, see. U. Stelkens, *§ 35a VwVfG*, no. 39. On the framework of general competences in E-government and administrative digitization, see U. Schliesky, *Der bundesrechtliche Rahmen und die Kooperationstatbestände*, in *Digitalisierte Verwaltung, Vernetztes E-Government*, II ed., M. Seckelmann (ed.), Berlin, Schmidt, 2019, 221; S.E. Schulz, *Der landesrechtliche Rahmen von E-Government, ibid.*, 243; A. Berger, *Zu den Anforderungen*, 1261, underlining the various digitization levels of each *Land*.
[44] Some scholars tend to exclude regulations of individual administrative authorities, see for example H. Schmitz and L. Prell, *Neues zum E-Government*, 1276; Id., *§ 35a VwVfG*, no. 11; other scholars request an ordinary law, so H. Kube, *E-Government*, 322. *Contra* M. Stegmüller, *Vollautomatische Verwaltungsakte*, 355; U. Stelkens, *§ 35a VwVfG*, no. 30.
[45] H. Schmitz and L. Prell, *Neues zum E-Government*, 1274.
[46] A concept in many ways corrisponding to technical discretion in Italian administrative law, see C. Fraenkel-Haeberle, *Unbestimmte Rechtsbegriffe, technisches Ermessen und gerichtliche Nachprüfbarkeit – Eine rechtsvergleichende Analyse*, in *Die Öffentliche Verwaltung*, 2005, 808; D. de Pretis, *Valutazione amministrativa e discrezionalità tecnica*, Padova, Cedam, 1995, 11; A. Travi, *Circa il sindacato del giudice amministrativo sulla discrezionalità tecnica della pubblica amministrazione*, in *Foro italiano,* 2001, III, 9.

which the PA exerts a non-discretionary power[47].

Interestingly, such limits partially overlap with the guidelines that Italy, in lack of regulatory provisions, is developing in case law[48].

Legal literature is widely debating the reason behind this limitation.

According to some scholars, the determining parameter should be the current development of computer technology[49]. Only deterministic algorithms currently correspond to the decision-making norms of the public administration and allow their translation into computer language[50]. Deterministic instructions guarantee the traceability of decisional steps and the predictability of the measure, which constitute requirements not yet met by AI.

Other scholars have identified the *ratio* of § 35a *VwVfG* in excluding decisions that are not subject to full judicial review - as are those characterized by administrative and technical discretion[51] - to completely subject the automated measure to the judicial review of administrative courts, thus regaining a warranty function by human control.

Such is a remarkable interpretational difference, as the second interpretation only would provide that technical progress be limited by a guarantee norm, whereas the first implies the legislator to adapt itself to AI development, therefore opening up to a wider range of possibilities concerning its use in administrative action.

The completeness of the judicial review, however, is not expressly indicated as a defining criterion, not even in the parliamentary report, and it does constitute an ambiguous distinguishing parameter when dealing with a third category of cases, which German dogmatic refers to as non-discretionary administrative decisions, i.e. administrative acts based on undetermined legal concepts (*unbestimmte Rechtsbegriffe*). A significant number of scholars and administrative court's decisions affirm that acts enacted in application of undetermined legal concepts are subject to full judicial review, which is the same control that administrative courts exercise towards non-discretionary acts. In such cases the judge shall completely replace his own evaluation of the fact and his interpretation of the undetermined legal concept with those provided by the deciding public administration[52].

In appliance of the criterion of the extension of judicial review, every provision requiring that the administration use an undetermined legal concept should be a case in which fully automated administrative acts are admissible. However, the administrative jurisprudence has identified a category of undetermined legal concepts formulated in a particularly broad manner, which are not subject to full judicial review: in those cases, the guarantee *ratio* of the provision excludes the applicability of § 35a *VwVfG*[53].

As noted at the beginning of the section, the legislator has chosen to express its limits in a negative formulation although it would have been easier to identify the admissible case of fully automated administrative act in positive, i.e. formulating the rule in terms of non-discretionary decision. That would have automatically excluded discretionary decisions and independent evaluations on behalf of the public administration. Yet it would be incorrect to maintain all non-discretionary acts suitable to full automation: such as those of administrative decisions that require a particularly complex investigation of facts. According to this interpretation then, the sectoral specific regulation shall not therefore establish general categories of acts and procedures suitable for full automation on the mere basis of the power exercised by the public administration, but must closely consider administrative acts and procedures, also in order to meet the requirements of Art. 22 GDPR[54].

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[47] See also *infra*, par. 3.3.
[48] Lately: Cons. Stato, sez. VI, 13.12.2019, n. 8472. See G. Avanzini, *Decisioni amministrative e algoritmi informatici. Predeterminazione, analisi predittiva e nuove forme di intelligibilità*, Napoli, Editoriale Scientifica, 2019; S. Civitarese Matteucci, *Umano troppo umano. Decisioni amministrative automatizzate e principio di legalità*, in *Diritto pubblico*, 2019, 5; G. Fasano, *Le decisioni automatizzate nella pubblica amministrazione: tra esigenze di semplificazione e trasparenza algoritmica*, in *Medialaws*, n. 3, 2019; R. Ferrara, *Il giudice amministrativo e gli algoritmi. Note estemporanee a margine di un recente dibattito giurisprudenziale*, in *Diritto amministrativo*, n. 4, 2019, 773; I.A. Nicotra and V. Varone, *L'algoritmo, intelligente ma non troppo*, in *Rivista AIC*, n. 4, 2019, 86; E. Prosperetti, *Accesso al software e al relativo algoritmo nei procedimenti amministrativi e giudiziali. Un'analisi a partire da due pronunce del Tar Lazio*, in *Diritto dell'informazione e dell'informatica*, n. 4, 2019, 979; E. Carloni, *I principi della legalità algoritmica. Le decisioni automatizzate di fronte al giudice amministrativo*, in *Diritto amministrativo*, 2020, 273; E. Falletti, *Decisioni automatizzate e diritto alla spiegazione: alcune riflessioni comparatistiche*, in *Diritto dell'informazione e dell'informatica*, n. 2, 2020, 169.
[49] A. Guckelberger, *E-Government: Ein Paradigmen wechsel*, 265.
[50] A translation in algebraic terms of legal instructions can be seen in F. Volpe, *Ammissioni e autorizzazioni*, Torino, Giappichelli, 2018.
[51] H. Schmitz and L. Prell, *Neues zum E-Government*, 1276; M. Martini and D. Nink, *Subsumtionsautomaten ante portas?*, 6.

[52] U. Stelkens, *§ 35a VwVfG*, no. 44.
[53] A. Berger, *Zu den Anforderungen*, 1263, wishing the legislator to clarify this aspect; H. Schmitz and L. Prell, *Neues zum E-Government*, 1276; M. Martini and D. Nink, *Subsumtionsautomaten ante portas?*, 6.
[54] A. Guckelberger, *E-Government: Ein Paradigmen wechsel*, 266; H. Kube, E-*Government*, 304.

3.2. *Fully automated administrative acts, principles of procedural investigation and the application of legal effects: consequences on the computer program admitted by § 35a VwVfG*

In order to identify which acts are suitable to full automation, the moment of fact investigation (*Sachermittlung*) must be distinguished from the application of legal effects (*Rechtsanwendung*) for the purpose of subsuming the general norm provision to the specific cases[55].

About the first point, full automation of the act could hinder the investigation and fact evaluation by reducing their accuracy. Therefore, § 35a *VwVfG* is completed by a new provision in § 24 (1) *VwVfG*[56]. The efficiency and celerity of the procedure - offered by fully automated administrative acts - find a limit in the inquisitorial principle that pervades administrative investigation, guaranteed by § 24 *VwVfG*. This principle is particularly articulated should the administration issue fully automated acts, so that in those cases a human investigation can be introduced „if the case requires it or if it emerges from the allegations of the participant" (§ 24 (1) (sentence 3) *VwVfG*)[57].

Firstly, this implies that the special sectoral regulation should also provide for the possibility of the human evaluation element. Secondly, the computer program must allow the human intervention from a technical standpoint, for example by including in the initial mask of data entry the possibility to enter information in free fields and letting the administrative employee intervene at any time. This is a technical requirement for the automation program[58], that further reduces the possibilities of full automation under German law[59].

As for the application of legal effects, it can be observed that fully automated administrative acts are part of an general trend in legal systems, due to the need for simplification but also to the realization of the principle of equality and non-discrimination[60]. Such trend is leading to more and more detailed norms to indicate the presuppositions, and to a frequent recourse to the norm-fact-effect scheme, without the intermediation on behalf of the administrative power for the application of the norm to specific cases. This habit has notoriously led to the wider use of the provision of simple declaration in order to commence an activity: this declaration in Italy is ruled by Art. 19 Law no. 241/1990, which like § 35a *VwVfG* does not apply to discretionary acts.

Such standardizing and digitizing trend has several positive aspects, but it also counts some incisive negative consequences[61]. Among these is the transfer of (a substantial part of) the preliminary investigation activity to subjects outside the public administration. The full automation procedure anticipates certain actions to the preliminary phase of the administrative procedure itself, weighing on the private party, and increasing the time rift between the moment in which the administrative relationship is established and the beginning of the procedural relationship between administration and applicant[62].

The application of such legal effects scheme, moreover, implies that the computer programs used by the administration shall contain only deterministic algorithms, excluding artificial intelligence and its black box decisions. In addition, at the current state of the art, the use of AI in relation to decision-making processes does not meet the requirements of democratic legitimacy and respect for the Rule of Law imposed in German public law[63]. From those principles arises the need for the steps of administrative decisions to be recorded and traced, so that they can be reconstructed in a reliable manner[64]. This implies that the computer program must be designed in such a way as to allow all the steps leading to the decision of the

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[55] A. Berger, *Zu den Anforderungen*, 1262.

[56] On the connection between the two provisions: A. Berger, *Zu den Anforderungen*, 1263; A. Windoffer, *§ 35a VwVfG*, no. 5.

[57] „*Setzt die Behörde automatische Einrichtungen zum Erlass von Verwaltungsakten ein, muss sie für den Einzelfall bedeutsame tatsächliche Angaben des Beteiligten berücksichtigen, die im automatischen Verfahren nicht ermittelt würden*". See also § 150 c. 7 AO and § 31a *SGB X*, commented by H. Schmitz and L. Prell, *Neues zum E-Government*, 1277; M. Martini and D. Nink, *Wenn Maschinen entscheiden*, 3 e 8.

[58] A. Berger, *Zu den Anforderungen*, 1263; U. Stelkens, *§ 35a VwVfG*, no. 41.

[59] On the technical limits to the total automation of the administrative procedure in the present time and on possible future developments, see A. Guckelberger, E-*Government: Ein Paradigmenwechsel*, 244.

[60] A. Berger, *Zu den Anforderungen*, 1262.

[61] See A.G. Orofino, *La semplificazione digitale*, in *Il diritto dell'economia*, vol. 100, n. 3, 2019, 87 ff. especially 99.

[62] H. Schmitz, *§ 9 VwVfG*, in *Verwaltungsverfahrensgesetz*, IX ed., P. Stelkens, H.J. Bonk, and M. Sachs (eds.), München, Beck, 2018, no. 16; H. Schmitz and L. Prell, *Neues zum E-Government*, 1275. The author points out that in the sequence leading to the automated administrative act (access to the portal, choice of the act, identity check of the applicant, data entry, check of data in databases, notification of missing or implausible data, calculation of costs, confirmation and submission of the request, algorithmic processing, issuance of the measure) the proceedings begins only after the request submission.

[63] At the current state of technology, as pointed out by A. Guckelberger, *E-Government: Ein Paradigmenwechsel*, 278; N. Braun Binder, *Vollautomatisierte Verwaltungsverfahren,* 319. Some proposals to harmonize automated decision and the Rule of Law are suggested by M. Martini, *Blackbox Algorithmus – Grundfragen einer Regulierung Künstlicher Intelligenz*, Heidelberg, Springer, 2019; L. Guggenberger, *Einsatz künstlicher Intelligenz in der Verwaltung*, 846.

[64] *Supra* footnote 27.

measure to be recorded and made public[65].

3.3. *The application of § 35a VwVfG in case of discretionary administrative power*

The literal negative wording of § 35a *VwVfG* raises the question of whether its limit should be considered in relation to the type of power *in abstracto*, i.e., when the power is designed as discretionary by the law, or whether the moment of its exercise should be relevant. It may be that due to self-limits or other previous administrative acts, the discretionary power will not allow the administration for discretionality[66].

Should this second hypothesis be correct, it would give the public administration a margin of autonomy to determine whether the case displays a lack of discretion, even in presence of an abstract discretionary power.

Scholars proposing this last reading maintain that even highly discretionary acts can be fully automated, such as *ex officio* annulment decisions, when the discretion is reduced to zero (*Ermessenreduzierung auf Null*)[67]. And this interpretation is confirmed by the abstract discretionary power of ordinance exercised by highway traffic management programs on the basis of algorithms[68].

4. *Legal consequences of a breach of § 35a VwVfG*

Finally, it is inevitable to wonder what consequences would have the issuing of an automated act violating § 35a *VwVfG*.

A first hypothesis of violation could consist in the issuance of the automated act lacking the special regulatory base required by § 35a *VwVfG*.

Awaiting jurisprudential decisions on this point, for the time being, scholars believe that the administrative act would be unlawful, yet not absolutely invalid ("*nichtig*"), unless one of the cases of invalidity set out in § 44 *VwVfG* is found in addition[69].

If, on the other hand, the defect consists only in the lack of the special legal basis, the unlawfulness would be due to the violation of a procedural rule, such as § 35a *VwVfG*, providing conditions and limits for fully automated administrative acts (legal reservation and lack of discretion), yet failing to comment on the content of the administrative measure[70].

An administrative act which is not invalid pursuant to § 44 *VwVfG* cannot be annulled solely on the grounds that the act came into being through the infringement of procedure regulations, if it is evident that the infringement has not influenced the decision on the matter (§ 46 *VwVfG*) [71].

This unlawful act could not be annulled neither it could be healed, as this item does not appear in the list of § 45 *VwVfG*. On the other hand, the remedy in this case would require a new course of proceedings by or with the contribution of a human being, i.e. - in the final analysis - it would mean the issuing of a new administrative act[72].

The hypothesis of a completely automated measure issued in absence of a special provision and in exercise of discretionary power seems to be different: in this case § 44 *VwVfG* would probably be applied [73].

In this regard, however, it is worth remembering the German doctrine of the apparent administrative act, which attributes to the invalid (but not recognizable as such) administrative act the production of favorable effects towards the recipient[74].

Of course, the sector-specific legislator can derogate from § 35a *VwVfG*, without such derogation constituting an unlawful breach. This contrast should be resolved according to the usual rules on regulatory antinomies, since the *VwVfG* is an ordinary law, at most performing a function of warning and reference to the principle of the Rule of Law[75].

5. *Hypothetical cases of fully automated administrative acts*

Pending further regulatory clarifications, scholars have indicated some categories of acts undoubtedly excluded from automated decisions[76]. In particular, such acts include those that require a purely discretionary balancing of interests (first of all, planning acts and those

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[65] Full traceability is required by H. Schmitz and L. Prell, *Neues zum E-Government*, 1277. Traceability only of the main decision steps is required by M. Martini and D. Nink, *Wenn Maschinen entscheiden*, 11.
[66] M. Stegmüller, *Vollautomatische Verwaltungsakte*, 357; H. Kube, *E-Government*, 305.
[67] H. Schmitz and L. Prell, *Neues zum E-Government*, 1276; M. Martini and D. Nink, *Subsumtionsautomaten ante portas?*, 1128. *Contra* M. Stegmüller, *Vollautomatische Verwaltungsakte*, 357.
[68] M. Martini and D. Nink, *Subsumtionsautomaten ante portas?*, 1130.
[69] H. Schmitz and L. Prell, *Neues zum E-Government*, 1276; U. Stelkens, *§ 35a VwVfG*, no. 56.

[70] M. Martini and D. Nink, *Subsumtionsautomaten ante portas?*, 6.
[71] See M. Martini and D. Nink, *Subsumtionsautomaten ante portas?*, 6. See also G. Nolte, *General Principles of German and European Administrative Law - A Comparison in Historical Perspective*, in *The Modern Law Review*, vol. 57, 1994, 191 ff. especially 197.
[72] M. Martini and D. Nink, *Subsumtionsautomaten ante portas?*, 7.
[73] H. Schmitz and L. Prell, *Neues zum E-Government*, 1276.
[74] F. von Alemann and F. Scheffczyk, *§ 35 VwVfG*, in *Verwaltungsverfahrensgesetz*, XLVIII ed., J. Bader and M. Ronellenfitsch (eds.), München, Beck, 2020, no. 42; M. Stegmüller, *Vollautomatische Verwaltungsakte,* 356.
[75] H. Schmitz and L. Prell, *Neues zum E-Government*, 1276; J. Ziekow, *Das Verwaltungsverfahrensrecht,* 1171; U. Stelkens, *§ 35a VwVfG*, no. 38.
[76] A. Berger, *Zu den Anforderungen*, 1263-1264.

wholly subject to the principle of proportionality[77]), and those relating to a complex fact investigation or to an investigation with variables that can hardly be translated into numerical scores (such as consulting services or organizational choices related to the operation of the facilities, the control of health and hygiene requirements and the granting of awards)[78].

In addition, the exclusion of an act from automated decisions may be due to certain mandatory ways of conducting the investigation, such as when the participation of third parties or the receipt of advisory opinions from other administrations is mandatory[79].

The acts that are instead generally indicated as suitable for full automation are[80]:

- building permits in the simplest cases;
- dispensations from certain obligations in the building permit procedure when detailed conditions specified in the regulations are met;
- monetary benefits (e.g. the *Kindergeld*[81]) or sanctions based on simple calculations, such as traffic violations;
- certificates and identity documents[82];
- acts issued in the context of mass proceedings, in which the procedural requirements related to participation are reduced, such as tax proceedings or access authorizations to restricted traffic zones and parking for residents[83].

6. *Problems due to the requirements of transparency and non-discrimination*

In addition to the interpretative problems illustrated so far, the fully automated administrative act raises issues ranging from the science of administration to the observance of fundamental rights. The topic is much discussed and will only be briefly outlined here.

First of all, an exponential increase in administrative and judicial appeals against automated acts has been hypothesized, which would -at least in the short term- neutralize the advantages in terms of efficiency and resource savings [84].

Secondly, there is an unresolved tension between the need for transparency of administrative action (i), the technical difficulties to uncover certain kind of software (ii), and the chance of circumvention of the software if - thank to transparency obligations- one knows the algorithm (iii)[85].

In this context, scholars still question the nature of the algorithm, and have probably identified it in an administrative instruction (*Verwaltungsvorschrift*)[86]. This qualification of the algorithm imposes it to be of public domain, but such obligation would guarantee the traceability of the decisional steps only for deterministic algorithms and not for AI[87].

The relationship between administrative transparency and the industrial secret of the software provider, is to be clarified, considering that the German regulation of trade secret was reformed in 2019[88], in accordance to the Directive EU 2016/943 on the protection of undisclosed know-how and business information.

Finally, the risks of discrimination cannot be underestimated. Non-discretionary administrative acts and deterministic algorithms in themselves are not discriminatory, but they could have discriminatory effects. Assuming, for example, that inspections reveal that in a particular ethnic, social or religious group irregularities are more frequent, the system would lead to direct the control activity frequently to a specific group of persons. While such consequence would be perfectly reasonable, it could end up in discriminatory behaviors[89].

[77] U. Stelkens, *§ 35a VwVfG*, nos. 42 - 43.
[78] This category may also include non-discretionary administrative acts not suitable for full automation: A. Guckelberger, *E-Government: Ein Paradigmenwechsel*, 265.
[79] N. Braun Binder, *Vollautomatisierte Verwaltungsverfahren,* 320.
[80] A. Berger, *Zu den Anforderungen*, 1263; N. Braun Binder, *Vollautomatisierte Verwaltungsverfahren,* 317. For more examples see also H. Kube, *E-Government*, 306; U. Stelkens, *§ 35a VwVfG*, no. 46
[81] A fixed monthly amount granted for each child to German tax resident, regulated by the *Bundeskindergeld-gesetz* (*BKGG*) of 11 October 1995 (*Bundesgesetzblatt* 1995, I, 3177).
[82] It is useful to remember that Germany has not adopted the so called "self-certifications", unlike Italy. See *Decreto del Presidente della Repubblica (DPR)* No. 445 of 28 December 2000 (*Gazzetta Ufficiale della Repubblica Italiana* of 20 February 2001, n. 42), which lists certifications and documents that can be replaced by a simple self-declaration, and Law No. 183 of 12 November 2011 (*Gazzetta Ufficiale della Repubblica Italiana* of 14 November 2011, No. 265), which requires public administrations to accept such self-produced documents, prohibiting the request for official certificates.
[83] For example, with regard to controls on electronic devices under the *Elektro und Elektronikgerätegesetz* of 20th October 2015 (*Bundesgesetzblatt* 2015, I, 1739). See H. Schmitz and L. Prell, *Neues zum E-Government*, 1274.

[84] M. Stegmüller, *Vollautomatische Verwaltungsakte*, 356.
[85] M. Martini and D. Nink, *Wenn Maschinen entscheiden*, 10; A. Guckelberger, *E-Government: Ein Paradigmen wechsel*, 269. For this reason the tax regulations allow a derogation from the obligation of transparency: compare § 88 (5) AO.
[86] More extensively and with some critical remarks A. Guckelberger, *E-Government: Ein Paradigmenwechsel*, 269, footnote 202.
[87] A. Guckelberger*, E-Government: Ein Paradigmen wechsel*, 277. About the topic, see C. Coglianese and D. Lehr, *Transparency and Algorithmic governance*, in *Administrative Law Review*, vol. 71, 2019, 1.
[88] *Gesetz zum Schutz von Geschäftsgeheimnissen* of 18th April 2019, in *Bundesgesetzblatt*, 2019, I, 466.
[89] M. Martini and D. Nink, *Wenn Maschinen entscheiden*, 9 - 10. Compare A. Guckelberger, E-*Government: Ein Paradigmenwechsel*, 246 footnote 52, about predictive policing software used by the German police to monitor and

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7. *Fully automated administrative act and procedural warranties*

Since automation derogates from those procedural warranties already provided, and because the necessary corrective measures have not been introduced by the new regulation, the problems arising from possibly distorting or even just stiff automated administrative decisions demand an investigation on whether automation offers any procedural warranties[90]. The doctrine firmly affirms the primacy of procedural rights (*Verfahrensrechte*) over efficiency and automation demands expressed by the system[91].

The *VwVfG* already included guarantee rules applicable to partially automated decisions, which have been extended to § 35a *VwVfG* or adapted to it, such as the inquisitorial principle mentioned above (§ 24 (1) (sentence 3) *VwVfG*).

Participation in the proceedings is particularly important in German law: § 28 (2) (4) *VwVfG* deals with the hearing of the interested parties, which can be excluded if „the authority wishes to issue a general order or similar administrative acts in considerable numbers or administrative acts using automated equipment". Some scholars argue that this exclusion does not apply to fully automated processes in which, on the contrary, the moment of possible participation must be particularly guaranteed, in accordance with § 24 *VwVfG*[92].

We can then examine § 39 (2) (3) *VwVfG*, which excludes partially automated acts from the obligation to statement of ground, but reduces such exception according to the circumstances of the individual case[93]. This provision is brought back to the state of the art at the time of its introduction (in 1976) and the derogation from the general principle of motivation should not be applied to fully automated administrative acts[94].

Finally, the discipline of access to documents is unchanged (§ 29 *VwVfG*). This should be adapted to § 35a *VwVfG*, not only in terms of

how the documents are accessed, but also in relation to making programs understandable and decisional steps ostensible[95].

8. *Perspectives and final remarks*

Although we are still far from a technology dictatorship[96] the implications in terms of potential lowering of procedural guarantees are real.

Due to the reform's recent enactment and to the prudence of the sector's legislation in introducing fully automated administrative acts, an identification of significant jurisprudential guidelines is infeasible. In its advisory role, jurisprudence has focused on the completeness of investigation documents and the principle of transparency, resolutive in tracing the decision-making mechanisms[97].

According to many, since simple and clear instructions may reduce interpretative doubts and provide a handy solution to possible regulatory antinomies[98], a total automation of the measures could have the virtuous indirect effect of fueling the need for legal formulations written in precise, technical, homogeneous and digitally oriented formulas[99]. While such development could lead to an improvement in legislative technique in general - a facet of it the Italian observer is particularly interested in -, it could also drive legislation towards impoverishment and tightness[100]. We are well aware, in fact, that the detailedness and technicality of the provisions do not always guarantee clear and unambiguous rules.

The computer as the mouth of the law could, in the end, be just a neo-illuminist illusion[101].

prevent house theft. On the topic see also E. Bozdag, *Bias in algorithmic filtering and personalization*, in *Enthics and Information Technology*, n. 15, 2013, 209; H. Steege, *Algorithmenbasierte Diskriminierung durch Einsatz von Künstlicher Intelligenz. Rechtsvergleichende Überlegungen und relevante Einsatzgebiete*, in *Multimedia und Recht*, 2019, 715.
[90] More extensively C. Fraenkel-Haeberle, *Fully digitalized administrative procedures*, 108.
[91] A. Guckelberger, *E-Government: Ein Paradigmenwechsel*, 272.
[92] A. Berger, *Zu den Anforderungen*, 1264; N. Braun Binder, *Vollständig automatisierter Erlass eines Verwaltungsaktes und Bekanntgabe über Behördenportale – Anmerkungen zu den §§ 24 Abs. 1 Satz 3, 35 a und 41 Abs. 2 a VwVfG*, in *Die Öffentliche Verwaltung*, n. 21, 2016, 891 ff. especially 895; A. Guckelberger, *E-Government: Ein Paradigmenwechsel*, 273 .
[93] M. Martini and D. Nink, *Wenn Maschinen entscheiden*, 12.
[94] A. Guckelberger, *E-Government: Ein Paradigmenwechsel*, 274; U. Stelkens, *§ 35a VwVfG*, no. 50.

[95] A. Guckelberger, *E-Government: Ein Paradigmenwechsel*, 274; N. Braun Binder, *Vollautomatisierte Verwaltungsverfahren*, 322.
[96] H. Schmitz and L. Prell, *Neues zum E-Government*, 1273.
[97] See the report of the working group of the presidents of the Higher Administrative Courts*, supra* footnote 27.
[98] A. Berger, *Zu den Anforderungen*, 1264; A. Guckelberger, *E-Government: Ein Paradigmenwechsel*, 264; H. Kube, *E-Government*, 309.
[99] This wish is not new, see L. Reisiniger, *Sistemi normativi e tavole di decisione*, in *Informatica e diritto*, 1979, n. 1, 139.
[100] H. Kube, *E-Government*, 309, with several bibliographic references.
[101] Compare the notorious words, „*Les juges de la nation ne sont que la bouche qui prononce les paroles de la loi, des êtres inanimés, qui n'en peuvent modérer ni la force ni la rigueur*": Montesquieu, *De l'esprit des lois*, II ed., Geneve, Barillot, 1749, 160.