



**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

Sec. 42a of the Code of Administrative Procedure, which amended this Code in order to implement EU Regulation 2006/123/EC, provides that a permission is considered granted after a certain deadline, only if the specific law so provides and if the petition is sufficiently precise. Besides, Sec. 10 (2) of the Code of Administrative Procedure provides in a general rule for speedy procedures without defining this. The latter norm can hardly be invoked before court, since it is so unspecific.

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

Sec. 42a of the Code of Administrative Procedure provides for the fiction of a granted permission. Yet, it has to be "activated" by the specific law which therefore must provide that the administration has to decide within a certain time limit. In many cases the specific law will cite Sec. 42a of the Code of Administrative Procedure explicitly.

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

Sec. 42a of the Code of Administrative Procedure sets a time limit of three months. This time limit may be prolonged once if this is justified by the difficulty of the matter. The concept of "reasonable time" is only known to the Code of Administrative Court Procedure (Section 75) which considers an action before court admissible even without





the existence of the administrative decision if the plaintiff has waited a "reasonable time" after his petition before taking court action. The minimum time limit in this case is three months.

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

It has to be pointed out that as a general rule there are no specific time limits in German administrative law. Only some (few) specific laws provide for these (see above, answer 2.)

5. Is it possible to extend the administrative time limits? Under what circumstances?
Yes, once, in a case of difficulty of the matter (see above, answer 3.)

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

The law does not say. Yet, the decision about the extension must be considered a procedural decision which under Section 44a of the Code of Administrative Court procedure cannot be subject to separate litigation. The legality of the extension of the time limit could therefore only be the object of judicial scrutiny in litigation of material compensation for a supposedly delayed permission.

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

A fictitious permission is fully valid, just like an express permission. Both can be annulled or altered only if the legal conditions which the law stipulates for these cases are met. These conditions include the protection of legitimate interests (see ACA-Seminary in Madrid, 2022)

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

There are no reliable numbers on this question. Yet, it is my impression that in some parts time limits are difficult to abide by for reasons of lack of staff and in other parts for reasons of complexity of the law which demands for very complex administrative decisions (i.e. in urban planning etc.)

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

Only if grave violations of the duties of the staff are involved. This depends on the single case.

Administrative silence

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

There is no definition of this concept. But as long as an authority does not positively decide about a claim the claim is simply not granted (unless this is explicitly stipulated in the law (see above))

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

No. But factually, the petitioner is still without the sought decision.

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

Yes, see above (Answers in the chapter administrative time limits).

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

If any, the positive model. But, as explained, it is only implemented in a few specific regulations.

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

Not applicable.

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)?

Not applicable.

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.

Not applicable.

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

As explained above in answer 3, a court action may be admissible after a reasonable time of waiting for the administrative decision. Yet, this action would not be directed against a negative decision (which does not exist); it would have to be directed at conceiving a positive decision or to make the administration decide at all.

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





A decision by the court is only possible if the law does not provide for a margin of discretion for the administration.

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?

The authority may - upon an action by the plaintiff - be facing financial penalties.

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

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

As explained above, the general provisions do not provide for this model. It has to be "activated" in the specific laws.

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

Generally after three months.

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?

The fictitious permission is valid even without such a confirmation. Yet, the petitioner is entitled to such a confirmation in a written form.





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

There are no specific rules about this. A third party may recruit to all remedies which are available against a "real" decision. The calculation of the time limit for the third party remedy starts with the existence of the fictitious permission, thus three months after the application.

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?

No.

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 implementation has been conducted as described above. The specific areas of law are i.e. rail infrastructure, urban planning (partly), chemical labs, energy market regulation, trade with agricultural property, public transport, import of infectious material.

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 admissibility of court action after a reasonable time.

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?

If one considers an obligation of the authority to act within a certain time limit, such a claim is at least thinkable.

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?

The Federal Administrative Court has found, that the violation of the general obligation of speedy conduct of administrative procedure (see above, answer 1) does not trigger a





fictitious permit as foreseen in Sec. 42a of the Code of Administrative Procedure; this is only the case if this consequence is expressly provided for in a specific rule (Federal Administrative Court, Judgment of 15 March 2017; ECLI:DE:BVerwG:2017:150317U10C1.16 0)

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.

Outside of the competence of the Federal Administrative Court the Federal Social Court has found that in the system of public health insurance a treatment is considered granted if the health insurance does not decide a corresponding petition within the given time limit (judgment of March 8, 2016; ECLI:DE:BSG:1056:080316UB1KR2515R0).

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

Examples:

Sec. 7f (2) of the General Railroad Act provides that a permission to start the operation of a railroad is considered granted if the competent authority does not decide in deviation of the petition within six weeks.

The Federal Building Code provides in several regulations that the permission of certain planning decisions are to be considered granted if the competent authority does not decide in deviation of the petition within a certain time limit.

- 4.2. Social security

See above, no. 2

- 4.3. Freedom of information

The Freedom in Information Act provides for a time limit of one month to answer a request. Yet, the violation of this time limit does not automatically result in a fictitious positive decision.





Administrative discretionary power

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

There is only a negative definition:

Sec. 40 of the Code of Administrative Procedure provides that an authority must exercise discretion according to the purpose of the enabling norm and within the limits of the law.

Sec. 114 of the Code of Administrative Court Procedure extends the court's scrutiny of such a decisions to these aspects.

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.

A discretionary regulation will usually use terms like "the authority may..." or "the permit may be granted, if..." instead of "the authority must..." or "the permit is to be granted, if..."

The margin of appreciation concerns the understanding of facts and the question whether a certain factual situation is comprised by a certain legal concept. In comparison discretion allows the competent authority to chose between several legal consequences/several kinds of decisions in a given factual situation.

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.

If a regulation provides for discretion the court will scrutinize if the authority has used this discretion within the purpose of the norm, if it has stayed within the limits of the law or if it has overseen a reduction of discretion. If several decisions are legal within the margin of discretion the court will not object to the one or the other.

In contrast, there is complete judicial review over the use of a margin of appreciation.





5. Is judicial review affected by the fact that the discretionary power used by the authority has resulted in a restriction of human rights? Is the intensity of judicial review in such a case different from that in the case of no administrative discretion?

If human rights are concerned in many cases the situation may arise that the different decisions the authority may adopt within its discretion affect the human right concerned to a different degree. In such a situation, the principle of proportionality - which is deducted from the rule of law and the granting of fundamental rights and thus forms part of constitutional law - will render only the decision legal which affects human rights the least. All other decisions will thus be illegal. In such a situation, we often find that the discretion is reduced to zero.

