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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. The Czech legal system sets specific time limits within which administrative authorities are obliged to issue decisions or complete actions. If there are no specific time limits, the administrative authorities are obliged to (in accordance with the principle of speed and efficiency or the principle of good administration) to act without undue delay - within "reasonable time" (see the answer to the question no. 3).

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. General time limits are set in the Code of Administrative Procedure (No. 500/2004 Coll.); derogations from these time limits are provided for in special laws.

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

   According to Art. 6(1) of the Code of Administrative Procedure: "*The administrative authority shall deal with matters without undue delay. If the administrative authority fails to act within the time limit prescribed by law or within a reasonable time limit, if no time limit is prescribed by law, the provisions on protection against inaction (Art. 80) shall apply to seek redress*." The concept of "reasonable time" thus applies when no specific time limits are set in the law.

   The Supreme Administrative Court (SAC) has concluded that the assessment of failure to act within reasonable time limit is a relative issue. (Un)reasonableness of the length of the proceedings has to be examined and conclusion must be made with regard to factors which directly affect the proceedings, such as complexity of the subject-matter, requirements for taking of evidence, the conduct and procedural activities of parties etc. Conversely, conditions of operation of the administrative authority (such as human

resources, internal organisation or workload) cannot be taken into account (e. g. judgment of 31 March 2010, no. 7 Ans 3/2010-138).

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

   Generally, administrative authorities are obliged to issue decisions without undue delay [Art. 71(1) of the Code of Administrative Procedure]. If a decision cannot be issued without undue delay, it shall be issued within 30 days of the commencement of the proceedings [Art. 71(3) thereof].

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

   The time limit is *ex lege* extended in specific situations provided for in Art. 71(3)(a) and (b) of the Code of Administrative Procedure. The time limit is extended either by up to 30 days [e. g. if it is necessary to hold a hearing or local inquiry or if the case is particularly complex etc.] or by "necessary time" to complete a specific action [e. g. to elaborate an expert report, to deliver a document abroad etc.]. In these situations, it is assumed that these actions which need to be taken will have impact on the length of the proceedings, so the time limit for issuing a decision is extended automatically.

   In addition, the time limit may be extended by the superior administrative authority. According to Art. 80(1) and (3) of the Code of Administrative Procedure, if the administrative authority fails to make a decision within the time limit, the superior administrative authority shall take measures against inaction (*ex offo* or on request of a participant) - it may, *inter alia*, reasonably extend the time limit. However, the time limit may be extended only if it can be reasonably expected that the administrative authority will make the decision within the extended time limit and if such a measure is more advantageous to the participants than other measures which may be taken [Art. 80(4)(d) thereof].

   Some special laws also provide for extension options. For example, according to Art. 14(7) of the Act on Free Access to Information (No. 106/1999 Coll.), the administrative authority which deals with a request to provide information under this act may extend the time limit up to 10 days for explicitly listed "compelling reasons" (e. g. locating and collecting voluminous amount of separate and distinct information); however, the person who submitted the request must always be informed of the extension and the reasons for it before the expiry of the original time limit (15 days). Or, according to Art. 29(2) of the Act on Free Movement of Services (No. 222/2009 Coll.), which applies if a special law [implementing Art. 13(4) of the Directive 2006/123/EC] provides for positive fictitious decision on authorisation to provide some service, the administrative authority may extend the time limit for issuing a decision (up to a maximum of twice as long) in particularly complex cases; however, the time limit may be extended only within 10 days of the submission of the application.

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

   Yes. Generally, participants have the right to appeal the decision [under Art. 80(4)(d) of the Code of Administrative Procedure] to extend the time limit.

Some special laws provide for exceptions. For example, due to the fact that the time limit for dealing with a request to provide information is not extended [under Art. 14(7) of the Act on Free Access to Information; see the answer to the question above] by issuing a formal decision, but only by informing the person who submitted the request, the extension cannot be appealed. In contrast, according to Art. 29(2) of the Act on Free Movement of Services, the administrative authority has to issue a formal decision on extension of the time limit under this provision which - on the other hand - also explicitly excludes the possibility to appeal against such a decision.

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. If the law does not provide for fictitious decision upon expiry of the time limit, unfavourable decision can still be made after the time limit has expired. But if the law provides for the fiction, no decision (whether favourable or unfavourable) can be made after the time limit has expired. The fictitious decision would first have to be annulled; otherwise, it would be contrary to the *res iudicata* (*res administrata*) principle.

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. Based on relatively low incidence of actions against failure to act (under Art. 79 of the Code on Administrative Justice), it can be assumed that failure to comply with administrative time limits is not a systemic problem. However, there are no hard data on the percentage of cases in which administrative authorities failed to comply with time limits and therefore it cannot be determined what the main reasons for non-compliance are in general. Though, it is worth mentioning that the SAC has observed cases in which administrative authorities were inactive due to their opposition to case-law (in particular, the tax authorities were refusing to pay interests related to verification of VAT deduction claims).

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

Civil servants may be held disciplinary liable for culpable breach of discipline in the service [Art. 88(1) of the Act on Civil Service (No. 234/2014 Coll.)]. Discipline in the service means proper performance of the duties of a civil servant arising from legal provisions (Art. 87 thereof). Civil servants have the duty to perform official tasks on time [Art. 77(1)(d)]. Therefore, if the failure to comply with the time limits can be considered as a culpable breach of duties, civil servants may be held disciplinary liable and sanctioned with reprimand, reduction in salary of up to 15 % for up to 3 calendar months, removal from the post of superior or dismissal from service [Art. 89(2)]. Officials of territorial self-governing units work as employees [Art. 1 of the Act on Officers of Territorial Self-Governing Units (No. 312/2002 Coll.)]; therefore, they may be sanctioned for breach of their duties under employment law.

Administrative silence

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

   Based on Art. 6(1) of the Code of Administrative, the administrative silence is defined as a failure to act within specific or reasonable time limit.

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

   Yes. However, only one example of this model can be found in the Czech legal system [deemed refusal of a request to provide environmental information according to Art. 9(3) of the Act on the Right to Enviromental Information (No. 123/1998 Coll.)].

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

   Yes. This model was mainly implemented to transpose the model provided for in Art. 13(4) of the Directive 2006/123/EC. However, several special laws provided for this model prior to the implementation of the Directive, while in others, the model was introduced without any connection to the Directive. For example:

   - According to Art. 58f(2) of the Energy Act (No. 458/2000 Coll.), if the Energy Regulatory Office does not decide on request to approve appointment, election or dismissal of a member of a statutory body or a supervisory board of an independent transmission system operator within 3 weeks, it is deemed to have approved the request.
   - According to Art. 16(3) of the Act on Protection of Competition (No. 143/2001 Coll.), if the Competition Office does not issue a decision on the proposal to authorise merger of competitors within 30 days nor does it inform them that the proceedings will continue, the Office is deemed to have authorised the merger. The same applies if the Competition Office does not decide within 30 days on the proposal to grant an exemption from prohibition to realize the merger prior to decision of the Office on merits - the exemption is deemed to have been granted [Art. 18(4) thereof].

- According to Art. 21(3) of the Act on Radio and Television Broadcasting (No. 231/2001 Coll.), if the Broadcasting Council does not decide on request of the licensed broadcaster to change certain facts set out in the license application within 60 days and if the licensed broadcaster is the sole participant of the proceedings, it is deem to have agreed to the changes. In addition, according to Art. 28(3) thereof, if the Broadcasting Council does not decide on registration of an operator of retransmission over an electronic communications network within 30 days, the applicant is deem to have been registered on the day following the expiry of the time limit.
- According to Art. 33(4) of the Act on Capital Market Business (No. 256/2004 Coll.), the Czech National Bank approves auction rules of public auction of securities and any amendments of these rules; if the Bank does not dispatch the decision on the application for approval of auction rules to the applicant within 30 days from the date of receipt of the application, it is deemed to have approved the rules.

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

   Given the fact that only the Act on the Right to Enviromental Information provides for the negative model, the positive one is more typical for the Czech legal system. However, it cannot be regarded as a predominant regulatory model of administrative silence - the Czech model is based on measures against inaction which can be taken by superior administrative authorities and subsequent judicial protection (see below).

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: As mentioned above, only the Act on the Right to Enviromental Information provides for the negative model. Therefore, the answer to this question as well as to the following questions (2 to 5) is based only on this single example.

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)?**

   According to Art. 9(3) of the Act on the Right to Enviromental Information, if the administrative authority fails to provide requested information or to reject the request

within the time limit, it is deemed to have decided to reject the request. Thus it is automatically considered to be rejected.

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.

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

   No. According to Art. 5 of the Code on Administrative Justice, the judicial protection may be sought only after the exhaustion of ordinary legal remedies in administrative proceedings. Thus, the "fictitious refusal" must be - firstly - appealed before appellate administrative authority, which is supposed to decide the case on merits (i. e., to provide the requested information or to uphold the refusal). This decision can then be challenged before administrative courts.

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: As was indicated in the answer to the previous question - administrative courts do not review "fictitious refusals" but subsequent decisions on merits of appellate administrative authorities (if the refusal is appealed). The administrative proceedings thus should always end with a standard decision on merits with reasoning and the court can either annul the decision and refer the case back to administrative authority (if the refusal to provide environmental information was unjustified/unlawful) or dismiss an action against the decision as unfounded.

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?**

   If an action against failure to act [under the Art. 79(1) of the Code on Administrative] Justice is well-founded, the court shall order the administrative authority to issue a decision in a "reasonable time limit" [Art. 81(2) thereof]. However, the Code on Administrative Justice does not contain provisions on the enforcement of decisions of administrative courts. Therefore, if the administrative authority does not voluntarily comply with the order imposed by an enforceable judgment, it is necessary to seek compliance by applying for judicial enforcement, which is entrusted to civil courts, or via enforcement officers. With the exception of the payment of costs, the enforcement may be carried out only by imposing "enforcement" fines [Art. 351 of the Civil Procedure

Code (No. 99/1963 Coll.)]. It is, however, important to note that these fines accrue to the State, not to the participant who brought the action.

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

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 positive model generally serves both of these purposes; the main purpose depends on the type of decision and regulatory context.

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

    Such prohibitions or restrictions arise from EU legislation in certain areas of law (for example, several EC/EU directives determine specific requirements on the content of decisions in procedures related to the protection of the environment). Otherwise, the Czech legal system does not contain any specific prohibitions or restrictions on the application of the positive model.

    However, prohibitions or restrictions may arise from general legal principles - namely, the principle of legal certainty and protection of the rights of third parties. In this context, it is worth mentioning that according to the explanatory memorandum to the Code on Administrative Procedure (2004), there were attempts to introduce the positive model as the general regulatory model of administrative silence during the discussions on the length of the time limit for issuing a decision (Art. 71 thereof). The memorandum states that this model was not introduced as general because it "*cannot be accepted generally in administrative proceedings, in particular, because of the protection of the rights of third parties*."

    This problem was highlighted in a very specific case which concerned an applicant - a television broadcaster - who submitted a request to the Broadcasting Council to agree with certain changes in his broadcasting license conditions. The Council then failed to issue a decision within the time limit. However, the SAC concluded that Art. 21(3) of the Act on Radio and Television Broadcasting, which provides for the fiction of a positive

decision upon the expiry of the time limit, could not be applied due to the fact that the case concerned a shared licence, which is unique in the Czech Republic - it was granted only to the applicant in 1994 to enable regional broadcasting. In its judgment (of 14 September 2011, No. 6 As 21/2011-230), the SAC relied on the case-law of the Constitutional Court according to which the purpose of the legal fiction is to enhance legal certainty. In view of this purpose, the SAC found questionable whether, to what extent and in what way the legal fiction may affect the rights and legally protected interests of third parties, and stated that there is no doubt that the legal fiction is "problematic" in relation to third parties. Given the fact that the licence in question was closely intertwined with licenses of regional broadcasters (some of whom did not agree to the changes), the SAC concluded that "*the rights established in one licence are so closely intertwined with the obligations set out in the other licence that, as regards the application of the fiction of a positive decision and its consequences, this is an exceptional situation. A fictitious, unjustified and therefore unreviewable decision will always, by its very nature, affect the rights of third parties [i. e., those with whom the applicant's licence is intertwined with pursuant to Art. 21(3) of the Broadcasting Act] in such a way that it may even empty the licence (as in the present case). There can be no doubt that, in such circumstances, the requirement of legal certainty and the strengthening of the rights of the participants is not met and that the legal fiction in question does not fulfil its purpose. On the contrary, it may be considered that the legal fiction is contrary to the requirement of legal certainty and that there is every reason to doubt whether it was the intention of the legislature that it should also apply to cases of intertwined licences*."

The judgment led to an amendment of Art. 21(3) the Broadcasting Act - under the current wording, the fiction is not applicable in proceedings with multiple participants.

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

   Following general rules on the calculation of time and time limits, a positive fictitious decision is deemed to have been issued on the day following the expiry of the time limit for issuing the decision.

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 confirmation or proof is required.

   Nevertheless, according to Art. 30(1) of the Act on the Free Movement of Services, which applies if a special law [implementing Art. 13(4) of the Directive 2006/123/EC] provides for positive fictitious decision on authorisation to provide some service, the administrative authority shall without undue delay make an entry in the file that the authorisation has been granted (*ex lege* by expiry of the time limit) and enter the holder of the authorisation in the relevant register. Upon request, it shall issue a certificate to the holder, which shall include the data identifying the holder, the legal provisions on the basis of which the authorisation has been granted and details of the subject matter and the scope of the authorisation.

Other special laws [than those implementing Art. 13(4) of the Directive] may also establish a specific process to confirm that the positive fictitious decision has been issued, but generally, it is not required.

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

The Czech legal system does not provide for specific legal remedies available to third parties affected by the positive fictitious decision.

Special laws providing for this type of decision do not exclude the possibility of an appeal (to the appellate administrative authority). However, only the participants of a proceeding have the right to appeal [Art. 81(1) of the Code of Administrative Procedure] and most of the proceedings which may end with positive fictitious decision have only one participant - the applicant [although there are exceptions - for example, the decision on a proposal to authorise merger of competitors under Art. 16 of the Act on Protection of Competition always concerns 2 or more competitors, thus there are more participants of the proceeding, but it is hard to imagine that one of the competitors would appeal the positive fictitious decision given that the proceeding is initiated on the basis of a joint proposal from all of the merging competitors].

However, third parties may try to initiate administrative review proceedings, which shall be commenced if the administrative authorities discover (on the basis of their own official activity or the initiative of a participant or third party) facts that give rise to reasonable doubts that a decision is in accordance with the law [Art. 94(1) of the Code on Administrative Procedure]. Participants or third parties thus have no legal entitlement to commence the review proceedings; the administrative authority (which issued the decision in question or the superior administrative authority, depending on how the review proceedings was initiated) shall commence this proceeding *ex offo* and within statutory time limits (generally - within 2 months since the discovery or within 1 year since the decision in question was issued, whichever time limit expires first). Only legality, not the “correctness” of the decision can be reviewed - and even though it is not clear how, in practice, the legality of a positive fictitious decision can be reviewed (there is no case-law on this matter), the law does not explicitly exclude the possibility of administrative review even when it comes to fictitious decisions. It should also be added that if the administrative authority concludes - after commencing the review proceedings - that even though the decision was not issued in accordance with the law, the prejudice which would result from its annulment to a participant to whom the decision established rights (and if he/she was in good faith) would be manifestly disproportionate to the prejudice to another participant or to the public interest, it shall terminate the proceedings [Art. 94(4) of the Code on Administrative Procedure].

Third parties may also try to seek judicial protection. The right to bring an action against an administrative decision [under Art. 65 of the Code on Administrative Justice] does not derive from previous participation in the administrative proceedings. This action may be brought by whoever claims to have been deprived of his rights (directly or as a result of a violation of his rights in the administrative proceedings) by an administrative act which concerns (establishes, modifies, revokes or determines) his/her rights and/or

obligations. This option, however, is just theoretical. The SAC does not have any case-law on third party judicial protection against positive fictitious decisions if the third party was previously not a participant of the administrative proceedings which led to the positive fictitious decision.

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?**

   Generally, positive fictitious decisions may be annulled by administrative authorities on appeal or in the administrative review proceedings, or by courts on the basis of an action (see the answer to the previous question).

   Apart from these regular procedures, the Act on the Free Movement of Services (No. 222/2009 Coll.) provides for a specific procedure to annul positive fictitious decision on authorisation to provide services [if special laws which regulate such services implement the positive model envisaged by Art. 13(4) of the Directive 2006/123/EC]. According to Art. 30(2): "*If the conditions to grant authorisation have not been fulfilled and the administrative authority competent to decide on the application subsequently discovers this, it shall decide that the authorisation ceases to exist. This decision can be issued within 3 years from the expiry of the time limit for issuing the decision on the application.*" The provisions of the Code of Administrative Procedure on review proceedings apply similarly.

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?**

   The Directive 2006/123/EC has been implemented by the Act on the Free Movement of Services and Act. No 223/2009 Coll., which amended 23 special laws to transpose the model provided for in Art. 13(4) of the Directive. According to Art. 28(1) of the Act on the Free Movement of Services: "*If another legal regulation so provides, the authorisation to provide the service is deemed granted on the expiry of the time limit for issuing the decision*." The amended special laws then provide for specific authorisations to be deemed to have been granted upon the expiry of the time limit and refer to the rules in Art. 28 to 30 of the Act on the Free Movement of Services which regulate certain specific procedural aspects.

   The positive model provided for in Art. 13(4) of the Directive 2006/123/EC has been implemented in various legal areas. In particular, the special laws provide for positive fictitious decision on, for example:

   - authorisation to conduct mining activities [Art. 5(5) of the Act on Mining Activities, Explosives and on the State Mining Administration (No. 61/1988 Coll.)];
   - certificate of proficiency to project, implement and evaluate geological works [Art. 3a of the Act on Geological Works (No. 62/1988 Coll.)];
   - registration to conduct installing or repairing of specified measuring instruments [Art. 19(2) of the Act on Metrology (No. 505/1990 Coll.)];

- licence for electricity and gas trading [Art. 8(1) of the Energy Act (No. 458/2000 Coll.)];
- authorisation to conduct enviromental impact assessment [Art. 45i(3) of the Act on the Protection of Landscape and Nature (No. 114/1992 Coll.); Art. 19(11) of the Act on Enviromental Impact Assessment (No. 100/2001 Coll.)];
- authorisation to act as a private veterinary technician - i. e., to conduct specific veterinary activities in a business manner [Art. 64(1) of the Veterinary Act (No. 166/1999 Coll.)];
- authorisation to operate a driving school [Art. 4(3) of the Act on Gaining and Improving Proficiency to Drive Motor Vehicles (No. 247/2000 Coll.)];
- authorisation to conduct accreditation or attestation in the field of public administration information systems [Art. 6(3) and 6b(4) of the Act on Public Administration Information Systems (No. 365/2000 Coll.)];
- authorisation to act as a receiver of liquidator of securities dealers, organizers of a regulated market and settlement system or central depository operators [Art. 198(1) of the Act on Capital Market Business (No. 256/2004 Coll.)];
- authorisation to provide employment mediation/facilitation services [Art. 61 of the Act on Employment (No. 435/2004 Coll.)];
- accreditation to conduct proficiency tests and periodic examination in the field of occupational safety and health [Art. 20(2) of the Act on Ensuring Further Requirements on Occupational Safety and Health (No. 309/2006 Coll.)];
- authorisation to act as an insolvency administrator [Art. 8a of the Act on Insolvency Administrators (No. 312/2006 Coll.)];
- authorisation to conduct specific expert activities in the field of air protection [Art. 32(2) of the Act on Air Protection (No. 201/2012 Coll.)];
- authorisation to conduct specific expert activities related to the use of nuclear energy [Art. 19(3) of the Atomic Act (No. 263/2016 Coll.)].

Other special laws amended in 2009 to implement the positive model provided for in Art. 13(4) of the Directive 2006 /123/EC were subsequently amended or repealed.

There have not been any particular difficulties with the implementation of the positive model envisaged by the Directive. However, it is worth noting that the explanatory memorandum to the Act No. 223/2009 Coll., which - as mentioned above - amended 23 special laws to transpose the positive model, does not indicate on what basis the model was implemented in these special laws and not in others (which would come into consideration), or why these laws provide for fictitious decisions only for certain authorisation procedures and not for others (see the list of examples above). It is thus unclear whether the implementation was done after a careful consideration for which authorisation procedures this model could be introduced and for which it could be not due to "*overriding reasons relating to the public interest, including a legitimate interest of third parties*" [as stipulated by Art. 13(4) of the Directive].

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 Czech regulatory model of administrative silence is based on measures against inaction. It means that if an administrative authority is inactive, its superior authority shall (*ex offo* or on request of a participant of the proceedings): a) order the inactive administrative authority to take necessary measures to remedy the situation or issue a decision within the time limit; b) take over the case; c) delegate the case to another administrative authority in its administrative district; d) reasonably extend the time limit if it can be reasonably expected that the inactive administrative authority will issue the decision within the extended time limit and if such a measure is more advantageous to the participants [Art. 80(4) of the Code of Administrative Procedure].

   If the superior administrative authority is also inactive (i. e., if it does not act on well-founded request of a participant to take measures against inaction), it is possible seek judicial protection. Where the failure to act consist in a failure to issue a decision on merits or certificate within the time limit, it is possible to bring an "action against failure to act" under the Art. 79(1) of the Code on Administrative Justice, which states: "*A person who has unsuccessfully exhausted the means which the procedural rules applicable to proceedings before an administrative authority provide for his protection against inaction by the administrative authority may, by action, request that the court order the administrative authority to issue a decision on the merits or a certificate. This does not apply if a special law links to the inaction of an administrative authority the fiction that a decision has been issued or other legal consequences*."

   Moreover, as was held by the Grand Chamber of the SAC (judgment of 16 November 2010, no. 7 Aps 3/2008), other forms of inaction can be defended against by an "interference action" [under the Art. 82 of the Act on Administrative Justice], which is a subsidiary and residual form of protection in the administrative justice system. The above-cited judgment has been followed by further case-law specifying in which situations and against which forms of inactivity it is possible to bring such an action.

   The special laws may provide for other specific legal remedies against inaction.

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 liability of the State and self-governing territorial units for damage caused by public authorities is regulated by the Act on Liability for Damage Caused in the Exercise of Public Authority (No. 82/1998 Coll.). This Act distinguishes between damage caused by an unlawful decision and damage caused by maladministration.

   - The right to compensation for damage caused by an unlawful decision is vested only in participants of the proceedings in which the decision was issued. Generally, the claim may be brought only if the final decision has been annulled or reversed by the

competent authority on the grounds of unlawfulness. As the law does not provide otherwise, damages may be claimed also for unlawful fictitious decisions.

- Maladministration is a much broader category; various forms of unlawful inactivity can be subsumed under this term. Article 13(1), in particular, states that failure to comply with the time limit for issuing a decision or for completing actions (and reiterates that if the law does not provide for a specific time limit, a failure to act within a reasonable time limit shall also be regarded as maladministration). Moreover, the right to compensation is vested in anyone to whom the damage has been caused by maladministration (not only the participants).

Irrespective of how the damage has been caused, appropriate compensation for non-financial (non-material) damage shall also be provided [Art. 31a(1)]. This compensation shall be awarded in money if the damage cannot be compensated in any other way (e. g. by issuing a formal apology) and the mere finding of an infringement of the rights of the injured participant would not be sufficient [Art. 31a(2)]. If the non-financial (non-material) damage has been caused by maladministration in form of a failure to comply with time limits, specific circumstances shall be taken into account in determining the amount of appropriate compensation. In particular, the overall length and complexity of the proceedings, the conduct of the public authority during the proceedings, the conduct of the injured party which contributed to delays and whether he/she used available remedies against inaction, and the importance of the subject-matter of the proceedings to the injured party [Art. 31a(3)].

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?**

   Yes, for example, in case of shared broadcasting licenses, the SAC found that the fiction of positive decision cannot be applied (judgment 14 September 2011, No. 6 As 21/2011-230; see above).

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 in the Czech Republic.

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 Czech Republic has never submitted such a question to the CJEU.

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

4.1. Construction, spatial development planning and environmental protection

The Building Act (No. 183/2006 Coll.) no longer provides for fictitious decisions, even though it used to provide for two typical examples of these:

- According to Art. 104 of the Building Act, a construction permit is not required for simple constructions and other projects specified in this provision. The builder is only obliged to notify the administrative authority; realization of the building or other project was then subject to the approval of this authority. According to Art. 106(1) thereof (which was repealed at the end of 2012), if the approval was not delivered to the builder within 40 days from the date of notification, nor the building authority prohibited the realization within this time limit, it was deemed to have approved the realization.
- Similarly, according to Art. 127(2) of the Building Act (which was also repealed in 2012), if the building authority did not approve or prohibit change in use of the building within 30 days from the date of notification, it was deemed to have approved the change. However, Art. 127(3) of the Building Act explicitly provided that if the change in use would affect the rights of third parties or required a detailed assessment of its effects on the environment, the fiction could not be applied.

However, the Building Act still provides for fictitious binding opinions. A binding opinion is a written opinion elaborated by "concerned" administrative authority on the basis of law; it is not a decision, but its content is binding for the operative part of the decision of the competent administrative authority [Art. 149(1) of the Code of Administrative Procedure]; thus, binding opinions may heavily influence decisions. Typically, this institute is used in building and environmental law where the law provides for binding opinions of various administrative authorities which are required - by law - to protect certain general interests pursuant to special laws (e. g. environmental components - water, soil, forests, plants and animals, landscape). Usually, there are specific time limits for issuing binding opinions.

According to Art. 4(9) of the Building Act, if the binding opinion is not issued within the time limit, it is deemed to be positive and without any conditions. Generally, this fiction applies to all binding opinions in all processes under the Building Act (spatial planning, construction etc.). However, Art. 4(12) thereof precludes the application of this fiction to certain binding opinions, essentially - important environmental opinions (e. g. EIA binding opinion, assessment of compliance with conditions for granting exemptions from prohibitions concerning specially protected species of plants and animals etc.). Article 4(9) of the Building Act also provides for option for extension of the time limit to issue a binding opinion (by a decision which is only noted in the file and the "concerned" administrative authority shall inform the applicant - thus the decision cannot be appealed). It should also be added that if the conditions for issuing a positive binding opinion were not met, the fictitious binding opinion may be annulled by issuing a new binding opinion of a superior administrative authority within 6 months from issuing a final decision [Art. 4(10) thereof].

4.2. Social security

There is no specific regulation on administrative silence in this area. General rules apply.

4.3. Freedom of information

As mentioned above, the negative model of administrative silence is provided for in Enviromental Information Act.

This model was also provided for in the Act on Free Access to Information (which is applicable to provision of other than environmental information). Moreover, unlike under the Enviromental Information Act, the "fictitious refusal" (deemed refusal to provide information) under the Act on Free Access to Information applied not only to the first-instance administrative proceedings but also to the appeal proceedings. However, this model did not prove to be functional due to the fact that the administrative courts were not able to review such fictitious decisions for lack of reasons and could only annul these decisions. Therefore, in 2006, the Act on Free Access to Information was amended. Since then, there are no "fictitious refusals", but on the other hand, the administrative courts reviewing decisions to refuse to provide information under this Act are empowered - if they come to conclusion that the decision was not based on any lawful ground - to not only annul the decision but also to order the administrative authority to provide the information (i. e., they can decide upon the matter itself).

Pursuant to Art. 14(7) of the Act on Free Access to Information, the administrative authority which deals with request to provide information may extend the time limit up to 10 days for explicitly listed "compelling reasons" (see above). The Act on Free Access to Information also provides for a specific remedy against inaction - complaint under the Art. 16a. Otherwise, general rules apply.

Administrative discretionary power

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

   Even though the Czech legal system [or more specifically, Art. 78(1) of the Code on Administrative Justice] uses the term "administrative discretion", it is not defined by any law but mainly by legal doctrine and case-law of administrative courts.

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

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*)?**

   As was explained in the answer to the previous question, discretion is related to the part of legal norm concerning legal consequences.

In contrast, margin of appreciation is related to the hypothesis (legal conditions for application of the legal consequences) of the legal norm. If it contains an undefined legal concept, the administrative authority must assess its content and conclude - based on an all-round assessment - whether or not a particular state of facts falls within the scope of such a concept. According to case-law [e. g., judgment of the SAC 28 July 2005, No. 5 Afs 151/2004-73 (No. 701/2005 Coll. of the SAC)], firstly, the administrative authority must generally define what falls or may fall within the scope of the undefined legal concept and apply this abstract definition to the case at hand. If the hypothesis of a legal norm containing an undefined legal concept is fulfilled, the administrative authority has no choice but to proceed as envisaged by relevant rules for such a situation (to apply the legal consequences).

However, a legal norm may simultaneously provide for both discretion and margin of appreciation. For example, the Act on Certain Administrative Offences (No. 251/2016 Coll.) covers several offences defined by abstract concepts (e. g., “public order", "civil coexistence" or "public outrage") for which the administrative authority may imposed a fine of up to a certain amount. The interpretation of such concepts (i. e., assessment whether a certain act constitutes an offence defined by such concepts) is a matter of margin of appreciation, the amount of fine to be imposed for the offence is, on the other hand, a matter of discretion.

The distinction between discretion and margin of appreciation in interpretation of undefined legal concepts is particularly important in terms of judicial review (see the answer to the question no. 4 below).

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.

   Undefined legal concepts are mostly abstract nouns or nouns with adjectives (such as “public order”, “public interest” or “substantial change”). Therefore, it is usually not a problem to recognize them in the legal system and thus determine if administrative authorities have margin of appreciation (in the sense outlined above - to assess content of such content and conclude whether or not a particular state of facts falls within the its scope).

   Determination of whether an administrative authority has discretion is based on assessment of structure and wording of a legal norm. As explained above, if the fulfilment of its hypothesis does not entail a single legal consequence (in other words - if the legal norm provides administrative authorities with possibility to choose from two or more solutions), then the authority has discretion. In contrast with margin of appreciation, discretion is typically indicated by a verb (the authority “may” permit or prohibit a specific, “has a right to…”, “is allowed to…” or “is empowered to…”).

Generally, law provides for administrative discretion to allow the administrative authorities to take into account specific circumstances of each case and to ensure that the authorities are adaptable to unpredictable situations. Typically, it is recognized in administrative sanctions law regarding imposition of sanctions for administrative offences. Laws mostly set only an upper limit (exceptionally also a lower limit) for imposing fines. Therefore, the administrative authority which decides on the offence may impose a fine within this range after considering aggravating, mitigating and other relevant circumstances. Discretionary power of administrative authorities is also recognized where the law does not confer a legal entitlement for granting a right (e. g., for granting citizenship, humanitarian asylum, etc.). Administrative discretion is also often associated with removing harshness of the law (mainly in social security law), awarding benefits or remission of payments (taxes, penalties, default interests, 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.

   According to Art. 78(1) of the Code on Administrative Justice, the court shall annul the contested administrative decision on the grounds of unlawfulness if the administrative authority exceeded the statutory limits of administrative discretion or abused it [abuse of administrative discretion is prohibited by Art. 2(2) of the Code on Administrative Procedure, according to which an administrative authority shall exercise its powers only for the purposes for which they are conferred by or pursuant to law and in the extent they are conferred by law]. Therefore, the SAC ruled that the judicial review of use of discretionary power is limited. Essentially, the court may only review whether the administrative authority has not departed from considerations set in law, whether the reasoning of the contested decision is in accordance with the rules of logical thinking and whether the premises of such reasoning have been established by due process of law (e. g., judgment of the SAC of 22 January 2004, No. 5 Azs 47/2003-48).

   It should also be noted that if the court decides on an action against a decision by which a penalty for administrative offence has been imposed, it may - if the penalty is manifestly disproportionate - dispense with the imposition of the penalty or reduce the amount of the penalty within the limits set in law [Art. 78(2) of the Code on Administrative Justice]. Therefore, courts may exceptionally substitute administrative discretion with their own. However, according to judgment of the SAC of 3 April 2012, No. 1 Afs 1/2012-36 (No. 2671/2012 Coll. of the SAC) - the alleged disproportionality of the imposed penalty must have the quality of unlawfulness (i. e., if the administrative authority has departed from the statutory limits when imposing the penalty, its assessment of the criteria for imposing the penalty lacked logic, the administrative authority did not take into account all the criteria set in law, the imposed penalty would be liquidating, etc.).

   On the other hand, the interpretation of an undefined legal concept and its application to a particular situation may be the subject of full (unlimited) judicial review as it falls

within the review of (un)lawfulness of contested administrative decisions. Therefore, administrative authorities are bound by courts' interpretation of an undefined legal concept and their assessment of whether or not a particular state of facts fulfils the concept [judgment of the SAC of 28 January 2015, No. 1 Azs 200/2014 (No. 3200/2015 Coll. of the SAC); similar distinction between the interpretation and application of undefined legal concepts and administrative discretion, including its impact on the scope of judicial review, was also made by the Grand Chamber of the SAC in resolution of 22 April 2014, No. 8 As 37/2011-154 (No. 3073/2014 Coll. of the SAC)]. For this reason, administrative authorities should also take into account "precedential" case-law of administrative courts.

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?**

   In the resolution of the Grand Chamber of the SAC of 23 March 2015, No. 6 A 25/2002-42 (No. 906/2006 Coll. of the SAC) and judgment of 20 July 2006, No. 6 A 25/2002/59 (No. 950/2006 Coll. of the SAC), the SAC emphasized that the so-called absolute or unlimited administrative discretion (if the administrative authority is not limited in its discretion by any criteria set by law) does not exist in a modern state governed by the rule of law. Every discretion has its limits which result from constitutional principles, the principle of equality, the prohibition of discrimination, the imperative to preserve human dignity, and also the principle of proportionality. Compliance with those limits is subject to judicial review.

   This is also reflected in recent case-law. For example, in its judgment of 21 January 2022, No. 5 Azs 70/2020-103 (No. 4326/2022 Coll. of the SAC), the SAC stated that the assessment of possible grounds for granting humanitarian asylum is a matter of administrative discretion, which is subject to judicial review only to a limited extent. However, the discretion in assessing the ground for granting humanitarian asylum is also limited, primarily by the prohibition of arbitrariness which derives from the constitutionally enshrined principle of a democratic state governed by the rule of law.