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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

Administrative decision-making must be exercised timely across all areas of administration. The exact time limits within which administrative competence must be exercised are regulated by applicable laws. Unless the law provides for fixed time limits, time limits are indicative by virtue of **section 11 of the General Principles of Administrative Law, Law of 1999 (L.158(I)/1999)**. Nevertheless, despite being indicative the threshold of 'reasonable time' cannot, under any circumstances, be exceeded (**section 10 of L.158(I)/1999**).

Furthermore, **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. The right to petition includes requests for the administration to issue an administrative decision or revoke or amend a decision or to deter or restore moral or material damage.

The same obligation is repeated under **section 35 of L.158(I)/1999**. However, section 35 provides that the duty to respond within the time period of 30 days applies where feasible and always in connection to the circumstances of the individual case at hand. Nonetheless, if a period of 3 months has lapsed and no response has been given, the aggrieved person can file a recourse before the Administrative Court, under **Article 146 of the Constitution,** if the omission is justiciable in nature (executory omission).

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

Please see response to Q1 for further details. In addition to the above, settled case law provides an authoritative interpretation of the notion of "reasonable time".

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

The 'reasonable time' test is expressly stipulated in the **General Principles of Administrative Law, Law of 1999**. In accordance with the provisions of the statute, competence must be exercised within a reasonable time for the decision to be current as to the real and legal facts (**section 10**). According to case law, reasonableness of time is determined by the complexity of the case and the magnitude of the inquiry necessary to ascertain the material facts for reaching the decision.

Failure to obey the 'reasonable time' rule may require that the legal regime in force at the time reasonable time had expired be applied before reaching a decision (**section 10**) or that no administrative decision can be reached if an excessive period of time has passed which influences the legal and real conditions (**section 11**).

On an EU level, Article 41 on the right to good administration of the EU Charter on Fundamental Rights generally requires that every person has a right to have his or her affairs dealt within a reasonable time.

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

Administrative authorities are duty bound to issue their decisions timely and with no delays. Time limits are laid down by the applicable statutes, regulations and/or orders. Generally speaking, time limits vary from a few days to a few months. For example, under the **Streets and Building Law** and in particular under **Order 207/2022** (issued by authorisation

of the said legislation) a decision on an Anti-Hail infrastructure building permit application[1] must be issued within 10 working days. Similarly, equally narrow timeframes are provided under **Order 388/2020** for a house building permit. Applications can only be made online and a final decision must be reached within 10 working days. Other statutes make provisions for decisions to be issued within a maximum period of 3-4 months. For example, **section 45 of the Municipalities Law of 2022, L. 52(I)/2022** specifies that a decision for any kind of section 44(1) permit must be issued within a maximum period of four months. Time runs from the day all necessary documents have been received. More importantly, if the municipality does not respond within the time period of four months, the permit is deemed granted (**section 45(2)**).

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

Whether an extension of time is possible, the circumstances under which such an extension is permitted and the duration of the extension are all matters governed by the provisions of applicable statutes, regulations or orders. Circumstances that might justify an extension are, the complexity of the case and the need for 'further inquiry'. Where the applicable statute, incorporates the positive model of administrative silence, as in the case of the Municipalities Law of 2022, time runs from the day all necessary documents have been received. Applicants are informed promptly if supplementary documents need to be submitted. Once the application is submitted with all supporting documentation, the permit is deemed granted and the matter resolved with the expiration of the time limit of 4 months.

Furthermore, by virtue of the provisions of **section 11 of L.158(I)/1999** the time limits are indicative unless statutorily specified as fixed. However, no administrative decision can be issued if an excessive period of time has passed from the expiration of the time limit which essentially influences the legal and real conditions.

In as far as the time limit of 30 days for petitions and complaints (**section 33** of **L.158(I)/1999**), **section 35** specifies that the obligation to respond within the said time period applies only if this is feasible considering all the circumstances of the case.

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

[1] For the protection of agriculture from hail and extreme weather conditions.

An aggrieved person may file a complaint under **Article 29 of the Constitution**. Article 29.1 requires that a reasoned decision be rendered by the Administration in response to a petition (written request) or complaint of an individual, within 30 days. If the administrative authority does not respond to the complaint the aggrieved may file a recourse before the Administrative Court, under **Article 29.2 of the Constitution** for the administration to respond.

Moreover, by virtue of **section 36** of **L.158(I)/1999**, if an administrative authority does not respond to the petition/complaint within the time frame of three months, such omission is deemed as a refusal to satisfy the petition/complaint and an aggrieved person may file a recourse before the Administrative Court under **Article 146 of the Constitution** if the omission is executory in nature. In such case, the individual cannot proceed by also filing a recourse under **Article 29.2** unless he or she has suffered damage as a direct consequence of the administration's omission to respond.

Also, a person can complain to the Commissioner for Administration and the Protection of Human Rights (Ombudsman) who can investigate both individual transgressions or systemic failures.

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

The determining factor is not whether the decision is favourable or unfavourable to the individual but whether an excessive period of time has elapsed between the expiration of the time limit and the issuance of the decision. No administrative decision can be reached if an excessive period of time has passed which essentially influences the legal and real conditions (**section 11 of L.158(I)/1999**). In actual 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.

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

As settled case law stipulates, an administrative authority cannot invoke its own shortcomings, deficiencies or limitations, i.e. the fact that it operates short-staffed, in order to justify its inability to comply with specific time limits or issue decisions timely and within a reasonable timeframe. Generally speaking, administrative authorities whose competence relates to the granting of funds might, at times, fail to comply with time limits. If funds are exhausted, applicants in waiting would need to wait even longer until new funds are available.

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

In as far as failure to comply with applicable time limits in the issuing of administrative decisions the following can be said:

Public authorities are staffed with public servants who are subject to the provisions of the **Civil Service Law, L.1/1990.** Disciplinary action may be taken against a civil servant who omits or acts in any manner which constitutes breach or is contrary to his or her duties (**section 73(1)(b)**). In this respect, a systematic failure to exercise his or her duties timely and speedily, may result in disciplinary action and subsequently to disciplinary penalties.

Similarly, liability may arise for negligence where a duty of care is owed to avoid negligent acts subject to harm being foreseeable or for misfeasance in public office. Misfeasance in public office is a tort. The tort is invoked where a public officer has exercised (or failed to exercise) their

power as a public officer in bad faith, knowing that the act in question would probably cause harm. The rationale behind the tort is that our society and legal system are based on the rule of law and that executive or administrative power should only be exercised for the public good, not for improper purposes. The tort of misfeasance in public office is available to help to rein in the abuse of administrative or executive power. In this case, a claim would be brought against the authority itself.

Furthermore, public authorities, can also be exposed to public law liability. **Article 172 of the Constitution** defines the liability of the State:

> "The Republic shall be liable for any unjust (wrongful) act or omission causing damage committed in the exercise or purported exercise of the duties of officers or authorities of the Republic. A law shall regulate such liability."

The matter was regulated by the **Courts of Justice Law of 1960, L. 14/60** (section 57). In the cases of **Symeon Georghiou v. Attorney-General of the Republic (1982) 1 C.L.R 938** and **Andromachi Costa Alexandrou v. The Attorney-General (1983) 1 C.L.R 41** the Supreme Court held that the notion of "exercise of duty" in Article 172:

- involves the execution of duties ordained by law, and covers cases of damage arising from the wrongful execution of their lawful duties whether intentional or accidental; that purported exercise of duty encompasses wrongful acts in the sense of Article 172, committed by officers or authorities of the Republic while professing or claiming to carry out duties associated with their office but not so in fact or law, in other words a case of abuse of office.
- that injurious act or omission is one that causes damage or produces adverse effects to the rights of the person affected thereby; that for the injurious act or omission to be actionable, it must be unjust (wrongful). "Unjust" or "wrongful" in the context of Article 172, signifies an act committed without authority or justification in law; that the authority of officers of the State emanates from the law or laws setting up their office, defining their duties and regulating their discharge subject, always, to the fundamental provisions of the Constitution and notions of good administration; that Abuse of authority or office lies at the root of the liability of the Republic for acts or omissions of its officers, both in the field of public as well as private law.
- that Article 172 lays down that the Republic is liable for the injury caused by the officer's wrongful act.

In as far as speedy compliance with court judgments is concern, three Bills are currently pending before the competent Standing Committee of

Parliament in relation to failure to comply with a Court's judgment delivered under Article 146 of the Constitution. One of the Bills makes provisions for the criminal liability of a civil servant who knowingly and fraudulently refuses to comply to a court judgment or incites other persons who are under a duty to comply to refrain from doing so.

Administrative silence

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

Although the concept of 'administrative silence' is not defined in national legislation, settled case law offers guidance on the distinction between inertia and a public authority's omission to act in accordance with its legal obligations (abstinence from acting). This is because **Article 146.1 of the Constitution** postulates in terms the justiciability of every executory act or decision or omission in the domain of public law issued in the exercise of executive or administrative authority. In that respect, only action or inaction of the administration productive of legal consequences can be the subject of judicial review. This is important in the sense that only executory acts are amenable to review. Executoriness connotes action expressive of the will of the public authority determinative in itself of the rights and obligations of the subject(s) of the decision. Therefore, a public authority's inertia is not an executory (justiciable) omission that is, it is not an action expressive of the will of the administrative body and hence, not an executory omission. An omission, though, to comply with a duty prescribed by law is an executory omission.

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

Section 36 of **L.158(I)/1999**, manifests an example of the negative model of administrative silence. As stipulated by the legal provision, if 3 months have passed from the filing of a petition or complaint and no response has been given, the omission is deemed as a refusal on the part of the administration to satisfy the petition/complaint. The aggrieved person may then lodge a recourse before the Administrative Court under **Article 146 of the Constitution.** However, an omission on the part of an authority to act in response to a petition/complaint is not reviewable per se. The omission becomes justiciable only if the request refers to the issuing of a potentially executory omission the Administration is law bound to remedy.

In this respect, a distinction can be drawn between (a) a fictitious refusal which is not executory in nature and (b) a fictitious refusal which constitutes a failure to act (omission) when the administrative activity is due in law but the corresponding obligation is broken; which is subsequently executory in nature. This arises out of the provisions of **Article 146 of the Constitution** which postulates in terms of justiciability every executory omission of any administrative authority which stems from failure to act where the activity is due in law.

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

There are a few pieces of legislation that introduce the positive model of administrative silence as a means to the public administration's decision-making process.

First, the statute on **Freedom of Establishment for Providers and Free Movement of Services Law of 2010 (L.76(I)/2010)** which transposes the Directive 2006/123/EC (Article 13(4)), on services in the internal market, incorporates the positive model of administrative silence into Cyprus' legal order.

Another example is the **Municipalities Law of 2022, L. 52(I)/2022** where the positive model of administrative silence has been made part of the administrative 'decision-making' process. **Section 45 of the Municipalities Law of 2022, L. 52(I)/2022** specifies that a decision for any kind of section 44(1) permit must be issued within a maximum period of four months from the day all necessary documents have been received. If the municipality does not respond within the time period of four months, the permit is deemed granted (**section 45(2)**).

Also, **section 18(3)** of the **Town Planning Law of 1972 (L.90/1972)** provides that failure to respond within 3 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.

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

It is difficult to offer a non-ambiguous answer to this question. First because **section 36** of **L.158(I)/1999**, provides an example of the negative model of administrative silence, implying the establishment of a

situation in which there is a fictitious negative decision which entitles the petitioner to challenge the denial, as if the claim had been explicitly refused.

Other pieces of legislation, on the other hand, have foreseen the institute of 'implicit approval' which implies the establishment of a situation in which there is a fictitious positive decision (**Municipalities Law of 2022**).

Yet, the model of administrative silence which is more typical in Cyprus' legal order is that prescribed by **Article 146 of the Constitution**. It manifests a situation in which there has been unlawful inactivity (omission) on the part of an administrative authority where the activity is prescribed by law.

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

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)?

No other action needs to be taken since **section 36** of **L.158(I)/1999** explicitly states that failure to respond to a petition or complaint is deemed as a refusal to grant the claim. When lodging, however, his or her recourse to the Administrative Court, the petition or complaint made to the 'silent' public authority will need to be filed together with the statements of the recourse in order to satisfy the 3 month lapse of time.

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.

There are no differences. The procedure for judicial review before the Administrative Court and on appeal before the Supreme Court is exactly the same.

However, 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 of 2017 L. 184(I)/2017** 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 (**section 42** of the said statute).

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

While bearing in mind the distinction between (a) administrative silence under **Article 29**, (b) administrative silence which is deemed as a refusal to satisfy a claim under **section 36** and (c) administrative silence under **Article 146** which constitutes a failure to act (omission) when such action is legally prescribed, three instances of 'fictitious refusal' of administrative silence can be described and the answer to the question is affirmative in all three of them:

The first arises out of the provisions of **Article 29 of the Constitution**. **Article 29.1** requires that a reasoned decision be rendered by the Administration in response to a petition (written request) or complaint of an individual within 30 days. If the administrative authority does not respond to the complaint the aggrieved may file a recourse before the Administrative Court, under **Article 29.2 of the Constitution** for the authority to respond.

The second situation arises out of the provisions of **section 36** of **L.158(I)/1999**. An omission to respond to a petition/complaint within the time frame of three months is deemed as a refusal to satisfy the claim and an aggrieved person may file a recourse before the Administrative Court under **Article 146 of the Constitution** if the omission is executory in nature. In such case, the individual cannot proceed by also filing a recourse under **Article 29.2** unless he or she has suffered damage as a direct consequence of the administration's omission to respond.

The third situation arises out of the provisions of **Article 146 of the Constitution** which gives the right to a recourse before the Administrative Court with respect to administrative omissions to exercise

power pertaining to the issuing of an administrative act or decision that the administration is legally bound to issue.

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

Article 146.4 of the Constitution stipulates in relation to challenged omissions that the Administrative Court may:

- Confirm, either in whole or in part, the decision, act or omission; or
- Declare that the omission, either in whole or in part, ought not to have been made and that whatever has been omitted should have been performed; or

In the case of omissions, the form of the judgments is declaratory. It declares the omission to discharge a duty as one that ought not to have happened and orders the doing of what ought to have been done. Thus, the declaration of the Court is an order to carry out a duty imposed by law.

The reason the Court cannot decide the matter itself is because 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 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 (**section 11(4) of the Administrative Court Law of 2015, L. 131(I)/2015**).

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?

Article 146.5 of the Constitution and **sections 57** and **58** of the **General Principles of Administrative Law, Law of 1999** impose an obligation on public bodies to give effect to judgments delivered under **Article 146 of the Constitution**.

More specifically, as stipulated by **section 59** of **the General Principles of Administrative Law, Law of 1999 (L.158(I)/1999)**, judgments issued are final and will acquire the force of res judicata. By virtue of **Article 146.5A of the Constitution**, both the Administrative Court and the Supreme Court are empowered to assess whether effect has been given to their decisions and if not, impose sanctions accordingly, in so far as statute law prescribes. Generally speaking, administrative bodies observe and comply with the Courts' judgments and until now, no statute has been enacted to regulate the aforementioned constitutional provision. However, three Bills are currently pending before the competent Standing Committee of Parliament to regulate the active compliance duty of administrative authorities for judgments delivered under **Article 146 of the Constitution**.

Furthermore, an aggrieved person has the right to file, anew, a recourse to the Administrative Court for a declaration that the non-compliance must be remedied.

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

This is because the role of the Courts of administrative jurisdiction is limited to testing the legality and not the correctness of the decisions from the point of view of the judiciary. The Court will not substitute itself for the decision maker nor will it amend the decision that has been challenged before it. In the case of omissions, the form of the judgments is declaratory. It declares the omission to discharge a duty as one that ought not to have happened and orders the doing of what ought to have been done. The order is therefore restricted to the discharge of a legal duty that the administration has no discretion to refuse to carry out. The

discharge of a legal duty by an administrative authority is an obligation for the non-carrying out of which there can be no excuse.

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

While Article 41 on the right to good administration of the EU Charter on Fundamental Rights generally requires that every person has a right to have his or her affairs dealt within a reasonable time, the initiative at the EU level that attributed administrative silence a positive legal fiction – namely Directive 2006/123/EC on services in the internal market (Service Directive) introduced the positive model into Cyprus' legal order.

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

There are no statutory or otherwise prohibitions or restrictions in Cyprus' legal order that refrain or restrict the application of the positive model of administrative silence in Cyprus' administrative decision-making process. The only restriction is placed by the Directive itself and subsequently by the transposing statute (**section 13(4)** of the **Freedom of Establishment for Providers and Free Movement of Services Law of 2010 (L.76(I)/2010)** (Article 13(4) of the Directive 2006/123/EC)) which stipulates for different arrangements to be put in place, where justified by overriding reasons relating to the public interest, including a legitimate interest of third parties.

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

The presumption under the positive model of administrative silence is that the silence means approval from the moment the statutory deadline has expired and the applicant has received no reply/notification.

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?

No such confirmation or proof is needed. Statutes that incorporate the positive model of administrative silence as a means of administrative decision-making, provide that the application/permit/claim is deemed granted/accepted when the statutory time limit expires and the applicant received no reply.

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

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 (*legitimatio ad causum*) is affected by the 'fictitious approval' he or she may lodge a recourse to the Administrative Court under **Article 146 of the Constitution**.

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?

An applicant who has made an application/claim to an administrative authority and the application was 'fictitiously approved' cannot contest the 'fictitious decision' in court requesting its annulment. He or she may however, request the cancellation of its approval by writing to the issuing public authority.

An interested, prejudiced party on the other hand, 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 in relation to 'fictitious decisions'. The recourse will take the course of the general procedure of judicial review. 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. The wording of **Article 146.3 of the Constitution** regulates in mandatory terms the time within which a recourse may be taken by a prejudiced party after gaining knowledge of the act or decision. It stipulates that a recourse shall be made within 75 days of the date when the decision or act was published or, if not published or in the case of an omission, when it came to the knowledge of the person making the recourse.

Publication means the communication of an act or decision of the administration as to clearly inform of the decision taken. 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.

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 accordance with **section 13(4)** of the **Freedom of Establishment for Providers and Free Movement of Services Law of 2010 (L.76(I)/2010)** (Article 13(4) of the Directive) different arrangements may be put in place, where justified by overriding reasons relating to the public interest, including a legitimate interest of third parties. This proviso provided the starting point to any potential implementation of the positive model of administrative silence into different national pieces of legislation. Where positive silence is found to be contrary to the public interest the positive model of administrative silence cannot be adopted, i.e. for aliens and immigration as well as citizenship.

In Cyprus, positive silence has been applied in a number of specialised fields. One such area of application is for instance the recognition of qualifications (**section 7A(9) of the Cyprus Scientific Technical Chamber Law of 1990** - architects, engineers and technology for the issuance of the European Vocational Identity Card through the IMI system) and the approval of permits in the sphere of competence of the municipalities. In 2022 the positive model of administrative silence was introduced in the **Municipalities Law**. Under **section 45(2)** of the said statute a permit deemed granted if the municipality does not respond within the time period of four months.

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?

(a) Administrative silence: **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 complain within 30 days. The right to petition includes requests for the administration to issue an administrative decision or revoke or amend a decision or to deter or restore moral or material damage. If the administrative authority does not respond to the petition or complaint the aggrieved may file a recourse before the Administrative Court, under **Article 29.2 of the Constitution**.

(b) Administrative silence which constitutes an omission to act as prescribed by law: A recourse may be lodged under **Article 146 of the Constitution** which postulates in terms of justiciability every executory omission of any administrative authority which did not take action when such action is legally prescribed and due in law.

(c) Complaints: An aggrieved person may file a complaint to the Commissioner for Administration and the Protection of Human Rights (Ombudsman) complaining about the administration's silence and/or failure to comply with statutory time limits.

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?

Under **Article 146.6 of the Constitution** an aggrieved person who has suffered damages on account of a renounced omission (there must be a direct nexus between the two), may seek compensation or another remedy and recover just and equitable damages to be assessed by a Civil Court or to be granted such other equitable remedy as the Civil Court is empowered to grant. The liability of the State under Article 146.6 is interwoven with the duty of the State to restore legality upon the annulment of an illegal act, decision or omission. The renunciation of an omission alone does not confer a right to damages per se. The right to compensation arises whenever, despite the restoration of the status quo ante, there is a residue of damage.

By virtue of settled precedent law, the right to damages arises if the claim is not satisfied by the authority responsible for the annulled decision.

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?

To the best of our knowledge no such case law exists.

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.

To the best of our knowledge no such case law exists.

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 preliminary ruling to the CJEU was made on the matter.

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

4.1. Construction, spatial development planning and environmental protection

The model of administrative silence which is applied in these areas of the law is that arising out of the provisions of **Articles 29 of the Constitution**, **section 36 of L.158(I)/1999** and **Article 146 of the Constitution**. Unless the positive silence model is adopted in the applicable statute, there is a right to a recourse under **Article 29.2** 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** or under **Article 146** for a 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. An example of positive silence is stipulated in **section 18(3)** of the **Town Planning Law of 1972 (L.90/1972).** This section provides that failure to respond within 3 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.

4.2. Social security

The model of administrative silence which is applied in this area of the law is that arising out of the provisions **Articles 29 of the Constitution**, **section 36 of L.158(I)/1999** and **Article 146 of the Constitution**. There is a right to a recourse under **Article 29.2** 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** or under **Article 146** for a 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.

4.3. Freedom of information

The model of administrative silence which is applied in these areas of the law is that arising out of the provisions of **Articles 29 of the Constitution**, **section 36 of L.158(I)/1999** and **Article 146 of the Constitution**. Unless the positive silence model is adopted in the applicable statute, there is a right to a recourse under **Article 29.2** 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** or under **Article 146** for a 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. Furthermore, an aggrieved may also have the right to file a formal complaint. **The Right of Access to Information of the Public Domain Law of 2017 L. 184(I)/2017** regulates freedom of information in the public domain. An aggrieved person may file a complaint to the Commissioner of Information complaining of failure to respond to a request for information or for violating the prescribed time frames.

Administrative discretionary power

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

In Cyprus' legal order, administrative acts and decisions are issued either from mandatory exercise of power (non-discretionary power) or from discretionary exercise of power. The revocation of a vocational license due to a criminal record, where such revocation is law prescribed, is an example of a mandatory exercise of power. Discretionary decision-making, on the other hand, is ultimately a process of isolating factors, evaluating each one of them and drawing a conclusion after a process of final evaluation and balancing of interests. The exercise of discretionary powers is governed, inter alia, by the principles of good faith, proportionality, impartiality and equal treatment.

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*)?

No such distinction is made.

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.

Generally speaking, the following 4 categories can be identified in relation to discretionary decision-making:

- Where there is a clear statutory legitimacy of discretion and its extent (i.e. "as it deems fit", "according to its judgment", "in accordance with its discretionary power"),
- Where the legislator has provided for alternative choices or solutions (thus, it rests upon the administration's discretionary power to decide on one of them),
- Where the legislator uses contingent words such as "possible", "may", "permit" etc.
- Where the legislator uses some vague concepts to be evaluated by the administration such as "public interest", "in urgent cases", "office needs", "necessary and appropriate measures", "common good" etc.

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.

When reviewing the legality of a decision, the Court examines whether the public body has exercised its discretionary powers, within lawful limits. The exercise of discretionary powers is governed, inter alia, by the principles of good faith, proportionality, impartiality and equal treatment. The Court will only intervene if, after taking into account all the facts of the case, it concludes that the findings of the administrative authority are not reasonably sustainable, or they result from an error of fact or law or are in excess or in abuse of its discretionary powers. The assessment of the facts lies with the administrative authorities and so long as the evaluation made and conclusions drawn therefrom are reasonably open to them and the public authorities acted within the parameters of the law, they are the sole arbiters of their decisions and the Courts will not interfere with a choice resting thereupon.

In essence, the court reviews the decision in order to ascertain whether:

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

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?

Article 35 of the Constitution, imposes a direct and positive obligation on all state authorities to, not only, pay close attention to human rights in the exercise of their powers, but also to secure the efficient application of those rights, throughout the field of their activity. The obligation cast upon the authorities of the State by Article 35 to ensure their effective application is consonant with the treatment of human rights as inalienable. The Constitution of the Republic, guarantees the protection of all basic human rights protected by the European Convention of Human Rights. In this sense, judicial review is a powerful instrument for the protection of fundamental rights and liberties duly safeguarded by the Constitution. The case law of the Supreme Court emphasises that respect for human rights must be uppermost in the mind of public bodies (**Cleanthous a.o. v. Cyprus Telecommunications Authority (1991) 4 C.L.R. 2971, Gregoriou v. Nicosia Municipality (No.1) (1991) 4 C.L.R. 3005**).

(a) The restriction of a human right legitimises a person to seek judicial review of administrative action. For example, equality before the administration and equal treatment thereby is assured by **Article 28 of the Constitution** as a fundamental right of the individual. Persons in the same position must be likewise treated. The right to equality legitimises a person to seek judicial review of administrative action in virtue of the interest to be likewise treated as any other person in the same position as it was stressed in the case of **Elia a.o. v. Republic (1999) 3 C.L.R. 884** (the right to equality generates a legitimate interest to have recourse to the Court to test the legality of action seemingly violative of the person's right to equality of treatment). Therefore, a justiciable act, decision or omission will be invalidated and declared null by the Court if it is contrary to the provisions of the Constitution.

(b) An applicant in a judicial review recourse may raise issues relating to the constitutionality of the applicable statute. A decision founded on an unconstitutional piece of legislation is tainted by unconstitutionality and it must on that account be annulled. In the case of **Cyprus Broadcasting Corporation v. Karagiorghis a.o. (1991) 3 C.L.R 159**, the plenary of the Supreme Court in a majority ruling held that a particular piece of legislation in relation to the composition of a number of councils violated **Article 28 of the Constitution**. On that account, the council in question was non-existent and its decisions had no legal consequences and were, therefore, null and void.

(c) An administrative decision that might interfere with constitutionally protected rights requires an even more careful balancing of interests in the exercise of discretion. For example, **Article 15 of the Constitution** safeguards the right to a private and family life in the same manner as does Article 8 of the ECHR. Therefore, in cases where the relevant decisions would constitute an interference with the rights protected by Article 15 (Article 8.1), they must be shown to be "necessary in a democratic society", that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued". Consequently, the Supreme Court in the case of ***Hayke Elias Ohanian v. Republic (2007) 4(A) C.L.R. 353*** held that "The exercise of the right to expel a third-country national when it might interfere with constitutionally protected rights, must emerge as a reasonable finding after carefully considering all the merits of each case, in order to be held necessary in a democratic society, that is to be justified by a pressing social need and in particular, it must be proportionate to the legitimate aim pursued. The public interest protected by the deportation of a non-national must not only be specified in the decision but at the same time it must be demonstrated, in order to ensure and compensate the right of each person's family life."