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The judge and inert administration. Administrative discretionary power

Riga, 27 April 2023

General report

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INTRODUCTION

The ACA-Europe seminar organised in Riga on 27 April 2023, and the questionnaire in preparation for the seminar addresses the issue of inert administration and the role and competence of the courts in this regard, as well as issues of administrative discretionary power.

The questionnaire was answered by 32 ACA members, observers and guests: Austria, Albania, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Norway, Poland, Portugal, Romania, Serbia, Slovakia, Slovenia, Spain, Switzerland, Sweden, Türkiye and the United Kingdom.

This general report presents a summary of the information provided by all the national responses to a questionnaire in order to gather information on the issues to be addressed at the seminar. It is not possible to give a detailed account of all the information provided by the reporters. However, the aim of this report is to provide a comprehensive overview of the main subjects and areas of discussion, which will be addressed during the seminar, as well as to highlight similarities and differences in the information provided by reporters.

The report is divided into three main sections. The first section provides an overview of the provide insights into the regulation and application of procedural time limits. The second section focuses on the current national regulations of the administrative silence, the role and competence of the courts in the process of appeal against fictitious acts resulting from administrative silence, as well as other legal remedies available in this regard. The final third section examines issues of administrative discretionary power, in particular, definition of discretionary power and its distinction from margin of appreciation in the interpretation of undefined legal concepts, criteria and methods for determining the administrative discretionary power and a judicial control limits in this regard.

1. ADMINISTRATIVE TIME LIMITS

1.1. General principles for setting time limits

The majority of ACA members have indicated in their national reports that their legal system sets specific administrative time limits within which authorities must take administrative decisions or complete administrative actions. While nine members (*Belgium, Estonia, Finland, Germany, Ireland, Luxemburg, Sweden, Switzerland and United Kingdom*) have specified that such time limits are set only in certain areas of law.

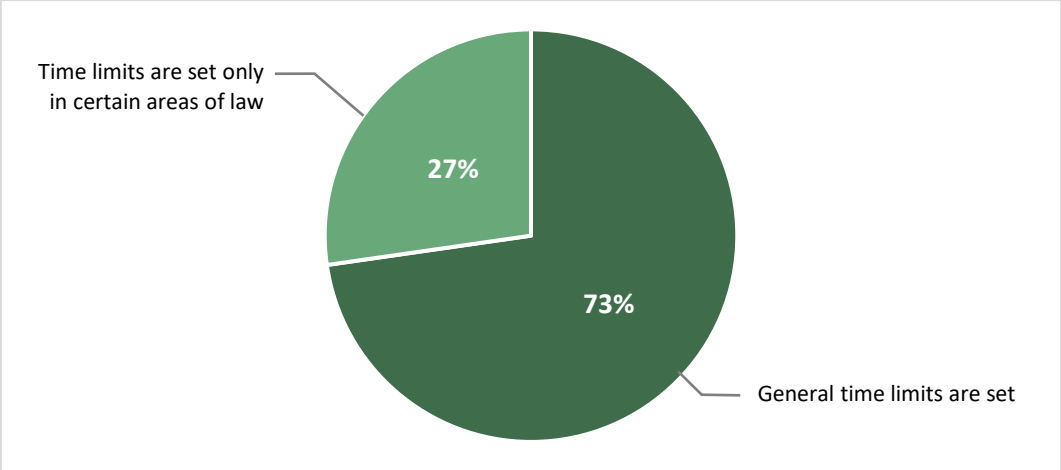

Figure 1. Determination of time limits

As regards where the relevant administrative time limits have been set, most ACA members indicated that they are set both in the national general code of administrative law or administrative procedure law and special laws (*Austria, Bulgaria, Croatia, Czech Republic, Germany, Greece, Hungary, Latvia, Lithuania, Portugal, Romania, Serbia, Slovakia, Spain, Switzerland, Türkiye and Norway*).

In such a case, national general code of administrative law or administrative procedure law usually sets general administrative time limits, while special law specify derogations from these time limits.

For example, *Austria* indicated that the general provisions of the administrative time limits are stipulated in the General Administrative Procedure Act. However, these provisions are applied only if administrative regulations do not provide otherwise.

Lithuania stated, that general administrative time limits are set out in the Law on Public Administration, providing that the subject of public administration must make an administrative decision on a person's request or complaint within 20 working days from the date of receipt of such a request or complaint. The special laws may also specify other time limits that can be shorter or longer than the general time limit of 20 working days.

Along with the national general code of administrative law or administrative procedure law and special laws, some members noted that administrative time limits are also set elsewhere (*Albania, Cyprus*, *France, Italy and Netherlands*).

The Netherlands has specified that the time limit for deciding upon an objection follows from the case law. *Italy* indicated that if terms exceeding ninety days are necessary for the conclusion of the proceedings, due to the administrative organization, nature of public interests, and the complexity of the proceeding, the state administrations and national public bodies adopt decrees to establish them on the proposal of the Ministers for public function and simplification of the legislation.

Cyprus stated that alongside other provisions, Article 29 of the Constitution safeguards, as a fundamental right of the individual, speedy administration imposing a duty upon State authorities to address petitions (written requests) and complaints of individuals in a manner befitting a society ordered by law. It expressly stipulates that an administrative authority must respond to a petition or complaint within 30 days.

Albania stated that sub-legal acts are issued based on and in accordance with ad hoc law.

Some members indicated that administrative time limits are set only in the general code of administrative law or administrative procedure law (*Poland and Slovenia*) or only in special laws (*Belgium, Estonia, Finland, Ireland, Luxemburg, Sweden and United Kingdom*).

For example, *Finland* stated that there is no general administrative time limit within which authorities must make administrative decisions or complete administrative action. However, the requirement of timeliness can be derived from Section 21 of the Constitution of Finland. Administrative Procedure Act also states that an administrative matter must be considered without undue delay. In addition, there are several statutory time limits laid out in specific acts.

Malta specified that administrative time limits in their legal system are set in the code of civil procedure.

According to the national reports, the procedures and time limits within which authorities have to take decisions or actions vary considerably among countries. However, in identifying common points, it needs to be noted that a large number of member states provide certain general time limits for the authorities. Members have mainly indicated that these time limits are set by the national general code of administrative law or administrative procedure law. However, in some cases, they may also be set by specific laws (*Albania, Bulgaria, Croatia, France, Hungary, Italy, Latvia, Lithuania, Malta, Netherlands, Portugal, Romania, Serbia, Slovakia, Slovenia, Spain and Türkiye*).

For example, in *Lithuania* the general administrative time limit in which administrative decisions are made is 20 working days from the date of receipt of request or complaint, in *Latvia* – one month, in *Italy* and *Romania* – 30 days, in *France* and *Malta* – two months.

Croatia stated that general administrative time limits are set in the General administrative procedure act, providing that the authority shall issue a decision within 30 days from the day of

receipt of the submission. In cases when the investigatory procedure is performed, the authority is obliged to issue a decision and deliver it to the party within 60 days from the day of receipt of the submission. The special laws may also specify other time limits.

In *Slovakia,* according to the Administrative Procedure Code, the administrative authority shall decide immediately (without delay) in simple matters. In other cases, the administrative authority shall decide the matter within 30 days from the opening date of the proceedings.

Spain indicated that the procedural time limits established in the different regulations vary depending on the nature of the procedure and the complexity of the issues to be examined. If no specific time limits are set in the corresponding sectoral regulation, the general time limit established in the Law on the Common Administrative Procedure applies.

Hungary has stated that in relation to the three types of procedures specified in the Administrative Authority Procedures Act, three general time limits are set for the competent authorities: (1) twenty-four hours in case of automatic decision-making, (2) eight days for summary proceedings and (3) sixty days for full proceedings (see the reply to point 1 above).

A significant number of countries also indicated that the concept of "reasonable time" for setting administrative time limits is applied in their legal system or case law. In general, as most national reports indicate, the concept is a guiding principle according to which authorities should ensure good administration in its activities. Several countries also indicated that the concept applies in cases where the law does not clearly set a time limit for action. In such cases, the authorities are obliged to act within a reasonable time (*Belgium, Bulgaria, Croatia, Greece, Latvia, Lithuania and Netherlands*).

In this regard, *Belgium* noted that the principle of "reasonable time", which derives from the general principle of good administration and legal certainty, can be applied to all administrative decisions. Furthermore, the reasonableness of the duration of the procedure must be assessed not only in relation to the overall duration of the procedure but also with the procedural steps in between.

Hungary reported that the Fundamental Law of Hungary states that everyone shall have the right to have his or her affairs handled impartially, fairly and within a reasonable time by the authorities. The same right can be found, as an element of the principle of legality, among the fundamental principles of the Administrative Authority Procedures Act.

Slovenia indicated that it is deemed that the specified time limits set out in the law are reflecting the “reasonable time” needed to decide on the subject matter. There is a general principle recognized in the Constitution as well as in subsequent the General administrative procedure act interpretation to support the necessity to decide in a reasonable time in general.

Slovakia's report notes that the concept of "reasonable time" is a legally indefinite term, the content of which is defined by administrative authorities in their decision-making practice. Reasonableness is to be assessed on a case-by-case basis, concerning the nature of the matter and the administrative authority´s workload.

According to the *Türkiye* report, the principles of "decision making in a reasonable time" and "notifying the decision without delay" are included in Article 6 “Principles of Good Administration" of the Regulation on the Procedures and Principles Regarding the Implementation

of the Law on the Ombudsman Institution. Thus, the principle of "reasonable time" is one of the criteria used in Ombudsman audits.

At the same time, several member states (*Austria, Czech Republic, Estonia, Finland, Germany, Luxemburg, Norway, Poland, Sweden and United Kingdom*) have indicated a different type of approach to setting time limits: their legal systems do not provide for general time limits for decisions or actions by the administrative authorities, but the general rule states that administrative authorities are obliged to act without undue delay or without unnecessary delay. . However, specific time limits may be provided by some specific legal acts.

The Czech Republic states that generally according to the Code of Administrative Procedure the administrative authority shall deal with matters without undue delay. The Supreme Administrative Court has concluded that the assessment of failure to act within reasonable time limit is a relative issue. (Un)reasonableness of the length of the proceedings has to be examined and conclusions must be made with regard to factors that directly affect the proceedings, such as complexity of the subject-matter, requirements for taking of evidence, the conduct and procedural activities of parties etc. Conversely, conditions of operation of the administrative authority (such as human resources, internal organisation or workload) cannot be taken into account.

In *Estonia,* according to the Administrative Procedure Act, administrative procedure shall be purposeful, efficient and straightforward and conducted without undue delay. Specific legal acts sometimes contain certain time limits for administrative procedure, but if that is not the case, the limitation is "no undue delay". Finland has also indicated a similar principle.

Also, in *Norway,* it follows from the Public Administration Act that cases shall be prepared and decided "without undue delay". Moreover, it follows that if it is expected that it will take a disproportionately long time before an application can be answered, the administrative agency that received the application shall as soon as possible provide a provisional reply. In the provisional reply the reason why the application cannot be dealt with earlier shall be explained, and it shall, as far as possible, be stated when a reply can be expected. In cases concerning individual decisions, a provisional reply shall be if an application cannot be answered within one month of its being received.

Sweden indicated that the Parliamentary Ombudsman and other supervisory authorities make reports and decisions on what reasonable time for a particular issue might be and these serve as guidance for the administration in general.

1.2. Extension of time limits

The absolute majority of national reports indicate that the legal system allows authorities to extend administrative time limits. Only a few countries indicated that such a possibility is not provided (*Austria, Croatia, Finland, Malta, Norway and Türkiye*).

Clearly, as explained by *Austria, Finland* and *Norway*, such an extension of administrative time limits is not relevant and common for those countries whose legal system does not provide specific administrative time limits. Consequently, also the question of the right of persons to complain about the authority's decision to extend the time limit is not relevant.

Some countries pointed out that such an extension of time limits is rather exceptional and only provided in specific cases (*Estonia, Hungary, Luxemburg, Slovenia and Sweden*).

Estonia pointed out that the possibility of extending the time limit depends on the special law which sets the time limit. For example, the General Part of the Environmental Code Act allows the extension of the time limit for issuing an environmental permit simply "if there appear circumstances which do not allow deciding on the issue of the permit within this time limit." The person may have a right of action depending on the circumstances.

In *Luxemburg*, the extension of administrative time limits is only possible in cases where the law exceptionally sets a time limit for the authority to take a decision. Normally, in such cases, the law allows the competent authority to extend the time limit once for a certain period if the case is complex. The decision to extend the time limit must be properly motivated.

Slovenia indicated that, generally, it is not possible to extend administrative time limits. However, there are some specific regulations in this regard, e.g. based on the Freedom of information act, administrative authority must decide on the party's application within 20 days, but in complex cases this time limit can be extended for additional 30 days, if the decision of the decision-making body decides that it is necessary in a specificcase.

Hungary stated that the Administrative Authority Procedures Act does not allow the authorities to extend the time limit set for the administration of a case, nor does it provide for such an extension. However, a separate Act of Parliament may allow such an extension.

All other member states indicated that their legal system at least partially allows the administrative authorities to extend the administrative time limit.

For example, in *Portugal,* time limits can be exceeded when there is a particularly complex procedure or difficulties in obtaining evidence. In these situations, the burden of proof regarding the need to extend the deadline for a better decision lies within the Administration.

Albania indicated that the public authority shall meet some criteria/requirements to extend the time limit for the conclusion of the administrative procedure:

1) The extension must not explicitly be forbidden by law;
2) The extension may be done in justified and objective cases;
3) The time limit may be extended for complex cases (such as a combination of administrative procedures, a large number of subjects, unification of administrative procedures, special investigation for the purposes of decision-making, a large volume of evidences, etc.);
4) The time limit may be extended only once, for the maximum and no more than the initial time limit;

5) The time limit may be extended to the extent it is necessary for the conclusion of the procedure;
6) The time limit may be extended by an interim decision in accordance with the principle of proportionality;
7) The extension of the time limit shall be notified to the party before the expiration of the initial time limit.

All the above requirements do not allow for the extension to be arbitrary or unjustified but are in favor of the fair and objective resolution of administrative case.

In the case of *Bulgaria*, the time limit may be extended if it is necessary to give other individuals or organisations the opportunity to object or is necessary to obtain the consent or opinion of another authority.

Ireland stated that some legislation specifically permits the extension of time for certain bodies within a specific service, whilst other bodies allow for the extension of time-based on discretion.

National reports indicate differences in regulations and case law regarding the rights of a person to complain about the authority's decision to extend the time limit.

Six member states reported that in their legal system there is no such right to complain about an extension decision (*Hungary, Netherlands, Norway, Poland, Serbia and Slovenia*).

The Council of State of The Netherlands indicated that although the extension of the decision period can have unpleasant consequences for the applicant (it will take longer before construction or the intended use can start, for example), it is in principle not possible to object against this decision.

In *Poland*, the decision to extend the time limit is made in the form of an order of an authority and this order cannot be appealed.

Ten member states reported that such rights exist in their legal system (*Czech Republic, Greece, Ireland, Italy, Latvia, Portugal, Romania, Slovakia, Switzerland and United Kingdom*).

The Czech Republic indicated that participants generally have the right to appeal the decision to extend the time limit. However, some special laws provide exceptions. For example, due to the fact that the time limit for dealing with a request to provide information is not extended by issuing a formal decision, but only by informing the person who submitted the request, the extension cannot be appealed. In contrast, according to the Act on Free Movement of Services, the administrative authority has to issue a formal decision on the extension of the time limit under this provision which, on the other hand, also explicitly excludes the possibility of appealing against such a decision.

Ireland also indicated that it is generally possible to appeal a negative decision in an application to extend the time limit of a particular service. However, there are no specified legal remedies available for a right to complain about an authority’s decision to extend the time limit.

Italian case law has admitted the appeal against the acts by which the authority requests unnecessary formalities or issues decisions that circumvent the content of the request or otherwise suspend the procedure without a deadline.

Latvia reported that according to the Administrative Procedure Law the decision on the extension of the time limit may be contested to a higher authority in accordance with the procedures regarding subordination. If there is no such higher authority, as well as the decision on the extension of the time limit of the higher authority, it may be appealed directly to the court. The court shall examine the complaint in a written procedure at one instance, with no right of appeal.

Some countries pointed out that the question about the right of persons to appeal against the authority's decision to extend the time limit could not be answered unequivocally (*Albania, Estonia, France, Germany, Lithuania and Luxemburg*).

France pointed out that, in general, persons do not have the appeal against the authority's decision to extend the time limit. However, such an appeal cannot be excluded if the particular decision is unfounded and affects the interests of the person concerned.

In *Germany,* the law does not regulate this issue. Nevertheless, the decision about the extension must be considered a procedural decision that cannot be subject to separate litigation. The legality of extending the time limit could, therefore, only be the object of judicial scrutiny in litigation of material compensation for a supposedly delayed permission.

Also, in *Lithuania,* the law does not provide a person's right to complain about the authority's decision to extend the time limit. The Supreme Administrative Court of Lithuania has stated that the decision to extend the administrative procedure is only an intermediate procedural document that does not cause independent legal consequences and, according to consistent court practice, cannot be the independent subject of an administrative dispute. Nevertheless, the reasons for the extension may be assessed when (if) the final administrative decision is challenged before the courts.

Albania reported that whereas the legislator does offer explicit provision in this regard, there are two approaches to challenging the interim decisions on the extension of time limits for the administrative procedure. On the one hand, their appeal is considered along with the final decision, on the other hand, their appeal is submitted immediately following their notification.

Luxemburg stated that in rare cases where the authority is obliged to reply within a certain time limit and extends that time limit, the applicant could theoretically complain about the authority's decision. However, in such a case, there would be a question of the admissibility and classification of such a complaint.

National reports indicate that almost all ACA member states (28 members in total) provide that an administrative decision unfavourable to the submitter or the potential addressee of the decision can still be made after the expiry of the time limit. However, several countries have highlighted some specificities in this regard.

For example, in *Cyprus*, no administrative decision can be reached if an excessive period of time has passed, which essentially influences the legal and real conditions. In fact, a challenged favourable decision to an interested party may be annulled by the court if the decision was taken in breach of the 'reasonable time' rule and by the time the decision was taken, the legal or real conditions have changed.

France, in this regard, noted that, unless the law provides otherwise, if the authority fails to take a decision within the time limit set by law, the claim is deemed to have been granted. The case law of the French Conseil d'Etat states that the authority may annul or revoke such a fictitious decision conferring rights on its own initiative or at the request of a third party only if it is unlawful and if the annulment or revocation takes place within four months of the decision.

Finland indicated that there are instances where unfavourable decisions cannot be made after the expiry of a given time limit (typically in matters initiated by authorities.

Greece also pointed out that in cases with a strict time limit and not an indicative one, the administrative decision cannot be made after the expiry of such time limit, whether or not the decision is unfavourable to the submitter. In these cases, if the authority makes a decision after the expiry of the strict time limit, this decision is not enforceable because the authority that issued this decision had no jurisdiction to issue such a decision.

Malta noted that such a decision is possible unless the addressee has already taken legal action.

Portugal indicated that pursuant to the Code for the Administrative Procedure the unofficial initiative procedures that may lead to issuing a decision containing unfavourable effects to the interested parties expires in the absence of a decision within 120 days' time.

Albania stated that, as a rule, the legislation requires compliance with the time limits for the conclusion of legal administrative actions. Albeit, in practice, it occurs that an administrative action may be completed out of the time limit set out by law. Code of Administrative Procedure offers a permitting approach in this regard states that failure to comply with the time-limits should be justified by the competent authority to the superior body, or by the competent official to his/ her own superior within 10 (ten) days from the expiry of the time-limit or the end of state of emergency.

The Czech Republic indicated that no decision (whether favourable or unfavourable) can be made after the time limit has expired if the law provides a fictitious decision upon the expiry of the time limit. Norway also indicated that in cases where the claim is deemed to be granted as the time limit expires, the authority is generally prohibited from making a decision that is unfavourable to the potential addressee after the expiry of the time limit.

Some countries also noted that if such a failure by the authority to meet a time limit has caused a financial loss or non-financial damage to a person, a persona is entitled to claim appropriate compensation (*Estonia, Greece, Italy and Latvia*).

1.3. Non-compliance with time limits

Failing to comply with established administrative time limits is reported as a common problem by eight member states (*France, Italy, Netherlands, Poland, Portugal, Serbia Slovakia and Slovenia*). A lack of institutional capacity is mainly cited as the main reasons for non-compliance with administrative time limits. However, some of the specificities identified by countries are also worth mentioning.

Italy reported that situations where an authority does not take administrative decisions or perform administrative actions within the time limit set by law are usually related to lack of resources within the authority (e.g. lack of staff), the improper organisation of administrative activities and inappropriate time limit provided for a complex proceeding (for example, if many advices need to be obtained).

In *Slovakia* the causes of the inactivity by public administration bodies are varied. Indeed, individual and, in a few cases, systemic failures by authorities and legal as well as non-legal causes can be identified. The legal causes of the inactivity lie in the deficient or missing regulation. Non-legal causes include a lack of financial resources that has impacts in terms of personnel and material.

France, *Poland* and *Slovenia* have indicated that, besides the lack of institutional capacity, a large number of applications on certain administrative matters to administrative bodies that have limited capacity is also a problem. *France* identified such administrative matters as asylum, urban planning and social assistance, while *Slovenia* highlighted cases related to work visas and permits.

Also, in *the Netherlands*, the problem is especially challenging in the context of asylum law, where the Immigration and Naturalisation Service has to deal with many applications, and in the cases of large compensation projects. Since the right to compensation depends mainly on the facts of the case, the Tax Service (Belastingdienst) has significant problems deciding timely the thousands of applications it is confronted with.

Although the other member states did not identify failing to comply with established administrative time limits as a common problem, lack of institutional capacity was also cited as a primary reason for time delays.

Germany indicated that time limits are difficult to abide by partly because of lack of staff, and partly because of the complexity of the law, which demands very complex administrative decisions (i.e. in urban planning etc.).

Albania noted that it used to be a common problem. However, since 2016, following the introduction of the amended Code of Administrative Procedure, a greater awareness of state administration for completing the administrative actions in due time is evident. This occurs due to the digitalization of services that are getting electronic (online). The authorities' failure to meet the time limit, aside from a lack of institutional capacity, is also sometimes caused by a lack of organizational skills of the institution to make a decision in due time and in any case the approaches of officials to obtain an unlawful benefit in corruptive means (criminal offence).

It is also worth mentioning the cases observed by Supreme Administrative Court of *the Czech Republic* in which administrative authorities were inactive due to their opposition to the case law (in particular, the tax authorities were refusing to pay interests related to verification of VAT deduction claims).

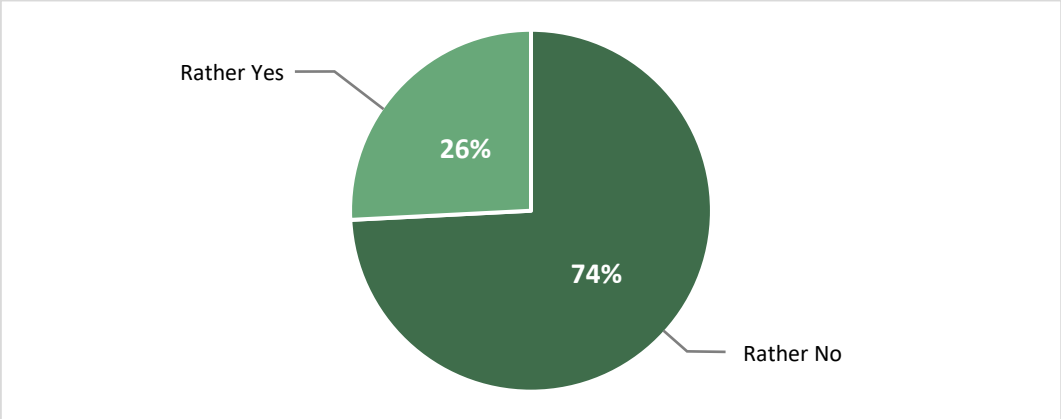

Figure 2. Is a non-compliance with the time limits a common issue?

On the question of whether there are any penalties or liability for the authorities or their staff for not complying with the time limits, only three member states indicated that their legal system does not provide such remedies (*France, Malta and Romania*).

In a significant number of countries, not complying with time limits in certain circumstances might result in staff being held liable to disciplinary or administrative action (*Albania, Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Estonia, Finland, Greece, Italy, Latvia, Lithuania, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden and Norway*).

In *Spain,* the Law on Common Administrative Procedure states that the staff in the service of the Public Administrations who are responsible for the handling of cases, as well as the heads of the administrative bodies competent to investigate and resolve them, are directly responsible, within the scope of their competences, for compliance with the legal obligation to issue a written decision within the deadline. Failure to comply with this obligation shall give rise to disciplinary liability without prejudice to any other liability that may arise in accordance with the applicable regulations. *Italy* also stated that according to the Administrative Procedure Law, failure or delay to issue the final decision is an element of individual performance assessment and disciplinary and administrative-accounting responsibility of the defaulting official.

The Supreme Administrative Court of *Lithuania* has stated that when applying disciplinary liability to civil servants for the failure to act, manifested by failure to perform procedural actions established by legal acts within the established terms, there must be assessed not only the objective basis of responsibility for failure to act – having the obligation to perform the actions established by legal acts, but also the subjective basis – the ability to act as required by law.

Slovenia indicated that disciplinary proceedings may be initiated against an individual civil servant if there are additional circumstances, e.g. showing a lack of due attention to the case.

Ireland, however, stated that there may be only internal disciplinary procedures where the competence of the staff to comply with procedural time limits is in question.

Finland indicated that questions of dealing with cases of undue delay are, in practice, perhaps most typically handled by the Parliamentary Ombudsman and the Chancellor of Justice, who supervise the activities of authorities and can investigate complaints concerning the undue delay in administrative decision-making. They can e.g. issue a reprimand to an authority or official concerned.

In addition, some of the countries (*Albania, Austria, Italy, Norway and Sweden*) also provide criminal liability in certain grave cases.

For example, in *Italy*, in accordance with the Criminal Code the public official or the person responsible for a public service who, within 30 days of the request, does not perform the act of his office and does not answer to explain the reasons for the delay, is punished with imprisonment up to a year or with a fine up to 1032 euros.

Some countries have also identified other measures.

In *Hungary* the Administrative Authority Procedures Act sanctions the exceeding of the time limit set for the administration of cases by imposing on the authority the obligation to pay fees and charges, and by exempting the client from paying the procedural costs.

The Netherlands, in 2009, adopted the Act on Penalty Payments in Case of Late Decisions. The essence of this Act is that an administrative body that does not decide in time on an application will have to pay a penalty payment for each day that the body is in default. This penalty has its boundaries. The maximum number of days that a periodic penalty payment can be forfeited is set at 42 days.

Norway indicated that in certain areas, such as spatial planning, failing to comply with the time limits could entail that the relevant authority would have to reimburse, either partly or in full, fees that the applicant has paid in order to have the authority decide the application.

In *United Kingdom* any remedy would be directed at the public authority and would not extend to staff.

2. ADMINISTRATIVE SILENCE

2.1. Administrative silence as a legal concept

Only a few national legislations contain a general definition of administrative silence (*Czech Republic, Greece, Italy, Romania, Serbia and Slovenia*).

For example, in the *Czech Republic,* the administrative silence is defined as a failure to act within a specific or reasonable time limit.

In *Italy,* according to the Administrative Procedure Law, the silence of the public administration is a misbehaviour of the administration who is obliged to conclude the proceeding by adopting a final decision within the time limit.

In *Slovenia,* if the administrative decision was not issued within the statutory set time limit, it is considered that the administrative silence (silence of administration) has occurred.

The *Greece's* Administrative Procedural Code contains a slightly broader definition: administrative silence occurs in cases where an authority is obliged to take an administrative decision but fails to do so within a specific time limit set by a special law, after the day of the submission of the petition. If a specific time limit is not set by law, administrative silence occurs when an authority is obliged to take an administrative decision but fails to take this decision within three months after the day of the submission of the petition.

Romania indicated that according to Administrative Litigation Law, not replying to the applicant within 30 days of registration of the application (unless otherwise provided by law) is defined by the concept of "failure to settle a petition within the legal time limit" and is considered an assimilated (atypical) administrative act.

Other national reports indicated that the "administrative silence" is not clearly defined as a general legal concept in their national legislation. However, it is present and is used in one form or another in certain administrative regulations and jurisprudence almost in all countries.

For example, *Spain* indicated that the concept of administrative silence has been included in the Spanish legal system for many years, and it is currently referred to the Common Administrative Procedure that address the lack of a written decision within the established time limit, and regulates the effects of the Administration's silence.

Portugal stated that in the doctrine silence can be "understood as the absence of a decision by the Administration concerning a petition addressed to it by an individual".

In *Slovakia,* the legal theory uses the term "fiction of decision / fictitious decision", which is the consequence of inaction by an administrative authority.

2.2. Legal models of administrative silence

Administrative silence by the administrative authorities can have different effects. The authorities' silence, or failure to take a decision within the set time limit, may be deemed to be a

refusal to take such a decision (negative model of administrative silence) or, in the opposite case, a claim not refused in due time is deemed granted (positive model of administrative silence). At the same time, administrative silence also may not have any specific effects and mean neither refusal nor granting of the application. However, a person may, for example, take action against the administrative authority's inaction.

National reports indicated that most legal systems provide both positive and negative models of administrative silence, or at least one of them. Moreover, in some countries, the relevant models are provided as a general principle in the case of administrative silence, while in others, they exist only in cases specifically provided for by law.

The negative model of administrative silence as a general principle in the case of administrative silence is established in *Belgium, Greece, Latvia*, *Luxemburg*, *Malta*, *Romania*, *Slovenia*, *Türkiye*. It means that administrative silence shall be recognised as a deemed refusal of a claim unless the law provides otherwise.

In certain areas of law, the negative model of administrative silence is provided in *Albania, Bulgaria, Cyprus, Czech Republic, France, Greece, Ireland, Italy, Norway, Serbia Slovakia, Spain and United Kingdom*.

For example, only one example of this model can be found in the *Czech* legal system: deemed refusal of a request to provide environmental information according to the Act on the Right to Environmental Information.

Italia indicated that their legal system provides a negative model but the law should explicitly provide that administrative silence is to be considered as a rejection of the claim.

Estonia stated that where not otherwise provided by law, administrative silence has a similar effect as refusal. However, nowhere in law it is explicitly stated that administrative silence equals refusal to grant the application.

In some countries where a negative model of administrative silence used to exist, indicated that it is no longer present in their legal system. In *the Netherlands,* before 2009, the case law of the Administrative High Court left it up to the parties whether the administrative silence should be considered as a fictitious refusal. If the administrative body wanted its silence to be considered a refusal, it only had to motivate this in its statement of defence. However, this model does not exist anymore. Also, in *Portugal* the current Code for the Administrative Procedure of 2015 does not provide, any longer, the negative effects of silence as a tacit act of refusal, enshrined in its previous that is now repealed.

Also, *Albania, Austria, Finland, Germany, Hungary, Lithuania, Poland and Switzerland* indicated that the negative model of administrative silence is not provided in their legal system.

Five countries have indicated the positive model of administrative silence as a general principle in the case of administrative silence in their legal systems (*France, Italy, Netherlands and Spain*).

In *Italy,* the Administrative Procedure Law states that the silence of public administration shall be deemed to constitute assent for all proceedings initiated by a request for an administrative act.

Similarly, in *Spain*, in procedures initiated at the request of the interested party, the law has sought to establish a general positive model of administrative silence, although with relevant exceptions.

The positive model of administrative silence also applies in other countries in certain areas provided for by law or as an exception (*Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Estonia, Finland, Germany, Greece, Hungary, Ireland, Latvia, Lithuania, Luxemburg, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Sweden, Türkiye and United Kingdom*). In several countries, this model was mainly implemented by transposing the positive silence model provided for in Article 13(4) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market into national legislation.

On the question of which regulatory model of administrative silence is more typical for national legal system 11 countries (*Belgium, Bulgaria, Greece, Latvia, Luxemburg, Malta, Romania, Slovenia, Sweden, Türkiye and United Kingdom*) indicated the negative model of administrative silence, while 7 countries indicated the positive model of administrative silence (*Austria, France, Hungary, Italy, Netherlands, Poland and Spain*). Meanwhile, the rest of the countries indicated that none of these models could be considered typical because, in most areas of law, administrative silence means neither refusal nor granting of the application, and the models are rather applied as exceptions.

2.3. The negative model of administrative silence

This section of General report summarises the responses of those ACA member states with a negative model of administrative silence in their legal system.

Types of administrative procedures the negative model can be applied to

All of the countries on the question of the types of administrative procedures that the negative model can be applied to, stated that the model is applicable to procedures that are initiated on the basis of an application or claim by a person (*Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, France, Ireland, Italy, Latvia, Luxemburg, Malta, Norway, Romania, Slovakia, Türkiye and United Kingdom*).

Only a few countries indicated that the negative model of administrative silence could also be applied to ex officio or other procedures (*Greece, Slovenia, Spain and Serbia*).

As *Slovenia* has stated, in any proceedings brought against the party (on an application or ex officio), the administrative silence presupposes a negative decision for the party (its application denied or imposition of new obligations on the party.

Spain indicated that for procedures initiated on the basis of applications, the negative silence model applies: (1) in those cases in which a rule with the status of law or a rule of European Union or international law applicable in Spain establishes otherwise; (2) in procedures relating to the exercise of the right to petition; (3) in those cases whose upholding would result in the transfer to the applicant or third parties of powers relating to the public domain or the public service, in

proceedings which involve the exercise of activities that may damage the environment and in procedures demanding the liability of the Public Administrations, as well as (4) in proceedings challenging acts and provisions of the public administration.

But for ex officio procedures: (1) in the case of procedures which may result in the recognition or, where appropriate, the establishment of rights or other favourable legal situations, the interested parties who have appeared in the proceedings shall understand their claims dismissed due to administrative silence; (2) in procedures in which the administration exercises powers to impose penalties or, in general, powers to intervene which may have unfavourable or burdensome effects, the proceedings shall lapse due to administrative silence.

The process for appealing against a "fictitious refusal"

The majority of countries reported that the negative or rejection effects of the expiration of the time limit without a written decision having been issued are produced immediately or automatically due to the expiry of the time limit, and national regulation does not provide any extra actions in order for the person to be able to appeal the refusal (*Bulgaria, Cyprus, Czech Republic, Greece, Ireland, Italy, Latvia, Norway, Serbia, Slovakia, Slovenia, Türkiye and United Kingdom*).

Some of these countries, however, pointed out that if the party wishes to challenge or appeal a rejection due to administrative silence, the party may have to justify that this silence has occurred, for example, by providing a copy, receipt or certification of the initial application, which initiated the administrative procedure that has not been resolved within the time limit (*Cyprus, France, Greece, Latvia, Luxemburg, Spain, Türkiye and United Kingdom*).

Belgium reported that in the case of the classic negative model, three preconditions must be identified:

1) a statement addressed to the competent administrative authority, made by the interested party;
2) the administrative authority must be obliged to take a decision;
3) the administrative authority must remain silent for four months.

Once these preconditions have been met, the "fictitious refusal" is subject to appeal.

Poland indicated that the general rules of administrative silence regulated in the Code of administrative procedure offer a possibility for a petitioner to receive proof of the authority accepting his application being silent for a prescribed time period.

Malta stated that the applicant has to provide proof of silence. However, the report does not provide any details.

Luxemburg indicated that all cases are different. Thus, the administrative judge must analyse on a case-by-case basis whether, in a particular case, the law provides that administrative silence is deemed to be a refusal.

Based on the national replies, it can be concluded that in almost all countries, the "fictitious refusal" resulting from administrative silence can be appealed before a higher authority (if any) and/or a court, with the majority of rapporteurs indicating no differences in the appeals process for "fictitious refusals" resulting from administrative silence from the general appeals process.

Only *Czech Republic* indicated that administrative courts do not review "fictitious refusals" but subsequent decisions on the merits of appellate administrative authorities (if the refusal is appealed). The administrative proceedings, thus, should always end with a standard decision on merits with reasoning, and the court can either annul the decision and refer the case back to the administrative authority or dismiss an action against the decision as unfounded. However, it should be noted that such a process is based on a single provision – the Act on the Right to Environmental Information – which is the only law that provides for the negative model of administrative silence in the Czech Republic.

A few countries highlighted some specificities of the process.

For example, *Cyprus* indicated that some statutes include provisions for hierarchical recourses or complaints to be made to higher authorities before lodging a recourse to the Administrative Court. For example, the Right of Access to Information of the Public Domain Law provides for the filing of a complaint to the Commissioner of Information if the administrative authority has failed to respond to a request or has violated the time frames.

Serbia indicated that in the appeal procedure due to the silence of the first instance administrative body the same authority acts in relation to the general appeal procedure. Its procedure differs from the general appeal procedure. In the appeal procedure, the second-instance authority requests that the first-instance authority shall inform the second-instance authority why it failed to issue a decision in a timely manner. If the second instance authority finds that the first-instance authority did not issue a decision within the time limit specified by law for a justified reason, it extends the deadline for issuing a decision for a period as long as the justified reason lasted, and 30 days at the latest. If the second-instance body finds that there is no justified reason for failing to issue the decision within the deadline specified by law, it decides on the administrative matter by itself or orders the first-instance body to issue a decision within a period no longer than 15 days. If the first-instance authority does not issue a decision again within the deadline set by the second-instance authority, it decides on the administrative matter by itself.

Slovenia noted that the only difference is that the appellate authority will ask first instance administrative authority for the reasons for the delay.

Italy specified that in the case of "fictitious refusal" the applicant will not be able to complain about the unlawfulness of the fictitious refusal for lack of reasoning.

In *Luxembourg*, there is a difference concerning time limits. The general time limit for action against a decision of the administrative authority is three months. It must be observed. Otherwise, the appeal will be declared inadmissible. As regards fictitious refusal, the individual is not obliged to act. He/she may prefer to wait until the administrative authority actually decides. The mechanism of fictitious refusal has traditionally been understood as a way of making the silent administration react. This is why the Luxembourg legal system has never provided that, in case of a fictitious refusal a person would be obliged to act within three months.

France indicated that in cases where the silence of the administrative authority is considered as a negative decision, and unless otherwise provided by law, the interested party has two months to lodge an appeal from the date of the fictitious negative decision. The applicant must prove by any available means the date on which the application was submitted to the administrative authority.

Türkiye also has a specific procedural provision – if the request is not replied to within thirty days, it shall be deemed to be dismissed. The persons concerned may brought an action to the Council of State, administrative and tax courts, depending on the subject of the case, within the time limits running from the end of thirty-day period. If the response given by the authorities within the thirty-day period is not final, the person concerned may either regard this response as dismissal or bring an action regarding this response as dismissal or wait for the final response. In this case, the time limit for the action shall not run. However, the waiting period cannot exceed four months from the date of application. In the case of not filing an action or dismissal of action due to the time limit, if a response is given by the authorities after the end of the thirty-day period, an action might be brought within sixty days from the notification of the response.

Competence of the court in relation to the "fictitious refusal"

According to national reports, there are some differences in the competence of national courts in cases where the "fictitious refusal" is found to be unjustified.

Eight countries indicated that the court's competence extends only to the annulment of such a "fictitious refusal" and ordering the administrative authority to issue a decision, but the court has no competence to decide upon the matter itself (*Bulgaria, Cyprus, France, Luxemburg, Malta, Norway, Sweden and United Kingdom*).

Cyprus specified that the reason the court cannot decide the matter itself is that the role of the administrative court in a recourse for judicial review is limited to testing the legality and not the correctness of administrative decisions. Two exceptions exist by virtue of the Administrative Court's Law of 2015. In asylum and tax recourses, the administrative court has jurisdiction to review both the legality and the correctness of the decision and to substitute the administration's decision with its own. However, in tax recourses where the applicant challenges the omission generated from inaction where the action is due in law, the administrative court has no jurisdiction to review the correctness of the omission. The matter must first be decided by the administrative authority in order to execute its legal obligation by issuing a decision.

In *Norway*, generally the courts competence is limited to ruling on the validity of the decision. As a consequence, the court's judgments in these matters will only rule that the decision – be it a regular one or a "fictitious refusal" constituted by the relevant rules on the negative mode – is invalid. It would then be for the relevant public body to examine or re-examine the matter, taking into account the ruling and findings of the courts. The courts would, at least generally, not set a specific time limit, but as always, the decision would have to be made "without undue delay" and in accordance with any other fixed time limits that might apply.

Luxemburg indicated that the administrative judge, following the classic procedure of the action for annulment, has the competence to annul the "fictitious refusal" and refer the case back to the administrative authority to decide upon the matter. However, if the competent administrative authority does not comply within three months of the referral, the party who received the annulment judgment may submit a request to the court that pronounced the annulment in question for the appointment of a special commissioner. In practice, in 98% of the cases, the request for the appointment of a special commissioner causes the administration to react and it takes a decision.

Once an administrative decision is taken, the request for the institution of a special commissioner becomes irrelevant.

Meanwhile, eleven countries stated that the court can also decide upon the matter itself (*Belgium, Croatia, Germany, Greece, Italy, Latvia, Romania, Serbia, Slovenia, Spain* and *Türkiye*).

In *Greece,* according to the Administrative Procedural Code, if a court finds a deemed refusal of a claim resulting from an administrative silence to be unjustified, it shall assign the authority to examine the petition and issue a relevant decision. In cases where the Tax Authorities have failed to issue a decision within a specific time limit, the court shall abrogate the administrative silence and decide upon the existence and the content of a right or an obligation.

Romania stated that, as a rule, the court may order the administrative authority to issue a decision within a certain time limit and may determine the application of certain penalties for each day of delay. If the court does not set a time limit, the administrative authority must comply with the obligation within 30 days from the date the court decision becomes final.

If the court has all the evidence necessary to verify that the conditions laid down by law for a favourable outcome of the plaintiff's application have been met, without further reassessment by the public authority, it may itself decide on the matter in dispute or oblige the public authority to issue an administrative decision with a certain content.

Slovenia similarly mentioned that if the court finds that the lawsuit is well-founded, it will mostly order the administrative body to issue a decision with a certain content in a certain time limit or if additional conditions are met (all of the facts are already determined or were determined by the court), the court can also decide on the case (dispute of full jurisdiction). The judgment will replace the decision of the authority.

Serbia indicated that if the court has the necessary facts and the nature of the subject matter allows/permits it, it can directly resolve the administrative matter with its judgment.

Spain reported that once the appeal has been lodged against the presumed rejection, the court has the same capacity to study, hear and resolve the case as if it were dealing with the challenge of an explicit act. It is a different matter that, precisely because it is a rejection due to administrative silence, in the absence of a written administrative decision, the court may lack essential data to decide on its own. In such a scenario, it would be possible to give a judgment ordering the administration to issue a written decision in accordance with the rules and details established by the court.

Meanwhile, all the countries where the court is competent to decide upon the matter itself instead of the "silent" authority indicated that this is only possible in cases in which the authority has no discretionary power or it is limited to zero (where a provision of applicable law requires that a specific content decision be issued and the authority is no longer required to carry out considerations of usefulness).

Legal remedies if the authority does not comply with the court's decision

From national reports, it is generally clear that all countries apply the principle that authorities are obliged to properly and in good time enforce a judgment or another decision directed against it, rendered or taken by a court in an administrative case. Most countries also provide various legal remedies in the case of an authority's noncompliance with this obligation.

Several countries indicated that if a court order to issue a decision is not complied with, the administrative authority may face financial penalties (*Albania, Bulgaria, Estonia, Germany, Greece, Latvia and Spain*).

For example, in *Bulgaria*, in accordance with the Code of Administrative Procedure, the responsible official who does not implement a court decision in force may be fined. The minimum financial penalty is about 100 EUR, and the maximum is about 1000 EUR.

Latvia also indicated that according to the Administrative Procedure Law, a court may impose a pecuniary penalty on the responsible official. The minimum pecuniary penalty shall be 50 EUR, the maximum – 5000 EUR. A person may ask a court to re-impose the pecuniary penalty until the head of an authority or another official enforces or terminates the activity specified in a court ruling. A repeated pecuniary penalty may be imposed not earlier than after seven days.

Some countries, as a possible legal remedy, also indicated administrative or, in grave cases, even criminal liability of a public official who does not implement the judicial decision (*Albania, Spain, Sweden and Türkiye*).

Similarly, the *United Kingdom* indicated that failure to comply with a court order could, in theory, generate proceedings for contempt of court. Sanctions for contempt of court include imprisonment, fines and seizure of assets.

Croatia stated that if the authority does not enforce the judgment within a certain period, the party can demand enforcement of the judgment from the court of the first instance. *Romania* reported that if the authority does not willingly execute the judgment, it is enforced by compulsory execution, following a special procedure provided by the Administrative Litigation Act.

The *Italian* legal system provides a wide range of legal remedies. The claimant may submit a complaint concerning the non-compliant execution of the judgment, and it shall be examined by the court, which issued the judgment, or by the Council of State if the judgment has been amended on appeal. In deciding the execution, a court may:

1) Order compliance, giving prescriptions, including by determining the content of the administrative act or by issuing it instead of the administration;
2) Annul the decision taken in breach of the res judicata;
3) In the event of compliance with judgments, which have not been res judicata or other measures (e.g., interim measures), determine the modalities of enforcement, considering the acts issued in violation of the decision to be ineffective;
4) Appoint an ad acta commissioner;
5) Impose a pecuniary penalty due for any subsequent infringement or non-compliance, or for any delay in the execution of the res judicata.

As in *Italy*, some other countries also pointed out that in certain or exceptional cases, the court has the competence to decide on the matter itself and replace the decision of the authority (*Poland, Serbia and Slovenia*).

Some countries indicated that their national legal system does not provide any specific legal remedies if an authority has failed to comply properly with a court order to issue a decision.

Norway stated that as the issue of authorities failing to comply properly with court orders is not a common issue, the legal remedies against said failure have not been thoroughly explored in practice. It has, however, been argued that should the authority's failure become flagrant enough, the courts could set specific time limits for when the decision must be made, and in extreme instances, possibly even decide on the matter itself.

Also, *Swedish* legislation is based on the assumption that public authorities will always follow a court's decision, if they do not, criminal responsibility may follow. If an authority does not comply with a courts ordering, a case concerning damages can be directed against the authority and a complaint to the Parliamentary ombudsman may also be done, resulting in an investigation and possible critique or prosecution.

The *Czech* Code on Administrative Justice also does not contain provisions for the enforcement of decisions of administrative courts. Therefore, if the administrative authority does not voluntarily comply with the order imposed by an enforceable judgment, it is necessary to seek compliance by applying for judicial enforcement, which is entrusted to civil courts or via enforcement officers.

Cyprus indicated that generally, administrative authorities observe and comply with the court's judgments, and until now, no statute has been enacted in this regard. However, three bills to regulate the obligation of administrative authorities to active compliance with judgments are currently pending before the Parliament.

2.4. The positive model of administrative silence

This section of General report summarises the responses of those ACA member states with a positive model of administrative silence in their legal system.

The purpose of the positive model

14 countries noted that the main purpose of the positive model in their legal system is to simplify certain administrative procedures (*Austria, Cyprus, Estonia, Finland, Germany, Greece, Ireland, Italy, Latvia, Lithuania, Netherlands, Poland, Romania and Türkiye*). 6 countries identified the protection of individuals' rights in the case of non-compliance with administrative time limits as the main purpose of the model (*Bulgaria, Croatia, Slovakia, Slovenia, Spain and Norway*). 7 countries identified both (*Albania, Czech Republic, France, Hungary, Luxemburg, Portugal and United Kingdom,*).

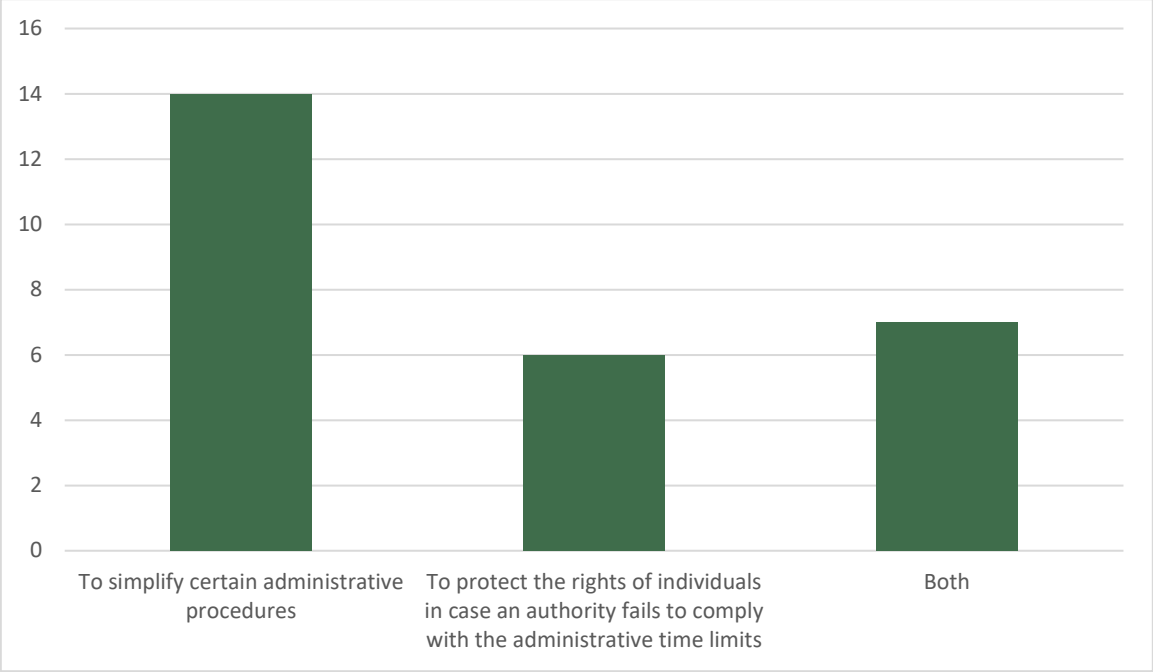

Figure 3. The purpose of the positive model

The prevalence of the purpose of simplifying and speeding up administrative processes is probably related to the fact that, as it was already mentioned in the section "Administrative silence", in several countries, the positive model of administrative silence was mainly implemented by transposing the positive silence model provided for in Article 13(4) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market into national legislation. The relevant provision states that failing a response within the time period set or extended, authorisation shall be deemed to have been granted. The purpose of such regulation is mainly related to reducing the administrative burden for the establishment and development of services, as well as simplifying and modernising public administration. This is also the explanation provided by the reports of several countries: *Cyprus, Finland, Germany, Greece, Ireland, Latvia, Lithuania, Poland and Romania*.

In the *Austrian* legal system, it is apparent from the preparatory works of the few provisions establishing a positive model of administrative silence that this model is only to be applied to cases where further examinations are not considered necessary.

Italy indicated that the positive model of administrative silence is a tool to simplify administrative procedures and to ensure legal certainty, which is fundamental in procedures involving economic interests linked to investments. Article 20 of the Administrative Procedure Law provides that the silence of public administration be deemed to constitute assent for all proceedings initiated by a request for an administrative act.

With regard to the protection of individuals' rights as the main purpose of the model, the national reports indicate the following.

The *Spanish* legal system imposes on the administration the legal obligation to issue a written decision in all cases. From this perspective, the positive effect of administrative silence constitutes a guarantee for citizens, who can have their applications upheld even when the deadline for doing so has expired and the administration has not issued a written decision as it should have done.

Bulgaria mentioned that on the grounds for the bill amending and supplementing the Code of Administrative Procedure, the institute of "tacit consent" is presented as an effective measure for the protection of citizens against the administrative authorities in cases where an authority fails to comply with administrative time limits. This institute reduces the administrative burden and increases the discipline to meet time limits.

The Czech Republic indicated that the positive model of administrative silence generally serves both of these purposes. The main purpose depends on the type of decision and regulatory context.

Portugal similarly pointed out that in the national legal order, the tacit approval ensures, on the one hand, the procedural speed and, on the other hand, guarantees the protection of rights, which exercise depends on an administrative control.

France explained that the 2013 reform of the regulation, which set the positive model of administrative silence as a general principle, was aimed at simplifying the relationship between the administrative authorities and citizens and modernising public action by reducing administrative procedures. Also, the risk of illegal tacit decisions was expected to act as an incentive for the administration to take decisions within a shorter timeframe.

Restrictions on the application of the positive model

On the question of whether the national legal system contained any prohibitions or restrictions on the application of the positive model in certain areas of law, most respondents answered in the negative, indicating that as the positive model mainly applies only to specific cases provided for by law no such prohibitions or restrictions are needed. (*Albania, Austria, Bulgaria, Estonia, Germany, Greece, Latvia, Norway, Poland, Romania, Slovenia and Türkiye*).

For example, *Austria* stated that the positive model of administrative silence is not a general legal principle in the Austrian legal system but an exception that is only to be applied when explicitly stated.

Poland specified that the fundamental limitation of the use of tacit settlement of a case results from the fact that this solution can be used only when a specific act so provides. In other words, it is the legislator who arbitrarily indicates in which areas a case can be settled tacitly.

Albania also pointed out that the law establishing the positive model of administrative silence provides that it should be regulated by a special law, without limiting the nature and types of special laws depending on the areas of law.

Finland, Ireland and *Slovakia* also indicated without further specifying that no such prohibitions or restrictions exist in their legal systems.

Cyprus, Lithuania, Luxemburg and the United Kingdom also reported that there are no prohibitions or restrictions on the application of the positive model in their legal system. However, as a possible restriction highlighted by the above-mentioned Directive 2006/123/EC, that imposes certain restrictions by defining services and areas where its provisions (including Article 13(4) in relation to the positive model of administrative silence) cannot be applied. It is clear that the relevant provisions should be taken into account by the countries where the Directive has been implemented.

The Czech Republic stated that the legal system does not contain any specific prohibitions or restrictions on the application of the positive model. However, prohibitions or restrictions may arise from general legal principles - namely, the principle of legal certainty and protection of the rights of third parties. According to the explanatory memorandum to the Code on Administrative Procedure, there were attempts to introduce the positive model as the general regulatory model of administrative silence during the discussions on the length of the time limit for issuing a decision. The memorandum states that this model was not introduced as general because it "cannot be accepted generally in administrative proceedings, in particular, because of the protection of the rights of third parties."

Hungary indicated that prohibitions on the use of the positive model could be found in individual sectoral rules. One example is the restriction in the Government Decree on Weapons and Ammunition, according to which no lawful silence is possible in the licensing process provided for in the Act on Firearms and Ammunition.

In the *Italian* legal system, some exceptions to the positive model of silence consent are provided for the legislator to safeguard interests for which a formal procedure is required. These are cases relating to procedures aimed at the protection of cultural heritage of the environment or decisions issued by the national defence, public security, immigration, health and public safety administrations.

In addition, the cases in which European legislation requires the issue of a formal administrative decision and those in which the law qualifies the silence of the administration as a refusal of the claim are excluded from the positive model of silence.

Portugal stated that the new Code for the Administrative Procedure announces as exceptional rule of tacit approval, eliminating the list of situations applied in the previous regime.

In the *French* legal system, the positive model of administrative silence is the general rule. However, the law sets a number of restrictions. The positive model does not apply where: the action does not concern an individual decision; the action is of a financial nature; the granting of an indirect action is incompatible with France's international and European obligations; the action relating the protection of national security, constitutional freedoms and principles and public order and, finally, in relations between the administration and its officials.

Spain as exceptions to the positive model indicated cases where administrative silence has a negative effect: (i) in those cases in which a rule with the status of law or a rule of European Union or international law applicable in Spain establishes otherwise; (ii) in procedures relating to the exercise of the right to petition; (iii) in those proceedings whose outcome would result in the transfer to the applicant or third parties of powers relating to the public domain or the public service; in proceedings which involve the exercise of activities that may damage the environment, and in proceedings concerning the liability of the Public Administrations, as well as (iv) in proceedings challenging acts and provisions and in ex officio review proceedings initiated at the request of the interested parties.

The Netherlands indicated that such a fictitious positive decision, for example, an environmental permit for the construction of a structure or the felling of a tree, may be at the expense of the public interest, which requires careful consideration of whether the criteria for granting a permit have been met and that, if not, the license will be denied. In addition, the public interest sometimes requires that certain conditions be attached to a licence. A fictitious positive decision could therefore be at the expense of the interests of third parties who cannot know that a positive decision has been taken and who may miss objection or appeal periods as a result. Therefore, some mitigating provisions have been made.

Tacit approval of the claim

National reports indicate that in the majority of countries, a moment when a person's claim is deemed to have been granted is the moment when the time limit set for handling a request expires (*Albania, Austria, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, France, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Norway, Poland, Romania, Slovakia, Slovenia, Spain and Türkiye*). In other words, a person's claim is deemed to have been granted immediately after the expiry of the time limit.

Some countries indicated more specific rules.

Estonia stated that a moment when the person's claim is deemed to have been granted depends on the specific provisions. Sometimes the application is deemed to have been granted once a certain amount of time has passed (for example, 10 days in case of a building notice or use and occupancy notice; 30 days in case of an activity licence), but there are also instances where the reaction time for the authority is not directly limited, but the application or declaration is deemed to have been granted immediately upon registration (for example notice of economic activities).

In *the Netherlands,* the applicable time limits are laid down in specific laws or follow the General Administrative Law Act. The legal consequences associated with a positive fictitious decision take effect three days after the decision period has expired without being used.

Portugal specified that in accordance with the Code for the Administrative Procedure, the time limit considered for the tacit approval is the notification period. It means the law considers

"that there is tacit approval if the act's notification is not sent until the first working day following the decision's deadline".

The United Kingdom reported that the specific moment an application is deemed to have been granted would depend on the provision in question. For example, the licence for a sex establishment is deemed to remain in force from the moment it expires until the withdrawal or determination of the application, and the notification is deemed approved after the expiry of 28 days from the date the application was received by the planning authority.

On the question of whether the person has to get any kind of confirmation or proof that the claim has been granted, 11 countries stated that no such confirmation or proof is required (*Austria, Croatia, Cyprus, Greece, Italy, Latvia, Norway, Portugal, Slovenia, Spain, Türkiye and United Kingdom*).

Greece, however, pointed out that when a petition to grant an authorisation is submitted, the authority shall issue a confirmation of receipt of a such petition that states the time limit within which the authority shall examine the petition, the legal remedies that are provided in case of rejection of the petition and a declaration that if the competent authority does not examine the petition within the statutory time limit, the authorisation is deemed to have been granted.

Meanwhile, 10 countries indicated that a person has a legal right to receive confirmation or proof that the claim has been granted (*Albania, Czech Republic, Finland, France, Germany, Hungary, Ireland, Lithuania, Luxemburg, Poland and Romania*).

Finland specified that in situations where authorisation is deemed to have been granted, a document indicating the same shall be issued to the applicant for the authorisation.

Luxemburg indicated that, in general, the person does not need to obtain confirmation or proof that the application has been granted. However, the law sometimes expressly provides that, on the initiative of the applicant who has obtained tacit authorisation, the competent authority must issue the documents relating to the authorisation without delay.

Albania reported that after exceeding the time limit, the party may request the issuance of a written confirmation as approved in silence. The confirmation shall contain the text of the request, the date of its submission and the fact that the public body has failed to notify its decision within the time limit.

If the authority does not issue a confirmation within seven days from the date of the party's request or at the same time does not issue the requested administrative act, the party may bring a lawsuit before the competent court for administrative matters in order to clarify the rights and obligations between the plaintiff and the public body.

The party also may request written confirmation through a judicial proceeding if the public body has failed to issue it upon the party's request.

In *the Netherlands,* the administrative authority is obliged to notify the fictitious order within two weeks after it has been granted, stating that the order has been granted ex officio. If the administrative authority fails to publish the order, the applicant may declare the administrative

authority to be in default. If the administrative authority does not make the notification within two weeks, it will forfeit a penalty for each day that it is in default.

Estonia pointed out that if an activity licence is required to be entered in the register, also in the case of a "silent" activity licence, the authority enters the data of the activity licence in the register on the working day following the expiry of the time limit. Similarly, the *Czech Republic* noted that the administrative authority shall, without undue delay, make an entry in the file that the authorisation to provide some service has been granted and enter the holder of the authorisation in the relevant register. Upon request, it shall issue a certificate to the holder.

Legal remedies available to third parties affected by the "fictitious decision" of granting a claim

All rapporteurs indicated that their national regulation does not provide any specific or special legal remedies available to third parties affected by the "fictitious decision" of granting a claim. However, in most countries if such "fictitious decision" of granting a claim affects the rights or legal interests of a third party, that party has the right to complain against the decision.

Cyprus explained that a third party may complain to the competent administrative authority which has "fictitiously approved" the claim or to the Commissioner for Administration and the Protection of Human Rights (Ombudsman).

Also, if the third party's existing and direct legitimate interest is affected by the "fictitious approval" he or she may lodge a recourse to the Administrative Court under Article 146 of the Constitution.

The Czech Republic indicated that generally according to the special laws, only the participants of a proceeding have the right to appeal against such a "fictitious decision".

However, third parties may try to initiate administrative review proceedings, which shall be commenced if the administrative authorities discover (on the basis of their own official activity or the initiative of a participant or third party) facts that give rise to reasonable doubts that a decision is in accordance with the law.

Third parties may also try to seek judicial protection. The right to bring an action against an administrative decision does not derive from previous participation in the administrative proceedings. This action may be brought by whoever claims to have been deprived of his rights by an administrative act that concerns his/her rights and/or obligations. This option, however, is just theoretical.

Germany specified that a third party may recruit to all remedies which are available against a "real" decision. The calculation of the time limit for the third party remedy starts with the existence of the fictitious permission, thus three months after the application.

Bulgaria and *Hungary* stated that the "fictitious decision" of granting a claim generally should not affect any third parties.

Bulgaria explained that according to the Code of Administrative Procedure, tacit approval may not impose obligations and affect the legal rights and interests of individuals and institutions

other than the applicant. In case of violation of this prohibition, the third parties concerned have the right to submit a claim.

Hungary also specified that the positive model shall not apply where the case involves an opposing party.

Annulment of the "fictitious decision" of granting a claim

According to national reports, no country has any special or certain procedure that allows annulling a "fictitious decision" of granting a claim. However, most countries indicated that such an annulment, where there are grounds, is possible according to the general procedure.

For example, *Cyprus* indicated that an applicant may request the cancellation of "fictitious decision" by writing to the issuing administrative authority. Also, an interested, prejudiced party, whose direct legitimate interest has been affected by the "fictitious decision", can contest in court the decision requesting its annulment. There is no special procedure. The only observation that can be made here relates to the strict constitutional time limit within which acts, decisions and omissions of the administration can be challenged by way of judicial review. In the case of a "fictitious decision", where there is no communication of the act/decision, the 75-day strict constitutional time limit is activated once the prejudiced party gains knowledge of the decision.

Other countries also referred to specific rules on setting time limits for appeals in cases where the decision has not been notified to the person.

Croatia indicated that according to the Act of Administrative disputes, if an individual decision has not been delivered to the party in accordance with the delivery rules, an appeal may be submitted within 90 days from the day when the party has become aware or could have become aware of the decision, and no later than within five years after the deadline.

In *Latvia*, according to the Administrative Procedure Law, if a decision restricts the rights or legal interests of a private person, but the private person has not been notified thereof, an application may be submitted within one month from the day when the private person has become aware thereof but not later than within one year from the day this decision comes into effect.

Some countries also indicated that, in certain cases, the authority has the right to annul the decision itself.

Italy explained that it is always possible, in the presence of a set of conditions and in the balancing of all the interests involved, for the public administration to annul ex officio its expressed or tacit decisions for defects of legitimacy or for opportunity reasons.

The Netherlands stated that the administrative authority may impose conditions on the decision or can even withdraw the decision "insofar as this is necessary to prevent serious damage to the public interest". The administrative body can only do this within six weeks of the fictitious decision and, in doing so, must compensate for any damage, for example, if a person who has been granted the permit has already started the activities that are licensed with it. This procedure also serves the interests of third parties. Application of these "corrective measures" is only allowed in exceptional cases.

In *Spain,* decisions obtained due to the positive effect of administrative silence can be challenged through ordinary channels, just like explicit acts. Furthermore, Article 47 of the Law on Common Administrative Procedure establishes that "explicit or presumed acts contrary to the legal system by which powers or rights are acquired" will be null and void "when the essential requirements for their acquisition are lacking". When faced with these acts that are null and void or legally void, the administration may also promote their ex officio review and declare them null and void, always after hearing the interested party and in accordance with a specific procedure.

Implementation of the positive silence model provided for in Directive 2006/123/EC

All countries where the Directive was to be implemented indicated that it had been implemented in national law on services and various specific pieces of legislation regulating the particular area of law.

Several national reports also clarified that any potential implementation of the positive model of administrative silence in accordance with Article 13(4) of the Directive was made in the light of the Directive's provision that different arrangements may be put in place, where justified by overriding reasons relating to the public interest, including a legitimate interest of third parties.

In this regard, some countries (*Greece, Latvia, Poland and Portugal*) indicated that a special working group was set up within the responsible ministries in order to undertake and monitor the various stages of the Directive's implementation and to assess in which areas and which services the positive model could be applied, in particular whether the application is not contrary to the public interest.

By way of example, in *Greece* and *Latvia* it was recognised that in the sector of education services, such a model may be in contradiction with the public interest and is not applicable in this area. *Cyprus* indicated that positive silence is contrary to the public interest with regard to aliens and immigration as well as citizenship. The *Finnish* report also lists a number of areas where the principle does not apply, such as financial and insurance services, transport services, the services of temporary work agencies, health care and pharmacy e.g.

In addition to these restrictions, *Estonia* also pointed out that the positive silence model is also not applied if an activity licence must be granted with secondary conditions.

The national reports also contained an extensive list of services and areas where the principle of positive silence has been implemented. *Spain* indicated that the relevant provisions of the Directive are taken on board and generalised in numerous sectors of administrative practice, such as, for example, the industrial, energy, construction, services, transport and communications sectors. *Germany* identified the following specific areas of law: rail infrastructure, urban planning (partly), chemical labs, energy market regulation, trade with agricultural property, public transport and import of infectious material. *Lithuania* specified that legal areas where the positive silence model is implemented are very different: natural gas sector, electricity sector, issuance of permits to purchase, keep or carry weapons, issuance of licenses for the wholesale and retail sale of alcohol products etc.

In addition, in the context of the implementation of the Directive, *Italy* pointed to the introduction of a single point contact, through which service providers can carry out, by electronic means, all the formalities necessary for access to and operation of an economic activity and obtain information and assistance.

No country has reported any difficulties in implementing the Directive in the national legal system.

However, the *Czech Republic* considered it worth noting that the explanatory memorandum to the act, which amended 23 special laws to transpose the positive model, does not indicate on what basis the model was implemented in these special laws and not in others (which would come into consideration), or why these laws provide for fictitious decisions only for certain authorisation procedures and not for others. It is thus unclear whether the implementation was done after careful consideration for which authorisation procedures this model could be introduced and for which it could be not due to "overriding reasons relating to the public interest, including a legitimate interest of third parties".

Belgium pointed out that although general rules have been adopted, the implementation of the positive silence model provided for in the Directive has still not been implemented in a unified and coherent manner. Rather, its implementation is dealt with on a case-by-case basis.

2.5. Other legal remedies

Legal remedies in situations of administrative silence where the law does not regulate it neither in accordance with the positive, nor the negative model

Several countries, in relation to other existing legal remedies, indicated that one or both of the silence models provided in the national legal system generally cover all situations and there is, in principle, no need for other solutions. The national reports of *Albania, Belgium, Greece, Latvia, Luxemburg, Slovenia and Türkiye* indicated this.

For example, in Slovenia, the general negative model is applicable in all situations. The *Latvian* and *Türkiyeish* administrative legal system also provides the negative model as a general principle in the case of administrative silence unless a specific provision states otherwise. *Albania*, meanwhile, emphasised that the situation of administrative silence is regulated in accordance with the positive model of administrative silence, and there are no other institutes related to the administrative silence.

Spain and *Norway* also pointed out that, in general, the regulation of the positive model and the negative model covers any possible administrative file. However, they clarified a few more options.

In *Spain*, Articles 29 and 30 of the Law on Administrative Jurisdiction 29/1998 provide for cases of jurisdictional challenges that can be brought in the absence of a written decision by the Administration, but to which the general concept of administrative silence cannot be applied. Article 29 regulates the so-called appeal against the inactivity of the Administration, in reference

to the possibility of appealing to the court in the event of failure to comply with a specific material benefit that has already been recognised in favour of the interested party. In turn, Article 30 regulates the appeal against a so-called "de facto act", in reference to the possible challenge against an action carried out by the Administration without competence or completely disregarding any legal procedure.

Norway explained that the most prominent additional legal remedy would be a complaint to the national Ombudsman. Ombudsman would then have the competence to examine to the case at hand and to issue a reasoned decision. In such a decision, Ombudsman could examine whether and why the relevant public authority has not acted in accordance with the relevant time limits. Should Ombudsman reach such a conclusion, Ombudsman could also recommend that the relevant authority re-examine the case.

Similar to Norway, also *Cyprus, Finland* and *Sweden* mentioned the possibility of submitting a complaint to the Ombudsman, Chancellor of Justice (in *Finland*) and Commissioner for Administration (in *Cyprus*).

Most countries, as a possible legal remedy in case of the administrative silence if it is not addressed by any of the models, indicated an appeal against the silence or inaction, which can be lodged with an authority or an administrative court (*Austria, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, France, Germany, Hungary, Ireland, Italy, Lithuania, Poland, Portugal, Switzerland and United Kingdom*).

In particular, the *Czech* regulatory model of administrative silence is based on measures against inaction. It means that if an administrative authority is inactive, its superior authority shall (ex offo or on request of a participant of the proceedings): 1) order the inactive administrative authority to take necessary measures to remedy the situation or issue a decision within the time limit; 2) take over the case; 3) delegate the case to another administrative authority in its administrative district; 4) reasonably extend the time limit if it can be reasonably expected that the inactive administrative authority will issue the decision within the extended time limit and if such a measure is more advantageous to the participants. If the superior administrative authority is also inactive, it is possible to seek judicial protection.

France stated that the refusal of an authority to take an action or make a decision can be appealed to an administrative court. This can lead to the decision being annulled and the administration being ordered to act in a certain direction within a time limit set by a judge, imposing a penalty if necessary. Such refusal or failure to act may also give rise to administrative liability on the part of the relevant administrative authorities.

In *Hungary*, Act on the Administrative Court Procedure provides a separate type of action: a lawsuit that can be brought against an administrative body for failure to fulfil its statutory obligation to perform an administrative act. The function of the so-called "action for failure to act" is to provide the party with legal protection against infringements of the law caused by the passive action of the public administration.

Moreover, the Court stated that in such a case, there is no supervisory (remedy) procedure in the proceedings of the administrative authority, and no conditions can be imposed on a person which it cannot fulfil within the legal framework.

Italy explained that according to the Administrative Procedure Code, the applicant may appeal against the silence, which does not mean a fictitious positive or negative decision. The object of the special rite is the inaction of the administration, which is required to issue a decision at the request of the party.

The Court orders the administration to provide within the time limit not exceeding thirty days and has the power to appoint a commissioner ad acta to replace the administration that does not comply with the order to issue the final decision. The court may rule on the merits of the claim only when it is a mandatory decision or when the authority is no longer required to carry out considerations of usefulness, or there is no need to carry out investigations.

Estonia stated that if a person wants to dispute an administrative omission or delay, the person must file a mandatory action (for the court to order the authority to act), for which the time limit is quite lenient: one year from the date when the authority should have issued the administrative act, or in case no deadline is provided by law, two years from the application. In case of a mandatory action, the court has two options: either to order the authority to make a specific decision or simply to order the authority to decide on the application.

The United Kingdom also pointed out that in the context of administrative silence, the most important public law remedy is the mandatory order. Mandatory orders are available when a public authority is in dereliction of a public duty. They have the effect of compelling the authority to act in light of its obligations.

In addition, *Slovakia* also pointed to the possibility of a motion addressed to a public prosecutor.

The *Netherlands*, for its part, offers a different solution. As stated in the report, besides the fictitious decision, the forfeit of a penalty is an important way to “hurry up” the administrative authority. In this case, the administrative body will have to be given a notice of default. After receiving this notice and two weeks after the decision period has expired, the administrative authority will forfeit a penalty.

In the absence of an order after sending a notice of default, the applicant can also immediately appeal to the court. The judge then has the following possibilities:

1) In case the appeal is well-founded, he can determine the height of the penalty that the administrative body has to pay.

2) In case the appeal is well-founded and the administrative body has still not notified a decision, the judge might oblige the administrative body to give a notification within two weeks after the judge’s decision has been sent to the administrative body. The judge might also oblige the body to pay an additional judicial penalty payment.

Compensation for financial loss or non-financial damage that has been caused as a result of the administrative silence

A notable majority of countries confirmed that, generally, a person is entitled to claim a compensation for financial loss or non-financial damage which has been caused as a result of the administrative silence of the authority.

Only *Ireland* and *the United Kingdom* replied differently.

Ireland indicated that a person is not entitled to claim such compensation. However, a person may be entitled to an award of damages or costs as a result of a judicial court order.

The United Kingdom explained that damages are not generally available as a public law remedy. However, claimants may be able to establish that a public law illegality is also actionable in private law, for instance, for negligence, breach of statutory duty or misfeasance in public office.

Several countries (*Bulgaria, Greece, France, Lithuania, Luxemburg and Netherlands*) emphasised that, in order to claim compensation, the loss or damage must be the result of the illegal administrative silence of the authority, and the causal link between the administrative silence of the authority and the damage must be proven.

Croatia and *Latvia* specified that compensation cannot be claimed for any procedural violation, but only for a violation if it has caused a significant infringement of rights or legal interests of a person.

In *Italy*, the Administrative Procedure Law provides compensation for unjust damage resulting from the unlawful exercise or lack of activity if the authority issues a positive decision requested by the party after the time limit set by law, or if the delay or failure to issue a negative decision causes damage.

In *Portugal,* the natural reconstitution rule prevails, that is, the pecuniary compensation will only be considered when natural reconstitution is not possible.

The Czech Republic indicated that if the non-financial (non-material) damage has been caused by maladministration in the form of a failure to comply with time limits, specific circumstances shall be taken into account in determining the amount of appropriate compensation. In particular, the overall length and complexity of the proceedings, the conduct of the public authority during the proceedings, the conduct of the injured party which contributed to delays and whether he/she used available remedies against inaction, and the importance of the subject-matter of the proceedings to the injured party.

In *Switzerland*, the Federal Court held that the fault of the person claiming compensation may be the reason for breaking the direct causal link between an unlawful action of the institution and the loss caused. If there is a risk that the party concerned could be harmed by the excessive length of the proceedings, it is obliged to inform the institution so that it can speed up the procedure. If the institution does not react, the party must submit a complaint to the competent authority. The party may claim compensation only if these measures have remained unanswered by the institution. If the above measures are not taken, the victim himself may be considered to be complicit in the proceedings relating to compensation for damages.

Hungary additionally pointed out that the legal person exercising public authority shall be liable for damage caused by the exercise of public authority. If the person exercising public authority is not a legal person, liability for the damage shall be borne by the administrative body having legal personality under which the administrative body has acted in the case is operating.

Furthermore, according to the established jurisdiction, errors in the application or interpretation of the law in the exercise of public authority in individual cases shall only give rise to liability for damages if they are manifestly serious.

2.6. Case law and regulation in non-harmonised sectors of law

National case law where regulation on administrative silence has been found unfounded or inapplicable

A majority of respondents indicated that the issue of national regulation on administrative silence had not been dealt with in their case law. *Bulgaria, the Czech Republic, Germany, the Netherlands, Romania* and *Spain* are the only countries mentioning such case law.

The Czech Republic indicated, by way of example, a case of shared broadcasting licenses, where the Supreme Administrative Court found that the fiction of positive decision cannot be applied.

In *Germany*, the Federal Administrative Court has found that the violation of the general obligation of speedy conduct of administrative procedure does not trigger a fictitious permit as foreseen in the Code of Administrative Procedure; this is only the case if this consequence is expressly provided for in a specific rule.

Spain explained that there are frequent administrative disputes in which the question of whether or not there has been a positive or negative effect of administrative silence is raised, which is why there are numerous rulings on this issue, depending on the different nature of the case in question. However, no individual case has been specified.

The Netherlands described a case concerning administrative penalty. As stated before, in *the Netherlands*, if an administrative body has still not decided on an application during the appeal process, the administrative court might impose a so-called judicial penalty. In addition to the judicial penalty, Dutch law provides an administrative penalty. The latter is a penalty the government automatically owes if it does not decide within the statutory period. The Temporary Penalty Suspension Act excludes both judicial and administrative penalty payments in asylum cases when the Immigration and Nationalisation Service does not make a decision on an asylum application in time.

This is contrary to the principle of effective legal protection. It is important for legal certainty and confidence in the government that the State Secretary decides on asylum applications in good time. Without a judicial penalty, a foreign national has no effective means of persuading the State Secretary to make a decision in time.

However, the Administrative Jurisdiction Division did rule that abolishing the administrative penalty in asylum cases is not contrary to the European principle of effective legal protection. Unlike a judicial penalty, the government automatically owes an administrative penalty. This penalty is, therefore, not a means for a citizen to persuade the government to make a timely decision.

Case law on the application or interpretation of the positive model provided for in Article 13(4) of Directive 2006/123/EC

Only seven respondents reported the following case law on applying or interpreting the positive model provided for in the Directive (*Belgium, Germany, Lithuania, Netherlands, Poland, Spain and United Kingdom*).

Germany indicated that outside of the competence of the Federal Administrative Court, the Federal Social Court has found that in the public health insurance system, a treatment is considered granted if the health insurance does not decide on a corresponding petition within the given time limit.

The Supreme Administrative Court of *Lithuania* has invoked the fiction of positive silence on multiple occasions whilst examining cases on issuing authorisations and licences. In a string of cases dealing with renewable solar energy and the issuance of licences to this effect, the Court emphasised that a decision on the issuance of licences should be taken without prejudice to the set time limits by public bodies. The positive model of administrative silence was enshrined in Article 17(2) of the Law on Electricity, which stated that if a properly submitted application for a permit is not answered within the specified time, it is considered that a positive decision on the permit issuance has been made. The Court stated that by relying on this provision, a person gained the right to carry out licensed activities in accordance with the requirements provided by legal acts and did not have to reapply for the issuance of the licence. According to the Court, under such regulation, the legislator, on the one hand, promoted good administration by public entities while, on the other hand, establishing an additional, exclusive pathway for the protection of the rights and legitimate interests of individuals. The Court repeated these statements in later cases.

In *the Netherlands*, the Rotterdam district court examined a case concerning granting a permit (ex officio) to exploit a restaurant. Art. 3 para 2 of the Liquor and Catering Law and the general local regulation state that the regulation on positive decisions in the event of late decisions of section 4.1.3.3 of the General Administrative Law Act does not apply.

The plaintiff argued that the aforementioned provisions of the general local regulation were non-binding because these articles had not been reported to the European Commission. The District Court stated that this does not follow the Services Directive.

The explanation provided with the particular general local regulation states that introducing a positive silence model may pose a risk to public health, as a permit may be issued without sufficient assessment. Because the local government determines which license applications are assessed in co-administration, it is impossible to regulate in the formal law which licenses are subject to a positive administrative silence and which licenses are not.

In *Poland*, in cases before the Supreme Administrative Court, operators applied for television broadcasting licences. Citing the general provision – article 11 (9) of the Freedom of Economic Activity Act, they considered that the concession had been granted to them by tacit consent.

The Supreme Administrative Court ruled in these cases that it, therefore, follows from the wording of the Directive 2006/123/EC and the justification of the draft Act on the provision of services in the territory of the Republic of Poland that, in view of the intended systemic objectives of the national legislator, the material scope of Article 11(9) of the Act on freedom of economic activity should be defined taking into account the exclusions and limitations contained in Directive. The Court, therefore, held that the provision of Article 11(9) of the cited Act was not applicable in the case for granting a concession for the distribution of television programs in the part concerning the concession fee.

In *the United Kingdom*, the Upper Tribunal considered a local housing authority's appeal against a decision of the First-tier Tribunal upholding the respondents' applications for licences under the Housing Act 2004. The respondents cross-appealed, arguing that the licences were deemed to have been granted to them after a reasonable time pursuant to Regulations 19 and 20 of the Provision of Services Regulations 2009, which gives effect in English law to Article 13 of Directive 2006/123/EC. According to Regulation 19, authorisation procedures and formalities had to be processed "within a reasonable period" which was fixed and made public in advance. Regulation 20 provided that applications had to be acknowledged "as quickly as possible". The respondents argued that, on the basis that the licences were deemed granted before they were refused, they could not have been refused at a later date.

The Upper Tribunal held that there was no material difference between the wording of Regulations 19 and 20 and the wording of Article 13 of Directive 2006/123/EC, the purpose of which was to clarify the exact time at which authorisation was deemed to be granted if not previously refused or expressly granted. The Upper Tribunal held that the purpose of Article 13 and Regulation 19 would be defeated if the latter were to be interpreted as meaning that, in any case where an authority did not publicise in advance and notify the fixed period within which an application would be determined, there would be a deemed grant after the expiry of a reasonable period of time, as that would enable authorities which did not specify such a period to fall back on an uncertain period of time and leave applicants vulnerable to delay. In the instant case, the First-tier Tribunal had correctly concluded that the authority had published a decision not to specify a fixed period of time on the basis that it was justified in not doing so by an overriding public interest in safety within Regulation 19(6). The respondents' cross-appeal was therefore dismissed.

The *Belgian* and *Spanish* case law addressed the relevant provision of the Directive indirectly.

A question to the Court of Justice of the European Union in order for it to make a preliminary ruling in a case concerning national regulation on administrative silence

No country has indicated such a question to the Court of Justice of the European Union.

However, it is worth mentioning *Portugal's* observation, given that European Union law has "zero tolerance" for tacit acts in environmental matters and providing Portuguese legislation with such cases of tacit approval regarding environmental permits, it should not be despised that such a request should be made.

National regulation on administrative silence in non-harmonised sectors of law

Construction, spatial development planning, and environmental protection

The national responses of *Croatia, Finland, Romania, Sweden* and *the United Kingdom* indicate that there are no special rules on administrative silence in their national legislation concerning this area of law.

According to the reports of other ACA members, national regulation on administrative silence in this area of law varies; moreover, in several countries, it is highly fragmented. Some relevant examples are provided below.

Poland indicated that only the positive model of administrative silence applies in these areas of law. Regarding construction law, the tacit consent of the authority refers to the notification of construction works.

The Polish legislator has also provided the construction of "tacit cooperation" of the authorities when issuing decisions in the framework of opinions and agreements on the establishment of spatial development conditions in law related to the natural environment.

In the *Italian* legal system, the positive model of silence is the general rule. Some exceptions are provided in cases relating to procedures aimed at the protection of cultural heritage or the environment.

Spain indicated that the different urban planning regulations typically provide a positive effect of administrative silence in relation to applications for urban planning licences (licences for buildings).

Cyprus stated that an example of positive silence is stipulated in section 18(3) of the Town Planning Law. This section provides that failure to respond within three months on an application for an extension on the validity of a planning permit deems the application approved, and the permit's validity is extended for another year.

In other cases, unless the positive silence model is adopted in the applicable statute, there is a right to recourse under Article 29.2 of the Constitution for the administration to respond, a right to a recourse which arises out of 3-month administrative silence which is deemed as a refusal to satisfy a claim under section 36 of the General Principles of Administrative Law or under Article 146 of the Constitution for recourse for judicial review if there has been a failure to act (omission) on the part of the public authority when action is legally prescribed.

In *Norway*, the positive model following from Article 13(4) of the Directive applies to the construction area in so far as the relevant service falls within the scope of The Services Act.

For questions on spatial development planning, the positive model generally applies by virtue of special laws.

For questions of environmental protection, a variation of the negative model applies in instances where the relevant authority does not order someone to clean up; this decision can be appealed against by others with a legal interest in doing so.

In *the Czech Republic*, the Building Act no longer provides fictitious decisions. However, the Building Act still provides fictitious binding opinions. A binding opinion is a written opinion elaborated by the "concerned" administrative authority on the basis of law; it is not a decision, but its content is binding for the operative part of the decision of the competent administrative authority. If the binding opinion is not issued within the time limit, it is deemed positive without any conditions. Generally, this fiction applies to all binding opinions under the Building Act processes. However, Art. 4(12) precludes this fiction's application to certain binding opinions, essentially – important environmental opinions.

Estonia stated that construction is one of the areas of law where the legislator has decided to implement a positive silence model, albeit for only cases of minor importance.

In *Germany*, the General Railroad Act provides that permission to start the operation of a railroad is considered granted if the competent authority does not decide in deviation of the petition within six weeks. Also, the Federal Building Code provides in several regulations that the permission of certain planning decisions is to be considered granted if the competent authority does not decide in deviation of the petition within a certain time limit.

Slovakia indicated that the Construction Act regulation related to the procedure for issuing a building permit contains provisions on the fiction of the positive opinion issued by the competent authority (e.g., if a nature protection authority fails to notify its opinion with regard to the construction that is subject to the building permit procedure within the prescribed time-limit, its consent, in terms of its interests pursued, shall be deemed to be given).

In the national law of *Albania*, silent approval is provided by specific law that deals with object construction or territorial development planning, specifically law "On territorial planning and development". This law provides that tacit approval shall mean the act of obtaining the right to develop, carry out works or use buildings without the approval of the planning authority if the approval or refusal of the request has not been issued within the terms provided by the relevant provisions herein.

Also, in *Lithuania*, there are some provisions implementing the positive model of administrative silence, mostly in the regulation of the territory planning process. The Law on Environmental Impact Assessment of Planned Economic Activities provides the positive administrative silence model approach in approval of the environmental impact assessment program and report.

Ireland, Portugal and *Türkiye* also pointed out that a positive model of silence can be found in some legal provisions in this area of law.

In *Switzerland*, generally, neither the Confederation nor the cantons provide for any model of silence in these areas of law.

However, there are exceptions. An example is the law on the protection of nature, monuments, and territories in the canton of Vaud. This law states that the owner of a site listed on the cantonal register must inform the Department of Safety and Environment of any works he intends to carry out. An investigation must be started within three months of the owner's notification of the planned works. Otherwise, permission to carry out the works shall be deemed to have been granted.

In *Greece*, the general principle of the negative model is mainly applied in this area of law. However, some provisions regulate the positive model. For instance, in case of sitting of a tourist port within an existing port, the Tourist Port Committee is obliged, before expressing its opinion, to forward the relevant file to the competent authority of the Ministry of Maritime Affairs and Insular Policy in order to express its opinion within the time limit of two months whether the tourist port will obstruct the operation of the existing port. If the Ministry of Maritime Affairs and Insular Policy does not express an opinion within the mentioned time limit, it shall be regarded that the above Ministry has expressed a positive opinion.

Also, in *Latvia*, the general principle of the negative model is mainly applied in this area of law. As an exception in accordance with Article 13(4) of Directive 2006/123/EC positive model is implemented in the Construction Act, providing for administrative authorities to issue a permit, note, and coordination by default.

In *Luxemburg*, for building permits, the general rules on a negative model of administrative silence apply in all cases where an individual administrative decision is taken.

In the area of environmental protection, the general rules on the negative administrative silence model also apply to applications for permission to build or carry out certain activities in a green area.

Also, in *Bulgaria*, *Serbia* and *Slovenia*, a general negative model of administrative silence is applied in a particular area of law.

Hungary, for its part, points out that the positive model applies according to the general rules in this area of law.

The *Netherlands* emphasised that a new environmental law will be applicable in the near future: the Environment and Planning Act. The positive model of administrative silence will no longer apply, whereas it currently does. Most permits granted under the construction of the positive model relate to a service. Many of these services consist of activities that place a burden on the environment and may also be in conflict with European law. Moreover, the assessment of a permit requires customization in which various interests must be weighed up. There is insufficient space for this when a permit is granted ex officio.

Social security

Fourteen respondents replied that there are no special rules on the administrative silence in their national legislation concerning this area of law (*Albania, Croatia, Czech Republic, Estonia, Finland, Ireland, Lithuania, Luxemburg, Norway, Poland, Romania, Sweden, Switzerland and United Kingdom*).

According to the reports of other respondents, national regulation on administrative silence in this area of law varies; moreover, in several countries, it is highly fragmented. Some relevant examples are provided below.

In the *Italian* legal system, social security is a matter for ordinary courts, not administrative ones. However, there are exceptional cases of silence assent (e.g., automatic registration of public employees to the retirement funds). The general rule is the negative model (e.g., any administrative request to the National Social Security Institute).

In *Greece*, the general principle of the negative model is mainly applied in this area of law.

In *Latvia*, the general principle of the negative model is mainly applied in this area of law. As an exception in accordance with the Article 13(4) of Directive regulations provide for social service providers to be registered in the register by default (if within one month after receipt of the application from the service provider the Ministry does not request additional information and documents, does not take and notify the decision to refuse to register the service provider, it shall be regarded that the service provider has been registered in the register).

Also, in *Bulgaria*, *Serbia, Slovenia* and *Türkiye*, a general negative model of administrative silence is applied in the area of social security.

Portugal noted that in the Law of Access to Law and Courts, the absence of a final decision by the Social Security services on the request for legal aid leads, within thirty days, to the approval of a tacit act.

Spanish Royal Legislative Decree, which approves the revised text of the General Social Security Act, establishes in Article 129 that "In procedures initiated at the request of the interested parties, once the maximum period for issuing and notifying a decision established by the regulation governing the procedure in question has elapsed without a written decision having been issued, the request shall be understood to have been rejected due to administrative silence. Exceptions to the provisions of the previous paragraph are those procedures relating to the registration of companies and to the affiliation, registration, deregistration and variations in the details of workers initiated at the request of the interested parties, as well as those relating to special agreements, in which the lack of a written decision within the established period shall have the effect of granting the respective request due to administrative silence".

Hungary indicated that the positive model applies according to the general rules in this area of law.

In *Austria*, the Federal Act on Hospitals and Sanatoria stipulates that a contract between insurance institutions and hospitals whose legal entity is not a region is considered to be approved by the regional government if it does not refuse the approval in writing within a given time limit.

Slovakia indicated that the positive model of administrative silence in this field is enshrined in the Act on Social Work and the Conditions for the Performance of Certain Professional Activities in the Field of Social Affairs and the Family regarding registration with the Slovak Chamber of Social Workers and Social Work Assistants.

Germany explained that in the public health insurance system, a treatment is considered granted if the health insurance does not decide on a corresponding petition within the given time limit.

Freedom of information

The national responses of thirteen respondents indicate that there are no special rules on administrative silence in their national legislation concerning this area of law (*Albania, Austria, Croatia, Estonia, Finland, Lithuania, Netherlands, Poland, Portugal, Romania, Spain, Switzerland and United Kingdom*).

According to the reports of other respondents, it can be concluded that the negative silence model prevails in this area. Some relevant examples are provided below.

In *Bulgaria, Greece, Latvia, Norway, Serbia, Slovakia, Slovenia* and *Türkiye*, a negative model of administrative silence is applied in the areas of freedom of information.

In the *Czech Republic*, the negative model of administrative silence is provided for in Environmental Information Act.

This model was also provided for in the Act on Free Access to Information. However, this model did not prove to be functional because the administrative courts could not review such fictitious decisions for lack of reasons and could only annul these decisions. Since then, there are no "fictitious refusals".

In *France*, contrary to the general positive model of administrative silence, if an authority does not reply to requests for information and documents within one month, it is deemed to have refused to provide them.

Germany noted that the Freedom in Information Act provides for a time limit of one month to answer a request. However, the violation of this time limit does not automatically result in a fictitious positive decision.

Italy indicated that the Administrative Procedure Law provides that a request for access to administrative documents is deemed refused after 30 days. The applicant may submit a request for a review to the responsible authority for corruption and transparency. The applicant may challenge the refusal before the Administrative Court or, in the case of regional administrations or local authorities, bring the matter before the local Ombudsman. In the latter case, access is deemed to be

granted if the Ombudsman does not confirm the refusal or postponement within 30 days of receiving the Ombudsman's communication.

Ireland explained that both the positive and negative silence models can be found in the Freedom of Information Act.

In *Hungary*, the positive model applies in this area of law according to the general rules.

3. ADMINISTRATIVE DISCRETIONARY POWER

3.1. Definition of discretionary power

All countries indicated that discretion is generally understood and commonly used in their legal system. Only in a few countries is it explicitly defined in a statute; most respondents indicated that the definition and interpretation of discretion has been established in case law or doctrine.

The definitions provided by the countries indicate a similar conception of discretion in national legal systems.

For example, *Bulgaria* stated that discretion allows the administrative authority to assess whether, when, and how to act to take the most appropriate administrative decision in each case.

In *the Czech Republic*, administrative discretionary power is generally recognized in situations when a legal norm does not entail a single legal consequence if its hypothesis is fulfilled. Therefore, the legal norm provides administrative authorities with possibility to choose from two or more solutions after considering all the specific circumstances of the case.

Estonia indicated that according to the Administrative Procedure Act, the right of discretion is an authorisation granted to an administrative authority by law to consider making a resolution or choose between different resolutions. The right of discretion shall be exercised in accordance with the limits of authorisation, the purpose of discretion and the general principles of justice, taking into account relevant facts and considering legitimate interests.

France explained that the administrative authority has discretion if, to make a decision, it has the freedom to assess the facts according to which it can choose between several decisions, all of which would be equally lawful.

Hungary stated that a discretionary administrative decision is a decision in which the authority bases its decision on a piece of legislation that only defines the framework of the decision. A discretionary decision is also a decision where the legal provision defining the options for a decision does not specify the conditions and criteria for the decision. An administrative decision is not a discretionary decision if the authority decides on the basis of an assessment of the evidence necessary to reach a decision by applying a legal rule which does not provide for discretionary powers.

Latvia noted that in the case of discretion, once the preconditions for applying a legal provision have been established, the authority may choose from several alternative legal consequences provided for in the legal provision rather than applying one specific consequence.

Lithuania indicated that According to the Supreme Administrative Court, the right of discretion of the administrative authority is understood as the power that gives the subject of administration a certain freedom of action in making decisions, enabling it to choose from several legally possible options of behaviour the one that it considers to be the most suitable.

In *Slovakia*, the Recommendation of the Committee of Ministers concerning the exercise of discretionary powers by administrative authorities defines discretionary power as a power that leaves an administrative authority some degree of latitude as regards the decision to be taken, enabling it to choose from among several legally admissible decisions the one which it finds to be the most appropriate.

In *Spain*, case law defines discretionary acts as those that result from freedom of choice between equally fair alternatives or options with the same legal effect, brought to the subjective judgement of the administration.

Serbia explained that a discretionary administrative act is an act the contents of which are not formerly determined, but the authority issuing such act has the option to select one of two or more legally equal possibilities.

The United Kingdom indicated that to say that there is a discretion presupposes that there is no unique legal answer to the problem.

3.2. The distinction between discretion and margin of appreciation in the interpretation of undefined legal concepts

Eleven respondents indicated no distinction between discretion and margin of appreciation (scope of appraisal) in the interpretation of undefined legal concepts in their legal system (*Belgium, Croatia, Cyprus, Ireland, Hungary, Lithuania, Romania, Serbia, Slovakia, Slovenia and Türkiye*) and *Bulgaria* has not provided an answer to this question. Other countries indicated that such a distinction is in place.

Most of the counties indicated that discretion is related to the part of the legal consequences of the legal provision. Meanwhile, the margin of appreciation is related to the part of the legal provision's hypothesis (legal conditions) in cases where it contains an undefined legal concept that needs to be specified.

At the same time, most national reports explained that, unlike discretion, which, as mentioned in question 1, means that the administrative authority has the freedom to choose among several alternative and legally permissible actions with the same legal effect, when authorities have to specify undefined legal concepts, the law generally allows only one – objective, fair and truthful – decision.

In particular, *Austria* explained that discretion, in a narrow sense, refers to margins that are intentionally granted to the administration by the legislator. In contrast, the legislator does not intend to grant discretion to the administrative authority when using undefined legal concepts. Undefined legal concepts are the result of the use of imprecise legal terms. Their contents and meanings have to be determined through interpretation. If, even after applying all methods of interpretation, no specific content emerges, the provision is not precise enough and infringes Art. 18 of the Federal Constitutional Law. However, if a provision allows for several interpretations,

preference shall be given to the interpretation enabling the provision to be in conformity with the Constitution.

The Czech Republic explained that if the hypothesis of the legal norm contains an undefined legal concept, the administrative authority must assess its content and conclude – based on an all-round assessment – whether or not a particular state of facts falls within the scope of such a concept. According to the case law, firstly, the administrative authority must generally define what falls or may fall within the scope of the undefined legal concept and apply this abstract definition to the case at hand. If the hypothesis of a legal norm containing an undefined legal concept is fulfilled, the administrative authority has no choice but to proceed as envisaged by relevant rules for such a situation (to apply the legal consequences).

In the *Greek* legal system, the margin of appreciation is recognized in cases where the authorities specify undefined legal concepts on the basis of common experience.

Italy indicated that the margin of appreciation is the margin of discretion when the legislator grants the authority the freedom to decide whether an element of a legal rule containing an indefinite legal concept is satisfied. The authority has no discretion to decide but only to fill the concept of content.

Spain stated that discretionality implies the recognition of a freedom of choice for the holder of the right, so that within the margin conferred by the enabling rule, any of the different options that could be exercised are legally permitted, and any of them can be chosen, given that such options have the same legal effect. On the other hand, when the right is exercised applying indeterminate legal concepts, there is no such freedom of choice between options with the same legal effect, but rather, when the legal concept applied presents some degree of indeterminacy or imprecision in its wording, such a concept can and must be individualised in its practical application in such a way as to identify the specific solution that is fair and appropriate to the circumstances of the case under consideration.

A different approach is described by *Latvia*, that, for its part, pointed out that it is generally considered possible to determine only one correct content of an undefined legal concept. However, in such a case, the authority has no margin of appreciation.

The margin of appreciation could be recognized in exceptional cases, where it may not be possible to identify a single legally correct content of the undefined legal concept in the specific factual circumstances of the case. In such cases, an assessment is required, which can only be carried out objectively by the authority concerned. In such a case, the authority has a margin of appreciation, i.e., the freedom to fill with content the undefined legal concept according to the factual circumstances of the case.

Similarly, *Norway* also pointed out that generally, the authorities are not offered any margin of appreciation in the interpretation of undefined legal concepts. In certain cases, it could, nevertheless, follow from an interpretation of the relevant provisions that the authorities are offered some degree of appreciation with regard to the assessment of whether the facts of the case at hand, are covered by the undefined legal concept (e.g., whether a planned construction project will, in

the view of the municipality, have "good visual qualities" when assessed in conjunction with its' natural surroundings and placement).

Noteworthy are also some other national responses in this regard.

Albanian legal system makes a distinction between discretion and margin of appreciation by the public administration body. The appreciation of the public body exists in any case, even in the situation of discretion as the body is obliged to investigate and to complete administrative actions on this basis.

In the framework of the appreciation, the public body considers the evidences, investigates thoroughly and comprehensively, evaluating the circumstances of the case in relation to the applicable law, to reach an administrative decision. Almost in any case, the decision is taken in compliance with the due process.

Also, in *the United Kingdom,* the distinction is recognized. As explained in the report, it sometimes being said that the interpretation (or application) of an undefined legal concept calls for an evaluative judgment rather than an exercise of discretion. Generally, the interpretation of legal concepts is assigned to the judgment of the court rather than an administrative body, whereas administrative discretion is conferred on public authorities. However, it may be found as a matter of interpretation of the legal concept that the evaluative judgment to be made in applying it is primarily reserved to the public authority, in which case the lawful limits of its function are in practice the same as for the exercise of discretion (in particular, it must make a decision which it not irrational).

3.3. Characteristics, criteria, or methods for determining the administrative discretionary power in a particular case

Most national reports indicated that the determination of whether an administrative authority has discretion is mainly based on the assessment of the structure and wording of a legal norm. This method of identifying discretion was pointed out by most of the respondents: *Austria, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Netherlands, Norway, Poland, Portugal, Serbia, Slovakia, Slovenia, Sweden, Türkiye and Switzerland.*

In this regard, firstly, most countries indicated that in the case when administrative authority has a freedom to decide whether to issue or not to issue a decision, discretion is usually indicated by the use of the words "may", "allowed", "can", "should", "it is permissible", "have the right" in the particular legal provision.

Slovenia, as an example, mentioned the following provision: the administrative authority can grant citizenship to a foreigner, bypassing the general rules, if he is a descendant of a Slovenian citizen and has lived in Slovenia for at least one year prior the date of the application for citizenship

and also meets additional conditions regarding economic security, not being part of any criminal proceedings, [..].

However, *Austria* highlighted that the mere use of the expression "may" does not constitute discretionary power if the law does not provide for criteria according to which the discretion is to be exercised. The law must determine a standard according to which the discretion is to be exercised; otherwise, it is unconstitutional.

Norway indicated that in some instances, the discretion might not follow directly from the provision itself. In such a case, the preparatory works could show that the legislator has intended for the authority to be offered discretion, even if terms like "may" have not been included in the provision itself. This could be the case if the assessment requires specific knowledge or, for example, if it presupposes broader assessments on a societal scale.

Estonia also highlighted that occasionally, if the wording is not clear, interpretation in conformity with the Constitution or EU law is also used.

Secondly, discretion may also be recognised where administrative authority has a freedom of content which means that an applicable legal provision prescribes that a decision is to be issued but does not determine specific content thereof. An authority shall issue such a decision by taking into account of the frameworks laid down in the applicable legal provision.

In this regard, for example, *Latvia* indicated that a legal provision may contain a precise list (catalogue) of possible legal consequences or define a range (field) of possible legal consequences, allowing to choose any legal consequences within the range (e.g., the provision provides that the authority shall impose a fine of between EUR 100 and EUR 5000).

Similarly, *Slovakia* noted that an administrative authority applies discretion by choosing the type of sanction when imposing penalties for administrative offenses provided that the law allows for alternatives, or when deciding on the amount of the fine within the range set by the law.

A similar approach was described by *Albania*, indicating that discretion is provided by law when it provides for the minimum and maximum opportunities of the public body and the body takes a decision within these limits.

Most countries also indicated that administrative discretionary power (or margin of appreciation if distinguished) could be recognised if the particular provision contains undefined legal concepts.

Slovakia stated that discretion is also when the administrative body gives the content of undefined terms such as "principles of morality", "good faith", or "reasonable time limit" in the process of applying the law.

Türkiye also explained that administration has discretion power in cases where legal provisions use not-so-clear terms such as "public safety, general health, public order requirements". The administration has discretion to fill in these ambiguous concepts. However, it should also be

noted that if vague concepts have an objective value, administration has no discretion power. For example, the concept of "immorality and decency" has an objective value in law.

The Czech Republic explained that undefined legal concepts are mostly abstract nouns or nouns with adjectives (such as "public interest" or "substantial change"). Therefore, it is usually not a problem to recognize them in the legal system and thus determine if administrative authorities have margin of appreciation.

In this regard, it is important to mention that *Latvia*, for its part, offers a different explanation concerning determining the margin of appreciation. As Latvia pointed out, two elements must be established:

1) the description of the preconditions for the application of the legal norm in the part of the legal circumstances of the provision contains an undefined legal concept;
2) there are objective reasons for the margin of appreciation, i.e., it is not possible to identify a single legally correct content of the undefined legal concept and an assessment is required which can only be carried out objectively by the authority concerned.

Latvia also highlighted that the following situations are recognised as objective reasons for recognising the margin of appreciation:

1) an assessment has to be made for a unique non-reproducible situation (e.g., an assessment for an oral examination that is not recorded or otherwise fixed);
2) an assessment is based on personal experience (e.g., in the case of assessment of civil servants);
3) an assessment is mainly based on political considerations or concerns the right of the administration to decide on its own organisation;
4) an assessment is complex, based on non-legal standards or political values, and adopted by a collegial body composed, for example, of experts in different fields or representatives of different social groups.

In addition to all the above, it also follows from some national reports that discretion may in some cases arise from the nature of the matter itself.

Greece and *Hungary* indicated that in cases where the administrative authority issues regulatory administrative acts it is recognized that the authority has discretionary power. In this case, the authority may adopt provisions that serve the public interest in a better way.

Türkiye noted that the administrative authority has discretion in the subject matter of the administrative action. For example, according to the regulation regulating aid to students in need, if the faculty administration has the right to choose one of the options of giving books, providing clothing, food aid, or providing shelter, there exists discretion here.

3.4. Judicial review of the use of discretionary power by the authority

Regarding the judicial review of the use of discretion by the administrative authority, all reporting parties indicated that, in general, judicial control of such decisions is limited to the question of where the administrative authority has exercised its discretion in accordance with the law. Furthermore, the courts cannot generally amend or annul administrative decisions because they consider another exercise of discretion more appropriate.

In particular, *Cyprus* noted that when reviewing the legality of a decision, the court examines the decision in order to ascertain whether:

1) there is a clear statutory legitimacy of discretion and its extent;
2) the public organ has exercised its discretionary powers;
3) there has been sufficient enquiry of all relevant facts for the discretion to have been exercised correctly, reasonably and under no misconception and
4) there was due reasoning for the decision.

In *the Czech Republic*, the Supreme Administrative Court ruled that the court may only review whether the administrative authority has not departed from considerations set in law, whether the reasoning of the contested decision is in accordance with the rules of logical thinking, and whether the premises of such reasoning have been established by due process of law.

Estonia indicated that when assessing the lawfulness of an administrative act issued as a result of the exercise of discretionary power, the court does not conduct a separate assessment of the expediency of a discretionary decision. When verifying the lawfulness of an administrative act or measure, the court does not exercise discretionary power instead of administrative authority. What this means in practice is that if one of the important reasons that formed the basis of the authority's discretionary decision is deemed unlawful or irrelevant by the court, the court cannot assess whether the authority would/should have taken the same decision even without that part of the reasoning – thus, the decision must be annulled.

Greece also explained that if the court establishes an incorrect use of discretion, this is a ground for annulment of the decision. If a petition to issue a decision was submitted before an authority and the competent authority did not issue such decision, the court cannot itself specify the content of the decision, because the content of the decision must be determined by the authority in the exercise of its discretion.

In *Hungary*, the Administrative Court Procedure Act sets out the limits of the discretionary power of the administrative court by stating that, in addition to the general aspects of review, "[i]n the context of the legality of an administrative act carried out within discretionary powers, the court shall also examine whether the administrative body exercised its powers within the limits of its discretionary powers, whether the criteria for discretion and their reasonableness can be ascertained from the document containing the administrative act."

Administrative Court of *Lithuania* adheres to its consistent practice that in the event where public authorities are given relatively wide discretion, in the implementation of certain legal norms or policy in a certain area, the courts examine only whether the subject of public administration,

exercising its discretion, did not make a clear error (in the assessment of circumstances and application of law), did not abuse authority (power), did not manifestly exceed the limits of discretion.

Spain stated that case law resorts to methods for the control of discretionary powers such as the control of the facts determining them as well as the regulated aspects, the observance of the procedure, the application of the general principles of prohibition of arbitrariness or misuse of power, or the implementation of general principles of law such as the principle of proportionality, among others.

In this regard, it should also be noted that some countries indicated an expansion of judicial control.

In particular, *Poland* indicated that the court is limited in its ability to review discretionary decisions, but at the same time seeks to expand it due to ensure the subjective right to a court to the fullest extent possible, as well as to protect the citizen from unilateral actions by administrative authorities.

It is pointed out in the legal scholarship that the concept of the directives of choice of legal consequences and the concept of the legality of purpose (goal), on the one hand, limit the freedom of the authority to decide on the shape of the decision and, at the same time, extend the scope of judicial review exercised by administrative courts over discretionary decisions. Especially, the concept of the legality of the purpose allows for a very wide control of the discretionary decision by the administrative court, and in fact allows for full control of decisions issued within discretionary power of the administration.

The administrative courts sometimes turn also to the criterion of reasonableness as a premise for reviewing discretionary decisions. It is also argued in the legal scholarship that, in administrative discretion cases, it is becoming increasingly common for administrative courts to reach for the principle of proportionality as a criterion for the control of discretionary power.

Italy pointed to the transition from a formal check on the existence of reasoning to the correctness and logic of the decision, which is a step towards a stronger review of administrative discretion.

A fundamental step in the evolution of the control of discretionary power is related to technical discretion, in which the administration's choice is grounded on technical rules. Initially, the judge exercised a weak review being able to annul acts based on evidently unreliable technical assessments. For now, the administrative judge's review is full and exclusive, although it can never substitute the choice of administration.

Luxembourg pointed out that the court's assessment of the discretion of the authorities was previously limited to the assessment of manifest error. However, this approach has given rise to controversy and confusion, in particular as to the meaning of the term "manifest".

In its 2010 judgment, the Administrative Court clarified its position, stating that a judge may annul an administrative authority's decision only for an error of discretion. Such an error may

take the form of a disproportionate application of a rule of law to factual elements. The judge's review of legality is thus carried out as a proportionality review.

France also pointed out that the administrative court has extended the scope of its judicial review. There are generally three types of discretionary control a judge can exercise:

1) Limited control: the judge has no control over the administrative assessment of the facts and is limited to superficial control, which is limited to identifying a manifest error of assessment. Recognising the discretion of the administration, it is considered that the court has the competence only to correct grave and manifest errors.
2) Ordinary legal control of the facts: the judge checks whether the nature of the facts of the case corresponds to the factual conditions laid down in the documents.
3) The control of ultimate legality or so-called proportionality: it is used when the administrative decisions reviewed by the judge infringe fundamental rights or fundamental freedoms.

In addition, some countries also indicated certain exceptions.

Latvia and *Portugal* emphasised that judicial control could be different where administrative discretion is limited to zero (despite the textual formulation of a legal provision indicating discretion, only one particular legal consequence can be legally correct). In such a case, the court can fully examine whether the authority has applied the only correct legal consequence. If the authority has not done so, the court may annul the unfavourable decision or order the authority to issue a decision of a specific content.

Slovakia stated that the only exception to the principle that courts should not substitute their discretion for the discretion of the administrative authority constitutes an exercise of mitigating power by a judge in cases where an administrative authority has imposed a penalty manifestly disproportionate to the nature of the act and its consequences.

Romania indicated that judicial review of the use of discretionary power might not be carried out in the case of administrative acts of public authorities concerning their relations with Parliament, acts of command of a military nature, administrative acts for the amendment or abolition of which another judicial procedure is provided for by organic law.

In contrast to the limited judicial review in case of discretion, most countries indicated that there is a complete judicial review over the interpretation of undefined legal concepts.

For example, *the Czech Republic* explained that the interpretation of an undefined legal concept and its application to a particular situation may be the subject of full (unlimited) judicial review as it falls within the review of (un)lawfulness of contested administrative decisions. Therefore, administrative authorities are bound by courts' interpretation of an undefined legal concept and their assessment of whether or not a particular state of facts fulfils the concept.

Greece indicated that in such a case, the court, having taken into account the common experience, shall examine whether or not the authority has correctly assessed the specification of

an undefined legal concept. If the assessment is found to be incorrect, then the court shall make its own assessment.

Spain also explained that when it comes to the interpretation and application of undefined legal concepts, the courts are fully empowered to carry out a full judicial review of the administrative decision, being able not only to annul it but even to replace it with a more appropriate one, when the conclusion is reached that, based on the particular circumstances of the matter examined and the evidence provided, the fairest solution is different from the one reached by the administration.

Meanwhile, some countries highlighted the limited control of the courts in cases where the authorities are found to have a margin of appreciation in interpreting undefined legal concepts.

Latvia emphasised that, if the authority has a margin of appreciation (exceptional cases where it is not possible to determine the single legally correct content of an undefined legal concept and an assessment is required which can only be objectively carried out by the authority concerned), the court can only examine whether there has been a manifest error of assessment or an essential procedural violation.

Estonia stated that when resolving disputes related to a margin of appreciation, the court is not forbidden from exercising an extensive control, including replacing the authority's assessment with that of the court. However, the court may be more restrained, especially when the assessment requires specific non-legal knowledge or experience and the interference with subjective rights is not serious.

The Supreme Court has explained that the court's control over the margin of appreciation may range from full control to a test of rationality to even a test of obvious errors, depending on the thoroughness of the regulation, the necessity of non-legal knowledge needed for the assessment and the seriousness of the restriction of subjective rights.

Norway pointed out that, in the context of discretion, certain provisions may lead to the conclusion that judicial review should be less intense to a certain extent and the assessment of the authorities must be taken into account. In such a case, the courts would still assess whether the facts of the case at hand are covered by the relevant legal provision, but they would offer some level of appreciation to the authority's assessment of the question. Should the courts, taking this margin into account, find that the facts of the case are not covered by the relevant legal provisions, the decision would generally be considered invalid.

Portugal stated that the "margin of free assessment" only admits a single decision that is wanted by the law. Therefore – even when the administration has a "margin of free assessment" namely to fulfil undetermined concepts using technical judgements, rules of experience or reasonability – its decisions may be challenged, although this jurisdictional appreciation is limited to cases of error or breach of the fundamental legal principles that govern the administrative activity.

3.5. Judicial review of the use of discretionary power by the authority that has resulted in a restriction of human rights

Most national reports indicate that judicial review of the use of discretionary power by the authority that has resulted in a restriction of human rights is more intense. This approach has been clearly pointed out by *Bulgaria, Croatia, Cyprus, Estonia, Finland, France, Greece, Ireland, Italy, Latvia, Lithuania, the Netherlands, Norway, Poland, Slovakia, Slovenia, Sweden and the United Kingdom*.

Most countries indicate that in such cases, the courts are more rigorous in assessing the principle of proportionality or even the intensity of the proportionality test is generally the same as in cases with no administrative discretion.

In particular, *Estonia* stated that the intensity of judicial review must be more thorough in case of a serious restriction of human rights. However, the court may still not exercise discretion instead of the authority.

Finland explained that restrictions of fundamental rights and liberties and human rights must comply with certain criteria such as proportionality and necessity. Thus, an authority's use of discretionary power resulting in the restriction of a human right would most likely receive heightened scrutiny during judicial review.

Greece indicated that judicial review is affected by the fact that discretionary power used by the authority has resulted in a restriction of human rights. In such cases, the courts are usually more rigorous in assessing the principle of proportionality. If the restriction is found to be not proportionate, the court annuls the unfavourable decision that restricts the human rights according to the Constitution, the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union where applicable. In taking this approach, the courts seek to assess proportionality with the same scrutiny as the European Court of Human Rights and the Court of Justice of the European Union.

Ireland stated that whilst the judicial review is not in itself a remedy to review the discretionary powers of a public authority but rather of the decision-making process emanating from the use of that power, such powers are reviewable in circumstances where the Human Rights of an aggrieved person are concerned.

Judicial review is concerned with the Courts exercising their constitutional duty to ensure that powers, governmental and administrative, are exercised within the law and the Constitution and in a manner consistent with the rights of individuals affected by them: "Where fundamental human rights are at stake, the courts may and will subject administrative decisions to particularly careful and thorough review".

Italy stated that if the discretionary power used by the authority has resulted in a restriction of human rights, the court is more rigorous in its assessment of the principle of proportionality, even if it is never possible to substitute its assessment for the assessment of the authority.

Lithuania explained that in such cases, the court very carefully analyses the situation through the prism of the principle of proportionality. In this respect, if the restriction is found to be disproportionate, administrative acts may be annulled.

Referring to the recent judgment of the Grand Chamber of the Administrative Jurisdiction Division of the Council of State, *the Netherlands* indicated that the intensity of the test of the principle of proportionality is determined by the degree of policy space the government has to make a decision and purpose that the decision serves and what its weight is. It is also important to determine whether and to what extent the interests of the citizens and businesses involved are affected. Here, human rights play an essential role. The more heavily these interests weigh, the more serious the adverse consequences of the decision or the decision violates human rights, and the more intensive the assessment will be by the administrative court.

The Constitution of the *Slovak Republic* provides that the review of any decisions concerning fundamental rights and freedoms should not be excluded from the court's jurisdiction. Thus, if a discretionary power used by the administrative authority had resulted in a restriction of human rights, a judicial review by the administrative court would be possible even though otherwise inadmissible.

Norway indicated that should the decision entail such a restriction, the courts would have to assess whether that restriction is justifiable, i.e., whether it is prescribed by, pursues a legitimate aim, law, and is proportionate. In assessing the proportionality of the restriction, the courts would generally conduct a full and unlimited assessment. Furthermore, the intensity of the review of the proportionality of the restriction would, in these instances, generally be the same as in cases of no administrative discretion. Regardless of whether there is an element of administrative discretion or not, the courts will, should they find that said restriction on human rights is not proportionate, and thus not justified, order that the decision is invalid.

Also, the *United Kingdom* explained that where alleged violations of fundamental rights are relevant to a rationality review of an exercise of administrative discretion, the courts will apply a more demanding approach to scrutiny than they otherwise would. Since the Human Rights Act came into force, the courts have adopted proportionality as the appropriate standard of review in claims in which the exercise of administrative discretion is alleged to have engaged rights protected under that Act, subject to considerations of deference which will be considered within the proportionality analysis.

Moreover, some countries highlighted that in taking this approach, the courts seek to assess proportionality with the same rigour and scrutiny as the European Court of Human Rights (*Greece, Latvia, Norway*).

At the same time, most national reports indicated that even if the court finds that the authority's discretion has resulted in a violation of human rights, it can only annul the particular decision. Only *Latvia* highlighted that the courts in such a case might also substitute their own assessment for the assessment of the authority.

In this regard, it is also worth mentioning the explanation given by Germany and Slovenia.

Slovenia stated that, in principle, there is no room for the use of the discretionary power of the administrative authority in the enforcement of human rights and also other legal rights of the parties. The right of a party must be recognized in full if the statutory conditions are met. Any interference or restriction of human rights must always pass a strict test of proportionality.

Similarly, *Germany* noted that in such situations, the principle of proportionality would only render legal the decision that has the least impact on human rights. All other decisions will thus be illegal. In such a situation, it is often found that discretion is reduced to zero.

The other countries mainly emphasise the obligation of the authorities to exercise discretion in accordance with human rights and also highlight the obligation of the authorities to provide reasons with particular rigour and intensity when the decision affects the essential core of fundamental rights. Furthermore, it is generally noted that the courts are competent to review such a decision by the authorities, but it is not specified whether and how the judicial review is affected in such a case.