

Estonia

Subtopic 1: Public bodies and the digitalisation of administrative decision-making processes

1. *Do administrative bodies in your country make use of algorithmically determined decision-making processes?*

Estonia is known globally for its e-governance. It is possible to access most services electronically, from one web portal, using the digital identification and digital signature attached to the ID-card – the same card used for all services. Databases are interoperable via a communication layer (X-road).¹ This means that to a large extent, the technological structure for providing proactive, algorithmically based decisions exists or can be created easily. Purely algorithmically determined decision-making is however not widely used, although there are proactive services, and this is something that it is planned to increase. Algorithms are used for proactive services and to some extent also profiling, as the actual will of a specific person is presumed.

There is a possibility to presume the will of persons. There is a Government Regulation from 2017 (adopted 3 June, in force 7 July 2017) on “Principles for Managing Services and Governing Information.”² The Regulation stipulates (in Article 2, extract) that *(2) Direct public services are the services provided by an authority to a natural person or a legal person in private law (hereinafter person) in accordance with the latter’s will, including presumed will, via a service contact in any communication channel (hereinafter channel), enabling the person to perform an obligation deriving from law or exercise a right deriving from law.*

(3) Proactive services are the direct public services provided by an authority on its own initiative in accordance with the presumed will of persons and based on the data in the databases belonging to the state information system. Proactive services are provided automatically or with the consent of a person.

(4) Event services are the direct public services provided jointly by several authorities so that a person would be able to perform all the obligations and exercise all the rights conferred on the person due to an event or situation. An event service compiles several services (hereinafter component service) related to the same event into a single service for the user.

The use of proactive services is mentioned in Article 7: *(8) If the information needed for the provision of a direct public service exists in the databases of the state information system, the authority shall devise a proactive service, where appropriate, in cooperation with the authorities administering the databases.*

The Estonian public administration is based on citizen centric electronic services in all areas, accessed from one web portal³ and in the same manner for all services, which makes them easy to use. An important enabler for seamless and efficient public services is the interoperability of databases. The system – called X-road – means that databases can communicate directly, meaning that authorities who are in need of data that exists in any public database will access this database rather than create their own. It is prohibited by law to create a database with information that already exists, and persons should not be asked to provide the same information more than once (Public Information Act)⁴. The

¹ <https://e-estonia.com/solutions/interoperability-services/x-road/>

² English translation available at, adopted under subsection 27 (3) of the Government of the Republic Act and subsection 6(2) of the Archives Act.

³ <https://eesti.ee>

⁴ <https://www.riigiteataja.ee/en/eli/514112013001/consolide>

Administrative Procedure Act⁵ contains requirements of efficiency. The access to personal data through the X-road is handled on a detailed level, meaning that the technical access via the X-road system is determined in service level agreements between the authorities in question, setting out which work positions should have access to which data. Anyone accessing personal data has to first identify themselves before they can get access and a footprint is always left, so it is possible to verify who has accessed what data. Such a system creates expectations among the population, which is why the government is constantly evaluating possibilities for even more efficient public services. Thus, the step to more algorithmically based ones is not too big, even if the use of “pure” profiling is not widely used or proposed.

The coordination of service provision is dealt with in Article 5 of the 2017 Regulation, which among other things states: *(1) The authorities coordinating development of services across authorities (hereinafter coordinators) shall be: 1) the Ministry of Economic Affairs and Communications in management of direct public services, including upon determination, sharing and exchange of the information necessary for providing such services;*

2) the Data Protection Inspectorate in organising access to and protection of information;

3) the Estonian Information System Authority in implementation of the requirements for the architecture of the state information system and for the key components of the state information system.

The Article also provides some detail on the process of coordination. Article 8 provides details on how lists of services are kept.

Examples of existing proactive services are the determination of a responsible doctor for any child born; decisions on health insurance for groups that are by default insured (children, pensioners, conscripts); special pension support; etc. Regular tax declarations are also pre-filled.

2. Do administrative bodies in your country make use of administrative decisions based on predictive profiling in the public sector?

A certain amount of profiling is behind the proactive services as mentioned. Predictive profiling as such is not used, but there are instances where a certain behaviour leads to a presumption of future behaviour, which in turn can trigger some action from authorities. This is however only done based on some initial action or consent by the individual. An example is that the police sends explicit “Christmas Cards” of traffic accidents to persons who have been involved in accidents previously and have convictions that have entered into force, i.e. it does not presume the behaviour unless there is an event (known to the person) based on which to predict/presume future behaviour.

3. Does this subtopic generate public debate?

The issue of proactive public services is of great interest in Estonia and discussed a lot. So far, most of the discussion has been among specialists, but there is also some wider interest. As there is currently a draft concept paper circulated in the ministries (Ministry of Communications and Ministry of Justice), it can be expected that when this is more mature, there will be more public discussion as well. The idea mooted in the paper is that most governmental services would be proactive. When a child is born and its birth registered, which already is done by the hospital (as most children are born in hospital) without special process, this would set in motion a number of decisions and governmental acts so in general, for the rest of the person’s life, it would only be in extraordinary cases or if a person does *not* want a regular service (does not want an allocated place in kindergarten, does not want to retire at 65 etc.) that the person would have to contact authorities to make an application or similar. Such a system could be supported by algorithms. The exact way in which this would work and how it would

⁵ <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/523012018001/consolide>

be in accordance with data protection legislation (especially the purpose limitation requirements) is still under discussion. One key question is whether the services will be promoted and presented by the authorities and provided on the acceptance of the person (but without specific application) or if it is even possible to provide the service until or unless the person expresses that they do not want it. The concept paper clearly expresses the need for agreement not just among ministries and authorities but also a societal acceptance.

As for the legal possibilities to increase proactivity (and/or use of algorithms) several provisions of the Constitution are of interest. Article 26 deals with the right to privacy. Use of personal data from various registries needs to be carefully considered under data protection legislation. In addition, the Constitution guarantees the right of all individuals to decide over their own life in an environment of personal dignity (Preamble and Articles 10 and 19). If decisions are “automatic” and based on presumptions of the state, it is unclear if the right to decide over your own life is fully respected. Thus, in the discussion it is stressed that more efficient and proactive decision-making does not have to be automated and would not be too generalised. Decisions can in many cases be based on data that the state already possesses, this not necessitating collection of additional data. The state in any event should be transparent about what data it possesses about individuals, so that they do not get the feeling that the state needs to find out a lot more about them in order to provide services in a new way. The Estonian e-governance helps to provide information to individuals in an accessible and clear manner about what data the state has on each individual and such a transparent system is all the more important if and when decisions get even more proactive.

The State Chancellery has a working party looking at proactivity in services, which includes the better use of algorithms. Similar legal issues as well as practical issues are examined. Information is given in the media in different ways about such activities.

Subtopic 2: Digitalisation of judicial and administrative proceedings

4. Are digital forms of judicial proceedings used in your country?

Yes. There is an e-file system (E-toimik) for civil-, administrative-, criminal- and misdemeanour cases. The e-file contains any documents linked to the case and the processing of it. Through this system the parties and their representatives can submit documents electronically and follow the development of the case electronically. The system is used for all kinds of cases and it can be used to submit a claim as well as to challenge decisions made. The criminal record is digitalised since 2012 and queries to it can be made electronically.⁶

Parties can choose how to submit documents, on paper or electronically. However, in Estonia most official documents are only electronic – i.e. the official version is the electronic one. The same is true for legislation that is issued only electronically.

There may be requirements on form for submission of documents in different legislation and there is a general requirement for how electronic, authentic documents are submitted.⁷ If there are no special rules in legislation on form, parties can decide themselves in what form to submit documents.⁸ The courts recommend submitting all documents for one case in one and the same format, either electronic or paper, to facilitate and ensure that the court can easily see if everything required has been submitted. If electronic submission is hindered by the fact that some document only exists on paper

⁶ <http://www.kohus.ee/et/andmebaasid/e-toimik>

⁷ Rules exist on format – maximum size (of documents, of e-mail submissions), accepted file types and so on. The rules are found on the web-page of the courts, <http://www.kohus.ee/et/andmebaasid/e-toimik>

⁸ Provisions on form requirements for documents submitted to court are found in the regulation from the Ministry of Justice number 59, 28 December 2005 ("*Kohtule dokumentide esitamise kord*").

(which may be the case for old documents, foreign documents, some private documents – as most public documents in fact have only digital valid form), it is possible to go to a notary and have a scanned copy certified in order to be able to submit this electronically.

4. *Is the possibility or obligation to litigate through digital procedure codified in law?*

Yes, the possibility is mentioned in the Procedural Codes. Furthermore, the entire Estonian administration is built around authentic digital documents rather than paper documents, which provides a possibility to undertake most transactions digitally by default.

6. *How are identities of litigating parties verified?*

In Estonia all residents possess an ID-card with a readable chip, for electronic identification. This is the main way to identify persons in all contexts: public, private, professional and so on. The same verification method is used in all contexts and there is no need for special systems for courts or administrative authorities.

7. *Is digital submission of procedural documents subject to digital authentication regulated?*

Documents should be digitally signed. It is possible to sign them in the e-file system. It is important to note that in Estonia digital signatures are widely used, it is the most common way to sign documents in any context – public or private. The same type of digital signature is used in all cases and it is equivalent by law to traditional signatures. There is thus no need for special rules or systems for signing documents for court or administrative proceedings.

8. *Is it obligatory or optional to digitally submit procedural documents?*

There is a choice of form, see above. However, see also what is said above about the digital form normally being the authentic form of official documents.

9. *Regarding classified documents:*

The e-file system does not permit the submission of classified documents or documents which are encrypted due to restricted access to them.

10. *How does the digital submitting of documents change the role of the judge?*

Judicial procedures are faster. As the Estonian society is in most instances “digital by default”, it is natural that court proceedings also make use of digital documents, signatures and so on. It is difficult to say what exactly it means apart from making proceedings faster, as it is not one isolated element of digitalisation but a small part of the general structure of society.

11. *Does your domestic law make a distinction between administrative proceedings within the administration and judicial proceedings?*

Specific laws contain procedural rules for certain areas and cases (by independent regulators for example).

12. *Does an administrative body coordinate, supervise or regulate the use of digital proceedings?*

No, handled as a normal part of proceedings. However, generally on coordination, see above (Question 1) regarding the coordination.⁹

⁹ Extract from Article 5

(1) The authorities coordinating development of services across authorities (hereinafter coordinators) shall be:
1) the Ministry of Economic Affairs and Communications in management of direct public services, including upon determination, sharing and exchange of the information necessary for providing such services;

13. Does subtopic two generate public debate in your country apart from legal scholarship discourse?

Not particularly as the digitalisation happened some time ago and is accepted as a normal feature, suitable to a largely digital society.

Subtopic 3: Judicial review of algorithmic and data driven decision-making processes

14. What are typically (i) the burden of proof, (ii) rules and norms on the admissibility of evidence, (iii) and evidentiary standards for public bodies and litigating parties in such cases in order to prevail on their claim?

No special rules. Digital evidence is admissible (as most Estonian official documents are digital by default). Advisory guidelines exist on types of digital evidence and some clarifications are planned/recently made in procedural law (but not specifically for algorithmically made decisions). Evidence is listed in accordance with provisions in the procedural code, in the statement of charges or statement of defence. Additional evidence is only allowed in special cases.

15. How does the (administrative) judge review algorithmic decision-making processes or profiling cases?

No special rules.

16. Can judges ask experts or advisory boards questions relating to the usage of data-driven of algorithmic decisions during judicial administrative proceedings?

Experts can be involved in court cases.

17. Are cases on the judicial review of algorithmic decision-making processes or profiling cases a trend or an outlier in case law of your country?

No cases known to this author. Cases on proactive services may be difficult to distinguish as electronic decision-making is so widespread – complaints about the form of the decision are not common, it tends to be on substance (right to get a certain benefit etc.) in which case the form of decision is not the determining factor.

18. Does subtopic three generate public debate in your country apart from legal scholarship discourse?

Not known (so not in any major way).

Subtopic 4: Treatment of (open) judicial data

19. Are there open judicial data initiatives promoting access to open judicial data?

All case law is published electronically and there are ways to make searching it easier. Case law of the Supreme Court can be searched in the State Gazette (*Riigi Teataja*) and on the Supreme Court's website by year, type of case, case number, date of judgment, court composition, type of proceeding, type of offence, annotation and content. On the Supreme Court's website case law can also be searched by keyword. Judgments of courts of first and second instance can be searched under the appropriate type of procedure and, depending on the type of procedure, cases can also be searched using a range of criteria. In all types of procedures, judgments can be searched by case number, courthouse, judgment type and date, the date of the proceedings and the content of the ruling. In

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criminal cases judgments can also be searched by the number of the pre-trial proceedings, case and judgment type, type of claim, type of sentence or, for example, by grounds for acquittal. Judgments in civil and administrative cases can also be searched by category and type of case, type of claim and case resolution.

Rules about publishing case law are laid down in the relevant codes of procedure. There are different rules for criminal and civil procedures. Publication is obligatory.

20. What kind of data does the judiciary in your legal system publish?

Case law of first and second instance courts has been available on the internet since 2001. Case law of the Supreme Court has been available since the court system was reorganised in 1993.¹⁰ Cases from the local-, administrative- and district courts can be found on the State Gazette (*Riigiteataja*) homepage and Supreme Court cases on the Supreme Court homepage.¹¹ Court decisions are only published electronically.

The obligation to make case law available is laid down in the Public Information Act, with more specific rules given in the various codes of court procedure. All court decision in force are public unless otherwise decided by law in specific cases. Exemptions are provided for in civil and administrative court proceedings, whereby courts do not disclose in their judgments, either on their own initiative or at the request of the individual in question, the name of the individual (replacing it with initials or other characters), their personal identification number, date of birth or address. Courts may also decide in civil and administrative court proceedings, either on their own initiative or at the request of the individual in question, to publish only the operative part of a judgment containing sensitive personal data or not to publish it at all, if replacing the name of the individual with initials or other characters might prejudice his or her privacy. Courts may also publish only the operative part of a judgement if the judgment contains information legally subject to some other access restriction.

On the Supreme Court homepage there are analyses of court cases from all (three) levels of national courts as well as from the European Court of Justice, concerning civil, criminal and administrative law cases. These analyses are made on certain specific topics and are not formal standpoints of the Supreme Court but tools to facilitate understanding of case law for academics and practitioners. There is a disclaimer on the Supreme Court homepage explaining that formal positions of the court are only expressed in its decisions.

The analyses include for example: overview of constitutional cases; overview of electronic monitoring as an alternative to incarceration; the meaning of being under the influence of narcotic drugs in the Criminal Code; analysis of court practice on compensation for non-material damage; and so on. As can be seen, the topics are wide and varied and the analysis is mainly qualitative.

The Courts website furthermore gives statistics on proceedings in courts of first and second instance since 1996. Supreme Court statistics are available on the Supreme Court website. Statistics on constitutional review have been available since 1993, while statistics on administrative, civil, criminal and misdemeanour cases have been available since 2002.¹²

21. Do the following governmental institutions in your country make use of algorithms that can analyze judicial data in order to translate this into information and patterns in case law, how certain judges rule in certain type of cases, or for other purposes? (Legislator, Judiciary, Administrative legislative advisory bodies).

Not known.

¹⁰ More information; https://e-justice.europa.eu/content_member_state_case_law-13-ee-en.do?member=1

¹¹ <https://www.riigikohus.ee/>. Parts of the web page and some case law is available in English.

¹² https://e-justice.europa.eu/content_member_state_case_law-13-ee-en.do?member=1

22. Do private parties such as law firms or corporations analyze legal data in order to translate this into information and patterns in case law, how certain judges rule in certain type of cases, or for other purposes?

Not known.

23. Does subtopic four generate public debate in your country apart from legal scholarship discourse?

No, not known (so not in any major way).