

THE DIGITAL ADMINISTRATION CODE IN ITALY: LIGHT AND SHADE

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Abstract: *The present article gives critical notice to the Italian Legislative Decree No. 82 of 2005, commonly referred to as the “Digital Administration Code”, subsequently integrated and amended by Supplementary Provisions and the corrective Legislative Decree (D. Lgs no. 159 April 2006), announced in many press releases as a revolution for public agencies and citizens. The author examines the principles and rules of this Code, emphasizing problematic and limits of this recent legislation.*

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The legislative Decree No. 82 of 2005, commonly referred to as the “Digital Administration Code”,¹ subsequently integrated and amended by Supplementary Provisions and the corrective legislative decree (D. Lgs 4 April 2006, n°159)² announced in many press releases as a revolution for public agencies and citizens, intended to re-establish tidiness in addressing and setting rules for every aspect of the technological innovation. The principles and rules that the legislator might have followed in the new Digital Administration Code were clearly indicated in the devolution Law no. 229/2003,³ that entrusted the Italian Government the task to:

- a. Graduate the evidential value and the probatory effectiveness of the different kinds of electronic signature;
- b. Review the rules of law in force in order to guarantee the broadest availability of the telematic operations provided by the public administration, and to easily ensure citizens and enterprises obtained access to these operations in respect of the principles of

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¹ Codice dell'Amministrazione Digitale Decreto Legislativo 7 marzo 2005, n. 82, Gazzetta Ufficiale n. 112 del 16 maggio 2005 - Supplemento Ordinario n. 93.

² Disposizioni integrative e correttive al Decreto Legislativo 7 marzo 2005, n. 82, recante Codice dell'amministrazione digitale, Decreto Legislativo 4 aprile 2006, n. 159, Gazzetta Ufficiale n. 99 del 29 aprile 2006 - Supplemento Ordinario n. 105.

³ Interventi in materia di qualità della regolazione, riassetto normativo e codificazione - Legge di semplificazione 2001, Legge 29 luglio 2003, n. 229, Gazzetta Ufficiale n. 196 del 25 agosto 2003.

equality, non-discrimination and in line with the regulations on the confidentiality of personal data;

c. Provide legal provisions relating to digital documents, such as the nature of origin and primacy, was similar to traditional documents recorded on paper; and to require administrations to adopt precautions to ensure the security, accuracy and the quality of the content of digital documents;

d. To modify laws and regulations in order to provide for consistency of approach and to simplify the prescriptive language;

e. Adapt Italian regulations to the rules set out by the European Union.

Unfortunately, this revolution was only partly successful; in fact the content of the legislative decree that anticipated the Code was preceded by a critical analysis from the Government Council, contained in Judgment n° 11995/2005 of the 7 February 2005 Assembly.⁴

The telematic revolution in the public administration is set out in the general principles in the first part of the Code, by which citizens become customers of new services and can exert “digital” rights (in particular, the articles 3-9 are the example of this revolution). The Code also considers other topics that can be applied to private relationships however there is some confusion among the articles dedicated to electronic documents, electronic and digital signatures, and to the evidential value of transmissions in respect of private relationships.

Within the context of digital documents, digital signatures and other versions of electronic signature, it is useful to refer back to the DPR n°513/1997.⁵ In articles 20 and 21 of Legislative Decree (D. lgs.) 82/2005, it seems that the “simple” electronic signature has disappeared (in contrast to the provisions of EU Directive⁶), then it mysteriously reappears in the Digital Administration Code in article 45:

“1. I documenti trasmessi da chiunque ad una pubblica amministrazione con qualsiasi mezzo telematico o informatico, ivi compreso il fax, idoneo ad accertarne la fonte di provenienza, soddisfano il requisito della forma scritta e la loro trasmissione non deve essere seguita da quella del documento originale.

2. Il documento informatico trasmesso per via telematica si intende spedito dal mittente se inviato al proprio gestore, e si intende consegnato al destinatario se reso disponibile all'indirizzo elettronico da questi dichiarato, nella casella di posta elettronica del destinatario messa a disposizione dal gestore.”

“1. The documents sent by anyone to a government office by any means electronic or computer, including fax, such that it is suitable to determine the source of origin, satisfies the requirement of writing and it is not necessary to send the original document following the transmission of the document by fax or computer.

2. The document transmitted electronically is sent by the sender when it was sent to his manager, and it is delivered to the recipient if it made available to the electronic address to which it is addressed, or the mailbox address of the receiver as it is made available by the operator.”

⁴ Le critiche al Codice della Pubblica Amministrazione Digitale nell'autorevole parere del Consiglio di Stato: grave stop al futuro del Codice; CdS – parere 7 febbraio 2005, n.11995; Presidente De Lise: Oggetto: Presidenza del Consiglio dei Ministri – Dipartimento per l'innovazione e le tecnologie. Schema di D.Lgs recante il “Codice dell'amministrazione digitale”, in attuazione della delega contenuta nell'articolo 10 della Legge 29 luglio 2003, n.229, “Interventi in materia di qualità della regolazione, riassetto normativo e codificazione – Legge di semplificazione 2001”. This judgment can be downloaded (in Italian) from http://www.scint.it/news_new.php?id=556.

⁵ Regolamento recante criteri e modalità per la formazione, l'archiviazione e la trasmissione di documenti con strumenti informatici e telematici, a norma dell'articolo 15, comma 2, della Legge 15 marzo 1997, n. 59, Decreto 10 novembre 1997, n. 513, Gazzetta Ufficiale del 13 marzo 1998 n. 60, which was repealed by article 77 of Decreto Disposizioni regolamentari in materia di documentazione amministrativa (Testo C) 28 dicembre 2000, n. 443, Gazzetta Ufficiale del 20 febbraio 2001, n. 42, S.O.

⁶ Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures, OJ L 13, 19.01.2000, p.12.

In addition, articles 64 and 65 indicate the importance is referred to the way how to access to the Public Administration Services. Article 64 (1) and (2) reads as follows:

“1. La carta d’identità elettronica e la carta nazionale dei servizi costituiscono strumenti per l’accesso ai servizi erogati in rete dalle pubbliche amministrazioni per i quali sia necessaria l’autenticazione informatica.

2. Le pubbliche amministrazioni possono consentire l’accesso ai servizi in rete da esse erogati che richiedono l’autenticazione informatica anche con strumenti diversi dalla carta d’identità elettronica e dalla carta nazionale dei servizi, purché tali strumenti consentano di accertare l’identità del soggetto che richiede l’accesso. L’accesso con carta d’identità elettronica e carta nazionale dei servizi è comunque consentito indipendentemente dalle modalità di accesso predisposte dalle singole amministrazioni.’

“1. The electronic identity card and the national charter services are tools for obtaining access to services online by the public authorities for which authentication is necessary.

2. The Public Administration can provide services over the internet, provided that the means of authentication can be affected by different instruments such as the electronic identity card and the national charter services, provided these instruments are sufficient to establish the identity of the person that seeks to obtain access to the service. It is possible to use the electronic identity card and national charter services, regardless of the methods of authentication determined by individual administrations.”

Article 65 reads as follows:

“1. Le istanze e le dichiarazioni presentate alle pubbliche amministrazioni per via telematica ai sensi dell’articolo 38, commi 1 e 3, del decreto del Presidente della Repubblica 28 dicembre 2000, n. 445, sono valide:

a. se sottoscritte mediante la firma digitale, il cui certificato è rilasciato da un certificatore accreditato;

b. ovvero, quando l’autore è identificato dal sistema informatico con l’uso della carta d’identità elettronica o della carta nazionale dei servizi, nei limiti di quanto stabilito da ciascuna amministrazione ai sensi della normativa vigente;

c. ovvero quando l’autore è identificato dal sistema informatico con i diversi strumenti di cui all’articolo 64, comma 2, nei limiti di quanto stabilito da ciascuna amministrazione ai sensi della normativa vigente e fermo restando il disposto dell’articolo 64, comma 3.”

“1. Claims and statements submitted to the government electronically in accordance with Article 38, paragraphs 1 and 3 of the Decree of the President of the Republic on December 28, 2000, n. 445 are valid:

a. if signed by a digital signature, whose certificate is issued by an accredited certificate authority;

b. or, when the author is identified by the computer system with the use of an electronic identity card or national card services to the extent determined by each administration in accordance with regulations in force;

c. or when the author is identified by the computer system with the different instruments referred to in Article 64, paragraph 2, to the extent determined by each administration to law and without prejudice to the provisions of Article 64, paragraph 3.”

The Italian Legislator took into account the numerous criticisms expressed by the Government Council⁷ and also from within the Centro Studi & Ricerche SCiNT⁸ by means of the last modifications applied as a result of the amending decree (D. Lgs no.159 of 4

⁷ CdS – parere 7 febbraio 2005, n.11995; Presidente De Lise, cit. note 4).

⁸ Lazari G., *Codice dell’amministrazione digitale incostituzionale?*, in Altalex alla pagina:

www.altalex.com/index.php?idnot=2403; Lisi A., *Grazie al nuovo Codice delle Amministrazioni Digitali rischiano di essere illegittimi tutti i siti web di commercio elettronico!*, in Altalex alla pagina www.altalex.com/index.php?idnot=1625.

April 2006). In accordance with the revised Italian rules of law now in force (DLgs 82/2005 as amended by the Dlgs no. 159/2006), at the time of writing, a “simple” electronic signature (for instance, an Identity Card and password) should be sufficient to grant a digital document evidential value.

The legislator has correctly divided the formal aspects and the probative aspects of a digital document: the written form is guaranteed for a digital document if it can be considered to be reliable. In this way, the legislator linked the general regulations of the Digital Administration Code at issue to the special Deliberation No. 11 of 2004 by the CNIPA (National Centre for IT in the Public Administration) dedicated to the electronic documents conservation⁹ (and to the Decree by the Ministry of Economics and Finance – DMEF – of 23 Jan. 2004).¹⁰

In these above rules of law (CNIPA Del 11/2004 and DMEF 23/1/2004) the idea of a valid digital document is related to the ability to detect changes, even when a digital signature is used. The subscription and the electronic signature should be related to the origin of the document. The evolution of the concept of the written form in relation to a digital document creates a break with the past: the evidence should not be such that a document is attributed to a person only through the use of their digital signature and the formal validity of the contractual declaration.

The articles relating to the conservation of a digital document are very important, because the new regulations will facilitate the use of digital document relating to contracts, administrative actions, accounts and fiscal actions.

It is important to recognize the great value of the provisions of the Digital Administration Code, because they contribute to re-establishing the relationship between citizen and Public Administration, especially in respect of article 3 (the right to use the technology), article 4 (participation in the administrative procedure), article 7 (services quality and user satisfaction – where the public administration will have to compare itself to the CRM company schemes (from Customer Relationship Management to Citizen Relationship Management), article 9 (democratic electronic participation) and to article 10 (Productive Activities Unique Desk – in a previous Decree, a unique code was provided for each Public Administration, should citizens and businesses need to report for any bureaucratic reason; Article 10 provides that such unique “Sportello per le attività produttive” is also implemented in electronic way).

Of great importance is the requirement, set out in article 53, that web sites of the Public Administration are required to respect the principles of accessibility, usability and availability of web sites by disabled people, including the provision of information, clarity of language, reliability, consultation with respect to simplicity, quality, homogeneity and interoperability, which underlines the requirements set out in Law no. 4/2004¹¹ “Provisions to support the access to information technologies for the disabled”.

Obviously the new regulation is not the all-embracing guide to the digital future for administrative procedure, and it is not clear why the DPR no. 68/2005,¹² referring to certified e-mail (Posta Elettronica Certificata) and the electronic log book regulations are not included in it (by corrective Decree no. 159/2006, it is included in Decree no.

⁹ Deliberazione CNIPA n. 11/2004 del 19 febbraio 2004 e Note esplicative “Regole tecniche per la riproduzione e conservazione di documenti su supporto ottico idoneo a garantire la conformità dei documenti agli originali” (Gazzetta Ufficiale del 9 marzo 2004, n. 57).

¹⁰ Ministero dell'economia e delle Finanze - Decreto 23 gennaio 2004, Modalità di assolvimento degli obblighi fiscali relativi ai documenti informatici ed alla loro riproduzione in diversi tipi di supporto (Gazzetta Ufficiale N. 27 del 3 Febbraio 2004).

¹¹ Disposizioni per favorire l'accesso dei soggetti disabili agli strumenti informatici, Legge 9 gennaio 2004, n. 4, Gazzetta Ufficiale del 13 del 17 gennaio 2004. For an unofficial translation into English, see: http://www.pubbliaccesso.gov.it/normative/law_20040109_n4.htm.

¹² Regolamento recante disposizioni per l'utilizzo della posta elettronica certificata, a norma dell'articolo 27 della Legge 16 gennaio 2003, n. 3, Gazzetta Ufficiale N. 97 del 28 Aprile 2005.

42/2005,¹³ which refers to the Connectivity Public System). Unfortunately, the Digital Administration Code has partly¹⁴ repealed the T.U.D.A. (Unique text about the Administrative Documentation – DPR no. 445/2000¹⁵) that only a few years earlier was considered as a unique normative corpus of the administrative procedure in Italy. To conclude, the Code will disappoint some people who thought a digital Public Administration revolution would occur in Italy, whilst others will consider the regulations contribute to the start of the technological change for future generations.

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¹³ Istituzione del sistema pubblico di connettività e della rete internazionale della pubblica amministrazione, a norma dell'articolo 10, della Legge 29 luglio 2003, n. 229, Decreto Legislativo 28 febbraio 2005, n. 42, Gazzetta Ufficiale n. 73 del 30 marzo 2005.

¹⁴ It repealed any TUDA stipulation regarding electronic documents.

¹⁵ Disposizioni legislative in materia di documentazione amministrativa. (Testo A) 28 dicembre 2000, n. 445, Decreto Legislativo 28 dicembre 2000, n. 445, Gazzetta Ufficiale n. 42 del 20 febbraio 2001- Supplemento ordinario n. 30.