REPUBLIC OF LATVIA
SUPREME COURT
SENATE

ACA EUROPE

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

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

Administrative time limits

1. Are specific administrative time limits within which authorities must take administrative decisions or complete administrative actions set in your legal system?

   - Yes
   - No
   - Only in certain areas of law

   Please specify your answer briefly, if necessary

   The Latvian legal system sets specific time limits within which authorities are obliged to take administrative decisions or complete administrative actions.
   Moreover, the principle of good administration obliges the authorities and public administration in general to act within the time limits set by law.

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 are set in the Administrative Procedure Law, providing that the authority (an institution) shall issue a decision (an administrative act) within one month from the day of receipt of the submission.
   The special laws may also specify other time limits. A longer time limit can only be set by law, while a shorter time limit that is more favourable to persons can also be set by another legal acts, such as Cabinet regulations or binding regulations of local governments.
   For example, according to the Law on the Election of Local Government Councils, submitters of the lists of candidates as well as the nominated candidates have the right to contest a decision of the election commission regarding approval of election results within three working days after the day of taking thereof to the Central Election Commission. The Central Election Commission shall take a decision within three days (Section 45^1). According to the Competition Law the Competition Council shall take a decision within six months from the day of the initiation of a case. According to the Law

on the Safety of Public Entertainment and Festivity Events the local government shall examine a submission within 10 days of the date of receipt thereof (Section 7).

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

   In the Latvian legal system the administrative time limits usually are specifically set out in law and the concept of "reasonable time" is not commonly used to define administrative time limits.
   However, according to the State Administration Structure Law, the state administration shall comply with the principles of good administration in its activities, including the fair implementation of procedures within a reasonable time period (Section 10(5)). So, in cases where the law does not clearly set a time limit for an action the authorities are obliged to act within a reasonable time.

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

   As mentioned in the answer to question No.2, the general administrative time limit in which administrative decisions are made is one month.

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

   According to Section 64(2) of the Administrative Procedure Law, if it is impossible to comply with the general time limit of one month for objective reasons, the authority may extend it for a period not exceeding four months from the day of receipt of the submission by notifying the submitter thereof. If lengthy establishment of facts is necessary, the time limit for issuing a decision may, by a reasoned decision and by notifying the submitter thereof, be extended by up to year by an authority to which decision may be contested but if there is no such higher authority or it is the Cabinet, a decision shall be taken by the head of the authority which issues the decision.
   Special laws may also provide for extension options. For example, according to the Competition Law, if the general time period of six month cannot be met due to objective reasons, the Competition Council may extend it for a period of up to one year counting the time period from the day of the initiation of a case. If prolonged fact-establishing is required in the case, the Competition Council with a justified decision may extend the time period for taking a decision to a period not exceeding two years from the day of the initiation of a case (Section 27).
   However, the extension cannot be arbitrary. According to the case-law of the Supreme Administrative Court, an extension of the time limit is permissible only in order to clarify all the circumstances necessary for taking an objective decision in the case.

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

   According to Section 64(2) of the Administrative Procedure Law, the decision on the extension of the time limit may be contested to a higher authority in accordance with the procedures regarding subordination. If there is no such higher authority or it is the Cabinet, as well as the decision on the extension of the time limit of the higher authority, it may be appealed directly to the court.
   The court shall examine the complaint in a written procedure at one instance, with no right of appeal.

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

   The law does not prohibit an authority to make any decision, even unfavourable to the submitter or the potential addressee of the decision, after the time limit set by law has expired.
   However, if such procedural violation admitted by the authority in administrative procedure in failing to comply with the time limit has caused a significant infringement of rights or legal interests of a person, a person has the right to contest and appeal such a decision for claiming compensation or in order to prevent recurrence of similar cases.

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

Failing to comply with established administrative time limits is not a common issue in Latvia. However, situations where an authority fails to take administrative decisions or complete administrative actions within the time limit set by law are usually related to a lack of resources within the authority (e.g. lack of staff) or improper organisation of administrative activities.

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

    If the failure of an authority staff member to comply with the time limit has caused serious or significant consequences, the particular staff member could be held administratively liable.
    For example, according to the Law On Disciplinary Liability of State Civil Servants, non-fulfilment or delayed, negligent or poor quality fulfilment of official duties, specific order or task shall be recognised as a disciplinary offence (Section 36).

Administrative silence

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

   No, the Latvian national legislation does not define "administrative silence" as a legal concept.

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

   Yes, the Latvian legal system provides for the negative model as a general principle in the case of administrative silence. It means that administrative silence shall be recognised as a deemed refusal of a claim unless the law provides otherwise.

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 Latvian legal system provides for a positive model of administrative silence. This model was mainly implemented by transposing 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 into national legislation.

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

   Latvian legal system is more typical of the negative model as a general principle in the case of administrative silence.

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

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)?

   Administrative silence shall be recognised as a deemed refusal of a claim. The regulation does not provide for any extra actions in order for the person to be able to appeal the refusal.
   When submitting a complaint to a higher authority or a court, the person may have to provide a copy of the claim or application he or she made to the “silent” authority.

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.

   In the case of silence by a lower authority, the person has the right to submit a claim to a higher authority. In the case of silence of a higher authority in the process of contesting a decision of a lower authority the person has the right to submit a claim directly to the court. In such a case, the person is deemed to have complied with the procedures for extrajudicial examination of a case.
   If there is no higher authority or it is the Cabinet, in case of silence of the authority the person may have recourse to the administrative court for a decision on the matter.
   A person has the right to apply to a higher authority or to a court when the time limit set by law for the authority to take a decision or an action has expired and the authority has failed to act. The appeals process follows the general procedure.

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

   In accordance with the general regulation and established case-law in situations of administrative silence the person may have recourse to the court for a decision on the

matter. The court examines and assesses the lawfulness and validity of the issuance of the decision.

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

   According to Section 254 of the Administrative Procedure Law, if a court finds an application for the issue of a decision to be founded, it shall assign the authority to issue a relevant decision. The authority from which an applicant requires particular action shall be summoned to participate as a defendant.
   In the judgment the court shall specify the content of the decision and the term for its issue if the authority is not anymore required to carry out considerations of usefulness. In this case the court judgment shall replace the decision until it is issued by the authority. The authority is not anymore required to carry out considerations of usefulness if it is:

   1) a mandatory decision (if an applicable legal provision prescribes that a decision of specific content is to be issued);
   2) a decision of free content (if an applicable legal provision prescribes that a decision is to be issued but does not determine specific content thereof) but the court has already carried out all the necessary considerations and has come to the conclusion that only a decision of one specific content may be correct.

   If the authority is still required to carry out considerations of usefulness, the court shall specify in the judgment that the authority shall issue the decision within a specific term. In the issuing of the decision, the facts determined in the judgment and the legal assessment thereof are mandatory for the authority.

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?

   It is the obligation of an authority to properly and in good time enforce a judgment or another decision (ruling) directed against it, rendered or taken by a court in an administrative case (Administrative Procedure Law, Section 375(1)).
   A participant to the administrative proceedings may submit a complaint regarding improper or non-conforming enforcement of a court ruling, and it shall be examined in the written procedure by a court which has rendered the ruling (Section 375(2)).

In deciding a complaint, a court may impose a pecuniary penalty on the responsible official. The minimum pecuniary penalty shall be EUR 50 but the maximum pecuniary penalty shall be EUR 5000 (Section 375(3)).
A person may ask a court to re-impose the pecuniary penalty until the head of an authority or another official enforces or terminates the activity specified in a court ruling. A repeated pecuniary penalty may be imposed not earlier than after seven days (Section 375(4)).

A person also has the right to claim compensation if losses or damage has been caused by unreasonable action of an authority at the enforcement stage of a court ruling (Administrative Procedure Law, Section 92).

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

See the answer to question No.5.

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 it was already mentioned, positive model was mainly implemented in the Latvian legal system by transposing the Article 13(4) of Directive 2006/123/EC into national legislation which states that failing a response within the time period set or extended, authorisation shall be deemed to have been granted. The purpose of such regulation is mainly related to reducing the administrative burden for the establishment and development of services, as well as simplifying and modernising public administration.

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

   The Latvian legal system does not contain any specific prohibitions or restrictions on the application of the positive model.
   A positive model so far has been implemented in some of the specific service areas covered by the Directive 2006/123/EC, assessing, before implementation, whether the application is not in contradiction with public interest.

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

   According to the Freedom to Provide Services Law transposing the Article 13(4) of Directive 2006/123/EC, it shall be considered that an authorisation has been issued by tacit approval if the competent authority does not take and does not notify its decision regarding the granting of an authorisation or the refusal to grant it within the time period specified in the regulatory enactment. This means that a person's claim is deemed to have been granted immediately after the expiry of the time limit.

4. Does the person have to get any kind of confirmation or proof that the claim has been granted? Where and within what time limit does it need to be received?

   No confirmation or proof is required. The fact that a claim is deemed to have been granted is specifically regulated in the law.

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

   National regulation does not provide for specific legal remedies available to third parties affected by the "fictitious decision" of granting a claim. However, if such "fictitious decision" of granting a claim affects the rights or legal interests of a third party, that party has the right to complain against the decision.

6. Is there a certain procedure that allows to annul a "fictitious decision" of granting a claim? If yes, are there any differences from the general procedure?

   As it was mentioned in previous answer, if a "fictitious decision" of granting a claim affects the rights or legal interests of a person, he or she has the right to contest and appeal such a decision according to the general procedure. The only exception to the general procedure concerns the counting of the time limit for appeal in case the decision has not been notified to the person. According to the Administrative Procedure Law if decision restricts the rights or legal interests of a private person but the private person has not been notified thereof, an application may be submitted within one month from the day when the private person has become aware thereof but not later than within one year from the day this decision comes into effect (Section 188(3^1)).

If a higher authority or a court finds an application for setting aside or invalidation of particular decision as founded, it shall set aside the relevant decision in full or in part or declare it invalid.

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?

   In order to implement and transpose the requirement of the Directive in the administrative practice of the responsible authorities, the sectoral ministries had assessed in which areas and which services the positive model could be applied, in particular whether the application is not contrary to the public interest. For example, it was recognised that in the sector of education services, such a model may be in contradiction with public interest and is not applicable in this area.
   To the moment, the positive model has been implemented in around 20 services (travel agent or tour operator registration, issue of special permit (license) for the performance of detective activity, registration of the places of economic activity involving precious metals, precious stones and their articles etc.).
   The potential implementation of the positive model is also assessed in the context of actual amendments to national legislation. For example, in 2022, the positive model in accordance with the Directive was introduced in the Construction Act, providing for administrative authorities to issue a permit, note, and coordination by default.

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?

   As already mentioned, the Latvian legal system provides for the negative model as a general principle in the case of administrative silence, that allows a person to have recourse to the court for a decision on the matter, unless a specific provision states otherwise. Thus, the Latvian legal system is not in a situation where the law does not regulate the administrative silence neither in accordance with the positive, nor the negative model.

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 general, if the administrative silence of the authority has caused the person financial loss or non-financial damage, the person is entitled to claim appropriate compensation. The administrative silence is considered as a procedural violation admitted by the authority in administrative procedure in failing to comply with the time limit. However, compensation cannot be claimed for any procedural violation, but only for a violation if

it has caused a significant infringement of rights or legal interests of a person. When claiming compensation, the person shall justify the losses or damage has been caused to him/her by the violation of the authority.

Case law and regulation in non-harmonised sectors of law

1. Do you have any case-law where national regulation on administrative silence has been found unfounded or inapplicable in a particular case?

   No, there is no such a case-law in Latvia.

2. Do you have any case law on the application or interpretation of the positive model provided for in Article 13(4) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market? If so, please describe the substance of the most relevant cases.

   No, there is no such a case-law in Latvia.

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, Latvia has never submitted such a question to the Court of Justice of the European Union.

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

   4.1. Construction, spatial development planning and environmental protection

   The general principle of negative model described previously is mainly applied in this area of law.
   As an exception in accordance with the Article 13(4) of Directive 2006/123/EC positive model is implemented in the Construction Act, providing for administrative authorities to issue a permit, note, and coordination by default.

   4.2. Social security

   The general principle of negative model described previously is mainly applied in this area of law.
   As an exception in accordance with the Article 13(4) of Directive 2006/123/EC regulations provide for social service providers to be registered in the register by default (if within one month after receipt of the application from the service provider the Ministry does not request additional information and documents, does not take and

notify the decision to refuse to register the service provider, it shall be regarded that the service provider has been registered in the register).

4.3. Freedom of information

There are no specific regulations on administrative silence in this area and the general principle described previously is applied.

Administrative discretionary power

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

In the Latvian legal system, it is recognised that a legal provision (legal norm) usually consists of two parts: the part of the legal circumstances (conditions) and the part of the legal consequences. Discretionary power is related to the part of the legal consequences of the legal provision. In the case of discretion, once the preconditions for the application of a legal provision have been established, the authority may choose from among several alternative legal consequences provided for in the legal provision, rather than applying one specific consequence.

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, the Latvian legal system distinguishes between discretion and margin of appreciation. The concept of discretion has already been explained in the answer to the first question. The margin of appreciation is related to the part of the legal circumstances (conditions) of the legal provision (preconditions for the application of the legal norm). Margin of appreciation may be recognised in cases where the description of the prerequisites for the application of a norm in the part of the legal circumstances (conditions) of the legal provision contains an undefined legal concept.
It is generally considered that it is possible to determine the only one correct content of an undefined legal concept and, consequently, the court may examine whether it has been correctly determined in the light of the factual circumstances of the case. In such a case, the authority has no margin of appreciation.
However, in exceptional cases it may not be possible to identify a single legally correct content of the undefined legal concept in the specific factual circumstances of the case. In such cases, an assessment is required which can only be carried out objectively by the authority concerned. In other words, there are objective reasons for the margin of appreciation in these exceptional cases. Only in such a case the authority has margin of appreciation, i.e. the freedom to fill with content the undefined legal concept according to the factual circumstances of the case.

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.

Discretion

To determine whether the authority has discretion in a particular case, it is necessary to analyse the text of the legal provision.

Discretion has two forms: freedom of issue and freedom of content.

Freedom of issue allows an authority to decide whether to issue or not to issue a decision but, in the event of issue, it determines specific content thereof. Freedom of issue is usually indicated by the use of the words "may", "allowed", "have the right" in the particular legal provision.

Freedom of content means that an applicable legal provision prescribes that a decision is to be issued but does not determine specific content thereof. An authority shall issue such decision by taking account of the frameworks laid down in the applicable legal provision. A legal provision may contain a precise list (catalogue) of possible legal consequences or define a range (field) of possible legal consequences, allowing to choose any legal consequences within the range (e.g. the provision provides that the authority shall impose a fine of between EUR 100 and EUR 5000).

A legal provision may provide for both types of discretion at the same time (e.g. the provision states that "the authority may suspend the permit for up to 6 months").

Margin of appreciation

Two elements must be established in order to recognise that an authority has margin of appreciation in a particular case:

1) the description of the preconditions for the application of the legal norm in the part of the legal circumstances of the provision contains an undefined legal concept;
2) there are objective reasons for the margin of appreciation, i.e. it is not possible to identify a single legally correct content of the undefined legal concept and an assessment is required which can only be carried out objectively by the authority concerned.

In Latvia, the following situations are recognised as objective reasons for recognising the margin of appreciation:

1) an assessment has to be made for a unique non-reproducible situation (e.g. an assessment for an oral examination that is not recorded or otherwise fixed);
2) an assessment is based on personal experience (e.g. in the case of assessment of civil servants);
3) an assessment is mainly based on political considerations or concerns the right of the administration to decide on its own organisation;
4) an assessment is complex, based on non-legal standards or political values, and adopted by a collegial body composed, for example, of experts in different fields or representatives of different social groups.

4. Is there a limit of judicial review of use of discretionary power by the authority in your legal system? If so, please explain possibilities of court examination and assessment in such a case?
   If your legal system distinguishes between discretion and margin of appreciation, please describe both.

   Yes, in the case of discretion and margin of appreciation, judicial control is limited.
   In the case of discretion, the court can only check whether the authority has committed an error in the use of discretion. There are three possible types of error in the use of discretion:
   1) failure to use the discretion, where it is provided for;
   2) exceeding the margin of discretion;
   3) incorrect use of discretion.

   If the court establishes one of these errors, this is a ground for annulment of the unfavourable decision. If the application is for the issue of decision, the court cannot itself specify the content of the decision, because the content of the decision must be determined by the authority in the exercise of its discretion. In such a case the court shall specify in the judgment that the authority shall issue the decision within a specific term. In the issuing of the decision, the facts determined in the judgment and the legal assessment thereof are mandatory for the authority.
   The situation is different if discretion is limited to zero (despite the textual formulation of a legal provision indicating discretion, only one particular legal consequence can be legally correct). In such a case, the court can fully examine whether the authority has applied the only correct legal consequence. If the authority has not done so, the court may annul the unfavourable decision or order the authority to issue a decision of a specific content.
   If the authority has margin of appreciation, the court can only examine whether there has been a manifest error of assessment or an essential procedural violation.

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

   Yes, the judicial review usually affects the fact that the discretionary power used by the authority has resulted in a restriction of human rights. In such cases, the courts are usually more rigorous in their assessment of the principle of proportionality and may substitute its own assessment for the assessment of the authority. If the restriction is found to be not proportionate, the court annuls the unfavourable decision that restricts the human right. In taking this approach, the courts seek to assess proportionality with the same rigour and scrutiny as the European Court of Human Rights.