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

Riga, 27 April 2023

Answers of the Supreme Administrative Court of Lithuania

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

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

Administrative time limits

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

   - ○ Yes
   - ○ No
   - ○ Only in certain areas of law

   Please specify your answer briefly, if necessary

The Lithuanian legal system sets specific time limits within which authorities are obliged to take administrative decisions or complete administrative actions.

The Supreme Administrative Court of Lithuania has noted that non-observance of the time limits in public administration is not compatible with the rule of law, the protection of legitimate expectations, and the principles of legal certainty, legal security and good administration. Time limits for administrative decisions are intended to ensure that the administrative procedure is not excessively extended, and that public authorities fulfil the competence entrusted to them.

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 out in the Law on Public Administration, providing that the subject of public administration must make an administrative decision on a person's request or complaint within 20 working days from the date of receipt of such a request or complaint (Article 10(4)).

The special laws may also specify other time limits, that can be shorter or longer than the general time limit of 20 working days. For example, according to the Election Code, the chairman of the Central Electoral Commission or his authorized member of this commission makes a decision on registration as a participant in an election political campaign no later than

within 3 working days from the date of receipt of all the documents (Article 68(5)). According to the Competition Law, the Competition Council must complete the investigation no later than within five months from the date the decision to initiate the investigation was made (Article 23(5)).

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 Lithuanian legal system the concept of "reasonable time" is not commonly used to define the administrative time limits. The administrative time limits usually are specifically set out in law.

However, the concept of reasonable time may come in handy in cases where the law does not clearly set a time limit for an administrative action. In such cases, public authorities must take administrative decisions or complete administrative actions within a reasonable time, as this comes out of the principle of good administration.

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 20 working days from the date of receipt of request or complaint.

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

If, due to objective reasons, the administrative procedure cannot be completed within the set time limit, the consideration may be extended for a period of no longer than 10 working days. A person should be notified about the extension of the time limit for the consideration and the reasons for the extension within 5 working days (Article 10(4) of the Law on Public Administration).

Special laws may also provide for extension options. For example, according to the Competition Law, the Competition Council may, by a reasoned resolution, extend the deadline for completion of the investigation each time by a maximum of three months (Article 23(5)).

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

The law does not provide for a person's right to complain about the authority's decision to extend the time limit.

The Supreme Administrative Court of Lithuania has stated that the decision to extend the administrative procedure is only an intermediate procedural document that does not cause independent legal consequences and, according to consistent court practice, cannot be the independent subject of an administrative dispute. Nevertheless, the reasons of the extension may be assessed when (if) the final administrative decision is challenged before courts.

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.

According to the case law of the Supreme Administrative Court of Lithuania, the time limit set for the subject of public administration within which an administrative decision must be taken is instructive. This means that expiration of the term established by law, within which an administrative decision must be made, does not negate the competence of the public authority to make an administrative decision or perform other actions. It does not directly create negative legal consequences, but only extends the administrative procedure. If a public authority misses the deadline for making an administrative decision established by law or another legal act, then inaction of the public administration entity can be stated, and this gives the person the right to defend his/her rights by filing a complaint about inaction. In this regard, the person concerned gains the right to complain on the lack of respect for procedural rights, e.g., that the procedure is unduly long. Indeed, excessively long administrative procedure may be a decisive factor with respect to a possible infringement of the subjective rights and legal interest of the person. Furthermore, according to the case law, violation of the mentioned deadlines does not release the public authority from the obligation to make an administrative decision.

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 Lithuania. However, situations where an authority fails to take administrative decisions or complete administrative actions within the time limit set by law are likely to be 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?

According to the Law on Civil Service, non-performance or improper performance of the civil servant's duties due to the civil servant's fault is considered official misconduct. In this regard, a staff member of the institution may be held disciplinary liable if they failed to act within the time limits.

The Supreme Administrative Court of Lithuania has stated that when applying disciplinary liability to civil servants for failure to act, manifested by failure to perform procedural actions established by legal acts within the established terms, there must be assessed not only the objective basis of responsibility for failure to act - having the obligation to perform the actions established by legal acts, but also the subjective basis - the ability to act as required by law.

Administrative silence

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

No, the Lithuanian national legislation does not explicitly 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)?

Lithuanian legal system does not provide for a negative model of administrative silence. Silence on the part of public authorities is rather perceived as an omission. In cases of silence or ignorance on the part of public administration entities (acting with intent or through negligence), an administrative dispute can be initiated. As mentioned before, according to the case law of the Supreme Administrative Court of Lithuania, the expiration of the term established by law, within which an administrative decision must be made, does not negate the competence of the public authority to make an administrative decision or perform other actions. But this gives the person the right to defend his/her rights by filing a complaint about inaction. Furthermore, according to the case law, violation of the mentioned deadlines does not release the public administration entity from the obligation to make an administrative decision.

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

Yes. The Lithuanian 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. In implementing these provisions special laws provide cases of positive administrative silence – usually regulating the issuance of authorisations and licences. The said legislation states that if an application for a licence or authorisation is not replied to within a specified time limit it is to be considered that a positive decision has been made regarding the issuance of a licence or authorisation.

In this regard, one can mention the specific provisions of the Law on Electricity. Article 17(2) provides that the permission is issued if the public authority does not contact the person who has duly applied for the permission in 30 days.

Positive model of administrative is not limited to the sphere of energy and one can note few other areas of public law benefiting from the positive administrative silence. For example, the Law on the Control of Arms and Ammunition sets out that once the police office informs the individual concerned about the receipt of the application and then the set time limit for contacting the individual concerned expiries, it is deemed that the decision on the issue of permit to acquire guns is taken.

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

In general, the model of administrative silence can be viewed as a rather foreign element to the legal system in Lithuania. At this point, it seems to be more of an exception to the traditional approach that includes formal adoption of administrative acts containing explicit reference to the legal basis and factual circumstances. Where a public administration entity misses the deadline for making an administrative decision established by law or another legal act, the inaction of the public administration can be challenged before courts.

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)?

3. Is the process for appealing against a "fictitious refusal" resulting from an administrative silence different from the general appeals process (for example, is there a different time

limit or review body than in general appeals process)? Please describe the main differences.

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

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

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

   Please specify your answer briefly

6. What legal remedies are available in your legal system if an authority has failed to comply properly with a court order to issue a decision?

7. In which cases the court has the competence to decide upon the matter itself instead of the "silent" authority:

   - In all cases
   - Only in cases of objective urgency
   - Only in cases which concern significant rights of the person
   - Only in cases in which the authority has no discretionary power or it is limited to zero
   - Never, because only the authority can make a decision
   - Other

The positive model

1. What is the main purpose of the positive model in your legal system?

   - To simplify certain administrative procedures
   - To protect the rights of individuals in case an authority fails to comply with the administrative time limits

   Please specify your answer briefly

As it was already mentioned, positive model was mainly implemented in the Lithuanian 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.

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

In the Lithuanian legal system, there are no clearly defined restrictions on application of the positive model.

However, it may be mentioned that the provisions of Directive 2006/123/EC (including Article 13(4)) were fully implemented by the Law on Services of the Republic of Lithuania, as a general law on services. This law clearly states the list of services to which this law (including the positive model of administrative silence enshrined in Article 13(4) of the Directive) does not apply. This can be understood as a guideline in which areas the positive model of administrative silence should not be applied, e.g., in the spheres of tax administration, financial services, transportation.

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

According to the Law on Services, transposing the Article 13(4) of Directive 2006/123/EC, if a proper application for the issuance of a permit, submitted together with all necessary documents and information, is not answered within the time limit established by law, the permit is considered to have been issued (except for the cases established by law, when the failure to submit a response is not considered the issuance of a permit and such exceptions are justified by important public interests, including the legitimate interests of third parties).

Other special laws, implementing Article 13(4) of Directive 2006/123/EC, (the Law on Electricity, the Law on Natural Gas, the Law on the Control of Arms and Ammunition, etc.) have very similar implementation of the mentioned rule.

This means that a person's claim is deemed to have been granted immediately after the expiry of the set 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?

The legislation does not require any confirmation or proof that the claim has been granted. In cases where the respective permit is granted, the person concerned may apply for the issue of certificate stating that such person has acquired the right to engage into respective activities.

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 via a general complaint procedure.

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

No, there are no peculiarities concerning the procedure on a "fictious decision". General rules set out in the Law on Public Administration and special regulation should be applied.

7. Please describe the implementation of the positive silence model provided for in Article 13(4) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market in your legal system. In which legal areas has it been implemented? Have there been any difficulties in its' implementation?

The provisions of Directive 2006/123/EC (including Article 13(4)) were fully implemented by the Law on Services of the Republic of Lithuania. The aforementioned law, as well as Directive 2006/123/EC, apply to all services that are not classified as services that are clearly outside the scope of the directive.

The positive silence model provided for in Article 13(4) of Directive 2006/123/EC was also implemented in various special laws, regulating the issuance of authorisations and licences, stating that if an application for a licence or authorisation is not replied to within a specified time limit it is to be considered that a positive decision has been made regarding the issuance of a licence or authorisation.

Legal areas, where the positive silence model is implemented, are very different. Some examples – issuance of certificates confirming the right to provide travel organization services (the Law on Tourism), issuance of energy activity license, permit or certificate (the Law on Energy), issuance of licenses and permits for activities in the electricity sector (the Law on Electricity), issuance of licenses and permits for activities in the natural gas sector (the Law on Natural Gas), issuance of permits to purchase, keep or carry weapons (the Law on Arms and Ammunition), issuance of licenses for wholesale and retail sale of alcohol products (the Law on Alcohol Control), issuance of permits for the production of fibre hemp products (the Law on Fibre Hemp), issuing a license for activities with precursors of narcotic and psychotropic substances (the Law on Precursors and Psychotropic Substances Control), issuance of a permit to cut, remove from the place of growth or intensively trim protected greenery, also issuance of qualification certificates of the manager of greenfield project preparation or an independent expert of greenfields (the Law on Greenery), issuance of a permit to keep wild animals in captivity (the Law on Wildlife), etc.

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 Lithuanian legal system does not provide for the negative model as a general principle in the case of administrative silence. The expiration of the term established by law, within which an administrative decision must be made, gives the person the right to defend his/her rights by filing a complaint about inaction or administrative delay.

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?

It is possible for individuals affected by administrative silence to submit a public liability claim, i.e., ask for damages in reliance on Article 6.271 of the Civil Code inter alia stipulating that the damage caused by unlawful action (active or passive) by public bodies must be compensated by the state. This legal option places a procedural burden on the applicants to demonstrate not only the unlawful inaction but also the damage that was caused in a causal connection to this inaction.

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?

There is no such case-law to our knowledge.

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.

The Supreme Administrative Court of Lithuania has invoked the fiction of positive silence on multiple occasions whilst examining cases on the issuance of authorisations and licences. In a string of cases dealing with renewable solar energy and the issuance of licences to this effect, the Court emphasised that a decision on the issuance of licences should be taken without prejudice to the set time limits by public bodies. The positive model of administrative silence was enshrined in the Article 17(2) of the Law on Electricity that stated that if a properly submitted application for a permit is not answered within the specified time period, it is considered that a positive decision on the permit issuance has been made. The Court stated that relying on this provision a person gained the right to carry out licensed activities in accordance with the requirements provided by legal acts and did not have to reapply for the issuance of the licence. According to the Court, under such regulation the legislator, on the one hand, promoted good administration by public entities while, on the other hand, establishing an additional, exclusive pathway for the protection of the rights and legitimate interests of individuals. These statements were repeated by the Court in later cases.

In this regard, one should also note the administrative case concerning the authorisation to keep (carry) weapons. The applicant alleged that national regulation forbids the competent authority to revoke its positive decision where it failed a response within the time period set.

Even though the applicable provision in this dispute stipulated that "in case of no answer regarding the licence to keep weapons, the positive answer should be presumed" (Article 12(7) of the Law on Control of Arms and Ammunition), it was not applied in an automated manner. In the proceedings, it transpired that, firstly, the competent administrative authority was only 4 days late in informing the person concerned about the refusal of authorisation and, secondly, the applicant had a criminal record in connection with unlawful bearing of arms that (quite clearly) precluded him from getting this licence in the first place. Under these circumstances, the Court emphasised that even a positive decision on an authorisation does not mean that such a decision cannot be cancelled. After receiving information which could be the basis for not issuing an authorisation the decision was cancelled.

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. Lithuania has not submitted such request 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

There are some provisions, implementing positive model of administrative silence, mostly in regulation of the process of territory planning. The Law on Environmental Impact Assessment of Planned Economic Activities provides positive administrative silence model approach in approval of the environmental impact assessment program and report. Law on Territory Planning – in coordination of the complex territorial planning document or territorial planning document of the project important to the state.

4.2. Social security

There are no specific regulations on administrative silence in this area, meaning that the general rules on administrative procedure concerning the adoption of formal administrative decision, challenging administrative delay or inaction, described previously, are applied.

4.3. Freedom of information

There are no specific regulations on administrative silence in this area.

Administrative discretionary power

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

In the Lithuanian legal system, legal acts do not provide for the precise definition of administrative discretionary power.

According to the Supreme Administrative Court, the right of discretion of the administrative authority is understood as the power that gives the subject of administration a certain freedom of action in making decisions, enabling it to choose from several legally possible options of behaviour the one that it considers to be the most suitable.

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*)?

No, there is no such formal distinction in the Lithuanian legal system. The commonly used term is discretion.

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.

Criteria or methods to determine whether an authority has discretionary power in a particular case are elaborated in the case law.

In its practice, the Supreme Administrative Court of Lithuania consistently notes that the right of discretion cannot be absolute in a state under the rule of law. The discretion must not be interpreted as an absolutely unmotivated and unbound choice. Administrative entities operating in public law sphere exercise the discretion within the limits set by legal acts and legal principles. According to the Supreme Administrative Court of Lithuania, entities using the right of discretion are constrained by the general requirements and criteria of the principle of legality. When exercising discretionary powers, public authorities should, among other things, not abuse the powers granted to them, adhere to the principles of objectivity and impartiality, equality before the law and proportionality. Discretion must be justified by objective facts and due regard to the general principles of law - rule of law, objectivity, proportionality, non-abuse of power, efficiency. In the exercise of discretion, the essential requirements of the rule of law, the service of government institutions to the people, good administration, responsible management (legality, objectivity, non-abuse of power, individual participation in making relevant decisions, transparency, etc.) must not be denied. The discretion must be exercised for the purposes for which it was conferred.

The Supreme Administrative Court of Lithuania has also stated that when exercising the right of discretion, the public authority must carefully investigate, support its assessment with arguments that are significant and that justify the conclusions reached based on them, reflect the factual circumstances as they really are and are sufficient for justification, and take into account all relevant other factors. Reasoned administrative discretion presupposes the implementation of the principles of legal certainty and clarity.

To sum up, it can be said that a discretion is used properly when a public authority operates within the limits established by law, adheres to established legal norms, general

principles of law, gives due regard to the established facts, follows the duty to give reasons and acts in compliance with the goals and objectives for which the institution was established and received the relevant powers.

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.

The review of the legal acts and actions (inaction) of the public authority, which exercises the right of discretion, is carried out by the court taking into account the freedom of assessment given to that authority. In this regard, the Supreme Administrative Court of Lithuania adheres to its consistent practice, that in the event where public authorities are given relatively wide freedom of action (discretion), in the implementation of certain legal norms or policy in a certain area, the courts examine only whether the subject of public administration, exercising its discretion, did not make a clear error (in assessment of circumstances and application of law), did not abuse authority (power), did not manifestly exceed the limits of discretion. In other words, where there is a discretion given to the public authority, the judicial review will be more lenient.

It should be also noted that administrative courts do not offer the assessment of the disputed administrative acts (or inaction) from the point of view of political or economic expediency.

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 fact that the discretionary power given to the public authority has resulted in a restriction of human rights affects the intensity of judicial review. In such cases, the court very carefully analyses the situation through the prism of the principle of proportionality. In this respect, if the restriction is found to be disproportionate, administrative acts may be annulled. For example, this may happen if it is determined that other possible acts to a lesser degree of the adverse effect on a person's rights are possible.