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Questionnaire
The judge and inert administration. Administrative discretionary power
Answers by the Supreme Court of Estonia

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
   - X Only in certain areas of law

   Please specify your answer briefly, if necessary

According to § 5 (2) of the Administrative Procedure Act[1] (henceforth APA), administrative procedure shall be purposeful, efficient and straightforward and conducted without undue delay, avoiding superfluous costs and inconveniences to persons. § 5 (4) APA provides that procedural acts shall be performed promptly, but not later than within the term provided by law or a regulation. Specific legal acts sometimes contain certain time limits for administrative procedure, but if that is not the case, the limitation is "no undue delay".

2. Where are the administrative time limits set:

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

   Please specify your answer briefly, if necessary

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

Even though the exact wording is not used in our Administrative Procedure Act, it is widely used in special laws as well as jurisprudence. There is no definition, but the Supreme Court has explained that the determination of what is reasonable time in a specific case depends on several aspects: the complexity of the issue, the number and type of procedural acts

[1] Available online in English: https://www.riigiteataja.ee/en/eli/527032019002/consolide.

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needed to complete the procedure, the correctness of the application, the way the applicant has followed the duty to cooperate in the procedure, and other circumstances which may objectively have an impact on the time needed for the procedure.[2]

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

It is impossible to speak of a general time limit in which administrative decisions are made (aside from "without undue delay" mentioned before). The time limits vary widely, from a few days (for example five days to respond to a request for information according to § 18 (1) of the Public Information Act[3]*) to several years (for example in planning law – the time limit for bringing a detailed spatial plan to effect is three years (§ 139 (2) of the Planning Act*[4]*)).*

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

The possibility to extend the time limit depends on the special law which sets the time limit. For example § 49 (5) of the General Part of the Environmental Code Act[5] *allows for the extension of the time limit for issuing an environmental permit simply "if there appear circumstances which do not allow deciding on the issue of the permit within this time limit."*

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

The person may have a right of action depending on the circumstances. (The right to bring actions against procedural acts is very limited – however, one of the bases for such an action can be if that procedural act infringes the applicant's non-procedural rights independently of the administrative act (§ 45 (3) of the Code of Administrative Court Procedure[6] *(henceforth CACP)). One such situation could be if the person's subjective right is restricted due to the authority's failure to act in due time.)*

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?

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

Please specify your answer briefly, if necessary

It depends on the legal situation in the specific area of law. However, in case the law does not provide for any repercussions, the Supreme Court has stated in a tax case that an

[2] Judgments of the Administrative Law Chamber of the Supreme Court of Estonia, 21.09.2011, in case no. 3-3-1-5-11, p 24 (available in Estonian: https://rikos.rik.ee/?asjaNr=3-3-1-5-11) and 06.03.2015, in case no 3-3-1-78-14, p 17 (available in Estonian: https://rikos.rik.ee/?asjaNr=3-3-1-78-14).
[3] Available in English: https://www.riigiteataja.ee/en/eli/522032022002/consolide.
[4] Available in English: https://www.riigiteataja.ee/en/eli/525102022002/consolide.
[5] Available in English: https://www.riigiteataja.ee/en/eli/517062022003/consolide.
[6] Available in English: https://www.riigiteataja.ee/en/eli/519052022001/consolide.

unnecessary delay is a procedural flaw which does not necessarily result in the annulment of the administrative act. If there is legal and factual basis for the administrative act, a person cannot require the authority to break the law in order to compensate for the delay.[7] *The main means of defence against administrative delay is a mandatory action to obligate the authority to act.*[8] *There also exists a possibility of monetary compensation depending on the circumstances. In extreme cases, though, a question of the proportionality of the procedure might arise.*[9]

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

   - ○ Rather yes
   - x Rather no

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

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

   Please specify your answer briefly

I also picked "other", because I think one of the reasons might be that the time limits provided by law are sometimes unreasonable.

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

There are no specific penalties for authorities or their staff for not complying with the time limits. However, as not complying with time limits means breaking the law, it might result in disciplinary action against the staff responsible for the delay, or in administrative supervision over the authority in certain cases.

Administrative silence

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

There is no legal definition for "administrative silence". The terms (with slightly different meanings) used in Estonian legislation and jurisprudence to signify what the questionnaire

[7] Judgment of the Administrative Law Chamber of the Supreme Court of Estonia in case no 3-3-1-78-14, p 18 (referenced above).
[8] *Ibid.*, p 19.
[9] *Ibid.*, p 24; judgment of the Administrative Law Chamber of the Supreme Court of Estonia, 13.02.2012, in case no. 3-3-1-79-11, p 13 (available in Estonian: https://rikos.rik.ee/?asjaNr=3-3-1-79-11).

might mean by "administrative silence" are "omission" and "delay", both of which are deemed to constitute actions of an administrative authority for the purposes of administrative court procedure (§ 6 (2) CACP). These terms do not have legal definitions either.

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

Where not otherwise provided by law, administrative silence has a similar effect as refusal. However, I am not aware of any area of law where it is explicitly provided that administrative silence equals refusal to grant the application.

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

In certain areas of law, special laws provide for a positive model.

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

Neither. In most areas of law, administrative silence means neither refusal nor granting of the application.

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

   I do not understand precisely what is meant by applying the negative model to ex officio procedures, as the negative model means that silence equals refusal to grant an application, but of course, if an authority starts a procedure ex officio but does not complete it, that also means that an administrative act is not issued.

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)?

   An application is not automatically considered to be rejected (= an administrative act issued) if the authority is silent – only the effect is similar, in that the requested administrative act has not been issued. But the applicant does not need any specific proof in order to appeal the silence: they must prove that they filed the application and claim that they have not received a response, and when the court receives such an action, they usually turn to the authority and request information and documents from it.

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

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

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

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

   Please specify your answer briefly
   N/A

6. What legal remedies are available in your legal system if an authority has failed to comply properly with a court order to issue a decision?
   If a court order to issue a decision is not complied with, the applicant may apply to the court for a fine (up to 32 000 €). If the authority still fails to comply with the judgment of the court, the fine may be applied several times (§ 248 CACP).

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
   - x 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?

   - x 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 has only been provided for in certain special laws and is meant for situations where the infringement of different rights and interests by the activity for which a permit is applied for is likely to be minor. Thus, the legislator has considered it appropriate to simplify such procedures.

2. Are there any prohibitions or restrictions on the application of the positive model in certain areas of law in your legal system?
As the positive model only applies if a special law so provides, no such prohibitions or restrictions are needed. Possibly, if the legislator went too far with this model and it resulted in a breach of important rights or interests, such a solution could be considered unconstitutional. However, there have been no such cases.

3. When (a specific moment or particular circumstances) is the person's claim deemed to have been granted?
It depends on the specific provisions, as the positive model is only provided by some special laws and there is no universal model. Sometimes, the application is deemed to have been granted once a certain amount time has passed (for example 10 days in case of a building notice or use and occupancy notice[10]; 30 days in case of an activity licence[11]), but there are also instances where the reaction time for the authority is not directly limited, but the application or declaration is deemed to have been granted immediately upon registration (for example notice of economic activities (§ 14 GEACA)).

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?
A building notice or use and occupancy notice is usually submitted via a register (or submitted on paper and entered into the register by the local authority) and is visible there for everyone (§ 36 (1), § 48 (1) and § 60 (3) of the Building Code). The same is true for a notice of economic activities (§ 14 and § 51 (3) GEACA), where the law also provides that a registrar, notary or economic administrative authority makes certified printouts of information entered in the register at the request of a person (§ 51 (4) GEACA). In case of a "silent" activity licence, the authority enters the data of the activity licence in the same register on the working day following the expiry of the time limit (§ 20 (4) GEACA).

[10] § 36 (2) and § 48 (2) of the Building Code (available in English: https://www.riigiteataja.ee/en/eli/509092022003/consolide). Both of these notices are meant for smaller buildings with presumably lower impact on the environment and neighbours' interests; bigger buildings require permits. However, in case of a notice, if the local authority finds that in this specific case, a more thorough procedure is necessary, it may initiate permit procedure.
[11] § 20 (4) of the General Part of the Economic Activities Code Act (henceforth GEACA, available in English: https://www.riigiteataja.ee/en/eli/515042021004/consolide). As with the building and occupancy notices, there exist parallel systems in GEACA for some activities with presumably lower impact that only require registration, and other activities which require a licence.

5. Are there any legal remedies available to third parties affected by the "fictitious decision" of granting a claim, if necessary?
   Yes. Although in practice, it is more difficult to dispute such a "fictitious decision", as there is no reasoning of the administrative authority to be relied upon, affected third parties obviously must have legal remedies – however, they are not quite the same as in case of an explicit administrative act. According to the case law of the Supreme Court concerning building notices, the authority's non-reaction to such a notice is not considered an administrative act, but a measure – which makes an action for annulment inadmissible, as a measure cannot be annulled.[12] However, the proper legal remedy in such a case is a mandatory action to force the authority to initiate state supervision over the building.[13] As no disputes regarding "silent" activity licences have reached the Supreme Court yet, one cannot say with any certainty whether such a solution will be deemed appropriate there. However, the possibility of state supervision exists in GEACA as well.

6. Is there a certain procedure that allows to annul a "fictitious decision" of granting a claim? If yes, are there any differences from the general procedure?
   There is no specific type of court procedure designed for such disputes. Mandatory actions are used in different situations, not only "fictitious decisions".

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?

   This directive is transposed into Estonian law by GEACA. As mentioned above, this general law provides for two options: in cases provided by special laws, an undertaking is required to either submit a notice to the registrar on commencement of economic activities in a relevant area of activity prior to commencement of economic activities (§ 14 (1) GEACA), or must have an activity licence prior to commencement of economic activities in an area of activity (§ 16 (1) GEACA). In the first case, approval of the registration is automatic and instant, but in the case of a licence, there are several possible results. After the undertaking submits an application, the authority must issue the licence "promptly when compliance with the requirements in the subject of review of the activity licence has been ascertained" (§ 19 (8) GEACA). Usually, the time limit is 30 days, which commences from the submission of all the required information (§ 20 (1) GEACA). If it appears upon review that personal or tangible requirements in the subject of review of the activity licence have not been complied with or an activity licence cannot be granted due to the reason that an undertaking obliged to submit the plan for compliance with the undertaking's diligence obligation has failed to submit such plan,

[12] Ruling of the Administrative Law Chamber of the Supreme Court of Estonia, 06.06.2018, no 3-17-1152/35 (available in Estonian: https://rikos.rik.ee/?asjaNr=3-17-1152/35), p 11; judgment of the Administrative Law Chamber of the Supreme Court of Estonia, 18.12.2019, no 3-17-1859/34 (available in Estonian: https://rikos.rik.ee/?asjaNr=3-17-1859/34), p 15.
[13] Ruling no 3-17-1152/35, p 10; judgment no 3-17-1859/34, p 15 (both referenced above).

the authority may suspend the time limit until the deficiency is remedied, but not for longer than another 30 days (§ 20 (2) GEACA). The authority may also extend the time limit for adjudication of the application once by up to 30 days if this is necessary due to the complexity of an individual case – reasoned notice of this must be given to the applicant (§ 20 (3) GEACA). In case of failure to adjudicate an application within the time limit or extended time limit, an activity licence is deemed to be granted to the undertaking by default. However, due to overriding reasons relating to the public interest, or in order to protect the rights of third persons, this principle may be deviated from in cases provided by (special) law. The positive silence model is also not applied if an activity licence must be granted with secondary conditions (§ 20 (4) GEACA).

According to § 2 (1) GEACA, the act applies to all undertakings and their economic activities in all areas of activity unless otherwise prescribed by law. Certain categories have been expressly excluded by GEACA itself (§ 2 (2–5)): notaries, enforcement agents, advocates, trustees in bankruptcy, patent agents, sworn translators, auditors, financial services, crediting and intermediation of credit, insurance activities and distribution, payment institutions or e-money institutions, management companies within the meaning of the Investment Funds Act, investment firms, data reporting services providers, investment agents and operators of the regulated market, account administrators within the meaning of the Securities Register Maintenance Act, strategic goods control systems, operators of tax warehouses, tax representatives of non-residents, operators of excise warehouses, registered consignees and registered consignors, operators of temporary storage facilities and customs warehouses, possessors of free zones and customs agencies. On the other hand, there are 64 pieces of legislation that reference GEACA and thus presumably[14] are within the area of regulation of this act.

No disputes regarding this positive silence model have reached the Supreme Court yet, so we are not aware of any difficulties with its implementation.

Other legal remedies

1. What legal remedies exist in your legal system in situations of administrative silence where the law does not regulate the administrative silence neither in accordance with the positive, nor the negative model?
   If a person wants to dispute an administrative omission or delay, the person must file a mandatory action (for the court to order the authority to act), for which the time limit is quite lenient: one year from the date when the authority should have issued the administrative act, or in case no deadline is provided by law, two years from the application (§ 46 (2) CACP). The same type of action would also be applicable in case of express refusal, but then, the time limit would be 30 days (§ 46 (2) CACP).
   In case of a mandatory action, the court has two options: either to order the authority to make a specific decision, or simply to order the authority to decide on the application

[14] I did not check all these acts individually, but excluded those that obviously reference GEACA for other reasons, such as the State Fees Act or the Penal Code.

(§ 41 (3) CACP). The choice between these depends on whether the authority has discretion in the matter, as the court may not exercise discretion in place of the authority (§ 158 (3) CACP). The court can, but does not have to set a time limit for the authority to act within (§ 168 (1) CACP).

A person can also request compensation for damages caused by the delay or omission. According to § 7 (2) of the State Liability Act[15], compensation for damage caused by an omission may be claimed if an administrative act is not issued in due time or a measure is not taken in due time and the rights of a person are violated thereby.

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?
According to § 7 (3) of the State Liability Act, compensation is provided for direct patrimonial damage and loss of income.

Case law and regulation in non-harmonised sectors of law

1. Do you have any case-law where national regulation on administrative silence has been found unfounded or inapplicable in a particular case? *No*

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*

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*

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

4.1. Construction, spatial development planning and environmental protection

There are no special rules on administrative silence in the legislation concerning spatial development planning[16] nor environmental protection[17]. While there are time limits set by law for some of the procedures regulated by these acts, no consequences are foreseen for the case of the administration not following these. However, construction is one of the areas of law where the Estonian legislator has decided to implement a positive silence model, albeit for only cases of minor importance. See answers to questions 3 and 4 in the chapter concerning the positive model for details.

[15] Available in English: https://www.riigiteataja.ee/en/eli/507062016001/consolide.
[16] Planning Act, available in English: https://www.riigiteataja.ee/en/eli/525102022002/consolide.
[17] General Part of the Environmental Code Act, available in English: https://www.riigiteataja.ee/en/eli/517062022003/consolide.

4.2. Social security

There are no special rules on administrative silence in the legislation concerning social security.[18] *As in previous cases, there are time limits set by law for most of such decisions, no consequences are foreseen in case of delay.*

4.3. Freedom of information

A request for information shall be complied with promptly, but not later than within five working days.[19] *However, as with social security, no special consequences are foreseen in case of a delay or omission.*

Administrative discretionary power

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

According to § 4 (1) APA, the right of discretion is an authorisation granted to an administrative authority by law to consider making a resolution or choose between different resolutions. The right of discretion shall be exercised in accordance with the limits of authorisation, the purpose of discretion and the general principles of justice, taking into account relevant facts and considering legitimate interests (§ 4 (2) APA).

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

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.
   The Supreme Court has explained that right of discretion is an authorisation granted to an administrative authority to choose between different legal consequences when implementing a legal provision. On the other hand, a margin of appreciation exists when the prerequisites of implementing a provision are ascertained by way of appraising, especially when an undefined legal concept must be applied, facts must be ascertained on the basis of non-legal criteria, but also in case of prognoses.[20]
   The most basic method of determining whether the authority has discretionary power in a particular case is whether the relevant provision prescribes only one possible outcome once its conditions are fulfilled, or the provision leaves some freedom of choice to the

[18] General Part of the Social Code Act, available in English: https://www.riigiteataja.ee/en/eli/509052022001/consolide.
[19] § 18 (1) of the Public Information Act, available in English: https://www.riigiteataja.ee/en/eli/522032022002/consolide.
[20] Judgment of the Administrative Law Chamber of the Supreme Court, 11.12.2020, no 3-20-1198/58 (available in Estonian: https://rikos.rik.ee/?asjaNr=3-20-1198/58), p 12.

authority – wording like "the authority may" vs. "the authority shall". Occasionally, if the wording is not clear, interpretation in conformity with the Constitution or EU law is also used. The most typical examples of decisions with a very wide margin of discretion is spatial planning.

As for margin of appreciation, the wording of these provisions may be quite resolute, but the room for appreciation lies in the interpretation of undefined legal concepts or appraisal of non-legal criteria. Some typical examples from recent case law include the determination of whether a tender in public procurement proceedings is abnormally low[21], appraisal of whether an alien presents a threat to public policy or public security[22] and assessment of the work ability of a person[23].

4. Is there a limit of judicial review of use of discretionary power by the authority in your legal system? If so, please explain possibilities of court examination and assessment in such a case?
   If your legal system distinguishes between discretion and margin of appreciation, please describe both.
   Yes, there is a limit to the judicial review of the use of discretionary power. According to § 158 (3) CACP, when assessing the lawfulness of an administrative act issued or an administrative measure taken as a result of the exercise of a discretionary power, the court verifies compliance by the administrative authority with the limits and purpose of the power, and with other rules which govern the exercise of discretion. The court does not conduct a separate assessment of the expediency of a discretionary decision. When verifying the lawfulness of an administrative act or measure, the court does not engage in an exercise of the discretionary power in the stead of the administrative authority. What this means in practice is that if one of the important reasons that formed the basis of the authority's discretionary decision is deemed unlawful or irrelevant by the court, the court cannot assess whether the authority would/should have taken the same decision even without that part of the reasoning – thus, the decision must be annulled.[24]

   However, such limits do not extend to margin of appreciation. When resolving disputes related to such decisions, the court is not forbidden from exercising an extensive control, including replacing the authority's assessment with that of the court. However, the court may be more restrained especially when the assessment requires specific non-legal knowledge or experience and the interference with subjective rights is not serious.[25]

[21] See, for example, judgment of the Administrative Law Chamber of the Supreme Court, 07.06.2021, no 3-20-2362/63 (available in Estonian: https://rikos.rik.ee/?asjaNr=3-20-2362/63), p 25.
[22] See, for example, judgment of the Administrative Law Chamber of the Supreme Court, 19.02.2019, no 3-17-1545/81 (available in Estonian: https://rikos.rik.ee/LahendiOtsingEriVaade?asjaNr=3-17-1545/81), p 26.
[23] See, for example, judgment of the Administrative Law Chamber of the Supreme Court, 20.06.2022, no 3-20-2474/11 (available in Estonian: https://rikos.rik.ee/?asjaNr=3-20-2474/11), p 15.
[24] See, for example, judgment of the Administrative Law Chamber of the Supreme Court, 07.10.2021, no 3-19-467/28 (available in Estonian: https://rikos.rik.ee/?asjaNr=3-19-467/28), p 25—26.
[25] Judgments no 3-20-2474/11, p 20, and no 3-20-1198/58, p 14.

The Supreme Court has explained that judicial review of discretionary decisions usually consists of a moderately intense test of rationality – or, in case of an extremely wide margin of discretion and a non-serious restriction of subjective rights, a test of obvious errors.[26] *As for margin of appreciation, there the judicial review may range from full control to a test of rationality to even a test of obvious errors, depending on the thoroughness of the regulation, the necessity of non-legal knowledge needed for the assessment and the seriousness of the restriction of subjective rights.*[27] *Even when a court is not obliged to a full control due to the aforementioned aspects, it is not forbidden, and once the first instance court has gone through the thorough examination, the court of appeal may only quash that if there are errors in the assessment.*[28]

5. Is judicial review affected by the fact that the discretionary power used by the authority has resulted in a restriction of human rights? Is the intensity of judicial review in such a case different from that in the case of no administrative discretion?
Yes, see answer to question 4. The intensity of judicial review must be more thorough in case of a serious restriction of human rights. However, the court may still not exercise discretion instead of the authority.

[26] Judgment no 3-20-1198/58, p 13.
[27] Judgment no 3-20-1198/58, p 14.
[28] Judgment of the Administrative Law Chamber of the Supreme Court, 22.09.2022, no 3-20-1548/31 (available in Estonian: https://www.riigikohus.ee/et/lahendid?asjaNr=3-20-1548/31), p 18—19.