

Automated Decision-Making in The EU Member State's Public Administration: The Compliance of Automated Decisions of the Estonian Unemployment Insurance Fund with Estonian Administrative Procedure Law

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Summary: Automated process control has been used for a long time. Innovation and information technology achievements have made it possible to use automation in the State governance. Algorithm-based automated decisions are integral part of the concept of e-Government. Automated decisions are becoming more and more prevalent in modern society of the EU. Using automated decisions in public administration is a challenge for Administrative Law, because it has to evolve and keep up with the usage of new technologies, keep the legal balance between the cost-efficiency and operational flexibility of the State in general and at the same time ensure the protection of rights of individuals in each Member State and in the EU as a whole. Estonia is EU Member State and its public sector uses automated decisions but there are no direct legal provisions regarding what automated decision is, what are the conditions for issuing them, what are the safeguards to avoid the violation of rights of individuals etc. The right to issue automated decision is based only on the authorisation norm stipulated in a specific act regulating the field of activity of administrative authority. The Estonian Unemployment Insurance Fund is one of the administrative authorities which issues automated decisions in its field of activity. The aim of this paper is to examine and find out whether the automated decisions used by Estonian Unemployment Insurance Fund comply with the general principles

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of administrative procedure and the EU rules on data protection but also to identify aspects where legal adjustment is needed and propose legislative amendments. The paper is based on the analysis of relevant scientific books, articles, legal acts, supported by relevant case law and other sources.

Keywords: automation, automated decisions, administrative procedure, Estonia, EU.

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1. Introduction

Computer technology has been developing with enormous speed and is one of the basis for innovation. It is considered a process whereby inventions are translated into commercialised or applicable approaches and products, or these approaches or products themselves¹.

Computer technology has brought along many opportunities to the private and public sector.

It is known from the history that the Western societies were developed mostly in a way that the democratic processes and bureaucratic control was considered the main means for accomplish the objectives of modern welfare states.² This means that the public sector was seen operating rationally and effectively.

The innovation has the potential for delivering more than it promises because it is potentially creative process that opens up for the emergence of the otherwise possible³.

Innovation stemming from the development of modern computer technologies means a new level of services delivered by the public sector.

Multiple research show that the drivers of computer technology-driven innovations are primarily related to reduction in delivery time, increase in operational

¹ OSBORNE, S., BROWN, L. (eds). *Handbook of Innovation in Public Services*. Cheltenham: Edward Elgar Publishing, 2013, p. 72.

² TORFING, J., PETERS, B. G., PIERRE, J., SØRENSEN, E. *Interactive Governance: Advancing the Paradigm*. Oxford: Oxford University Press, 2012, p. 17.

³ TORFING, J., TRIANTAFILLOU, P. (eds.). *Enhancing Public Innovation by Transforming Public Governance*. Cambridge: Cambridge University Press, 2016, p. 1.

flexibility, cost-effectiveness and decreased production and labour costs in public sector⁴⁵⁶. These characteristics could be used in communication with citizens and fulfilling public administration's tasks related to socio-economic policies.

Above mentioned elements are part of the concept of electronic government or e-Government. Most of the current definitions of e-Government can be summarized with four basic elements:

- a) the use of ICTs (computer technology);
- b) the support of governmental actions (to provide information, services, administration, products);
- c) the improvement of government relationships with citizens (creation of new communication challenges or promotion of citizen engagement of in the political administrative process);
- d) the use of strategy to add value to the participants in the process⁷.

It is better to understand the meaning of e-Government with the help these elements as there is no legal definition for e-Government. E-Government is based on digital communication between citizens and public administration. Government can execute its administrative power with the help of tools based on computer technology. This means that data is electronic by default⁸.

It is also said that data is the backbone of digital realm, and the fuel of automated decision-making systems⁹. The more accurate the data, the higher level of automated decisions in the meaning of data collection.

Electronic data enables public administration to issue automated administrative legal acts with the help of computer technology namely algorithms.¹⁰ Algo-

⁴ OSBORNE, S., BROWN, L., WALKER, R. (eds.). *Innovation in Public Services Theoretical, managerial, and international perspectives*. Oxon: Routledge, 2016, p. 4.

⁵ MONARCHA-MATLAK, A. Automated decision-making in public administration. *Procedia Computer Science*. 2021, vol 192, p. 2077.

⁶ HARLOW, C., RAWLINGS, R. Proceduralism and Automation: Challenges to the Value of Administrative Law. *Forthcoming*, E. Fisher, J King and A Young (eds.) *The Foundations and Future of Public Law (in honour of Paul Craig)* (OUP 2019), LSE Law, Society and Economy Working Papers. 2019, no. 3, 2019, p. 17.

⁷ RAMON GIL-GARCIA, J. *Enacting Electronic Government Success*. Boston: Springer, 2012, pp. 8–9.

⁸ NYMAN METCALF, K. How to build e-governance in a digital society: the case of Estonia. *Revista Catalana de Dret Públic*. 2019, no. 58, p. 3.

⁹ ABRUSCI, E., MACKENZIE-GRAY SCOTT, R. The questionable necessity of a new human right against being subject to automated decision-making. *International Journal of Law and Information Technology*. 2023, vol. 31, issue 2, p. 120.

¹⁰ See also: ANDRAŠKO, J., HAMULÁK, O., MESARČÍK, M., KERIKMÄE, T., KAJANDER, A. Sustainable Data Governance for Cooperative, Connected and Automated Mobility in the European Union. *Sustainability*. 2021, vol. 2021, no. 19, pp. 1–25. ISSN 2071-1050. DOI 10.3390/su131910610

rithms are mathematical constructs with a finite, abstract, effective, compound control structure, imperatively given, accomplishing a given purpose under given provisions¹¹.

This once-futuristic view of automated decision making has become the accepted view in many areas of the public sector¹². It has been noted that over the past 20 years the number of public sector organisations that have automated decisional processes has grown significantly¹³. For example, the Government of the Republic of Estonia (hereinafter Estonia) started to reduce administrative bureaucracy by using e-solutions in their decision making procedures already 20 years ago and nowadays every Estonian public service has some e-solution component attached to it¹⁴.

Due to the above this means that automated decision making based on algorithms has proved to be effective tool in this field so far.

As automated decision making processes are becoming more and more common there is a need to address the regulatory base of automated decisions in order to provide comprehensive legal framework. Rule of law, as well as the protection of fundamental rights, are values that can and should remain in an era of automation¹⁵. It basically comes down to how the human behaviour can be regulated with the help of technology.

This article is concentrated on the instrumental function of administrative procedure ie. administrative procedure must ensure the correctness of the substantive outcome which encompasses the quality of the result of the procedure including decisions¹⁶¹⁷. The article will analyse whether the automated decisions of the Estonian Unemployment Insurance Fund (hereinafter the Fund) comply with the principles of Estonian administrative procedure law and data protection rules of the EU. Currently, there are no general legal provisions about the

¹¹ WILLIAMS, R. Rethinking Administrative Law for Algorithmic Decision Making. *Oxford Journal of Legal Studies*. 2022, vol. 42, issue 2, p. 469.

¹² RANERUP, A., HENRIKSEN, H. Z. Digital Discretion: Unpacking Human and Technological Agency in Automated Decision Making in Sweden's Social Services. *Social Science Computer Review*. 2020, vol. 40, issue 2, p. 445.

¹³ VETRO, A. Imbalanced data as risk factor of discriminating automated decisions: measurement-based approach. *Journal of Intellectual Property, Information Technology and Electronic Commerce Law*. 2021, vol. 12, no. 4, p. 272.

¹⁴ KERIKMÄE, T., PÄRN-LEE, E. Legal dilemmas of Estonian artificial intelligence strategy: in between of e-society and global race. *AI & SOCIETY: Knowledge, Culture and Communication*. 2021, vol. 36, p. 561.

¹⁵ HARLOW, C., RAWLINGS, R. 2019, *supra nota*, 9, p. 4.

¹⁶ PONCE, J. Good administration and administrative procedures. *Indiana Journal of Global Legal Studies*. 2005, vol. 12, no. 2, p. 553.

¹⁷ ALLIKMETS, S. Tuntud või tundmatu hea halduse põhimõte. *Juridica*. 2014, issue 3, 2014, p. 221.

issuance of automated decisions by Estonian public administration. Administrative Procedure Act (hereinafter APA) stipulates only the principles of administrative procedure¹⁸. The Fund issues automated decisions based on the authorisation norm provided in Unemployment Insurance Act (hereinafter UIA)¹⁹.

The first part of the article gives a brief background of automated decisions and their deployment in public administration. The second part describes the current situation of Estonian administrative procedure encompassing automated decisions. The third part of the article analyses the Fund's automated decisions' compliance with the principles of administrative procedure. The fourth part concludes the results of the analysis, identifies areas that need legal regulation and makes corresponding proposals.

2. Automation and administrative procedure

Automation is basically the use of mechanical or electronic devices to automatically control processes or activities. It has two main branches: physical (robotics in areas like autonomous vehicles or robotic vacuum cleaners), and virtual or cognitive (incl. monitoring e-tags on toll roads or diagnosis and treatment decisions guiding systems for doctors)²⁰.

Automated systems themselves can be divided into two main groups based on the functionality of the algorithms used.

First, a rule-based systems and secondly, systems developed using machine learning systems²¹. Rule-based systems are grounded in logic and rule-based programs that apply rigid criteria to factual scenarios, responding to input information entered by a user in accordance with predetermined outcomes²².

Rule-based systems are not trained to recognise patterns within big datasets or predict the possibility of an event, they just do what they have been previously programmed to do. They are known also as deterministic systems and as they leave no discretion for decision-maker they are more suitable

¹⁸ Administrative Procedure Act, par. 3–7.

¹⁹ Unemployment Insurance Act, par. 23, section 4.

²⁰ DICKINSON, H., YATES, S. From external provision to technological outsourcing: lessons for public sector automation from the outsourcing literature. *Public Management Review*. 2023, vol. 25, issue 2, p. 244.

²¹ GONTARZ, I. Judicial Review of Automated Administrative Decision-making: The Role of Administrative Courts in the Evaluation of Unlawful Regimes. *Elte Law Journal*. 2023, no. 1, p. 154.

²² HONG, M.; HUI, C. Towards a digital government: reflections on automated decision-making and the principles of administrative justice. *Singapore Academy of Law Journal*. 2019, vol. 31, no. 2, p. 878.

for automation²³ and they have been used in administrative processes for decades²⁴. Legislated sub-delegation to an algorithm can be used if there is minimal discretion and expressible rules or operations reflecting the direction of the legislature²⁵.

Use of algorithms raise issues stemming from rule of law such as equal treatment, procedural fairness, transparency and privacy protection. Basically, it is a situation when legal norms are translated into lines of code, which would reflect the law²⁶.

Transparency of the algorithms used is one element that guarantees the traceability of a decisions made. Traceability of an administrative act enables the court to evaluate whether the decision complies with relevant legal norms.²⁷

Automated decision making's compliance with legal norms is an important issue because automation will continue to gain increasing prominence in the future as the government authorities are increasing the use of automation²⁸. The lack of legal basis for automated decision making in public administration is a common issue for many EU Member States²⁹.

Public administration's operation in issuing automated decisions is based on administrative procedure. The purpose of administrative procedure is to guarantee that decisions issued by public administration are correct. Therefore, the procedure for fair processing of administrative subject matters is inevitable prerequisite for making high-quality decisions.

In order to ensure the legal basis and high-quality of automated decisions, which are gaining more and more popularity, it is important to make sure that the rules of administrative procedure allow automatic decisions to be made in the first place and thus support the application of e-Government conception,

²³ NG, Y., GRAY, S. Disadvantage and the automated decision. *Adelaide Law Review*. 2022, vol. 43, no. 2, p. 644.

²⁴ FINCK, M. Automated Decision-Making and Administrative Law. *Forthcoming*, P. Cane et al. (eds). *Oxford Handbook of Comparative Administrative Law*. Oxford: Oxford University Press, 2020. Max Planck Institute for Innovation and Competition Research Paper, no. 19–10, p. 4.

²⁵ MCCANN, S. Discretion in the Automated Administrative State. *The Canadian Journal of Law & Jurisprudence*. 2023, vol. 36, issue 1, p. 172.

²⁶ GONTARZ, I. 2023, *supra* nota 23, p. 157.

²⁷ See also: ANDRAŠKO, J., MESARČIK, M., HAMULÁK, O. The regulatory intersections between artificial intelligence, data protection and cyber security: challenges and opportunities for the EU legal framework. *AI & Society*. 2021, vol. 36, no. 2, pp. 623–636. ISSN 0951-5666. DOI 10.1007/s00146-020-01125-5

²⁸ NG, Y. Institutional adaptation and the administrative state. *Melbourne University Law Review*. 2021, vol. 44, no. 3, p. 924.

²⁹ SUKSI, M. Administrative due process when using automated decision-making in public administration: some notes from a Finnish perspective. *Artificial Intelligence and Law*. 2020, vol 29, p. 91.

continuous innovation of public sector mentioned in the introductory part of this article but also keep the administrative procedure simple and understandable³⁰.

3. Estonian administrative procedure and its current situation regarding automated administrative legal acts

Administrative procedure in Estonia is regulated by APA, which entered into force 01.01.2002³¹. APA is a part of the Estonian Administrative Law, which regulates the performance of public tasks by authorities of the executive branch of State power. Similar to the German *Verwaltungsverfahrensgesetz*³², it is a general act in the meaning of *lex generalis* and stipulates the common procedural requirements of administrative field in Estonia. A large part of field specific or special administrative procedure, such as the list of documents to be attached to different applications or the deadlines of different administrative measures has been established by other acts or implementing regulations issued on the basis of these acts.

If the substantive law says what decision the public administration must make, the procedural law says how the decision is made³³.

Scholars have recognised the modernity of APA as the provisions that recognised digital signature and enabled administrative acts and other documents to be delivered to individuals electronically came into force on 10.08.2002³⁴. These provisions emphasise the use of computer technology by public administration and thus support the elements of e-Government applied in Estonia.

APA states its purpose as to ensure the protection of the rights of persons by creation of a uniform administrative procedure which allows participation of persons and judicial control³⁵. The purpose contains three interconnected and basic elements:

³⁰ BATALLI, M., FEJZULLAHU, A. (2018). Principles of good administration under the european code of good administrative behavior. *Pecs Journal of International and European Law*. 2018, no. 1, p. 27.

³¹ Administrative Procedure Act, *supra* nota 20.

³² The German Administration Procedure Act – a federal law – took effect on 25 May 1976 and serves as a model for respective administration procedure acts on Länder-level (*Landesverwaltungsverfahrensgesetze*).

³³ AEDMAA, A., LOPMAN, E., PARREST, N., PILVING, I., VENE, E. *Haldusmenetluse käsiraamat*. Tartu: University of Tartu Press, 2004, p. 21.

³⁴ SEIN, K.; RISTIKIVI, M. *Õigusriigi taastamine. Eesti seaduste ja institutsioonide reformid 1992–2002*. Tartu: University of Tartu Press, 2022, p. 108.

³⁵ Administrative Procedure Act, *supra* nota 20, par. 1.

- protection of the rights of the persons in administrative procedure;
- the establishment of a uniform procedure that treats persons equally, ensuring the participation of persons;
- judicial control of administrative activities.

It follows that by enforcing APA, the State must ensure that the legal norms regarding these 3 elements must be usable and effective. In order to effectively use legal norms regarding the purpose of APA, it stipulates the principles of administrative procedure:

- 1) Protection of rights;
- 2) Right of discretion;
- 3) Choice of form and purposefulness;
- 4) Principle of investigation;
- 5) Accessibility and data protection³⁶.

These principles will be clarified in the upcoming part of this article which analyses the Fund's automated decisions' compliance with these principles.

APA stipulates the notion of administrative acts that an administrative act is an order, resolution, precept, directive or other legal act which is issued by an administrative authority upon performance of administrative functions in order to regulate individual cases in public law relationships and which is directed at the creation, alteration or extinguishment of the rights and obligation of persons³⁷.

The notion of an administrative act stipulates the situations where the administrative acts can be issued. It is related to the prerequisites of lawfulness of administrative act because administrative acts create, alternate or extinguish rights and obligations of persons.

An administrative act is lawful if it is issued by a competent administrative authority pursuant to legislation in force at the moment of the issue, is in accordance with the legislation in force, is proportional, does not abuse discretion, and is in compliance with the requirements for formal validity³⁸.

Hence, if the State wishes to deploy algorithm based automated administrative acts they must meet the criteria of lawfulness.

Currently there are no legal norms *expressis verbis* regulating the automated administrative legal acts stipulated in APA. In this case the issuance of automated administrative legal acts in Estonia these acts must comply with current provisions of APA including the principles of administrative procedure.

³⁶ Ibid., 20, subchapter 2.

³⁷ Ibid., 20, par. 51.

³⁸ Ibid., 20, par. 54.

4. The Fund and its automated decisions

The Fund was established with the UIA, which entered into force 01.01.2002. The Fund is legal person in public law³⁹. APA states that administrative authority means any agency, body or official which is authorised to perform public administration duties by an APA, a regulation issued on the basis of an APA or an administrative contract⁴⁰.

Authorisation to perform public administration duties is based on the competence of public authority given by legal act. Administrative decision can be made only by an administrative authority which has the necessary competence. This derives from the principle of rule of law and democracy⁴¹. The Fund's competency is based on UIA, which stipulates that the Fund shall perform the obligations arising from UIA⁴².

This means that the Fund is an administrative authority in the meaning of APA.

The Fund grants and pays unemployment insurance benefit. If the applicant qualifies or does not qualify for unemployment insurance benefit the corresponding decision is made.

With the adoption of the Act on the Implementation of the Personal Data Protection Act the UIA was amended with the authorisation norm for the Fund to issue automated administrative acts as in order to achieve its objectives and perform the functions imposed on the unemployment insurance fund by the law, the unemployment insurance fund has the right to issue administrative acts automatically without direct intervention by a person if this is possible considering the circumstances of issue of the administrative act and the contents thereof.⁴³

This provision entered into force 15.03.2019 and gave the Fund authority to issue automated decisions. The above mentioned amendment was based on the Art 22 of the GDPR regulating the automated individual decision-making and the conditions that the data subject can be the subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her if is authorised 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^{44,45}.

³⁹ Unemployment Insurance Act, *supra nota* 21, par. 1.

⁴⁰ Administrative Procedure Act, *supra nota* 20, par. 8, section 1.

⁴¹ AEDMAA, A., LOPMAN, E., PARREST, N., PILVING, I., VENE, E. 2004, *supra nota* 34, p. 43.

⁴² Unemployment Insurance Act, *supra nota* 21, par. 1, section 2.

⁴³ The Act on the Implementation of the Personal Data Protection Act, par 113, section 1.

⁴⁴ Explanation letter, Act on the Implementation of the Personal Data Protection Act for the second reading of the draft 778 SE II, p 8.

⁴⁵ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free

As Estonia is a Member State of the EU the legal norms of the above-mentioned regulation apply directly.

Since then the Fund has been issuing two types of automated decisions regarding unemployment insurance benefit:

- decisions about granting the unemployment insurance benefit and
- decision about refusing the unemployment insurance benefit.

In the case of granting unemployment benefit the applicant must meet 3 different criterias:

First, the applicant must be registered as unemployed, secondly, the applicant must have at least 12 months of unemployment insurance period within the last 36 months before registering as unemployed and thirdly the termination of employment must be in general involuntary⁴⁶.

Refusing decision is issued when the applicant does not meet at least one of these criteria.

In a situation where there are no direct provisions regulating the issuance of automated administrative acts in APA it is necessary to analyse whether the automated unemployment benefit decisions comply with the principles of administrative procedure stipulated in APA.

4.1. Protection of rights

This principles states that in administrative procedure, the fundamental rights and freedoms or other subjective rights of a person may be restricted only pursuant to law and that administrative acts and measures shall be appropriate, necessary and proportionate to the stated objectives⁴⁷.

The protection of fundamental rights and freedoms stems from the Constitution of the Republic of Estonia (hereinafter the Constitution) which encompasses the right from assistance from the State in the case of a need⁴⁸. This means that the State with its state bodies is the obliged subject of fundamental rights and freedoms⁴⁹. In other words, the state bodies must protect these fundamental rights and freedoms.

The Constitution also stipulates the conditions for restriction of fundamental rights and freedoms. Such restrictions must be necessary in a democratic society

movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) OJ L 119, 4. 5. 2016, p. 1–88, art 22 section 2, point b;

⁴⁶ Unemployment Insurance Act, *supra nota* 21, par. 6.

⁴⁷ Administrative Procedure Act, *supra nota* 20, par. 3, section 1 and 2.

⁴⁸ The Constitution of the Republic of Estonia, par. 28.

⁴⁹ MARUSTE, R. *Konstitutsionalism ning põhiõiguste ja -vabaduste kaitse*, Tallinn: AS Juura, 2004, p. 240.

and must not distort the essence of the rights and freedoms restricted⁵⁰. It needs to be emphasised that fundamental rights and freedoms can be restricted, and they are not absolute. If they were absolute, it would bring us to the situation where the limits of fundamental rights and freedoms were very narrow in order to avoid the conflict of these rights and freedoms⁵¹.

So if the state bodies must protect the fundamental rights and freedoms on one hand, then on the other hand they can serve as a tool for restricting the same rights and freedoms if these rights and freedoms are restricted by the law.

Due to the above it is understandable in the case when the Fund issues a decision of granting unemployment insurance benefit because the applicant is in the situation of a need and has the right to the assistance from the State.

If the Fund issues a decision about refusing unemployment insurance benefit (burdensome administrative act) then we come to a question whether the Fund has the right to do so because it is a restriction of a fundamental rights and freedoms to get assistance from the State in the case of a need.

According to the requirement of a legal basis, also known as reservation of the law in the case of burdensome administrative act the compliance with the reservation of the law is essential^{52,53}.

UIA stipulates the requirements for qualifying for unemployment insurance benefit and if the applicant's situation after the ending of employment does not meet the provided criteria, the Fund has the right to refuse granting unemployment insurance benefit based on the criteria enshrined in UIA. The author of this article has no information that UIA's compliance with the Constitution has been contested in the Supreme Court of Estonia, which means that restriction of the right to get the State's assistance in the case of a need is appropriate, necessary and proportionate.

Another important right stipulated in the Constitution is that everyone whose rights and freedoms are violated has the right of recourse to the courts⁵⁴. From the viewpoint of State this is related to the principle on legal certainty because the finality of administrative acts.

Due to the above the applicant whose application for unemployment insurance benefit has been refused has the right to contest the corresponding decision.

APA stipulates that a person who finds that his or her rights are violated or his or her freedoms are restricted by an administrative act or in the course of

⁵⁰ The Constitution of the Republic of Estonia, *supra nota* 49, par. 11.

⁵¹ The Constitution of the Republic of Estonia, annotated edition, Tartu Iuridicum 2020, p. 127.

⁵² ANNUS, T. *Riigiõigus*. Tallinn: AS Juura, 2006, p. 79.

⁵³ Supreme Court of Estonia Administrative Law Chamber decision, case no 3-3-1-51-01, p. 2.

⁵⁴ The Constitution of the Republic of Estonia, *supra nota* 49, par. 15.

administrative proceedings may file a challenge⁵⁵. This right derives from the Constitution as a safeguard against the State's arbitrariness.

APA states the formal requirements for administrative act as an administrative act shall contain a reference to the possibilities and place of and term and procedure for the challenging of the administrative act.

The Fund's automated decisions contain the reference for contestation of the decision. This ensures that the applicant of unemployment insurance benefit is aware of the opportunity of how and when the applicant can protect his/her rights if the applicant thinks that the corresponding decision might violate his/her rights which are protected by the law.

From the viewpoint of State the contestation of decisions is related to the principle on legal certainty because the finality of administrative acts and *res judicata* belongs to the principles of Estonian and EU Law⁵⁶. The finality of administrative act means that once the contestation deadline has passed and the addressee has not contested it, the administrative act becomes legally binding. This gives the State and the state bodies certainty in executing its administrative power.

The Fund has been issuing automated unemployment insurance benefit decisions for the granting of benefit since 25.10.2019. and for the refusal of benefit since 14.02.2023⁵⁷.

In conclusion it can be said that if the legislator has stipulated the conditions for qualifying for unemployment insurance benefit and the compliance of UIA with the Constitution has not been challenged in the Supreme Court of Estonia and the applicants can contest the automated decisions based on the protection norm then this means that the contestation norm works and applicants can use it effectively to ensure that their rights are not violated.

4.2. The right of discretion

The right of discretion is an authorisation granted to an administrative authority by law to consider making a resolution or choose between different resolutions⁵⁸. In other words, the discretion allows the state body to choose between different options and solutions when making a decision. These options can be positive or negative for the addressee of the administrative legal act and that is why these options must have legal grounds.

⁵⁵ Administrative Procedure Act, *supra nota* 20, par. 71.

⁵⁶ SCHASMIN, P., GINTER, C. Euroopa Liidu õigusest tulenevad võimalused jõustunud kohtuotsuste ja haldusaktide uueks läbivaatamiseks. *Juridica*. 2015, issue III/2015, p. 184.

⁵⁷ „Rule of the procedure for processing the application for unemployment insurance benefits“. Estonian Unemployment Insurance Fund.

⁵⁸ Administrative Procedure Act, *supra nota* 20, par. 4, section 1.

From the viewpoint of administrative state body, it is always easier and more certain to make a decision when all the provisions are enshrined in legal act because the space for error is minimal. But the legislator does not always give detailed rules (including undefined legal terms) in the legal act and has delegated the specification of the legal norm to the implementer of the legal act⁵⁹

The Supreme Court of Estonian has not given exact guidelines to the Estonian Parliament about the situations when the discretion is compulsory. The intensity of the restrictions established by the law and the purpose of the law must be considered in particular⁶⁰.

Discretion means that the decision maker must choose from different options then using rule-based algorithms for making decisions is problematic because the rule-based algorithm is programmed to act when certain conditions are met. In other words, algorithms can be used in automated decision making if the decision is based on imperative legal norm and there is no space for discretion. In this case the algorithm identifies just the facts that are necessary for making a decision.

Next, we examine whether there is any space for discretion in the legal norms regulating the conditions for qualifying for unemployment insurance benefit.

As mentioned earlier the applicant must meet 3 different criteria to qualify for unemployment insurance benefit⁶¹. First the applicant must be registered as unemployed. Taxation Act (hereinafter TA) amendment that entered into force 01.07.2014 introduced Estonian employment register, which is a sub-register of the taxable persons and which is maintained to ensure the performance of functions imposed by law on the Tax and Customs Board, the Labour Inspectorate, the Estonian Unemployment Insurance Fund, the Health Insurance Fund, the Social Security Board, the Financial Intelligence Unit and the Police and Border Guard Board. The authorised processors of the employment register are the Labour Inspectorate and the Estonian Unemployment Insurance Fund⁶². According to the provisions regulating the employment register the person providing work is required to register in the employment register the commencement, suspension, termination and type of employment and other data related to employment of persons⁶³.

As the employment register is maintained to ensure the performance of the Fund, the Fund can rely on data entries about the terminated employments and make sure that the applicants are in fact unemployed and thus their unemployment status can be confirmed.

⁵⁹ LEMBER, K. Tehisintellekti kasutamise haldusakti andmisel. *Juridica*. 2019, issue 10, 2019, p. 752.

⁶⁰ ANNUS, T. 2006, *supra nota* 53, p. 107– 108.

⁶¹ Unemployment Insurance Act, *supra nota* 21, par. 6, section 1.

⁶² Taxation Act, par .25, section 1 and 2.

⁶³ Ibid 63, par 25, section 2.

Next step is confirming the reason for termination of the last employment. The reason can be confirmed from the employment register entries because the person who provides work is obliged to enter the reason for termination of employment⁶⁴.

Third condition is the completion of necessary unemployment insurance period. Unemployment insurance database is maintained for keeping records of insured persons and their unemployment insurance periods⁶⁵. Calculation of insurance periods is based on that database and entries to this database come from employment register and the register of taxable persons⁶⁶.

Due to the above the algorithm can be used to determine whether the applicant has the necessary unemployment insurance periods completed (at least 12 months) within the established reference period (previous 36 months from the day of registration as unemployed).

Therefore, if the algorithm detects from the database entries that the applicant meets all the necessary criteria for qualifying for unemployment insurance benefit the decision for granting of benefit can be issued automatically. If the applicant does not meet at least one of criteria for qualifying for unemployment insurance benefit: cannot be registered as unemployed because the applicant has ongoing employment; cannot be granted unemployment insurance benefit because the last employment ended voluntarily or the applicant has not completed at least 12 months of unemployment insurance periods within 36 months previous to the date of registration as unemployed the decision regarding the refusal of the benefit can be also issued automatically with the relevant reasoning in order to ensure the effectiveness of the right to contest the decision⁶⁷, follow the obligations for reasoning stipulated by the APA⁶⁸ and repeatedly emphasised by the Supreme Court of Estonia⁶⁹.

It can be concluded that in a situation when all the necessary conditions for qualifying for unemployment benefit are stipulated in imperative legal norms and the necessary information for identifying the conditions can be obtained by computer technology automatically the Fund does not have the space for discretion to make a decision regarding the granting or refusal unemployment insurance benefit. This means that automated decisions are admissible⁷⁰ and do

⁶⁴ The Regulation of the Government of the Republic of Estonia „Statute of the register of taxable persons“, par. 53, section 2, p. 9.

⁶⁵ Unemployment Insurance Act, *supra* nota 21, par. 35, section 1.

⁶⁶ *Ibid* 21, par. 7, section 4, p. 1 and 2.

⁶⁷ ANNUS, T. 2006, *supra* nota 53, p. 112.

⁶⁸ Administrative Procedure Act, *supra* nota 20, par. 56, section 2.

⁶⁹ Supreme Court of Estonia, Administrative Law Chamber decisions, cases no 3-3-1-13-02, p 14; 3-3-1-54-03, p. 34; 3-3-1-66-03, p 18; 3-3-1-16-05, p 17; 3-3-1-49-08, p 11.

⁷⁰ BUOSO, E. Fully Automated Administrative Acts in the German Legal System. *European review of Digital Administration & Law – Erdal*. 2020, vol 1, issue 1–2, p. 117.

not contradict the principle of discretion when the legislator has not provided for it in the legal norm.

4.3. Choice of form and purposefulness

Administrative procedure shall be purposeful, efficient and straightforward and conducted without undue delay, avoiding superfluous costs and inconveniences to persons⁷¹. This means that the procedure must be carried out in the most effective way considering all the necessary aspects stipulated directly in the law keeping in mind the purpose of the law. This encompasses the principle of proportionality in administrative procedure⁷². If the procedure is not specified to the detail in the legal act, the state body must decide what measures and to what extent are proportionate to achieve the goal.

The principle of choice of form of purposefulness is closely connected to the right to good administration. Supreme Court of Estonia has taken the view that the right to good administration is one of the fundamental rights that derives from the par 14 of the Constitution⁷³. The decision was made before Estonia became a member of the EU and before TFEU equalized the Charter of Fundamental Rights of the European Union with the treaties of the EU⁷⁴ and the above-mentioned Charter became legally binding.

Regarding automation of the decisions the author finds it necessary to examine the right to be heard as it is one of the elements of the right to good administration and is directly connected to the automated processes of decision making.

The conception of right to be heard comes from the principle of Roman Law – *audi alteram partem*. It means that everyone has the right to be heard before the individual measure will be applied regarding his/her case⁷⁵. The aim of this principle is to ensure that the representative of administrative power would give the person chance to present his/her opinions and objections before making a decision. APA provides that an administrative proceeding may be conducted without hearing the opinions and objections of a participant in the proceeding if there is no deviation from the information provided in the application or explanation of the participant in the proceeding and there is no need for additional information.⁷⁶

⁷¹ Administrative Procedure Act, *supra nota* 20 par 5, section 2.

⁷² Supreme Court of Estonia decision, case no 3-4-1-1-03 p 17.

⁷³ *Ibid.*, 73.

⁷⁴ ALLIKMETS, S. 2014, *supra nota* 19, p. 223.

⁷⁵ PARREST, N. Hea halduse põhimõtte Euroopa Liidu põhiõiguste hartas. *Juridica*. 2006, issue 1, 2006, p. 31.

⁷⁶ Administrative Procedure Act, *supra nota* 20, par. 40, section 3, p. 2.

At first glance one can say that this provision can be considered as restriction of the fundamental right, which can be restricted by law. The more valuable the restricted right and the more intensive the restriction, the better must be the reasons for doing it.⁷⁷

The reason for restricting the right to be heard is legitimate, it is the cost-effectiveness of public administration, which is a constitutional legal value, and reasonable distribution of resources for processing large number of similar cases, which has been emphasised by Supreme Court of Estonia.⁷⁸

The Fund's automated unemployment insurance benefit decisions are based strictly on data coming from different registries and applicant's opinions and objections cannot change that data and therefore cannot change the outcome of the procedure – the decision. Automated decisions are made quickly for there is no reason to specify different facts and deviation. It follows that automated decision of the Fund in above mentioned cases comply with the principle of choice of form and purposefulness.

4.4. Principle of investigation

During proceedings in a matter, an administrative authority is required to establish the facts relevant to the matter and, if necessary, collect evidence on its own initiative for such purpose.⁷⁹

One aspect of this principle is cooperation between state body and the applicant.⁸⁰ The state body must if possible cooperate with the applicant in order to gather evidence on its own initiative or to request the applicant to provide corresponding evidence necessary for the conducting of administrative procedure.

Gathering evidence is necessary for proving the facts the decision is based on, especially if the decision is contested⁸¹ but also for the so-called activity follow-up of the state body.

The analysis of administrative body activity follow-up helps to detect gaps in the quality of administrative procedure and its outcome. The conclusions are irreplaceable for assessing the current situation and addressing the shortages in the future.

Principle of care stemming from the EU law has effect on the principle of investigation. According to it the administration has an obligation to investigate

⁷⁷ ALEXY, R. Kollisioon ja kaalumise kui põhiõiguste dogmaatika põhiprobleemid. *Juridica*, 2001, issue 1, 2001, p. 12.

⁷⁸ Supreme Court of Estonia Constitutional Review Chamber decisions, cases no 3-4-1-16-14 p. 16; 3-4-1-10-14 p. 13; 3-4-1-2-05 p. 37; 3-4-1-4-01 p. 13.

⁷⁹ Administrative Procedure Act, *supra* nota 20, par. 6.

⁸⁰ ANNUS, T. 2006, *supra* nota 53, p. 114.

⁸¹ AEDMAA, A., LOPMAN, E., PARREST, N., PILVING, I., VENE, E. 2004, *supra* nota 34, p. 28.

impartially and carefully all the factual and legal circumstances regarding the case.⁸² Administrative body must find out all the favourable and burdensome circumstances as well as circumstances regarding public interest and take them into account when making a decision.⁸³

Automated decisions of the Fund for granting and refusing of unemployment insurance benefit are based solely on the State governed database entries like we observed earlier. If the Fund would use human case worker to process all the cases that can be processed by algorithm the situation would question the efficiency of administrative procedure because from the viewpoint of the principle of investigation there is nothing to investigate. The facts are based on the database entries and the interoperability – communication between databases – is provided by law.⁸⁴

It can be concluded that if the facts necessary for making decisions regarding granting or refusing unemployment insurance benefit are all based on database entries that have legal power then there is no need to investigate these facts any further as it would hinder the effectiveness of public administration. Hence, the above-mentioned automated decisions do not contradict the principle of investigation.

4.5. Accessibility and data protection

Administrative procedure is public. An administrative authority is responsible for the display in its premises of important information concerning administrative proceedings (instructions for submission of documents, instructions for completing forms, forms, explanations etc.).

In administrative procedure, personal data shall be processed pursuant to the procedures for processing personal data deriving from the Personal Data Protection Act and GDPR as Estonia is a Member State of the EU. An administrative authority may, for the purpose of issuing administrative acts, taking measures or entry into administrative contracts in administrative procedure, process personal data regarding any circumstances necessary for the proceedings in a matter, unless otherwise provided by law or legislation issued pursuant to law⁸⁵.

The general principle of freedom of information is stipulated in the Constitution⁸⁶. This means that the public can have access to the information regarding the action of administrative power and everyone has the right to access information about himself/herself held by the governmental organisations. In Estonia the access and range to public information is regulated by Public Information Act

⁸² ANNUS, R. Uurimisõhimõtte haldusmenetluses. *Juridica*. 2008, issue 7, 2008, p. 499.

⁸³ *Ibid.*, 83, p. 500.

⁸⁴ NYMAN METCALF, K. 2019, *supra nota* 11, p. 6.

⁸⁵ Administrative Procedure Act, *supra nota* 20, par. 7, sections 1, 2, 4 and 5.

⁸⁶ The Constitution of the Republic of Estonia, *supra nota* 49, par. 44, section 2.

(hereinafter PIA) to ensure that the public and every person has the opportunity to access information intended for public use, based on the principles of a democratic and social rule of law and an open society, and to create opportunities for the public to monitor the performance of public duties⁸⁷. Pursuant to PIA public information is information which is recorded and documented in any manner and on any medium and which is obtained or created upon performance of public duties provided by law or legislation issued on the basis thereof⁸⁸.

This means that the Fund as legal entity in public law that acts on the basis of UIA is responsible for making it possible for the public to access the information regarding the action of the Fund provided that access to this information is not restricted according to the law.

Freedom of information is closely related to data protection. While a person has the right to access to information that the public sector has about him/her the public body as a data controller must ensure that the processing of personal data is in accordance with legal norms. In another words even if the public body does not have to obtain the consent from the data subjects to process their personal data if it is necessary for fulfilling the legal obligation⁸⁹, the data processing must comply with the provisions of data protection.

GDPR provides rules for fully automated individual decision-making. These rules are directly applicable to every EU Member State incl. Estonia. The data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her⁹⁰ and stipulates three exemptions from above mentioned general rule. One of these exemptions is the right to conduct automated decision making towards data subjects if it is authorised 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 interests⁹¹. The intention here is directed to the Member States whose laws should adopt the suitable measures to safeguard data subjects⁹². GDPR recital 71 clarifies above mentioned provision that automated processing should be

⁸⁷ Public Information Act, par. 1.

⁸⁸ Ibid. 88, par. 3.

⁸⁹ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016. on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), *supra nota* 46, art 16, section 1, p c.

⁹⁰ Ibid., 46, art 22.

⁹¹ Ibid., 46, art 22, section 2, p b.

⁹² MALGIERI, G. Automated decision-making in the EU Member States: The right to explanation and other „suitable safeguards“ in the national legislations. *Computer Law & Security Review*. 2019, vol 35, issue 5, p. 2.

subject to suitable safeguards, which should include specific information to the data subject and the right to obtain human intervention, to express his or her point of view, to obtain an explanation of the decision reached after such assessment and to challenge the decision⁹³ but like the European Court of Justice has commented directly on the legal status of recitals: „Whilst a recital in preamble to a regulation may cast light on the interpretation to be given to a legal rule, it cannot in itself constitute such a rule“^{94,95}.

If we compare the safeguards mentioned in recital 71 with the safeguards provided by the APA par 36 section 1, UIA par 45 section 1 and APA par 37 section 1 regarding the Fund’s unemployment insurance benefit automated decisions we can see that the risks that arise from not adopting those safeguards are mitigated:

The applicant’s right to obtain human intervention, express his/her point of view or obtain information about the decision reached is covered by the duty of administrative authority to give explanations. This duty includes explanation regarding the rights and duties of the participant in the proceeding, within which term the administrative proceeding is presumably conducted and which are the possibilities to expedite the administrative proceeding, which applications, evidence and other documents must be submitted in the administrative proceeding and which procedural acts must be performed by participants in the proceedings⁹⁶.

The applicant’s right to challenge the automated decision is guaranteed by the protection norm⁹⁷.

As for the right to access data that the Fund has regarding the applicant’s unemployment insurance benefit proceedings everyone has the right, in all stages of administrative proceedings, to examine documents and files, if such exist, which are relevant in the proceedings and which are preserved with an administrative authority⁹⁸.

It follows that the Fund’s automated decisions regarding granting or refusing of unemployment insurance benefit comply with the principle of accessibility and data protection.

⁹³ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), *supra* nota 46, recital 71.

⁹⁴ WACHTER, S., MITTELSTADT, B., FLORIDI, L. Why a Right to Explanation of Automated Decision-Making Does Not Exist in the General Data Protection Regulation, *International Data Privacy Law*. 2017, vol. 7, issue 2, p. 80.

⁹⁵ Judgement of the European Court of Justice 19.07.1989, Casa Fleischhandels-GmbH v Bundesanstalt für landwirtschaftliche Marktordnung, case 215/88, EU:C:1989:331, p. 3.

⁹⁶ Administrative Procedure Act, *supra* nota 20, par. 36, section 1.

⁹⁷ Unemployment Insurance Act, *supra* nota 21, par. 45, section 1.

⁹⁸ Administrative Procedure Act, *supra* nota 20, par. 37, section 1.

5. Conclusion, proposals and future work

The use of automated decisions in public administration brings us to two issues: the rationality in the exercise of State administrative power, that needs to have accurate decisions and no place for arbitrariness⁹⁹, and building corresponding trust in society¹⁰⁰.

The execution of State's administrative power must be based on law. Individuals' rights must be protected and these rights can be restricted only in accordance with the law. On the other hand, public administration is expected to operate with the growing efficiency and prudent resource planning keeping in mind the fast development of computer technology. Algorithm-based decisions in public sector play already a role in automating routine and administrative tasks that do not involve discretion¹⁰¹. Taking into account their efficiency and consistency they are considered a very attractive tool¹⁰² and therefore their use is increasing.

Trust for automated decisions in society means that the society is ready to accept automated decisions. In other words, individuals can be sure that automated decisions are not discriminatory, automated decisions can be challenged, sufficient explanation is given about the outcome of particular automated decision, these decisions are reliable tool of public administration and thus integral part of rule of law, which is one of the unifying principle of the EU.

In Estonia there are no direct general provisions regarding the usage of automated decisions by public administration. The Fund uses automated unemployment insurance benefit decisions based on the authorisation norm stipulated in UIA, but the norm does not clarify the specific requirements for automated decisions. If there are no direct legal provisions about the specific requirements, automated decisions must comply with the principles of administrative procedure stipulated in the general act – AIA. The aim of this article was to find out whether the Fund's automated decisions regarding granting or refusing of unemployment insurance benefit are in accordance with the principles of administrative procedure.

The result of the analysis shows that the above-mentioned decisions comply with the principles of administrative procedure. Nevertheless, it is necessary for systematic approach and legal clarity to enshrine conditions for issuance of automated decisions by Estonian public administration because it would provide

⁹⁹ HONG, M., HUI, C. 2019, *supra* nota 24, p. 887.

¹⁰⁰ WACHTER, S., MITTELSTADT, B., RUSSELL, C. Counterfactual explanations without opening the black box: automated decisions and the GDPR. *Harvard Journal of Law & Technology (Harvard JOLT)*, 2018, vol 31, no. 2, p. 843.

¹⁰¹ MCCANN, S. 2023, *supra* nota 27, p. 193.

¹⁰² STRANDBURG, K. J. Rulemaking and inscrutable automated decision tools. *Columbia Law Review*. 2019, vol. 119, no. 7, p. 1884.

the general legal base and necessary guidelines for automated decision – making to support the administration of e-Government, to level up public trust, support innovation in public sector and ensure that increasing automated decision making in Estonian public sector would have solid and clear general legal base.

Based on the analysis the following aspects that need to be addressed for further legal amendments have been identified.

First, the Fund as Estonian administrative authority has the right to issue automated administrative acts based on the authorisation norm¹⁰³. There is another administrative authority in Estonia that has the same right based on similar authorisation norm – the Tax and Customs Board¹⁰⁴. It can be concluded that considering the fast development of computer technology and the speciality of the field of public sector, there will be more administrative bodies using automatic decisions in Estonia. Stemming from the above the author finds that just an authorisation norm for issuing automated administrative acts is not enough to regulate the issuance of automated administrative acts because authorisation norm does not specify what is automated administrative act and what are the exact conditions of issuing them.

Secondly, regulating the issuance of automated administrative acts in general act (APA) is closely related to State liability. In Estonia State liability is regulated by State Liability Act that stipulates that a person whose rights are violated by the unlawful activities of a public authority in a public law relationship may claim compensation for damage caused to the person¹⁰⁵. According to this act one prerequisite of claiming the damage from the State is that the person can request to repeal the administrative act that violates the person's rights and causes damage¹⁰⁶.

This means that to ensure individual's rights to claim damages from the State caused by administrative act for the legal clarity it is necessary to enshrine the nature and conditions of automated administrative act in APA because simple authorisation norm is not concrete enough for State's liability to compensate the damages to individuals caused by automated administrative act. If the State wants to use algorithm based automated administrative acts as a part of e-Government concept, then the State's responsibility must be very clearly provided for in the legal act.

Thirdly, GDPR is based on the art 16 of TFEU stating that everyone has the right to the protection of personal data concerning them¹⁰⁷¹⁰⁸. The authorisation

¹⁰³ Unemployment Insurance Act, *supra* nota 21, par. 23, section 4.

¹⁰⁴ Taxation Act, *supra* nota 63 par. 46² section 1.

¹⁰⁵ State Liability Act, par. 7, section 1.

¹⁰⁶ *Ibid.*, 106, par. 3.

¹⁰⁷ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016. on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), *supra* nota 46, recital 1.

¹⁰⁸ Consolidated version of the Treaty on the Functioning of the European Union, art 16.

norm that gives the Fund the right to issue automated administrative acts was adopted and enforced due to the fact that the EU adopted GDPR¹⁰⁹.

There are five general principles of Estonian administrative procedure as discussed previously in this paper. One of these concerns data protection. Data protection is regulated by the EU Law ie. by GDPR and is therefore directly applicable to the EU Member States.¹¹⁰ This means that the administrative procedure principle of data protection regarding automated decisions is regulated by GDPR. It follows that those three general principles of Estonian administrative procedure (the right of discretion, choice of form and purposefulness and principle of investigation) fall outside of the scope of GDPR and its regulation of automated decisions because they are not related to data protection. This means that authorisation norm that is based on GDPR and the right to data protection is not sufficient legal base for other principles of administrative procedure which do not encompass data protection in the field of automated administrative acts. Regulation of principles of administrative procedure that are not related to data protection is in the competence of every EU Member State incl. Estonia and can be stipulated in its national law. The regulation of nature and conditions of automated administrative acts in general act APA ensures that automated administrative acts in administrative procedure would have legal base, would be comprehensive and clear.

The issuance of automated decisions based on deterministic systems is a choice for administrative authority, not an obligation. Administrative acts must comply with the principles of administrative procedure, fulfil the criteria enshrined in the law in order to be legally binding. The above-mentioned proposals would ensure rule of law and effective protection of rights of individuals and at the same time support cost-efficiency and operational flexibility of the State while applying the concept of -e-Government in executing its administrative power.

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¹⁰⁹ Explanation letter, Act on the Implementation of the Personal Data Protection Act, *supra nota* 45, p. 1.

¹¹⁰ See also VARDANYAN, L., KOCHARYAN, H., HAMULÁK, O., MESARČÍK, M., KERIK-MÄE, T., KOOKMAA, T. The Unwanted Paradoxes Of the Right to Be Forgotten. *Masaryk University Journal of Law and Technology*. 2023, vol. 17, no. 1, pp. 87–109. ISSN 1802-5943. DOI 10.5817/MUJLT2023-1-3.

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