



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

**Riga, 27 April 2023**

### ***Questionnaire***

#### ***The judge and inert administration. Administrative discretionary power***

##### **Introduction**

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

As the administrative silence is mainly related to the failure of authorities to act or to reply within the prescribed procedural time limits, the questions in the first section of the questionnaire will provide insights into the regulation and application of procedural time limits in the Member States. The following sections of the questionnaire contain questions that are directly related to the current national regulations of the administrative silence. The regulations are generally classified into a negative model (silence as deemed refusal of a claim) and a positive model (a claim not refused in due time is deemed granted). Most legal systems usually provide for both models and various specific combinations. However, the understanding and regulation of these models, as well as the various exceptions and specific rules, differs among legal systems. The questionnaire also seeks to identify national experiences in implementing Article 13(4) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, intended as a mechanism of simplifying and speeding the administrative activity. And finally, as one of the most important aspects, the questionnaire will clarify the role and competence of the courts in the process of appeal against fictitious acts resulting from administrative silence, also identifying the legal remedies. The questionnaire is intended to identify mentioned aspects for further workshop discussions.

The seminar is also intended to discuss issues of administrative discretionary power. The most ambiguous aspects of this matter relate to the identification of the discretionary power in each specific case, as well as to the competence of the court and limits of judicial review of use of discretionary power by the authority. The practice and approach of the Member States on this issue vary. Some legal systems between discretion in a narrow sense and margin of





appreciation in the interpretation of undefined legal concepts. However, in most legal systems no such distinction is made. There are also differences in the methods, characteristics or mechanisms used to determine whether an authority has discretionary power in a particular case. The questionnaire thus aims to identify national regulations and practices on the mentioned issues.

### Administrative time limits

1. Are specific administrative time limits within which authorities must take administrative decisions or complete administrative actions set in your legal system?
  - Yes
  - No
  - Only in certain areas of law**

Please specify your answer briefly, if necessary

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

**Answer for questions 1 and 2:** There is no general administrative time limit within which authorities must make administrative decisions or complete administrative action. However, the requirement of timeliness can be derived from section 21 of the Constitution of Finland (good governance). Section 23 of the Administrative Procedure Act also provides that an administrative matter must be considered without undue delay. Upon the request of a party, an authority must inform the party about the estimated date of issue of a decision and respond to queries about the progress of consideration.

In addition to the above-mentioned general requirements of consideration without undue delay, there are a number of statutory time limits laid out in specific acts, e.g. in the Child Welfare Act, the Aliens Act, the National Pensions Act, the Act on Social Assistance, the Mental Health Act and the Act on the Openness of Government Activities to name but a few.

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





Like mentioned above, according to section 23 of the Administrative Procedure Act administrative matters must be considered without undue delay. “Undue delay” is not defined in the Act, nor is there a general definition of what constitutes a “reasonable time”.

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

There are no general time limits.

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

N/A

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

N/A

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

In general, the law does not prohibit an authority to make an unfavourable decision after the time limit set by law has expired. However, there are instances where unfavourable decisions cannot be made after the expiry of a given time limit (typically in matters initiated by authorities), e.g. an administrative decision to recover benefits under the National Pensions Act cannot be made after the five year time limit set in the.

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

Failure to comply with requirement of undue delay is not a common problem in Finland and when it does occur, it is typically associated with a lack of resources within the authority.

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

In principle yes, according to section 118 of the Constitution a civil servant is responsible for the lawfulness of his or her official actions. Everyone who has suffered a violation of his or her rights or sustained a loss through an unlawful action or omission by a civil servant has the right to request that the civil servant or other person in charge of a public task be sentenced to a punishment and that the public organisation, official or other person in charge of a public task be held liable for damages, as provided by an Act.

Questions of undue delay are in practice perhaps most typically handled by the Parliamentary Ombudsman and the Chancellor of Justice who supervise the activities of authorities and can investigate complaints concerning undue delay in administrative decision making. They can e.g. issue a reprimand to an authority or official concerned.

#### **Administrative silence**

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

Not in legislation. However, the concept has been defined in legal theory and also in draft legislation and surveys on the issue.

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

No.

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

Yes, but it is exceptional. As in Latvia, in the transposing of Article 13(4) of Directive 2006/123/EC the model has been implemented. According to section 13 of the Act on the Provision of Services, the authorisation is deemed to have been granted if an application has not been processed within the set time limit.





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

Neither can be said to be typical.

### The negative model

1. What are the types of administrative procedures that the negative model can be applied to:
- Procedures that are initiated on the basis of an application or claim by a person
  - Ex officio procedures
  - Other

Please specify your answer briefly, if necessary

The Finnish legal system does not provide for a negative model. The questions in this section are not applicable in the Finnish context.

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

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?





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

As mentioned above, the positive model is implemented by transposing Directive 2006/123/EC and thus relate to the requirement of undue delay as provided by article 13(2) of the said directive.

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

No general prohibitions or restrictions.

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

According to section 13 of the Act on the Provision of Services, where an authorisation application has not been processed within the estimated time period and the time period has not been extended, the authorisation shall be deemed to have been granted. The same shall apply in situations where the authorisation application is not processed within the extended time period and there are no grounds for continued processing.

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?

In the situations where authorisation is deemed to have been granted, the applicant for authorisation shall be issued a document indicating the same.





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

The Administrative Judicial Procedure Act applies, according to which a person whom a decision concerns, or whose right, obligation or interest is directly affected by the decision, and a person whose right of appeal is separately provided by law may request a judicial review of an administrative decision by way of appeal. An authority may also request a judicial review by appeal if this is necessary because of a public interest overseen by the authority (section 7).

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 not a certain procedure. General rules under the Administrative Judicial Procedure Act apply.

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?

According to section 2 of the Act on the Provision of Services, the Act does not apply to:

- 1) financial and insurance services or services related to occupational and personal supplementary pensions;
- 2) the provision of the network services and communications services referred to in the Communications Markets Act or to the services referred to in Directive 2002/58/EC of the European Parliament and of the Council concerning the processing of personal data and the protection of privacy in the electronic communications sector;
- 3) transport services and port services;
- 4) the services of temporary work agencies;
- 5) services provided by a health care professional referred to in the Act on Health Care Professionals, services provided by a service provider referred to in the Private Health Care Act or health care services provided by a municipality or a joint municipal authority or by the State;
- 6) services provided by a pharmacy, subsidiary pharmacy, licensed medicine chest, hospital pharmacy or dispensary referred to in the Medicines Act
- 7) audio-visual services and radio broadcasts;
- 8) the lotteries referred to in section 2 of the Lotteries Act;
- 9) child and youth services, child day care services, services for people with physical or intellectual disabilities, services for the elderly, substance abuse services or other equivalent social services and social housing organised by a municipality, joint municipal authority or the State;
- 10) the private security services referred to in the Private Security Services Act
- 11) the services provided by a public purchase witness;





12) taxation.

We are not aware of any particular difficulties in the implementation 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?

Complaints can be made to the Parliamentary Ombudsman and the Chancellor of Justice.

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?

In principle yes.

### 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?

N/A

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:

N/A

4.1. Construction, spatial development planning and environmental protection





#### 4.2. Social security

#### 4.3. Freedom of information

### **Administrative discretionary power**

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

Administrative discretionary power is defined through the legal principles of administration enshrined in section 6 of the Administrative Procedure Act, according to which an authority shall treat equally those to whom it is providing services in administrative matters and shall exercise its competence only for purposes that are acceptable under the law. The acts of an authority shall be impartial and proportionate to the objectives sought. These acts shall protect expectations that are legitimate under the legal order. The use of discretionary power must naturally conform with the Constitution (equality, the public authorities' obligation to guarantee the observance of basic rights and liberties and human rights).

#### 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 wording of a legal norm will indicate if an authority has discretionary power in a particular case or not (“may” or “can” vs. “shall”). As an example of a legal norm indicating discretionary power e.g. section 13 of the Social Assistance Act “Preventive social assistance can be granted for instance for measures to support the activation of the assistance recipient (---)”. In some instances, the discretionary power might be very wide (e.g. section 9 of the Openness of Government Activity “access to a document which is not yet in the public domain (---) shall be granted at the discretion of the authority”). In other situations, the discretionary powers might be very limited or non-existent, for instance in the case of certain subjective rights (e.g. section 50 of the Health Care Act “urgent medical care (---) shall be provided for patients” or section 12 of the Early Childhood Education and Care Act “full-time early childhood education and care shall be organised for the child”). The amount of discretionary power varies depending on the administrative matter concerned, but even when the discretionary power is wide, the authority must have objective and reasonable justification for the decision and the reasons for the decision must be given in a transparent way.





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 the Administrative Judicial Procedure Act appeals over administrative decisions may be filed on the grounds that a decision is unlawful. Judicial review of an administrative decision is thus restricted to the legality of the decision, including, in the case of undefined legal concepts, the interpretation of such legal concepts, and not its appropriateness i.e. whether the administrative authority has used its discretionary power appropriately. As an example, in the case of subsidies, the preconditions must be fulfilled but there is no right to be granted a subsidy. That said, if an administrative authority would be found to have exceeded the limits of its discretion or misused its discretionary power, such a decision would be annulled as unlawful. Like mentioned above, the use of discretionary power must conform with rights and obligations enshrined in the constitution and the legal principles of administration.

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?

Restrictions of basic rights and liberties and human rights must comply with certain criteria such as proportionality and necessity and, thus, the use of discretionary power by an authority resulting in the restriction of a human right would in practice most likely receive heightened scrutiny during judicial review.

