REPUBLIC OF LATVIA
SUPREME COURT
SENATE

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

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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

Hungarian legal system sets specific time limits within which the authorities must act.

Act No. CL of 2016 on Administrative Authority Procedures (hereinafter referred to as the "Administrative Authority Procedures Act") distinguishes between three types of administrative procedures. According to Article 39 of the Administrative Authority Procedures Act, an application may be determined in (1) automatic decision-making procedure, (2) summary procedure or (3) full procedure. Automatic decision-making is possible if (a) it is permitted by Act of Parliament or Government Decree, (b) the authority is in possession of all information at the time of the submission of the application or can obtain the information through automatic information transfer, (c) the decision does not require discretion, and (d) there is no opposing party. Summary procedure can be used if (a) based on the full and complete application and its annexes as well as the information available to the authority, the facts are clear (b) there is no opposing party.

Pursuant to section 50, the **time limit for the administration of the case is (1) twenty-four hours in the case of an automatic decision, (2) eight days in the case of a summary procedure and (3) sixty days in the case of a full procedure.**

A time limit longer than the sixty-day time limit applicable to full proceedings may be prescribed by an Act of Parliament, whereas a shorter time limit may be prescribed by any law.

Unless otherwise provided by law, the time limit for the administration of the case shall begin on the day on which the proceedings are instituted.

If an Act of Parliament or a Government Decree does not provide for a time limit for the performance of a procedural act, the authority, the client and the other persons involved in the proceedings will ensure that the procedural act is performed or the order is issued without delay, but **within eight days** at the latest.

The case shall be disposed **with priority** if (a) it is justified by the vulnerability of the interests of the minor client, (b) it is justified by the need to avert a situation involving a threat to life or

serious harm, (c) the authority has ordered a provisional protective measure, or (d) it is otherwise necessary in the interests of public security, public order or national security.

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 administrative time limits, as mentioned in point 1 above, are set out in the Administrative Authority Procedures Act. However, time-limits specific to a particular field of law may be set by legislation other than the Administrative Authority Procedures Act.

For example, in the field of competition law, under section 63 of the Competition Act (Act No, LVII of 1996 on the Prohibition of Unfair Market Behaviour and Restriction of Competition), the time limits in proceedings related to the prohibition of unfair influence on business decisions may be three months, in proceedings related to restrictive agreements or practices contrary to the prohibition of abuse of dominant position six months, in certain merger proceedings six months, whereas in other proceedings four months, thirty days or sixty days.

Another example is section 164 of Chapter XII of Act No. CXLIII of 2015 on Public Procurement, according to which the Public Procurement Arbitration Committee is obliged to conclude the proceedings within fifteen days from the beginning of the deadline for the submission of the case, if the case has not been heard. If the Arbitration Committee has held a hearing in the case, it must conclude the proceedings within twenty-five days of the start of the time limit for the submission of the case. The Arbitration Committee must conclude the proceedings within sixty days of the date on which the proceedings were initiated in the case of a modification or performance of a contract concluded on the basis of public procurement proceedings that are contrary to the Public Procurement Act, in the case of non-reliance on public procurement proceedings, and in cases where the proceedings of the Arbitration Committee are initiated *ex officio* and the contract has already been concluded in the public procurement proceedings against which a remedy is sought.

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

Article XXIV(1) of the Fundamental Law of Hungary provides that everyone shall have the right to have his or her affairs handled impartially, fairly and within a reasonable time by the authorities.

The same right can be found, as an element of the principle of legality, among the fundamental principles of the Administrative Authority Procedures Act. According to **section 2(2)(c) of the**

Administrative Authority Procedures Act, in exercising its powers, the public authority shall act within a reasonable time within the time limits laid down by law.

This issue involves two different but concurrent principles. What is reasonable, is established in relation to the circumstances of the given case and is not as precise requirement as a statutory time limit. The reasonable time requirement may even oblige the authority to act before the expiry of the time limit. On the contrary, a case pending for decades may be regarded to have been completed within a reasonable time if the circumstances of the case objectively required so much time. Hence, the constitutional-level requirement of the completion of proceedings within a reasonable time is not necessarily congruous with the observation of the time limits set out in procedural law.

It follows from the right to a fair administrative procedure, as guaranteed by the Fundamental Law, that if the administrative authorities violate the time limits set out by the legislator for taking decisions and applying sanctions (imposing administrative fines), the consequences thereof should not be borne by the clients, but by the defaulting authority [see Constitutional Court Decision no. 5/2017 (III.10.) AB).

In its judgment adopted in case no. Kf.IV.38.020/2019, the Curia emphasised that the right to fair administration also includes the requirement to complete the proceedings within a reasonable time. The reasonableness of the duration of the proceedings must be assessed in the light of the specific circumstances of each case, including the importance of the case for the party (what was at stake) concerned, the complexity of the case, and the conducts of the applicant and the competent authority.

In its decision no. 25/2020 (XII.2) AB passed on the issue of tax penalty, the Constitutional Court has clearly identified the constitutional elements of exceeding the time limits specified for imposing sanctions. The contested legal act underlying the Constitutional Court's decision was judgment no. Kfv.I.35.454/2018/5 of the Curia of Hungary. This Constitutional Court decision can be considered as a landmark decision, which also had far-reaching impact on the jurisprudence of the courts. The Constitutional Court explained that, in the application of section 219 of Act No. CL of 2017 on the Rules of Taxation (Taxation Act), it is a constitutional requirement flowing from Article B(1) and Article XXIV(1) of the Fundamental Law that the tax authority should, when imposing a tax penalty, consider *ex officio* the time taken to reach a decision. If it finds that its first instance decision was taken after an unreasonably long period of time, it must reduce the amount of the tax penalty in proportion to the damage caused to the taxpayer or, in a particularly justified case, it must refrain from imposing a tax penalty, and must state the reasons for its consideration in the decision.

The operative part of the decision introduces two novelties, as compared to the previous situation: firstly, in addition to the right to fair proceedings, it identifies the rule of law and the resulting legal certainty in relation to the completion of the proceedings within a reasonable time; secondly, it introduces the requirement of proportionality in the imposition of a legal consequence for exceeding the time limit.

The Constitutional Court has pointed out that the right to the administration of cases within a reasonable time does not lay down a specific, quantified time-limit or deadline for

public authority decisions completing the proceedings, nor does it call for statutory time-limits, but creates a right at a high level of abstraction for everyone to have their cases dealt with and completed by the public authorities within a reasonable time.

Violations of the constitutional requirements can be decided on a case-by-case basis, according to the specificities of the individual cases. Thus, the nature of the administrative sanction imposed, the specificities of the administrative procedure, the legal nature of the time limit missed, and other characteristics must be examined. In this way, the Constitutional Court has developed an independent test for assessing the constitutionality of time limits for the application of sanctions.

Decision no. 25/2020 (XII.2.)AB of the Constitutional Court in a way separated the enforcement of the constitutional requirement from the observance of the statutory deadlines. This was later confirmed by further decisions of the Constitutional Court, e.g. decision no. AB 3458/2020 (XII.14.), which pointed out that the imposition of a tax penalty was not unconstitutional merely because of a breach of the procedural time limit, since the statutory procedural time limit could not be mechanically identified with the reasonable time limit within the Fundamental Law.

In its judgment in case no. Kfv.IV.37.759/2021, concerning the review of a judicial decision having declared the unlawfulness of a competition authority decision, the Curia explained that the formal observance of a procedural time-limit did not mean that the authority had completed the case within a reasonable time. Even proceedings of short duration in absolute terms could be found to have been protracted if it was not possible to identify the efforts made by the authorities concerned to reach a decision as soon as possible, while respecting the fair proceedings requirements. Section 63(8) of the Competition Act specified 17 cases when certain time periods are not to be taken into consideration when the time limit for the administration of a case is being calculated. The successive use of such time periods and/or the repeated taking of certain acts (e.g. supplementation of documents) may create a situation where the time limit for the administration of the case is formally legally observed, but the reasonable time limit required under fundamental law is nevertheless infringed. In the case at issue the Curia considered the legal deadline to have been observed, but emphasised the proportionality aspect, stressing that the three-year long procedural time limit must be taken into consideration among the mitigating circumstances when the fine amount is determined.

In its judgment no.Kfv.VI.37.026/2022/8. the Curia stated in the part addressing the relevant principles that a decision taken within the time limit set out for the administration of a case can only violate the fundamental right to fair proceedings if it can be established that the undue delay of the authority led to the protraction of the proceedings.

The Curia has stressed that "fair proceedings" represent a quality which can only be assessed by taking into account the entirety of the proceedings and the circumstances of the case. Therefore, despite the absence of certain details and despite the observance of all the detailed rules, proceedings may still be unfair or unjust. In making this assessment, it is necessary to assess the applicable legal context, the decision under review, the purpose of the legislation, and the facts of the given case.

A statutory procedural time limit cannot be mechanically identified with the reasonable time required under the Fundamental Law. The decisive factor in assessing whether there has

been a breach of the right to good administration is not whether the authority has breached the law setting the time limit, but whether the authority's undue delay can be established in respect of the entirety of the proceedings.

In the case at issue, the Curia concluded that the Competition Authority had acted actively and in cooperation with the undertaking involved in the case in clarifying the facts, and had made every effort to bring the proceedings to a speedy conclusion, had not delayed them unnecessarily, and had therefore lawfully adopted its decision. In its assessment, it took into consideration the complexity of the case, the time needed for the taking of evidence, including, for example, the need to contact foreign authorities.

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

In relation to the three types of procedures specified under section 50 and section 39 of the Administrative Authority Procedures Act, three general time limits are set for the competent authorities: (1) twenty-four hours in case of automatic decision-making, (2) eight days for summary proceedings and (3) sixty days for full proceedings (see the reply to point 1 above).

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

Section 50 of the Administrative Authority Procedures Act does not allow for the authorities to extend the time limit set for the administration of a case, nor does it provide for such an extension.

However, a separate Act of Parliament may allow such extension. This is the case, for example, with the Competition Act, section 63 of which allows the President of the Competition Authority or, in justified cases, the President of the Competition Council may extend the time limits before their expiry: in proceedings concerning the prohibition of unfair influence on business decisions on two occasions, each time for a maximum of two months; in proceedings concerning restrictive agreements or practices that infringe the prohibition of abuse of a dominant position on two occasions, each time for a maximum of six months; or in merger proceedings.

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

Since the Administrative Authority Procedures Act does not allow the extension of the general time limits applicable to the administration of the various cases, the possibility raised in the question does not exist, since no appealable decision exists.

Against a competition authority order extending a time limit, no independent remedy can be filed.

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

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

- Rather yes
- Rather no

We note, however, that no precise statistics are available.

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

In the absence of statistical data, the question is difficult to answer. Lack of institutional capacity is probably the main reason for missing administrative deadlines.

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

The Administrative Authority Procedures Act sanctions the exceeding of the time limit set for the administration of cases by imposing on the authority the obligation to pay fees and charges, and by exempting the client from paying the procedural costs. Pursuant to section 51 of the Administrative Authority Procedures Act, if the public authority exceeds the time-limit set for the administration of the given case, the public authority shall be obliged to pay the client an amount equal to the fee payable for the procedure, or the administrative service fee for the use of administrative procedures or services of an administrative nature under the Act on Fees or, failing that, HUF 10 000, and the client shall also be exempt from paying the procedural costs.

If the client suffers loss or damage due to the authority's failure to meet the time limit, the client may also claim damages. Pursuant to **Section 51(2) of the Administrative Authority Procedures Act**, the authority shall issue a certificate on the extension of time limit at the request of the client, which then may be used in the court proceedings instituted for the compensation of the

loss or damage caused in the exercise of administrative authority. Under **section 24 (3) of Act No. CXXX of 2016 on the Code of Civil Procedure** (Code of Civil Procedure), the enforceability of a claim for compensation for damage caused in the exercise of administrative authority is subject to the condition that the court hearing the administrative case - if administrative judicial remedies are available - has found a violation in a final decision.

Pursuant to **section 103(4) of the Administrative Authority Procedures Act**, if the authority exceeds, in *ex officio* proceedings, twice of the length of the time limit set for the administrative procedure, it may not impose any legal consequence other than a finding of the infringement or ordering to cease the unlawful conduct or to restore the lawful situation. In such a case, no new proceedings may be initiated against the same client on the same factual and legal basis. (The above provision of the Administrative Authority Procedures Act does not apply to all official proceedings, e.g. to competition proceedings.)

Under section 6:548 (1) - (2) of Act No. V of 2013 on the Civil Code (Civil Code), liability for damage caused in the exercise of administrative authority may be established if the damage was caused by the exercise of public authority or the failure to exercise public authority, and the damage could not be remedied by ordinary legal remedies or in administrative lawsuit.

The legal person exercising public authority shall be liable for damage caused in the exercise of public authority. If the person having exercised public authority is not a legal person, liability for the damage shall be borne by the administrative body having legal personality in the framework of which the administrative body having acted in the case operates.

According to the established jurisdiction of the courts, errors in the application or interpretation of the law in the exercise of public authority in individual cases will give rise to liability for damages only if they are manifestly serious.

Administrative silence

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

No, Hungarian law does not define the legal concept of administrative silence.

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. The Administrative Authority Procedures Act allows for administrative silence in by using a differentiated approach to the various types of proceedings and only in administrative proceedings started upon request.

Under section 80(2) of the Administrative Authority Procedures Act, the client is entitled to exercise the requested right if the authority fails to take a decision within the time limit set for the administration of the case. This is called lawful silence, which is possible (1) in a case that can be handled in an automatic decision-making procedure and no Act of Parliament or Government Decree excludes it, (2) in a case that can be determined in summary proceedings, the law or a government decree so provides, (3) in full proceedings, if an Act of Parliament or a Government Decree so provides, and there is no opposing party in the case. The logic of the regulation is that as fact-finding in a case becomes more and more complex, the conditions for implicit decision-making become more and more stringent.

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

The Hungarian legal system follows the positive model.

The negative model

Based on the answer to the above point, it can be established that Hungarian administrative authority procedural law does not contain a silence-refusal rule. Hungarian general procedural law has never used the silence-refusal (negative silence) rule. Therefore, we cannot answer the questions asked in this part.

1. What are the types of administrative procedures that the negative model can be applied to:

    - Procedures that are initiated on the basis of an application or claim by a person
    - Ex officio procedures
    - Other

    Please specify your answer briefly, if necessary

2. Does the negative model mean that a person's application or claim is automatically considered to be rejected or are extra actions required in order for the person to be able to appeal the rejection (for example, does the person have to provide proof that authority has been silent on the particular matter in order for it to be able to appeal the rejection)?

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

The primary aim is to simplify certain administrative procedures, but the secondary aim is to protect the rights of individuals. Moreover, this regulation is also in line with the harmonisation done in the context of the positive silence mechanism provided for in Article 13(4) of Directive 2006/123/EC on services in the internal market.

The legal institution of implicit decision-making, of silence-consent was already recognised in Act No. IV of 1957 on the General Rules of State Administrative Procedure (State Administrative Procedure Act), was also applied in Act No. CXL of 2004 on the General Rules of Administrative Authority Procedures and Services (Administrative Authority Procedures and Services Act) and is also regulated in section 80(2) of the Administrative Authority Procedures Act in force at

present. Implicit decision-making has undergone continuous changes over the past decades, both in terms of regulation and interpretation.

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

The Hungarian legal system allows for the use of silence-consent in accordance with the various types of procedures. In (1) automatic decision-making proceedings, this is the general rule, from which an Act of Parliament or a Government Decree may derogate; in (2) summary proceedings and (3) full proceedings, however, it is only possible if a separate Act of Parliament or a Government Decree allows it, whereas in the case of full proceedings, an additional condition is that no opposing party exists in the case. These provisions are properly applicable to the specialised authorities via the rule of application relating to specialised authorities. (See also the response to question 3 under the heading "Administrative silence".)

At this juncture, however, it is important to note, that prohibitions on the use of the positive model can be found in individual sectoral rules. One example is the restriction in section 3 of Government Decree No. 253/2004 (VIII.31) on Weapons and Ammunition, according to which no lawful silence is possible in the licensing process provided for in section 3 of Act No XXIV of 2004 on Firearms and Ammunition.

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

The client shall be entitled to exercise the requested right if the authority fails to take a decision within the time limit set for taking a decision. [See section 80(2) of the Administrative Authority Procedures Act]

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 case of a lawful silence, the authority shall record the acquired right on the application and on a copy of the application possessed by the client or shall issue a copy of the copy possessed by the authority to the client. [See section 80(3) of the Administrative Authority Procedures Act].

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

The national legislation does not provide for any specific remedies available to third parties affected by a so-called "fictitious decision" granting the exercise of the requested right.

The positive model shall not apply where the case involves an opposing party, therefore the right of remedy is irrelevant.

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?

The annulment of the fictitious decision granting the requested right is possible under section 123 (1) (g) of the Administrative Authority Procedures Act, namely if an additional client should have been involved in the proceedings. National legislation on this issue does not deviate from the general procedural rules.

Under section 123(1)(g) of the Administrative Authority Procedures Act, a decision of a public authority which has been taken in proceedings in which an additional client should have been involved is *ab ovo* null and void. The inclusion of known clients in the proceedings and the examination of the client's standing is an *ex officio* obligation of the authority under section 5(2)(a) of the Administrative Authority Procedures Act, whether the proceedings are initiated or continued upon request or *ex officio*. [See. Bír. Kfv.II.37.542/2009/7.; Főv. Judg. 3.Kf.27.207/2011/2.; Curia Kfv.I.35.473/2012/4.]. In contrast, the "discovery" of unknown clients is not an obligation of the proceeding authority, in such a case it must be ensured that the authority makes every effort to ensure that the persons who may be potential clients in the given proceedings are aware of the proceedings. The jurisprudence is also consistent in that a failure to allow a client to exercise his rights as a client in the proceedings leads to the annulment of the decision, since the unlawful denial of the client status violates the fundamental right to fair administrative authority proceedings and the right to a remedy.

Since it is closely linked to the question raised, it should be mentioned that in addition to annulment, a range of so-called *ex officio* remedies are also available, namely modification or revocation of the decision by the authority in its own competence, supervisory proceedings, and action by the public prosecutor in the public interest.

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?

Directive 2006/123/EC of the European Parliament and of the Council on services in the internal market is transposed into Hungarian law by Act No. LXXVI of 2009 on the general rules for the taking up and pursuit of service activities (Services Act). Article 13(4) of the Directive is transposed by section 14 of the Services Act, which provides that the client may not exercise his right in case of the authority's failure to act if it is excluded by a special law or a Government Decree issued under original legislative power for compelling reasons in the public interest. In the absence of such a circumstance, the principle of silence-consent applies in all licensing procedures covered by the Act (exceptions are set out, for example, in the Law on the Activities of Lawyers and in the Accounting Act in respect of the activities of accounting services). The compelling reasons relevant to a particular type of case do not need to be indicated at legislative level.

No information is available on difficulties encountered in the implementation of this Article 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?

Section 127 of Act No. I of 2017 on the Administrative Court Procedure (hereinafter: Administrative Court Procedure) provides for a lawsuit that can be brought against an administrative body for failure to fulfil its statutory obligation to perform an administrative act. The Ministerial Explanatory Memorandum to this Article points out that the function of the so-called "**action for failure to act**" is to provide the party with legal protection against infringements of the law caused by the passive action of the public administration. If an administrative body fails to fulfil its statutory obligations, it commits an infringement by its passive conduct. It was necessary to designate the action as a separate type of action because the rules governing administrative actions under the general part presuppose an active act on the part of the administrative body, an act which is absent in the case of an action for failure to act: it is the failure to act that constitutes the administrative body's breach of the law.
As a general rule, an action for failure to act is heard by a single judge, but in cases of particular complexity the case may be referred to a judicial panel. Actions for failure to act are generally simpler than general administrative actions, they do not require extensive evidence taking, and the court only has to decide whether the administrative body has fulfilled its procedural obligation and whether it has complied with it. Therefore, in such cases the court acts in a simplified procedure.

In its decision No 1/2022 KJE on the prerequisite for bringing an action for failure to act, the Curia of Hungary stated that in the absence of a statutory provision expressly providing for a procedure to remedy the failure to act referred to in section 128(2) and (3)(e) od the Administrative Court Procedure Act, the initiation of such an action is not subject to the condition that the client initiate supervisory proceedings or apply to the supervisory body pursuant to section 15(2) and § 113(2)(b) of the Administrative Authority Procedure Act. In fact, under the current Administrative Authority Procedure Act there is no supervisory (legal remedy) procedure at all that can be used in administrative authority proceedings that would comply with the provisions of section 128(2) of the Administrative Court Procedure Act, which is intended to remedy a failure to act. And no condition can be imposed on a party which it cannot fulfil within the legal framework. This interpretation does not prevent the supervisory body from taking action if the client notifies it of the failure, it merely precludes the possibility of preventing the filing of a lawsuit on account of a failure to notify.

The situation to which the question refers, namely that the law regulates administrative silence neither in accordance with the positive, nor the negative model, cannot be applied to the Hungarian legal system.

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?

As explained above, pursuant to **section 6:548 subsections (1) - (2) of Act No. V of 2013 on the Civil Code (Civil Code),** liability for damage caused in the exercise of administrative authority may be established if the damage was caused by the exercise of public authority or the failure to exercise public authority, and the damage could not be remedied by ordinary legal remedies or in administrative lawsuit.

The legal person exercising public authority shall be liable for damage caused in the exercise of public authority. If the person exercising public authority is not a legal person, liability for the damage shall be borne by the administrative body having legal personality under which the administrative body having acted in the case is operating.

According to the established jurisdiction, errors in the application or interpretation of the law in the exercise of public authority in individual cases shall only give rise to liability for damages if they are manifestly serious.

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?

We are not aware of any such case in Hungary.

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.

We are not aware of any such case in Hungary.

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 reference has been made to the Court of Justice of the European Union by a Hungarian court or tribunal.

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

    4.1. Construction, spatial development planning and environmental protection

In this area, too, the positive model applies according to the general (not sector-specific) rules described above.
Section 53/E of Act No. LXXVIII of 1997 on the Shaping and Protection of the Built Environment stipulates under the heading “Rules of the procedure of the building and building supervision

authorities" that the competent authorities may not impose in their opinions any additional conditions or requirements for granting the permission for use of a building compared to those laid down in their opinions on the building permit proceedings, nor may they refuse to grant an opinion on the grounds that the rules in the field have changed in the meantime. **If the competent authority fails to issue an opinion within the time limit specified for its procedure and no opposing party is involved in the proceedings, its consent shall be deemed to have been given.**

4.2. Social security

In this area, too, the positive model applies according to the general (not sector-specific) rules described above. Act No. CXXII of 2019 on Persons Entitled to Social Security Benefits and on the Coverage of These Benefits provides that in areas not regulated by that Act (among others) the provisions of the Administrative Authority Procedures Act shall apply, includes the above presented provisions of the Administrative Authority Procedures Act.

4.3. Freedom of information

In this area, too, the positive model applies according to the general (not sector-specific) rules described above.

Administrative discretionary power

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

In the Hungarian legal system, the scope of administrative decisions taken in the exercise of discretionary powers was defined in an Opinion of the Administrative-Labour Department (at present: Administrative Department) of the Curia of Hungary (Opinion 2/2015 (XI.23.) as follows:

A discretionary administrative decision is a decision in which the authority bases its decision on a piece of legislation that only defines the framework of the decision. A discretionary decision is also a decision where the legal provision defining the options for a decision does not specify the conditions and criteria for the decision. An administrative decision is not a discretionary decision if the authority decides on the basis of an assessment of the evidence necessary to reach a decision, by applying a legal rule which does not provide for discretionary powers.

Substantive administrative law also indicates the aspects of discretion in several cases. Aspects of discretion are the circumstances which the public authority must take into consideration in the exercise of its discretion on the merits.

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*)?

Hungarian legal terminology (discretionary power/decision made in the exercise of discretion) does not distinguish between "discretion" and "margin of appreciation" but in terms of content,

we can speak of a type of discretionary power that is distinct from the definition explained in point 1 above (discretion) and corresponds to the category of "margin of appreciation (scope of appraisal) in the interpretation of undefined legal concepts", i.e. the discretionary power to interpret the undefined concepts on which the decision is based. But this kind of discretion is not separately regulated and categorised in the Hungarian legal system.

Examples of the latter are the Competition Authority decisions which result from the exercise of the Authority's discretionary power: i) most significantly, the Competition Authority's practice relating to the imposition of fines and, more broadly, to the imposition of sanctions (e.g. the elaboration in practice through discretionary decisions of concepts such as what constitutes a "very serious infringement" in the criteria for determining a fine); (ii) and such discretion is also exercised by the Competition Authority, when it decides on requests from undertakings as to whether the information contained in their replies to questionnaires constitutes business secrets.

As to the interpretation of the English terms used in the question, in Hungarian administrative legal terminology it is misleading that the terms "diszkréció"/"diszkrecionális jogkör" ('discretion' and 'discretionary power') exist but their content is not identical with margin of appreciation. According to the relevant literature, "diszkréció" (free discretion/insight) gives the decision-maker a broader "room for manoeuvre" than margin of appreciation, so it is important to distinguish between this latter concept and discretion, as discretion is not the same as margin of appreciation. "Diszkréció" (free discretion/insight) means that the decision of an administrative body is not bound by the law. It can take several forms: the administrative body can act when the law does not regulate the activity in question, when no authorisation exists but the state's objectives or interests require the taking of the decision; the administrative body is allowed to take a decision which departs from the legal norm; and finally, there can be a situation where the law authorises the administrative body to act but does not specify the content of the action to be taken. "Diszkréció" (free discretion/insight) has lost significance as a result of the requirement and dominance of the rule of law in public administration, since the rule of law requirement necessitates and entails the adoption of appropriate legislation.

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.

Based on the relevant provisions and jurisprudence of Hungarian administrative law, we can answer the question adequately with regard to "discretionary power" (see the answer to point 1).

In Hungarian administrative law, the freedom ensured by discretion may have various forms (based on KMK Opinion 2/2015 (XI.23.):

(1) **Discretion appearing in the enumeration of decision options**. Classic examples of this are some of the former statutory provisions on social benefits, which only provided for the possibility of granting a particular benefit ("may be granted") under certain conditions. Hence, in such cases the law only enumerates the decision options, from which the authority can choose.
(2) **When the law sets only the framework for the decision**. It applies predominantly in cases concerning the imposition of fines, usually by setting the upper limit or both limits of the fine. (As to the example of the Competition Authority mentioned above, the Competition Authority has wider discretion, because that discretion extends to the definition of the concepts underlying the criteria for the imposition of the fine.)
(3) Regulatory solutions where **the law only empowers the authority to take a decision but does not specify the conditions or criteria thereof**.
Relevant and typical case law example (Kfv.III.37.188/2021.):
The first instance public body authority excluded the applicant from the Chamber because, in its opinion, the applicant had not complied with the Chamber's data reporting requirements in 2017-2019, as it had not provided data within the time limits set by the Auditing Act and the Statutes of the Hungarian Chamber of Auditors. As aggravating circumstance, the public body authority assessed that the applicant's 3 consecutive annual data submissions to the Chamber were incomplete, so that the infringement was repeated. In addition, the applicant recorded an annual commission fee of HUF 40 000 to 80 000 per client for 24 omitted mandates, which is a fraction of the Chamber's recommended fee. The first instance court hearing the case held that the application of a blatantly low commission fee could not be taken into account as an aggravating circumstance. On the other hand, it also stated that, even without taking account of the aggravating circumstance, the failure to provide all the information required for three years and the failure to provide part of it in good time was sufficient for the most severe penalty to apply. According to the Curia of Hungary, which dealt with the case in review proceedings, by its latter conclusion the first instance court itself assessed the further aspects which could be assessed. In its judgment, it took over the role of the administrative authority. **After having declared the authority's assessment to be unlawful, the first instance court itself assessed the remaining aspects that could still be assessed. By its judgment, it took over the role of the administrative authority.** Therefore, the Curia changed the first instance judgment, quashed the contested order, and remitted the case to the first instance authority.

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.

Based on the relevant provisions and jurisprudence of Hungarian administrative law, we can answer the question with regard to the "discretionary power" (see the answer to point 1).

Section 85 of the Administrative Court Procedure Act sets out the limits of the discretionary power of the administrative court. Under subsection 5 of that provision, in addition to the general aspects for review, "[i]n the context of the legality of an administrative act carried out

within discretionary powers, the court shall also examine whether the administrative body exercised its powers within the limits of its discretionary powers, whether the criteria for discretion and their reasonableness can be ascertained from the document containing the administrative act."

According to KMK Opinion 2/2015 (23.11.2015) referred to in the reply to point 1, the purpose of the review of an administrative decision taken under discretionary powers is to assess the legality of the decision, in accordance with the general purpose of administrative proceedings. According to the relevant practice of the Curia of Hungary, this means that if the law lays down the criteria for discretion, the administrative court must assess, in the context of the action, whether the administrative body has applied those legal provisions in reaching its decision. The court may not base its decision on the fact that, although the decision of the administrative body is not unlawful, another, equally lawful decision may be taken in the matter within the limits of the law, with a different assessment. In this case, the court would take over the role of the administrative authority and decide on a matter which falls exclusively within the competence of the administrative body. The judicial review of legality does not give the court the possibility to override the discretion of the public authority (Kfv.III.37.188/2021.)

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?

According to Article 28 of the Fundamental Law of Hungary, the laws - including administrative laws allowing for discretion – shall be interpreted in accordance with the Fundamental Law. This rule is relevant in the sense that judicial review must cover the question whether the administrative body has, in exercising its discretionary power, complied with its obligations under the Fundamental Law in cases where the exercise of the discretion has resulted in the restriction of a fundamental human right protected in the Fundamental Law.
Under section 26(1) of Act No. CLI of 2011 on the Constitutional Court, persons or organisations affected by a particular case may submit a constitutional complaint to the Constitutional Court where, as a result of the application of a law not being in conformity with the Fundamental Law in the court proceedings conducted in their case, the rights ensured for persons or organisations under the Fundamental Law were violated. Hence, constitutional complaint is also available to a body or person whose fundamental human rights protected by the Fundamental Law have been restricted as a result of an administrative authority decision taken in the exercise of discretionary powers, provided that the body or person has challenged the decision before an administrative court, and the court has determined the case by applying a law which has not been in conformity with the Fundamental Law. For a constitutional complaint may only be lodged if the person concerned has exhausted the available remedies or no remedy has been available.

The criteria for an appropriate, Fundamental Law conform interpretation applicable to cases involving fundamental rights have been worked out in the Constitutional Court's practice. In this respect, decision no. 5/2017 (III. 10.)AB of the Hungarian Constitutional Court can be mentioned, in which the Constitutional Court examined the exceeding of the statutory time limits by the administrative authority in the context of the right protected in the first sentence of Article XXIV (1) of the Fundamental Law, namely that "everyone shall have the right to have his or her affairs handled impartially, fairly and within a reasonable time by the authorities." The Constitutional

Court's decision stated that "a fundamental condition to the equitability and fairness of the administrative authority proceedings is that the administrative authority observe the applicable statutory time limits. This requirement must be strictly adhered to, especially where the administrative authority imposes a sanction on the client. The purpose underlying the setting out of substantive administrative sanctions in statutes is to ensure that no person in the position of a client in administrative authority proceedings, on whom the administrative authority has imposed an adverse legal consequence for a breach of an administrative norm by the client, is exposed to a threat of being subject to a sanction for a long and uncertain period of time, contrary to the existing legal provisions governing substantive time limits. [...] It follows from the fundamental right to fair administrative authority proceedings, guaranteed by the Fundamental Law, that the burden of the administrative authority's failure to comply with the time limits set by the legislature for the adoption of a decision and the imposition of a sanction should be borne by the authority having failed to comply with its legal obligations within the prescribed time limits, and not by the client. [...] Consequently, a contrary judicial interpretation, namely an interpretation not attaching to the administrative authority's failure to comply with the statutory time limit for the imposition of a sanction the consequence of the loss for the defaulting authority of the opportunity to impose a sanction, that is, a judicial interpretation finding that an administrative authority having failed to comply with the substantive time limit did not, for that reason alone, commit a violation having affected the merits of the case, is contrary to Article XXIV(1) of the Fundamental Law." (AB Decision 5/2017 (III. 10.), [15] - [17]).

Under the Hungarian legal system, such situations can be mentioned as further examples, in which the law allowing for the exercise of discretion attempts to set limits to possible restrictions on human rights in and through the exercise of discretion. Thus, for example, section 51 of Act No. II of 2007 on the Entry and Residence of Third-Country Nationals provides, in accordance with the relevant international and EU legal standards, by overriding the discretionary power of the authorities, that "return or expulsion may not be ordered or carried out to the territory of a country which is not considered a safe country of origin or a safe third country, in particular, where the third-country national would be exposed to the risk of persecution on account of his or her race, religion, nationality, membership of a particular social group or political opinion, or to the territory of a State or the border of a territory where there are serious grounds for fearing that the third-country national who is being returned or expelled would be in danger of being persecuted for reasons contrary to Article XIV of the Fundamental Law. (non-refoulement)."