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SUPREME COURT
SENATE

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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

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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

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 general provisions of the administrative time limits are stipulated in the General Administrative Procedure Act 1991 (Allgemeines Verwaltungsverfahrensgesetz 1991 - AVG, https://www.ris.bka.gv.at/Dokumente/Erv/ERV_1991_51/ERV_1991_51.pdf). However, these provisions are applied only if administrative regulations do not provide otherwise.

   Administrative criminal proceedings are governed by their own rules, which are set out in the Administrative Penal Act 1991 (Verwaltungsstrafgesetz 1991 - VStG, https://www.ris.bka.gv.at/Dokumente/Erv/ERV_1991_52/ERV_1991_52.pdf).

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

   Yes, see question 4 in “Administrative time limits”
   Administrative authorities are obliged to issue a decision without undue delay.

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

According to sec. 73 para. 1 AVG administrative authorities are generally obliged to issue an administrative decision without undue delay, however, at the latest within six months after receipt of the application.

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

   No

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

   See question 5 in “Administrative time limits”
   The administrative authority cannot extend its own time limit.

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

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

   - Rather yes
   - Rather no

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

   Reasons for failing to comply with administrative time limits may be a combination of various factors, such as staff shortages, organisational deficiencies and a high level of applications. Especially in asylum and aliens law the level of new cases continues to be

high due to the numerous applications for international protection filed in Austria from 2015 onwards.

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

    If the parties suffer damage as a result of an unnecessary delay in the proceedings, official liability claims may arise. According to art. 23 of the Federal Constitutional Law (Bundes-Verfassungsgesetz - B-VG, https://www.ris.bka.gv.at/Dokumente/Erv/ERV_1930_1/ERV_1930_1.pdf) the federation, the provinces, the municipalities and the other bodies and institutions established under public law are liable for the injury which persons acting on their behalf in execution of the laws have by illegal behaviour culpably inflicted on whomsoever. Persons acting on behalf of one of these legal entities are liable, insofar as intent or gross negligence for the injury for which the legal entity has indemnified the injured party can be laid to their charge.

    In the event of culpable infringement, civil servants can also be subject to disciplinary liability (see sec. 92 Federal Civil Servants Act, Beamten-Dienstrechtsgesetz 1979 - BDG 1979, https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40215895/NOR40215895.pdf).

    In cases of particularly serious violations criminal penalties could be imposed as well.

Administrative silence

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

   No, “administrative silence” is not defined as a legal concept in Austrian. However, this term is sometimes used in certain administrative regulations and jurisprudence.

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

   No

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

   Yes

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

   Since the Austrian legal system does not provide for a negative model of administrative silence, the positive model is more typical.

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

    n.a.

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)?

    n.a.

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.

    n.a.

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

    n.a.

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

    n.a.

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?

In Austria, the first instance administrative courts cannot order an authority to issue a decision, however first instance administrative courts rule on complaints on the ground of breach of the duty to reach a timely decision by an administrative authority (sec. 130 para. 1 lit. 3 B-VG, sec. 8 Proceedings of Administrative Courts Act, Verwaltungsgerichtsverfahrensgesetz - VwGVG, https://www.ris.bka.gv.at/Dokumente/Erv/ERV_2013_1_33/ERV_2013_1_33.pdf). Within three months upon receipt of the complaint, the authority may make up for the decision. Otherwise, the authority has to submit the complaint to the first instance administrative court the competence to decide on the administrative matter is transferred to the first instance administrative court (sec. 16 VwGVG).

The situation is different if a first instance administrative court is in default: If a first instance administrative court does not decide within its decision deadline (which is generally six months) an application for setting a deadline can be filed with the Supreme Administrative Court (art. 133 para. 1 lit. 2 B-VG, sec. 38 VwGVG). Upon application, the Supreme Administrative Court may order the first instance administrative court to decide within a time limit set by the Supreme Administrative Court. However, the Supreme Administrative Court itself shall not decide on the case, not even after the first instance administrative court fails to issue a decision within the set time limit.

There are special rules in administrative penal law: If the accused has filed a complaint against a penal order by an administrative authority and if 15 months have passed since the authority received the complaint, the penal order ceases to have effect by law. The proceedings must then be discontinued (sec. 43 para. 1 VwGVG).

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

n.a., see question 6 in “The negative model”

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

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.

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

Yes. 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. In these cases, the applicant has to notify the administrative authority about an intended project, such as the foundation of an association.

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

In provisions relating to administrative silence, legal consequences derive from the expiration of a fixed time limit.

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?

After the administrative authority was notified by the applicant, the claim is considered to be granted after the fixed time limit has elapsed. A confirmation is not generally needed.
Only sec. 12 Supply of Services Act (Dienstleistungsgesetz – DLG, https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40133107/NOR40133107.pdf) stipulates in accordance with art. 13 para. 5 of the Directive 2006/123/EC that the granted authorisation of the access to or exercise of a service activity has to be confirmed as quick as possible.

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

The provisions relating to administrative silence do not provide for legal remedies available to third parties. Unless the competent authority declares not to support the claim or initiates an approval procedure, the claim is considered to be valid.

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?

   There is no such procedure that allows to annul a "fictitious decision" of granting a claim.

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?

   In Austria, the Directive 2006/123/EC was transposed by the Supply of Services Act. The positive silence model provided for in art. 13 para. 4 of the Directive is adopted in sec. 12 DLG. There are no known difficulties in its implementation.

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?

   See question 6 in “The negative model”

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?

   See question 10 in “Administrative time limits”

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 such case-law.

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.

   No, there is no such case-law.

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.

No, the Austrian Supreme Administrative Court has never submitted such a question to the Court of Justice of the European Union.

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

4.1. Construction, spatial development planning and environmental protection

As regulations on administrative silence are the exception in Austrian law, there is no general rule on administrative silence in different legal areas.

The few existing administrative silence provisions relating to construction, spatial development planning and environmental protection stipulate the necessity of a notification of an intended project which is considered to be authorised after a fixed time limit has passed (see sec. 44 para. 1 Upper Austrian Building Code, Oö. Bauordnung - Oö. BauO, https://www.ris.bka.gv.at/Dokumente/Landesnormen/LOO40007190/LOO40007190.pdf).

4.2. Social security

Sec. 11 of the Federal Act on Hospitals and Sanatoria (Krankenanstalten- und Kuranstaltengesetz – KAKuG, https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40060868/NOR40060868.pdf) 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.

4.3. Freedom of information

There are no national regulations on administrative silence in this area.

Administrative discretionary power

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

The principle of legality enshrined in art. 18 para. 1 B-VG stipulates that the entire public administration has to be based on law. The Parliament itself is also bound by the principle of legality as legal provisions have to be sufficiently precise and need to sufficiently determine the contents of administrative acts. However, this does not per se exclude the granting of certain margins to the administration.

Art. 130 para. 3 B-VG creates the constitutional framework for the granting of discretion on the level of simple law. According to this provision, in general, there is no illegality if the discretion is exercised in accordance with the law, meaning that the authority is not allowed to exceed or abuse the margin of discretion. Other rules apply to administrative penal proceedings and matters falling under the jurisdiction of the Federal Fiscal Court (see below question 4).

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. Discretion in a narrow sense (*deutsch - Ermessen)* refers to margins which are intentionally granted to the administration by the legislator. In contrast, it is not the legislator's intention to grant discretion to the administrative authority when using undefined legal concepts (undefined legal terms - *unbestimmte Gesetzesbegriffe*). Undefined legal concepts are the result of the use of imprecise legal terms. Their contents and meanings have to be determined through interpretation.

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.

Discretion

To determine whether the authority has discretion in a particular case, it is necessary to analyse the text of the legal provision and to interpret the relevant law. "Discretion" as a legal term is scarcely used in Austrian legal provisions, but the use of words such as "may" or "allowed" indicate discretion, whereas the words "has to", "must" or "is" imply the existence of bound decisions. However, 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 (see judgement of the Austrian Supreme Administrative Court VwGH 19.4.2012, 2012/01/0026, https://www.ris.bka.gv.at/Dokumente/Vwgh/JWT_2012010026_20120419X00/JWT_2012010026_20120419X00.pdf, all judgements only available in German).

Administrative discretion comprises both the discretion to act (the authority may, but is not obliged to act - *Handlungsermessen*) and the discretion to choose (the authority must act, but is free to choose between different courses of action - *Auswahlermessen*). For example, discretionary power to act has been recognised by the Austrian Supreme Administrative Court in relation to sec. 68 para. 2 to 4 AVG. It held that the power granted to the authority to deviate from an already legally binding decision under that provision lies within the authority's discretion (see VwGH 28.2.2012, 2012/05/0017,

https://www.ris.bka.gv.at/Dokumente/Vwgh/JWT_2012050017_20120228X00/JWT_2012050017_20120228X00.pdf).

Margin of appreciation in the interpretation of undefined legal concepts

The content of the undefined legal concept must be established through interpretation by the administrative authorities.
If, even after applying all methods of interpretation, no specific content emerges, the provision is not precise enough and infringes art. 18 B-VG. 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 (see judgement of the Austrian Constitutional Court on the alleged lack of determinability of the term "locality" which was deemed sufficiently precise VfGH 3.10.2007, G12/07, https://www.ris.bka.gv.at/Dokumente/Vfgh/JFT_09928997_07G00012_00/JFT_09928997_07G00012_00.pdf).

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.

Discretion

Decisions by administrative authorities characterised by discretionary power are subject to limited review. In general, first instance administrative courts cannot modify (or set aside) administrative decisions only because they consider another exercise of discretion more appropriate (art. 130 para. 3 B-VG). The review is limited to the question if the authority has exercised its discretion in accordance with the law. If this is not the case, the court itself must exercise discretion in its decision on the merits. However, first instance administrative courts in administrative penal proceedings as well as the Federal Fiscal Court in all proceedings exercise discretion, even if this means deviating from the authority's exercise of discretion. In this respect, the courts have full power of cognition. The Austrian Supreme Administrative Court may only examine whether the first instance administrative court was authorised to exercise its discretion and, if so, whether it exercised its discretion in accordance with the law (art. 133 para. 3 B-VG).

Margin of appreciation in the interpretation of undefined legal concepts

Laws containing undefined legal concepts may be examined by the Austrian Constitutional Court for their constitutionality under art. 18 B-VG. The use of undefined legal concepts is compatible with art. 18 B-VG if the content of the terms in question can be determined to such an extent that those subject to law can adjust their conduct accordingly and the application of such concepts by the authority may be examined for

compliance with the law (see judgement of the Austrian Constitutional Court VfGH 2.3.1995, B 1476/93, https://www.ris.bka.gv.at/Dokumente/Vfgh/JFT_10049698_93B01476_2_00/JFT_10049698_93B01476_2_00.pdf).

Owing to the general obligation of first instance administrative courts to decide on the merits of a case, review of the application and interpretation of undefined legal concepts by the administrative authority is not limited. Concerning judicial review by the Austrian Supreme Administrative Court, a legal question of fundamental importance has to be raised (see for example VwGH 31.1.2022, Ra 2021/01/0322, https://www.ris.bka.gv.at/Dokumente/Vwgh/JWT_2021010322_20220131L00/JWT_2021010322_20220131L00.pdf).

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?

If the margin of discretion is abused or exceeded by the authority, the first instance administrative court itself must exercise discretion in its decision on the merits.
If discretion is exercised in accordance with the law, first instance administrative courts, in general, cannot substitute their own assessment for the assessment of the authority (see above question 4). The Constitutional Court may examine decisions of first instance administrative courts under the aspect of arbitrariness.
Laws which allow for restrictions of human rights (*deutsch - eingriffsnahe Gesetze*), such as penal or tax laws, need to predetermine the conduct of the administration in a particularly detailed manner.