Seminar organized by the Supreme Court of the Republic of Latvia in cooperation with ACA-Europe

Riga, 27 April 2023

Questionnaire
The judge and inert administration. Administrative discretionary power

Introduction

The seminar will address the issue of inert administration and the role and competence of the courts in this regard. The inaction or silence of the authorities and its consequences affect the rights of individuals no less significantly than the administrative actions or administrative acts of the authorities. While institutional silence is mainly related to the managerial aspects of public administration, it also interacts and correlates with legal aspects, such as principles of legal certainty, good administration and the prohibition of arbitrariness. The aim of the questionnaire and the seminar is therefore to summarise and analyse the regulation and practice of the Member States in order to determine whether the rights of individuals in the context of administrative silence converge and are comparable in the different legal systems.

As the administrative silence is mainly related to the failure of authorities to act or to reply within the prescribed procedural time limits, the questions in the first section of the questionnaire will provide insights into the regulation and application of procedural time limits in the Member States. The following sections of the questionnaire contain questions that are directly related to the current national regulations of the administrative silence. The regulations are generally classified into a negative model (silence as deemed refusal of a claim) and a positive model (a claim not refused in due time is deemed granted). Most legal systems usually provide for both models and various specific combinations. However, the understanding and regulation of these models, as well as the various exceptions and specific rules, differs among legal systems. The questionnaire also seeks to identify national experiences in implementing 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, intended as a mechanism of simplifying and speeding the administrative activity. And finally, as one of the most important aspects, the questionnaire will clarify the role and competence of the courts in the process of appeal against fictitious acts resulting from administrative silence, also identifying the legal remedies. The questionnaire is intended to identify mentioned aspects for further workshop discussions.

The seminar is also intended to discuss issues of administrative discretionary power. The most ambiguous aspects of this matter relate to the identification of the

discretionary power in each specific case, as well as to the competence of the court and limits of judicial review of use of discretionary power by the authority. The practice and approach of the Member States on this issue vary. Some legal systems between discretion in a narrow sense and margin of appreciation in the interpretation of undefined legal concepts. However, in most legal systems no such distinction is made. There are also differences in the methods, characteristics or mechanisms used to determine whether an authority has discretionary power in a particular case. The questionnaire thus aims to identify national regulations and practices on the mentioned issues.

Administrative time limits

1. Are specific administrative time limits within which authorities must take administrative decisions or complete administrative actions set in your legal system?

   - **Yes**
   - No
   - Only in certain areas of law

   Please specify your answer briefly, if necessary

In general, the Albanian legislation does not contain provisions that provide time limits within which public authorities must complete administrative actions or issue administrative acts on individual rights and interests. According to the Code of Administrative Procedure of the Republic of Albania (hereafter referred as "CAP"), particularly its Article 53, point 1[1], time limits for the parties to perform a procedural action, hereinafter referred to as "procedural time limits" shall be set out by law or sub-legal acts. Generally, the time limits are embodied in specific laws that govern a certain area of state administrative activity or sub-legal acts that are issued pursuant to or in accordance with law.
An illustration for the time limits provided by law – Article 69 of Law no. 9920, dated 19.05.2008 "Tax procedures in the Republic of Albania", as amended, provides for that within 10 days from calculation of tax assessment, the tax administration notifies the taxpayer of it, in order to pay the tax obligation.
Illustration from the time limits provided by sub-legal act – Decision no. 125, dated 17.02.2016 of the Council of Ministers "On the temporary and permanent transfer of civil servants", Chapter II, point 20[2], the competent unit decides on the transfer of civil servant within 10 days.

[1] Article 53, paragraph 1, of the CAP provides that "Time limits for the parties to perform a procedural action, hereinafter referred to as "procedural time limits" shall be set out by law or sub-legal acts.
[2] According to Chapter II, point 20, of Council of Ministers' decision no. 125/2016: "The competent unit, within 10 days from the date receiving Restructuring Committe's proposal, decides on the transfer of civil servant, notifies the civil servant of the decision and take its written decision."

If the laws or sub-legal acts do not set out a specific time limit for conducting a procedural action, then based on Article 53, paragraph 2 of the CAP, the action is conducted within a reasonable time limit and in line with the principle of lawful exercise of discretion, as otherwise these acts risks its unlawfulness.[3]
In spite of aforementioned, based on Article 91 of the CAP, public authorities shall complete the administrative procedures with a final decision within the time limits set out by special laws, and in case the time limit is not set, the general time limit as set out by paragraph 2, Article 91 of the CAP is 60 days[4].
All above provisions are in accordance with the rules and principle of administration developed by SIGMA, owint to the fact that the CAP was drafted with their assistance.

2. Where are the administrative time limits set:

   - The Constitution
   - **The general code of administrative law or administrative procedure law**
   - **Special laws**
   - **Other**

   Please specify your answer briefly, if necessary

The administrative time limits for completion of administrative action against the individual/ parties in the administrative procedure are provided for in:

1) Specific laws that discipline an area of state administrative activity;
2) Sub-legal acts issued based on and in accordance with adhoc law;
3) The Code of Administrative Procedure of the Republic of Albania, where there are no provisions in the first two.

An illustration for case no.1 – Article 69 of Law no. 9920 "Tax procedures in the Republic of Albania", dated 19.05.2008 as amended, Article 69 provides that, within 10 days from calculation of tax assessment, the tax administration notifies the taxpayer of it, in order to pay the tax obligation.
Illustration of case no.2 – Chapter II, paragraph 20 of Decision no. 125, dated 17.02.2016 of the Council of Ministers "On the temporary and permanent transfer of civil servants"[5], the competent unit decides on the transfer of civil servant within 10 days.
Illustration for case no.3 – the CAP obliges the public authorites to complete the administrative procedures by or without a final decision within 60 days.

[3] See Article 53, paragraph 2 of the CAP: "Unless otherwise provided by this Code, if the laws or sub-legal acts do not provide for a specific time limit for conducting a procedural action, the public organ conducting the procedure, shall, by means of a special decision, set a reasonable time limit, according to the specific case and in line with the principle of lawful exercise of discretion.".
[4] Article 91, paragraph 2 of the CAP: "In case the special law has not specified any time limits, the time limit for the conclusion of the administrative procedure is 60 (sixty) days. "
[5] According to Chapter II, paragraph 20 of Council of Ministers' decision no. 125/2016: "The competent entity, within 10 (ten) days from receiving the restructuring committee's proposal, decides on the transfer of civil servant, notifies the civil servant of the decision and takes it written his/her.".

3. Is the concept of "reasonable time" for the setting of administrative time limits defined and applied in your legal system or case-law?

As it is explained above, the time limit for completion of administrative action or administrative procedure with/without a decision are provided for in specific laws and specific sub-legal acts. Nevertheless, when the specific law or sub-legal acts do not set out time limits for the administrative action, then the general time limit of 60 days as defined by the CAP shall by applied.
Despite aforesaid, regarding the procedural actions that are not governed by the specific legjislation, Article 53, paragraph 2 of CAP provides the possibility of taking actions within a reasonable time, in line with the discretion of public body.
It is worthy to emphasize that the reasonable time limit is enforceable only for the procedural actions that are deemed adhoc actions, taken by public body to reach to the final decision.

4. Describe the general time limits in which administrative decisions are made in your legal system.

As aforesaid, procedural time limits are many and vary from 5 days, 10 days, 15 days, 30 days, etc. We may say that the framework and general time limit is 6- days as set out by CAP for the completion of administrative procedure by or without the decision of the public body.

5. Is it possible to extend the administrative time limits? Under what circumstances?

Based on the CPA, the extension of procedural administrative time limit and final time limit for the completion of administrative procedure by the public organ is possible. Paragraph 3, Article 53 of the CPA provides that the procedural time limit specified by law or sub-legal acts may be extended only if this is explicitly provided for in the law or sub-legal acts. Additionally, the time-limit set by the public body in line with discretion, may be extended upon justified request of the interested party submitted prior to expiry of the time limit. Regarding the administrative procedure time limit, it can be extended according to Article 92 of the CAP. Based on this Article, the time limit may be extended only once as the initial time limit. Thus, if the time limit is 10 days as defined by the specific law, then this time limit may be extended for no more than 10 days. If the general time limit is 60 days, the extended time limit may be for no more than an additional 60 days. According to Article 92 of the CAP, 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 combination of administrative procedures, large number of subjects, unification of administrative

procedures, special investigation for the purposes of decision-making, 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 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 artibrary, unjustified, but are in favour to the fair and objective resolution of administrative case.

6. Does a person have the right to complain about the authority's decision to extend the time limit?

Special laws and the CAP do not contain any Article providing the possibility of administrative and judicial appeal against interim decisions for the extension of time limit of administrative procedure within the framework of taking the final decision. Nevertheless, the same thing applies to the prohibition of appeal against them. Whereas the legislator does offer explicit provision in this regard, there two approaches to challenging the interim decisions on the extension of time limits for the administrative procedure where on the one hand, their appeal is considered along with the final decision and on the other hand their appeal submitted immediately following their notification. Both these approaches are possible in practice with regard to administrative appeal before the authority that has issued the act, the superior body, and/or the administrative court. Regarding the administrative appeal before the authority that has issued the act or the superior body, the time limits are met in accordance with the special legislation or as set out in Article 128 onwards of the CAP providing the administrative legal remedies and for the judicial appeal the time limits contained in Article 18 of law no. 49/2012 "On administrative courts and adjudication of administrative disputes", as amended.

7. If an administrative decision is unfavourable to the submitter or the potential addressee of the decision, can it still be made after the expiry of the time limit?

   - **Yes**
   - No
   - No, unless the delay on the part of the institution has a proper justification
   - Other

   Please specify your answer briefly, if necessary

As a rule, the legislation requires the 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 or the CAP. Article 91, paragraph 5, of the CAP offers an permitting approach in this regard and states that: Failure to comply with the time-limits provided in this Article 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.
While it prescribes the possibility of failure to meet the time limits for conclusion of the administrative procedure, the CAP accepts the issuance of a decision provided that the arguments to be given in front of the superior or superior body of the public administration for the delays of decision within 10 days from the expiration of the deadline. In this case, the CAP does not "dictate" the form of decision-making of public body in favour and against the administrative party, but such a provision can be interpreted and understood as a possibility to give a decision out of time limit.
However, the risk of rendering a decision out of the time limit conflicting with the party's interest in the administrative procedure, is his/her administrative challenge or judicial one for unlawfulness regarding the violation of administrative procedure, where the procedural time limit for its conclusion in due time and delivering a final decision in due time, is included.

8. Is failing to comply with established administrative time limits a common problem in your country?

    - Rather yes
    - **Rather no**

It used to be a common problem but following the introduction of the amended Code of Administrative Procedure, after 2016, a greater awareness of state administration for completing the administrative actions in due time is evident. This occurs due the digitalization of services which are getting electronically (online). It is worthy to note that emerge problems on this issue but do not occur frequently.

9. What are the main reasons for failing to comply with administrative time limits in your country?

    - Lack of clear regulation
    - **Lack of institutional capacity**
    - Deficiencies in the administration of the authorities
    - Deficiencies at national policy level
    - **Other**

    Please specify your answer briefly

Cases when the administrative actions were completed with delay (beyond the time limits provided by law and the CAP) are related with institutional capacities such as lack of trained administrative staff or lack of staff in quantity. Similary, we might say that the lack of organization 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).

10. Are there any penalties, disciplinary or criminal liability for authorities or their staff with regards to not complying with the time limits?

Definitely, there are. Regarding the civil servants, civil judicial and prosecution servants and those of foreign service, the initiation of a disciplinary procedure may be required for minor, serious and very serious violations, based on Articles 57-61 of law no. 152/2013 "On civil servant", as amended. Types of disciplinary measures are reprimand, withholding the remuneration for a period up to 6 months, suspension of the right to any type of promotion, including in the salary step, for a period up to two years; and where there are serious consequences dismissal from the civil service. With regard to other employees, whose employment status is governed by specific law, the initiation of disciplinary procedure may be requested according to the specific rules of the organic law, whereas for other employees whose employment relationship is governed by the Labour Code, as amended, the provisions of the Labour Code are applied to the disciplinary procedure and disciplinary measures are initiated according to the domestic law and individual employment agreement.
Taking into account the consequences to the party due to the administrative delay, the non-contractual damage compensation might be claimed based on the Constitution, as amended, Civil Code, as amended and the law on non-contractual liability of state bodies. If it is considered the possibility of criminal offence, the case may be referred to the prosecution office for the initiation of criminal prosecution.

Administrative silence

1. Does your national legislation define "administrative silence" as a legal concept? Please specify.

Yes, the Albanian procedural administrative law defines the legal concept of administrative silence in the "positive" version/model and the outcome is the consent of party's request in the administrative procedure and not its refusal. Article 97 pf CPA provides the silent consent: "1. If the party in an administrative procedure has requested the issuance of a written administrative act and the public body fails to notify its decision within the time limit as set out by law or sub-legal act for the conclusion of the procedure, and neither notifies of the extension of the time limit, nor a decision issued within the extended time limit, the request shall be deemed approved, and the request written administrative act as approved in silence (hereinafter referred to as "the act in silence"), for the cases been provided in special laws. 2. The party shall be entitled to request from

the public authority, which has failed to issue the requested administrative act, a written confirmation that his/ her request is considered to have been approved in accordance with paragraph 1 of this Article. 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 defined as per paragraph 1 of this Article. 3. If the authority does not issue a confirmation in accordance with paragraph 2 of this Article within seven days from the date of submitting the request of the party as per paragraph 2 of this Article, or at the same time does not issue the requested administrative act, the party may bring a lawsuit to the competent court for administrative matters, to clarify the rights and obligations between the plaintiff and the public organ." According to this Article, when the public body fails to notify its decision on the party's request, then it request is deemed as silent approval, only if provided explicitly by special law.
The silent approval has three preconditions to occur and produce legal effects. First: There should be a request from the party to complete an administrative action; Second, There is omission in time of the public body within the time limits provided by law; Third: The special law provides specifically the silent approval.
It is worthy to emphasize that the silent approval should not be confused with the inaction of public administration bodies for which the special law does not provide the silent consent because the silent consent has positive approach approving the party's request and not refusing it.

2. Does your legal system provide for a negative model of administrative silence (deemed refusal of a claim)?

The national law does not provide for silent "disapproval", but only silent approval as it is clarified above. Thus, the silent approval based on the Albanian legislation does not provide for the negative model, but the positive one.
Regarding the negative model, the national law provides for the inaction of public administration bodies, but shall not be confused woth silent consent. The notion of inaction is provided for in Article 2, point 5, of law no 49/2012, as amended: "Administrative inaction" is every failure of action by a body of the public administration to exercise administrative activity, according to the public function, which creates legal consequences on subjective rights or lawful interests".

3. Does your legal system provide for a positive model of administrative silence (a claim not refused in due time is deemed granted)?

Yes. The answer is given in Question 1 and 2 as abovementioned.

4. Which regulatory model of administrative silence is more typical for your legal system?

Under national law, there is no answer for this question because it provides for only the silent approval and not silent disapproval. Although the legislator has defined the silent

approval according to Article 97 of CPA, it is not a legal institute applied largely, as it was regarded as exceptional concept in practice from its nature where bodies fail to give a decision on the request of administrative parties and consequently are approved. In these conditions, the silent approval is not regarded as "typical" legal institute in our legal system.

The negative model

1. What are the types of administrative procedures that the negative model can be applied to:

    - Procedures that are initiated on the basis of an application or claim by a person
    - Ex officio procedures
    - Other

    Please specify your answer briefly, if necessary

Based on the explanations provided in the previous questions, the administrative silence of public bodies does not entail a negative nature/model.

2. Does the negative model mean that a person's application or claim is automatically considered to be rejected or are extra actions required in order for the person to be able to appeal the rejection (for example, does the person have to provide proof that authority has been silent on the particular matter in order for it to be able to appeal the rejection)?

Based on the explanations provided in the previous questions, the administrative silence of public bodies does not entail a negative nature/model. Silent approval, not disapproval.

3. Is the process for appealing against a "fictitious refusal" resulting from an administrative silence different from the general appeals process (for example, is there a different time limit or review body than in general appeals process)? Please describe the main differences.

Based on the explanations provided in the previous questions, the administrative silence of public bodies does not entail a negative nature/model. Silent approval, not disapproval.

4. Can the "fictitious refusal" resulting from an administrative silence be appealed in court?

Based on the explanations provided in the previous questions, the administrative silence of public bodies does not entail a negative nature/model. Silent approval, not disapproval.

5. What is the competence of the court if the "fictitious refusal" is found to be unjustified:

   - The court can order the administrative authority to issue a decision, but cannot set a specific time limit in which it shall be done
   - The court can order the administrative authority to issue a decision within a certain time limit
   - The court can decide upon the matter itself
   - Other

   Please specify your answer briefly

Based on the explanations provided in the previous questions, the administrative silence of public bodies does not entail a negative nature/model. Silent approval, not disapproval.

6. What legal remedies are available in your legal system if an authority has failed to comply properly with a court order to issue a decision?

Based on the explanations provided in the previous questions, the administrative silence of public bodies does not entail a negative nature/model. Silent approval, not disapproval. Despite aforesaid, owing to the fact that the question does not deal with silent disapproval, but it is a question on legal remedies available to subjects to execute the judicial decisions, to oblige the public bodies to complete an administrative action, let us introduce with the following remedies:

1) Seizure and fine by the state or private judicial bailiff;

According to the Civil Procedure Code, as amended, law no.49/2012, and the domestic law on enforcement, when the court decision is placed on enforcement/execution through the judicial bailiff, at first the voluntary execution with timeline belongs to the public body and if the latter does not take action, the obligatory execution by the bailiff commences. At the obligatory execution, the bailiff may decide the pleacement on seizure of public body objects.

Moreover, it can fine the public officials that prevent the enforcement of court decision.

2) To initiate a criminal proceeding for preventing the enforcement of court decision;

Against the public officials that prevent or fail to execute the decisions, a criminal proceeding may be initiated based on the Criminal Code, as amended, for the criminal offences of preventing the enforcement or failure to enforce the court decision without grounded reason. (Articles 320, 320/a, 321).

3) To request the completion of special actions by the court;

Based on Articles 66-68 of law no. 49/2012, as amended, if the judicial bailiff fails to execute the court decision, he or she requests the court to perform special actions such as fine or other measures.

4) To request the taking of disciplinary measures against the public officials;

Finally, the taking of disciplinary administrative measures may be requested against the public officials that have not respected the court decision against the public officials based

on Articles 57-61, of law no.152/2013, as amended, on civil servant, civil judicial and prosecution servants or governed by the Labour Code for those whose employment relationship at a institution is governed by the Labour Code .

7. In which cases the court has the competence to decide upon the matter itself instead of the "silent" authority:

    - In all cases
    - Only in cases of objective urgency
    - Only in cases which concern significant rights of the person
    - Only in cases in which the authority has no discretionary power or it is limited to zero
    - Never, because only the authority can make a decision
    - Other

Based on the explanations provided in the previous questions, the administrative silence of public bodies does not entail a negative nature/model. Silent approval, not disapproval. Despite aforementioned, while the question raised does not relate with the silent disapproval, but it is a general question on the decision-making of administrative court in Albania, according to law no. 49/2012, as amended, they can not decide as public bodies but as an administrative jurisdiction, as they infringe the principle of the court designated by law.

The positive model

1. What is the main purpose of the positive model in your legal system?

    - **To simplify certain administrative procedures**
    - **To protect the rights of individuals in case an authority fails to comply with the administrative time limits**

    Please specify your answer briefly

The main purpose of the silent consent based on Article 97 of the CPA has been to guarantee the individual rights in relation to the decision-making of the public bodies. Additionally, we may mention the increase of efficiency of public bodies, avoiding the consequences emerging from the lack of its efficiency.[6] In this framework, we can not exclude the simplification of administrative procedures, providing the parties with legal expectations from their request as simply as possible.

2. Are there any prohibitions or restrictions on the application of the positive model in certain areas of law in your legal system?

[6] See the Commentary on the Code of Administrative Procedure, by SIGMA, page.449

The Albanian legislation does not contain any restriction on the application of the silent consent in any certain area of law. This is defined by the Article itself allowing the silent consent, Article 97 of the CAP that requires its regulation by special law, without setting restrictions on the nature and types of special law according to areas of law.

3. When (a specific moment or particular circumstances) is the person's claim deemed to have been granted?

Based on Article 97 of CAP, the silent consent is deemed to have been granted at the moment when the public body does not reply with the time limit for the conclusion of administrative action, requested by the administrative party. 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 defined in paragraph 1 of this Article. If the authority does not issue a confirmation in accordance with paragraph 2 of this Article within seven days from the date of the party's request based on paragraph 2 of this Article, 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 may request the written confirmation through a judicial proceeding if the public body has failed to issue it upon party's request.

4. Does the person have to get any kind of confirmation or proof that the claim has been granted? Where and within what time limit does it need to be received?

See the response of Question 3.

5. Are there any legal remedies available to third parties affected by the "fictitious decision" of granting a claim, if necessary?

Actually, the national law does provide any legal remedy to third parties affected by the "silent consent", but the party is entitled to submit a claim administratively and judicially.

6. Is there a certain procedure that allows to annul a "fictitious decision" of granting a claim? If yes, are there any differences from the general procedure?

We would like to explain that there is a possibility to appeal a "fictitious decision" through administrative legal remedies (administrative appeal and administrative review), and judicially through bringing a lawsuit before the court and the silent consent is deemed unlawful or void/invalid. There are no specific rules, but general regulations on administrative and judicial appeal shall be applied. In this regard, we can mention the fact that Article 97 of the CAP dictates the enforcement and type of claim to be submitted

within this framework, that of specification of right and obligations. On the other hand, the administrative party may request from the court the written confirmation as approved in silence.

7. Please describe the implementation of 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 in your legal system. In which legal areas has it been implemented? Have there been any difficulties in its' implementation?

With regard to this question, we clarify that Albania is in phase of accession negotiation with the European Union and it has no obligation to implement the EU legislation (directives + regulations - Acquis). For this reason, there is no reply to this question.

Other legal remedies

1. What legal remedies exist in your legal system in situations of administrative silence where the law does not regulate the administrative silence neither in accordance with the positive, nor the negative model?

The Albanian legislation provides for the silent approval, not silent disapproval. Thus, the legislator has preferred to accept the positive model of administrative silence. Moreover, the Code of Administrative Procedure, as amended, has defined the situation of administrative silence and provides a positive approach for the purpose of approving the party's request in the administrative procedure. Thus, our legal system regulates the situation of administrative silence. Additionally, there are no other institutes related to the administrative silence, except from those abovementioned.

2. Is a person 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?

The Code of Administrative Procedure does contain any specific provision that authorizes that the injured party by the administrative silence to gain damage compensation particularly under these conditions and circumstances. Nevertheless, in principle, the CAP based on the principle of liability of public administration bodies.[7] This results from Article 44 of the Constitution. In this case, as substantive law, law no. 8510, dated 15.07.1999 "On non-contractual liability of state administration entities", as amended, and provisions of the Civil Code, as amended, regarding the damage compensation,

[7] See Article 15 of CPA that provides for: "Public bodies and their employees when they complete an administrative procedure are liable for the damage caused to the parties, according to the separate law."

whereas as a procedural law on bringing a lawsuit, law no.49/2012, amended, Article 17, paragraph 1, letter "f"[8].

Case law and regulation in non-harmonised sectors of law

1. Do you have any case-law where national regulation on administrative silence has been found unfounded or inapplicable in a particular case?

No, there is no case. Moreover, there are no many cases in the legal practice when the interpretation of silent approval or administrative silence has been made.

2. Do you have any case law on the application or interpretation of the positive 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? If so, please describe the substance of the most relevant cases.

With regard to this question, we clarify that Albania is in phase of accession negotiation with the European Union and it has no obligation to implement the EU legislation (directives + regulations - Acquis). For this reason, there is no reply to this question.

3. Have you submitted 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? Briefly describe the request and the substance of the judgment.

With regard to this question, we clarify that Albania is in phase of accession negotiation with the European Union and it has no obligation to implement the EU legislation (directives + regulations - Acquis) and to refer a case for to the CJEU under the preliminary reference procedure. For this reason, there is no reply to this question.

4. Briefly describe the national regulation on administrative silence in the following legal areas:

    4.1. Construction, spatial development planning and environmental protection

The national law defines the silent approval of the individual requests only if it is provided by specific law. One of cases when the silent approval is provided by specific law deals with the object construction or territorial development planning specifically law no. 107/2014 "On territorial planning and development". This law provides a definition of

[8] Based on Article 17, paragraph 1, letter "f", of CPA, the lawsuit is brought to compensate extra-contractual damage according to a separate law.

tacit approval under Article 3, point 18 postulating: "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." Additionally, Article 40 of law no.107/2014 provides for the extension of the term of completion of the works through tacit approval if the public body fails to decide on the party's request within the time limit.[9]

Moreover, Article 42 of this law provides for the tacit approval of the utilisation, in case no decision has been made by the public body within the established time and the person performing the works has fulfilled all administrative acts provided for in the legislation on construction works.[10]

Furthermore, based on Article 44, paragraph 3 of this law, the construction permit shall be considered as being awarded tacitly, if the responsible authority fails to make decisions within the above deadline and the responsible planning structure at the local authority has not given any negative opinion regarding the request. Nevertheless, tacit approval does not apply to construction permits that are within the competence of the TCC, as well as for other works, including those with high risk, as defined by the development regulation or are specifically regulated by the applicable legislation.

The tacit approval is mentioned in the area of environmental protection and state activity within this framework.

Social security

Silent approval is not part of the social security and stated activity linked to this.

4.2. Freedom of information

Silent approval is not part of the giving information and documentation by the state authorities versus requesters.

Administrative discretionary power

1. How is administrative discretionary power defined in your legal system?

The administrative discretionary power is provided for by Article 11 of CAP. Based on this Article, discretion shall be lawfully exercised when it is in line with the following

[9] See Article 40, parapragh 4, of this law providing that: "The request for extension of the works is deemed to be approved tacitly if the planning authority fails to notify the concerned decision to the requesting subject within the 45-day period from the filing date of the request "

[10] See Article 42, paragraph 5, of this law: "The utilisation certificate shall be examined and awarded according to the procedures and deadlines set out in the legislation on the discipline of construction works. In case no decision has been made within the established deadlines and the person performing the works has fulfilled all administrative acts provided for in the legislation on construction works without violation, the utilisation certificate shall be considered to be approved tacitly."

conditions: a) it has been provided by law; b) it does not go beyond the limits of the law; c) the selection of the public body was made only to achieve the objective for which the discretion was allowed, and is in line with the general principles of this Code; and ç) the choice does not constitute an unjustified departure from previous decisions made by the same body in identical or similar cases.

2. Does your legal system distinguish between discretion (*deutsch – Ermessen*) and margin of appreciation (scope of appraisal) in the interpretation of undefined legal concepts (*deutsch – Beurteilungsspielraum*)?

Yes, even the 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 cae 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.
In the case of discretion, the public body has a limited margin of appreciation (from minimum to maximum), within which it takes the decision in proportion with the state it dictated, following the same administrative practice. However, the minimum and maximum limits for the decision-making are provided by law and the body decides within this space. In this case, we can say that the discretion "is equal to the evaluation of public body". Nevertheless, discrection is not allowed in the cases that are not provided by law and for cases there are no legal provisions, thus in the case of a concept that is not governed by the administrative law according to the German notion, as in this case where the party brings a case before the court to render justice on the grounds of absence of applicable law, through the principle of law, based on Article 1, paragraph 1, of the Code of Civil Procedure, amended.

3. What are the characteristics, criteria or methods used in your legal system to determine whether an authority has discretionary power in a particular case? Provide the most typical examples of case law where the discretionary power has been recognised.
   If your legal system distinguishes between discretion and margin of appreciation, please describe both.

In order to understand discretion, first the legal provisions should be evaluated as the discretion is allowed when it is provided explicitly by law. When we say discretion is provided by law, we mean that the law provides for the minimum and maximum opportunities of the public body and the body takes a decision within this space (limits). Thus, briefly speaking, the discretion is understood by the content of law or sub-legal act. The characteristics of the administrative discretion are:

1) It is provided by law;

2) The selection of the public body does not go beyond the limits of the law;
3) The selection of the public body is according to the purposes of law;
4) The selection of the public body was made only to achieve the objective for which the discretion was allowed;
5) The selection of the public body is in line with the general principles of this Code;
6) The choice does not constitute an unjustified departure from previous decisions made by the same body in identical or similar cases.

The most typical cases of discretion are cases provided by law no. 152/2013 "On civil servant", as amended, regarding the administrative actions performed by the public body in the recruitment of the civil servants. For instance, based on Articles 21-31 of this law, the public bodies that recruit civil servants in the public administration may assess the candidates with 100 points based on his/her experience, written test results and education. The public body ranks as successful the person obtaining more than 70 points. Therefore, there is an administrative action with discretion of public body where the minimum and maximum limits of its conclusion are provided.
Regarding the last question, refer to the response given to question 2.

4. Is there a limit of judicial review of use of discretionary power by the authority in your legal system? If so, please explain possibilities of court examination and assessment in such a case?
   If your legal system distinguishes between discretion and margin of appreciation, please describe both.

Yes, there is a possibility of judicial review of administrative action in administrative courts. More specifically, when it deals with unlawful administrative acts, due to discretion, the time limit for its judicial challenge is set out by the separate law starting from 5-day time limit and more[11]. When the time limit is not set out by the separate law, the 45-day time limit is provided by Article 18 of law no. 49/ 2012, as amended. When there is an invalid administrative act, a lawsuit may be brought in any time, without time limit.
When the administrative examines a administrative discretionary act, it can decide to annul it on the grounds of unlawfulness. In this case, the administrative court has defined limits to examine the case, according to the principle of law, which are sanctioned in Article 37 of law no. 49/2012, as amended: "The court examines the legality of the contested administrative action based on the evidence submitted by the parties and the legal and factual situation that existed at the time of performance of the concrete administrative action. 2. In cases when the plaintiff requests or the substantive law requires the issuance of an administrative act, the court bases its decision on the factual and legal situation at the timeof taking the decision. 3. In a case when the law gives the public body the right to alternative choices in the issuance of an administrative act or the performance of another administrative action, the court also examines whether: a) The choice by the public body was made in conformity with the objective and purpose of the

[11] Law on food provides out 5-day limits to challenge the National Food Authority's acts.

law; b) The choice by the public body was made only to reach the purpose of the law; c) The choice by the public body is in a correct relation with the need that dictated it...".
Regarding discretionary acts of public bodies, the administrative court evaluates if the discretion has been exercised in conformity with law (evaluated the legality of procedural act), but can not evaluate in essence as the public body, as it violates the principle of the court designated by law. In this way, the desicion-making of the court is provided for in Article 40 of law no.49/2012, as amended, where the court may annul the administrative act, oblige the administrative body to amend the act, to state the nullity of the administrative act when it is invalid, etc.
Meanwhile, if the court is in front of the administrative non- discretionary actions, then the court assess that the public body has made correct physical evaluation of administrative action. Thus, it considers the legality of the act not only in procedural terms. In this case, the additional decision-making is that what may alter the administrative act.

5. Is judicial review affected by the fact that the discretionary power used by the authority has resulted in a restriction of human rights? Is the intensity of judicial review in such a case different from that in the case of no administrative discretion?

Yes, during the judicial review of discretionary acts, the court tends to annual the acts that have violated or restricted the human rights and fundamental freedoms. The court takes into account the compliance with the principle of proportionality in relation to the restriction of human rights and fundamental freedoms.Yes, concerning the discretionary acts, the court has restrictions to its decision-making being focused on the principle of proportionality and the procedural way of exercising the discretion by the public body. There is not the same thing regarding the administrative actions without discretionary nature.