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# Contemporary Challenges in Administrative Law and Public Administration

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# **Contemporary Challenges in Administrative Law and Public Administration**

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# Electronic administration: brief reflection on a new administration model

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## **Abstract**

*The article 14 of the Code of Administrative Procedure (CPA), approved by Decree-Law no. 4/2015, of January 7, is entitled "Principles applicable to electronic administration". This article comes with the approval of our new Code of Administrative Procedure and for the first time determines in paragraph 1 that the services of the Public Administration should, in the performance of their activity, use electronic means. It should be noted that in that provision the legislator uses the word 'should' and not 'can'. This means that the Administration have no choice. The Public Administration is forced to use electronic means, unless it is not possible. The legislator establishes an obligation of facere, whose objectives are the greater efficiency and administrative transparency, as well as a greater approximation of the services to the population. Looking to article 14 of the CPA, we will try to elucidate a concept of Electronic Administration, to reflect about this new model of Administration and the principles that apply to it, as well as to verify if this new model of Public Administration serves the public interest.*

**Keywords:** *electronic administration; new administration model; public interest; public efficiency.*

**JEL Classification:** K23, K24

## **1. Introductory note**

It is an unavoidable reality the impact that the new technologies have in the current society and consequently in the Law. In fact, since the end of the 20<sup>th</sup> century, at the beginning of the 21<sup>st</sup> century, there has been a process of transformation of the entire world society<sup>3</sup>. Information and communication technologies

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<sup>3</sup> Irene Araguas Galcera, 'La Administración Electrónica En España: De la "Administración En Papel" a la "E-Administración"', *Revista Chilena de Derecho Y Ciencia Política*, 3.2 (2012), 109–39 (p. 110) <<https://doi.org/10.7770/rchdycp-V3N2-art425>>.

have an essential role to play in people's daily lives, both in their personal relations and in their legal relations<sup>4</sup>. Thus, in the face of the growing phenomenon of the use of means such as computers, *tablets*, *smartphones*, the internet and social networks, law also had to adapt. Administrative Law, like the branch of Public Law that regulates the Public Administration, was also not alien to this new mode of interaction of society.

This text is intended to be a simple reflection about the use of electronic media by Public Administration. Our aim is to search for legal solutions that, in general terms, demonstrate the existence of a new Administration model, that is, of an Electronic Administration. We will also try, in a conclusive way, to assess the positive and negative aspects of this new model of Administration. For this purpose, we have divided this text into three points. In the first point, it gives a brief notion of Electronic Public Administration. In the second point, we will analyze the solutions foreseen in the Code of Administrative Procedure that are demonstrative of a new model of Administration. In the third and last point, we will make some injunctions regarding the pros and cons in the use of electronic means by our Administration.

## 2. Concept of Electronic Administration

Our Public Administration - in an organic, material and formal sense<sup>5</sup> – is, increasingly, an Electronic Administration. It is important, therefore, before we analyze in what terms our Electronic Administration is configured, to perceive what, in fact, one must effectively understand by an Electronic Administration.

The term "Electronic Administration" is the Portuguese translation of the term "*e-Government*". The translation into the letter of the expression could, however, lead us back to a reality different from what is truly an Electronic Administration. In fact, the expression 'e-Government' should not be confused with or used as a synonym of e-Government. This is because, from the organic point of view, our Public Administration does not only understand the Government, as an administrative organ. In addition to the State and its organs, such as the Government - the highest body of public administration, under the terms of Article 182 of the Constitution of the Portuguese Republic (CRP) - other public entities and their bodies, as well as agents and workers of the Public Administration. Thus, to use the term 'e-Government' seems to us too reductive to define what we really have in mind when we think in an Electronic Administration. In fact, it is not only the Government that uses electronic means<sup>6</sup>.

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<sup>4</sup> Araguan Galcera, pp. 110–11.

<sup>5</sup> See Diogo Freitas do Amaral, *Curso de Direito Administrativo - Vol. I*, 4.<sup>a</sup> (Coimbra: Almedina, 2016), p. 32); and Fernanda Paula Oliveira and José Eduardo Figueiredo Dias, *Noções Fundamentais de Direito Administrativo*, 5.<sup>a</sup> (Coimbra: Almedina, 2017), p. 20).

<sup>6</sup> Although from a different perspective, but also by distinguishing the expressions administration électronique and e-gouvernance, see Herbert Maisl and Bertrand du Marais, 'L'administration

An Electronic Administration is an Administration that is characterized by the use of the most varied information and communication technologies and that provides its services, or most of them, using electronic means. It is a typical State Model Administration which, understood in a broad sense, means a modernized State, adept of the use of the new technologies that the market offers, in a society in a society that tends to be also modernized.. It is, moreover, this modernized society that demands, directly and indirectly, a more modernized Public Administration. It can thus be said that an Electronic Administration is the reflection of the "electronic society" in which we live today.

An Electronic Public Administration is not, in our understanding, a new Public Administration, in an organic, material or formal sense. In fact, it continues to integrate public bodies, organs, agents and workers of the Public Administration, even though their number in those two cases may have changed. On the other hand, the activity exercised remains an administrative activity, ie there remain the typical instruments of action in particular the administrative act, the Regulation and the contract. What really characterizes an Electronic Public Administration, at least in the way we look at it in this text, is how it relates to each other and to individuals. It is, so to speak, the same Public Administration in an organic sense, which uses the same instruments, with the same purposes of public interest, but externalizes its will and executes its decisions, in a different way from the traditional one

### **3. The Electronic Public Administration in the CPA**

#### **3.1. Principles for Electronic Administration**

Our current Code of Administrative Procedure (CPA), approved by Decree-Law No. 4/2015, of January 7, innovated with the enshrining in Article 14 of a set of principles applicable to Public Administration, namely when using electronic media.

In paragraph 1 of article 14, the legislator determines that the Public Administration should use electronic means in the performance of its activity. First of all, it results from a principle of preference for the use of electronic means by the Public Administration.

The way how the legislator enshrines this principle, reinforces the idea mentioned in the previous point that the use of electronic means does not mean a different Public Administration in an organic sense, but also does not mean a substitution or modification of the typical instruments of the Administration. It also means that the Public Administration, in the exteriorization of its will, whether through an administrative act, a contract, or a regulation, should make a

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Électronique', *Revue Française D'administration Publique*, 110.2 (2004), 211–16 (pp. 211–12) <<https://doi.org/10.3917/rfap.110.0211>>.

preferential use of the use of electronic means. Strictly speaking, the use of electronic media will have more impact on the procedure, that is, on the *modus operandi*. This does not mean that the Public Administration fails to manifest and execute its will through a procedure. The procedure remains, what changes are, in fact, some of its formalities.

The preferential use of electronic media by the Public Administration has as its main objectives, according to the same precept, greater efficiency and transparency, as well as the approximation of services to the interested parties. From this follow, first of all, the manifestation of three guiding principles of administrative activity, but also of administrative organization: i) the principle of good administration; (ii) the principle of transparency; (iii) and the principle of bringing services closer to the public:

- i) Principle of good administration: This is a principle enshrined in Article 5 of the CPA, which states, *ipsis verbis*, that the Administration should be guided, in the exercise of its activity, by criteria of efficiency, economy and speed. Good administration is, therefore, an administration that fulfills these criteria. The concept of good administration therefore implies that the Administration is always in the best interest of the public interest<sup>7</sup>. Good administration is a concept traditionally linked to the merit of administrative action, but that the legislator "juridified" in the new Code of Administrative Procedure, by consecrating it as a principle of administrative activity. The use of electronic media by the Public Administration is thus seen as a way of giving greater efficiency of action to the Administration. This conclusion, which is moreover clear in the Code, allows us, on the other hand, to make a less clear inquiry, namely whether, given the inertia of the Administration in the use of electronic means - a concrete action by the Administration in the direction of its use can be demanded in the courts.<sup>8</sup>
- ii) Principle of transparency: As in our Constitution, we do not find an explicit reference to a principle of transparency in our Code of Administrative Procedure, in particular the principles governing administrative activity<sup>9</sup>. This does not mean, however, that there are no special diplomas with an explicit consecration of this principle. Concerning in particular the Code of Administrative Procedure, although the legislature does not expressly conscribe it as a general principle of administrative activity, it refers to transparency in Article 14 (1)

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<sup>7</sup> Mário Aroso de Almeida, *Teoria Geral Do Direito Administrativo*, 2.<sup>a</sup> (Almedina, 2015), p. 56.

<sup>8</sup> Almeida, p. 57 e 58.

<sup>9</sup> About the principle of transparency in administrative law, see Débora Melo Fernandes, 'O Princípio Da Transparência Administrativa: Mito Ou Realidade?', *Revista Da Ordem Dos Advogados*, 425-457 (2015).

of the CPA and its importance is particularly visible in the consecration of a principle of open administration in Article 17 of the CPA but also in the configuration of the right to information laid down in Articles 82 to 85 of the CPA<sup>10</sup>. It should also be noted that this right to information in electronic procedures is covered by Article 82 4 of the CPA, which provides for the right of the persons concerned to have access to a restricted access service in which they can obtain electronic information on the status of the procedure. Transparency is therefore an end to be achieved by the Administration, which in this case is intended to be achieved through the use of electronic means. Although this principle does not result directly from the Code of Administrative Procedure, as a general principle of administrative activity, the truth is that, whether some special legal solutions recognize it or the doctrine itself, it identifies it as the defining principle of the administrative activity<sup>11</sup>. In any case, its importance is particularly evident when the legislator imposes on the Public Administration the use of electronic means, to obtain greater transparency in the exercise of that activity, which implies, of course, that the referred means be ensured in such a way as to ensure such transparency. To that end, even if it does not exhaust it, the legislator in Article 14 (4) of the CPA requires that the use of electronic means be properly disseminated so that all interested parties can use them in the exercise of their legally protected rights and interests.

- iii) Principle of the approximation of services to the population: This principle is enshrined in Article 267 (5) of the Constitution of the Portuguese Republic and, unlike the previous ones, is an essential principle for administrative organization. Thus, along with decentralization and deconcentration, imposed by the constituent legislator, the ordinary legislator, requires the use of electronic means also as a way of promoting a closer approximation of services to the interested parties. In this way, the electronic means should work as a concrete action by the Administration in the direction of its use can be demanded in the courts. a bridge between the Public Administration and the private ones, promoting the dialogue between both poles of the administrative juridical relation.

From the aforementioned principles, it can be concluded that they are objective principles, that is, goals of a more or less theoretical nature, to be achieved by the Public Administration in the exercise of the activity. However,

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<sup>10</sup> See SÉrvulo Correia, “O Direito À Informação E Os Direitos de Participação Dos Particulares No Procedimento E, Em Especial, Na Formação Da Decisão Administrativa”, *Cadernos de Ciência Da Legislação*, 9/10 (1994), 133–64 (p. 135 e ss).

<sup>11</sup> See the authors referenced in Fernandes, p. 430 a 434.



along with these principles, the legislator establishes other principles that shape that Administration, limiting it in the exercise of its activity using electronic means.

One is thinking in principles like the one of the protection of the personal data, explicitly consecrated in the article 18 of the CPA, and that as far as the Electronic Administration is implicitly of the number 2 of article 14, of the CPA, in particular where the legislature determines that access to electronic means must guarantee the availability, access, integrity, authenticity, confidentiality, conservation and security of all information submitted to the Administration. The implementation of this principle is also expressly reflected in the law on the protection of personal data, approved by Law no. 67/98, of October 26. It should be noted that this protection must be effective and that the restriction of this right to protection is in fact equivalent to the restriction of a fundamental right, in particular the privacy right reserved in Article 26 of the CRP, so that any restriction, in the name of an Electronic Public Administration, must always have legal origin, be general and abstract, be proportional, not retroactive, or collide with the essential core of that Fundamental Right, which is a right, freedom and guarantee.

Another principle which merits reference, albeit implicitly, is the principle of equality, in particular Article 14 (5) and (6) of the CPA, where it prohibits the use of electronic means in a discriminatory manner, in particular in relation to those, who in their relationship with the Public Administration, do not use electronic means.

It is clear from Article 14 (3) of the CPA that the Electronic Administration is subject to all general principles of administrative activity, ie the principles laid down in Articles 266 and 268 Of the CRP and 3 to 19 of the CPA. The subjection to some of these principles is clear, although implicitly by the legislator, in the remaining paragraphs of Article 14. However, in paragraph 3, the legislator reinforces the idea that not only those, but also others: principle of legality (Article 3 of the CPA), principle of the pursuit of public interest, respect for the rights and (Article 4 of the CPA), the principle of proportionality (Article 7 of the CPA), the principle of fairness and reasonableness (Article 8 of the CPA), the principle of impartiality ( Article 9 of the CPA), the principle of good faith (Article 10 of the CPA), the principle of collaboration (Article 11 of the CPA), the principle of participation (Article 12 of the CPA), (Article 13 of the CPA), the principle of free competition (Article 15 of the CPA), the principle of liability (Article 16 of the CPA) and the principle of sincere cooperation with the European Union ( Article 19 of the CPA).

Article 14 of the CPA, insofar as it establishes the principles applicable to Electronic Administration, is presented in a rigorous way as being unnecessary, given that the principles listed therein, directly or indirectly, apply to the Administration Regardless of their traditional way of doing business or using electronic means.

### 3.2. References to the Electronic Public Administration in CPA

It is not only in Article 14 of the CPA, that we find an express reference to the Electronic Administration. In fact, we find throughout the Code several references to the Electronic Administration that translate, in fact, in an accomplishment of the duty of use of electronic means, on the part of the Public Administration, enshrined in number 1 of the mentioned precept.

In Part III, Title I and Chapter I of the Code of Administrative Procedure, the legislator lays down the general rules applicable to the administrative procedure. Several articles of the Code of Administrative Procedure specify the terms in which the use of electronic means by the Administration should be processed, developing Article 14 of the CPA. Those provisions essentially apply to the administrative procedure, which is understood to be a “*legally ordered sequence of acts and formalities for the preparation and expression of the practice of an administrative act or its implementation*”<sup>12</sup>. The regulation of the administrative procedure accepts, without a doubt, several objectives, namely the rationalization of the means to be used by the Administration, greater clarification of the Administration's will, protection of the legally protected rights and interests of citizens that relate to the Administration, and finally, the participation of those interested in training of decisions<sup>13</sup>.

The use of electronic media by the Administration has a greater impact on the administrative procedure, as defined in the previous paragraph. As mentioned above, it is not the organic nature of the Administration, which remains the same, nor its typical instruments of action, but the manner in which the Administration externalizes its will or executes its decisions. Let us see, therefore, what changes were introduced in the procedure, and foreseen in the CPA, so that one can effectively speak today in an Electronic Administration:

- i. Article 61 of the CPA: This article is entitled "use of electronic means", and translates the reinforcement of the ideas already enshrined in Article 14 of the CPA. In fact, from that precept, it is a duty to use electronic means at the stage of instruction of procedures, aiming for greater transparency, simplification and speed in the procedure. Article 61 of the CPA ensures that the interested parties have access to the electronic identification of the bodies responsible for the direction of the procedure and of the body with competence to decide, as well as to monitor the deadlines, simplification and procedure of the procedure. For this purpose, the interested parties have the right to know, through electronic means, the processing of the procedures that

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<sup>12</sup> Diogo Freitas do Amaral, *Curso de Direito Administrativo - Vol. II*, 3.<sup>a</sup> (Coimbra: Almedina, 2015), p. 266.

<sup>13</sup> Amaral, *Curso de Direito Administrativo - Vol. II*, p. 268 e 269.

- concern them and, also, to obtain the necessary instruments for the communication, by electronic means, with the services.
- ii. Article 62 of the CPA: this article provides a set of rules applicable in the context of a procedure that starts and develops in an electronic one-stop-shop<sup>14</sup>. Thus, whenever a procedure starts or develops within that scope, it must provide clear and accessible information to any interested party on the documents necessary for the presentation and instruction of the corresponding applications and conditions for obtaining the intended legal effects with the request; on the means of electronic consultation of the status of applications; on the means of electronic payment of fees due, where appropriate; on the complete information regarding the legal discipline of the administrative procedures that can be carried out through the electronic counter in question; the address and contact of the administrative entity with jurisdiction for the direction of the administrative procedure in question; and, finally, information on the means of judicial and extrajudicial reaction to resolve any disputes. The electronic one-stop shop should be able to intervene in the procedures to be developed between the interested parties and the Administration, receiving the acts of one and other, upon delivery of the respective receipt. The legislator admits that there are technical failures, in particular when it provides for a reduction in the time between submission of documents at the counter and its delivery to the recipient, when there is a technical interruption in the operation of the electronic means necessary for transmission.
  - iii. Article 63 of the CPA: This article establishes that the communications of the Administration with interested parties throughout the procedure can only be processed by electronic mail, when the interested party has given their written consent, and for this purpose, in its first intervention in the procedure, or later, indicate the electronic mailbox, under the terms provided in the public service of the electronic mailbox. This public electronic mailbox service was created by Decree-Law no. 93/2017 of 1 August and assumes its association with a unique digital address, which corresponds to the e-mail address freely chosen by the individual. In paragraph 2, the legislator establishes a presumption of consent for the use of the means indicated, in particular when the person concerned has established regular contact with one of them.

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<sup>14</sup> For further developments on the electronic counter, see: Ana França Jardim and Miguel Assis Raimundo, 'Balcão Único Eletrónico', in *Comentários Ao Novo Código Do Procedimento Administrativo*, ed. by Carla Amado Gomes, Ana Fernanda Neves, and Tiago Serrão, 3.<sup>a</sup> (Lisboa: AAFDL, 2016), pp. 515–50 and Miguel Prata Roque, 'O Procedimento Administrativo Eletrónico', in *Comentários Ao Novo Código Do Procedimento Administrativo*, ed. by Carla Amado Gomes, Ana Fernanda Neves, and Tiago Serrão, 3.<sup>a</sup> (Lisboa: AAFDL, 2016), pp. 493–514 (pp. 497–502).

- iv. Article 64 (5) of the CPA: Article 64 of the CPA provides for the obligation to prepare documents and terms of oral proceedings, which must be integrated in an administrative process in paper format. However, in paragraph 5, it recognizes the possibility of the electronic administrative process.
- v. Article 88 (5) of the CPA: Excludes the application of the delays provided therein to situations in which the acts and formalities of the procedure are practiced through electronic means.
- vi. Article 94 (2) of the CPA: Provides, regarding the final decision of the procedure, that when it is delivered through electronic means, it must be affixed electronic signature or other appropriate means of authentication of the competent body holder.
- vii. Article 104 (1), al. c) and paragraph 5 of the CPA: It provides for the possibility of submitting applications using electronic means, and the application must observe the format established in the institutional site of the public entity.
- viii. Article 105 (4), CPA: This article provides for the registration of the submission of applications, and in the services that provide electronic means of communication, the registration of the submission of the application must be made electronically.
- ix. Article 106 (3) of the CPA: determines, with respect to the receipt of the delivery of applications, that the electronic register automatically issues a receipt proving the delivery of the applications submitted by electronic data transmission, indicating the date and time of submission and registration number.
- x. Article 112, paragraph 1, al. c) and paragraph 2, al. a), of the CPA: This article governs the form of notifications. These can now be made by electronic mail or electronic notification automatically generated by the system incorporated into an electronic site belonging to the service of the competent body or to the electronic one-stop-shop. Such notifications may be made by the Administration, regardless of consent, for computer platforms with restricted access, or for the e-mail addresses indicated in any document presented in the administrative procedure, in the case of legal persons. In other cases, the electronic notification will have to obtain the consent of the interested parties, that is to say, when the notifications are not made in the framework of electronic platforms or are not made for legal persons.
- xi. Article 113 (5) and (6) of the CPA: This article is very important because it determines the moment at which notification using electronic means is deemed to be made. Thus, notification by electronic means is considered to be effected, in the case of electronic mail, at the moment the recipient accesses the specific mail sent to his electronic

mailbox, and in the case of other notifications by electronic data transmission, at the moment the recipient accesses the specific mail sent to his electronic account, opened with the computer platform provided by the institutional website of the competent body. A first question arises immediately: how is the Administration aware of the moment when the person concerned accesses the specific mail sent? This assumes that the notified party confirms receipt of the notification, which for obvious reasons may not happen. Paragraph 6 seems to resolve the issue, stating that in the absence of access to the electronic mailbox, or the electronic account opened on the computer platform provided by the institutional website of the competent body, notification should be twenty-fifth day after its dispatch, unless it is established that: i) the notifier communicated the alteration of that one; (ii) it is demonstrated that such communication was impossible; iii) or that the electronic communications service has prevented the correct reception, in particular through a filtering system not attributable to the interested party. But here we have another doubt: as we mentioned above, Article 64 of the CPA provides that for the purpose of electronic communications, the interested party must identify the electronic mailbox that holds, under the terms provided in the service electronic mailbox. As we also mentioned, the public electronic box service is subject to legal discipline, namely Decree-Law no. 93/2017 of 1 August and its article 8 disciplines the sending and receiving of electronic notifications made for the public service of electronic notifications, providing in its paragraph 3 that '[t]he notification sent to the public service of electronic notices shall be presumed to be made on the twenty-fifth day after its dispatch, of that notice in the service support system of electronic notifications'. In this way, it becomes difficult to understand which of the two presumptions must be valid: that of the CPA, or that of Decree-Law 93/2017, of August 1? Unless it is accepted that the electronic notification can be made for an electronic mail that is not part of the public service of notifications, however, this hypothesis does not seem to be the one that goes against the solution enshrined in Article 64, CPA and that for obvious reasons will be the one desired by the legislator<sup>15</sup>.

#### **4. Final notes: pros and cons of this new model of administration**

The intention of the legislator to promote the use of electronic media in relations between the administration and the parties is well-known. This trend is

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<sup>15</sup> In the sense that the electronic notification can be made for an electronic mail that is not integrated into the public service of notifications, *veja-se* Roque, pp. 510–11.

seen not only in the General Administrative Law, and in the Code of Administrative Procedure in particular, but also in the so-called special branches of Administrative Law, such as Urbanism Law and Environmental Law.

See, for example, the field of public procurement. Our Public Procurement Code (CCP)<sup>16</sup> is rich in references to the use of electronic means, and there is also a public procurement portal whose objective is to centralize the most important information on public procurement, in particular matters relating to pre-contractual procedures and the execution of contracts already in place of celebrated. Publication of contracts is required by Article 465 of the CCP for reasons of transparency and protection of competition between the various economic operators.

But it is not only in public procurement that we find the reference to the use of electronic means. As mentioned, other special branches of Administrative Law follow the evolution of new technologies. Take as an example, in the Law of Urbanism, Article 8-A, of the Legal Regime of Urbanization and Building (RJUE)<sup>17</sup> which provides for the electronic processing of the procedures provided for in the Scheme, such as the licensing procedure, authorization of building use, prior information and prior notification. Also note in Environmental Law, the single environmental licensing regime, approved by Decree-Law no. 75/2015, of May 11, and whose procedure involves the use of electronic means, within the scope of an electronic one-stop-shop.

These are just a few examples, of a more specific nature, in which Public Administration relates to individuals through the use of electronic means. Effectively, the electronic advances within the Public Administration is, today, an undeniable reality. The question, however, is whether this increasingly intensive use of electronic means has only advantages, or whether it has some drawbacks.

The advantages are many and it is enough to read the precepts, listed above, to understand what they are: efficiency, economy, speed, sustainability, convenience, transparency, simplicity, among others. Notwithstanding the undeniable advantages, we must, however, consider possible drawbacks that may result from the use of electronic means.

As for the drawbacks, one might think of aspects of a more practical nature, such as the existence of flaws in computer systems, sometimes the inability of the platforms to support the loading of certain files, their slowness, practical problems that can undermine the purpose of the system and make it simpler to simplify administrative activity in an even more bureaucratic and inefficient way.

However, the main drawback that we see in the use of these means is the fact that not everyone has access in equal conditions to such electronic resources. It is a fact of our country that not all people have access to a computer, or even the internet. Sometimes the problem can not be a matter of access, but of knowing

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<sup>16</sup> Approved by decree-law no. 18/2008, of January 29.

<sup>17</sup> Approved by decree-law no. 555/99, of December 16.

how to use those technological means. It is true that Article 14 (5) CPA provides for a prohibition of discrimination between those who deal with the Administration using electronic means and those who do not. It seems to us, however, that the solution to the discriminatory problem must go further than this. Our catalog of Fundamental Rights is not, nor can it be, in the face of the evolution of society itself, a closed catalog. Is it not justified today to talk about a Fundamental Right of access, of all, to the Internet? In the face of the network society that today imposes itself, it may be thought that it will not be the responsibility of the State to ensure that everyone, on an equal footing, can intervene in this networked society, particularly when the Public Administration itself has the same new reality. We think that it is necessary to rethink, at least in this part, with regard to the open spirit of our Constitution.

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