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

Co-funded by
the European Union

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.

Requirements intended to guarantee the timeliness and expediency of the proceedings are imposed on both the administration and the judiciary. The Dutch legal system sets specific time limits within which authorities are obliged to take administrative decisions ('orders') or complete administrative actions. The General Administrative Law Act (GALA) provides for a general time limit on which we will elaborate under 3. Furthermore, the principle of 'reasonable time' as laid down in Article 6 ECHR obliges authorities to decide within six months after receiving an objection. Here, the time limits follow from the case law of the highest courts (both the Supreme Court and the Administrative Jurisdiction Division of the Council of State).

- Where are the administrative time limits set:

    - The Constitution
    - The general code of administrative law or administrative procedure law
    - Special laws
    - Other : case law (concerning the time limit for deciding upon an objection)

    Please specify your answer briefly, if necessary.

Article 4:13 GALA points out that an administrative decision shall be made within the time limit prescribed by statutory regulation, or, in the absence of such time limit, within a reasonable period after receiving the application. When special law offers no specific time limit, the general time limits of the GALA apply. The GALA also provides for specific time limits when a public preparatory procedure is followed, which is the case in large spatial projects which might infringe on the rights of many residents. In these cases, as a general rule the administrative authority shall make its order on the application as soon as possible, but at the latest within six months of receiving the application (art. 3:18 GALA).

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

Article 4:13 GALA states that, when a special law has no provision on the time limit, the time limit has to be 'reasonable'. The reasonable time limit shall in any event be deemed to have expired if the administrative authority has not made an administrative decision or given communication as referred to in article 4:14 within eight weeks of receiving the application (article 4:13, para 2 GALA). A reasonable time limit might, however, be shorter than eight weeks – in one case, the Administrative Jurisdiction Division of the Council of State judged that fifteen days was a reasonable time limit in relation to a request for enforcement (ABRvS 27.04.2011, ECLI:NL:RVS:2011:BQ2646).

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

We think it is best to quote the appropriate articles from the GALA.

Article 4:13
1. An administrative decision shall be made within the time limit prescribed by statutory regulation, or, in the absence of such time limit, within a reasonable period after receiving the application.
2. The reasonable period referred to in subsection 1 shall in any event be deemed to have expired if the administrative authority has not made an administrative decision or given communication as referred to in article 4:14 within eight weeks of receiving the application.

Article 4:14
If, in the absence of a time limit prescribed by statutory regulation, an administrative decision cannot be made within eight weeks, the administrative authority shall inform the applicant, stating a reasonable time limit for the administrative decision to be made.

Article 4:15
The time limit for making an administrative decision shall be suspended with effect from the day on which the administrative authority requests the applicant to amplify the application pursuant to article 4:5 until the day on which the application has been amplified or the time limit set for this purpose expires without being used.

It follows from these articles that the GALA leaves room for specific time limits in special laws, in the absence of which the eight week-limit from the GALA applies or the 'reasonable' limit.

In special laws, many specific time limits are set, of which we will offer a few examples:

- in the field of immigration law the time limit is 15 days for a visum short stay, six months on a residence permit)
- in spatial law the time limit is eight weeks after receiving the application for a building permit

- an order on the re-evaluation of the health situation of an employee has to be taken within eight weeks after the application.

The GALA also has specific rules on the taking of an order upon an objection. This shall be taken within six weeks on the notice of objection (Article 7:10 paragraph 1 GALA) or within twelve weeks when an external advisory committee has been established.

In cases where an objection procedure has been followed by a judicial procedure, the case law concerning the 'reasonable time' comes into play (art. 6 ECHR). This case law mainly serves as a means to determine how the total length of the procedure can be attributed to each of the different procedures. It is therefore not a time limit to decide upon an application. According to the ABRvS, the 'decision upon an objection' (*beslissing op bezwaar*) has been given within a reasonable time if it has been taken within six months. Since this time limit cannot really be seen as a time limit to take an administrative decision, we will not discuss this specific situation further.

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

The GALA offers a few possibilities to extend a time limit. The general time limit of art. 4:13 can be extended when from the day on which the administrative authority requests the applicant to amplify the application until the day on which the application has been amplified or the time limit set for this purpose expires without being used (art. 4:15 para 1 GALA). Other circumstances which allow for an extension are a given consent of the applicant, a delay which is attributable to the applicant or *force majeure* with the administrative body (art. 4:15 para 2 GALA).

The time limit for giving an order on an objection can be extended without a motivation for six weeks (art. 7:10 para 2 GALA).[1] Further postponement of the time limit can only be given if the interested parties consent, the petitioner consents and other interested parties are not prejudiced and in so far as a further delay is necessary in order to comply with other laws.

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

Although the extension of the decision period can have unpleasant consequences for the applicant (it will take longer before construction or the intended use can start, for example), it is in principle not possible to object against this decision. See Council of State, 19 August 2015, ECLI:NL:RVS:2015:2653:

[1] Article 7:10:
1. The administrative authority shall decide within six weeks of receiving the notice of objection, or within ten weeks if a committee as referred to in article 7:13 has been established.
2. The time limit shall be suspended with effect from the day on which the petitioner is requested to remedy an omission as referred to in article 6:6 until the day on which the omission is remedied or the time limit set for this purpose expires without being used.

'The Council has declared the objection submitted by the applicant inadmissible, as the decision to extend the decision period is not subject to objection or appeal. In this context, the Board refers to article 6:3 of the GALA, which stipulates that an order regarding the procedure for preparing an order is not subject to objection or appeal, unless this decision touches the interests of the applicant separately from the decision.'

The ratio of article 6:3 of the GALA is that no legal remedies are used against decisions that merely pertain to the procedure. After all, objections relating to the preparation of the decision can be raised in the procedure against the decision on the application. Independent legal remedies against the procedural decision can only be used if the interests of the interested party are harmed independently of the decision to be prepared. This benefits an efficient legal process.

6. 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,

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

    - Rather yes
    - Rather no

More than twenty years ago, two evaluation committees of the General Administrative Law Act (GALA) came to the conclusion that there were shortcomings in the government's compliance with deadlines.[2] It seems to be that this problem is still persistent. All recent reports from the Ombudsman (f.e. 'The civilian cannot wait', 2021 (*De burger kan niet wachten*)) speak of exceeding time limits as a problem to a bigger or smaller extent. The problem is especially problematic in the context of asylum law, where the Immigration and Naturalisation Service has to deal with many applications, and in the case of large compensation projects, as entailed by the State in the wake of the recent child allowance affair and the mining damage in Groningen. Since the right to compensation depends largely on the facts of the case, the Tax Service (*Belastingdienst*) has great problems deciding in time in the thousands of applications it is confronted with.

[2] 'Toepassingen en effecten van de Algemene wet bestuursrecht 1994-1996', verslag van de commissie evaluatie Awb, 18 december 1996 en 'Toepassingen en effecten van de Algemene wet bestuursrecht 1997-2001', verslag van de commissie evaluatie Awb II, 18 december 2001.

In 2003, the Ombudsman published a report on the results of a voluntary investigation he had conducted into the way in which the central government deals with citizen correspondence. The report shows that the (central) government often failed to meet the statutory decision deadlines. The duration of handling objections was a "serious problem", according to the Ombudsman.[3] Also in 2003 in a report from the Court of Audit (Algemene Rekenkamer) with the title 'Decision periods, where does the time go?', it was noted that the exceeding of time limits presented a 'persistent problem'.[4]

8. 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

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

At first, there was no sanction for exceeding these legal terms for the administrative body. This has changed when the Act on Penalty Payments in Case of Late Decisions came into force on 1 October 2009 (TK nos. 29934 and 31751). The essence of this Act (articles 4:17 to 4:20 GALA) is that an administrative body which does not decide in time on an application, will have to pay a penalty payment for each day that the body is in default.

This penalty has its boundaries. The maximum number of days that a periodic penalty payment can be forfeited is set at 42 days. For the first 14 days, the administrative authority will forfeit an amount of € 23 per day. For the second fourteen days an amount of € 35 per day and for the other days € 45.

The administrative body does not automatically forfeit penalty payments after the unused expiry of a statutory decision period. First, the applicant has to give the administrative authority a notice of default. This can be done by means of a written request to the administrative authority in which a claim is made for the penalty payments due to the absence of an order. After receiving such a request, the administrative body has two weeks to take the decision. After those two weeks, the administrative body will forfeit a daily penalty. Other conditions are: a) only interested parties are eligible for the penalty; b) the administrative authority must be given notice of default within a reasonable time after the decision period has expired and c) the regulation does not apply when an order period has expired in the case of an application which must be regarded as manifestly inadmissible or manifestly unfounded.

[3] De Nationale Ombudsman, Rapport Burgerbrieven 30 september 2003, 2003/325.
[4] Beslistermijnen. Waar blijft de tijd?, Kamerstukken II 2003/04, 29 495, nr. 2, p. 12.

Administrative silence

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

The wording in itself is not a legal concept.

To understand the Dutch system on administrative silence, it is useful to distinguish two situations. An applicant who is confronted with an administrative body who does not decide or decides too late on an application has the following possibilities:

1) The failure to make an order in due time is equated with an order (art. 6:2 GALA), thereby offering a possibility to object and appeal to the failure to make an order. This failure however has no 'substance' and should not be equated with a refusal (e.g. of a permit), unless a specific law states otherwise.[5]

As regards to the way the judge deals with appeals against decisions in the sense of art. 6:2 GALA, article 8:55f is relevant. This allows for the applicant or third parties to lodge an appeal directly with the administrative court against the failure to notify the decision in time. The court will deal with the appeal in accordance with article 8:54 of the GALA, i.e. without a hearing. He will take his decision within eight weeks after receiving the appeal and will, if the appeal is well-founded and no order has been published yet, determine that the administrative authority will still publish the order. The authority has to comply within two weeks after the date of the judge's decision (art. 8:55d para 1 GALA). The court may determine a different term on the basis of art. 8:55d para 3 GALA. It goes without saying that this can be a short term. After all, the administrative body no longer has to take an order. It concerns only the publication and communication of the decision.

2) He can use the Lex Silencio Positivo if this law is applicable (see hereafter) and use the general possibilities of objection and appeal to this positive decision (which, unlike the 6:2-route does have 'substance').

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

Before 2009, the case law of the Administrative High Court (Centrale Raad van Beroep) left it up to the parties whether the administrative silence should be considered as a fictitious refusal. If the administrative body wanted its silence to be considered a refusal, it only had to motivate this in its statement of defence. However, this model does not exist anymore.

[5] Art. 6:2 Awb:
For the purposes of statutory regulations governing objections and appeals, the following shall be equated with an order:
(a) a written refusal to make an order, and
(b) failure to make an order in due time.

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

Yes.

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

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

The negative model

Not applicable. A written refusal to take a decision is not equated with a rejection of the application (see for example CRvB 22 December 2016, ECLI:NL:CRVB:2016:4941).

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 an order, but cannot set a specific time limit in which it shall be done
    - The court can order the administrative authority to issue an order 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 of December 28, 2009, in the General Administrative Law Act – at the same time as the introduction of the Services Act – a section 4.1.3.3, 'Positive fictitious decision in case of late decision', included, partly because art. 13, fourth paragraph, Services Directive, 2006/123/EC, required this. This arrangement of the fictitious positive decision ('by right') is often referred to as 'lex silencio positivo' (LSP), a form of legal jargon Latin: at silence (silencio) is the fiction of a positive decision. Art. 4:20b, first paragraph, GALA provides: 'If the application for the decision has been made, the requested decision has been given ex officio', and the second paragraph: 'The granting of an order ex officio applies as an order.' It is important to note that par. 4.1.3.3 GALA applies optionally, namely only insofar as this is determined by statutory regulation. Large numbers of permits have now been designated for the application of section 4.1.3.3 GALA. Under the Environment and Planning Act (*Omgevingswet*), one of the biggest transformations in the field of spatial law, the Lex Silencio Positivo will no longer be applied. This means that the applicant of a permit who wishes to induce a administrative body to make an order will only have the rules on the Penalty Payments and Appeals in Case of Late Decisions at its disposal.

The law aims to introduce the permit granted ex officio (also referred to as lex silencio positivo) in various laws. The law is the elaboration of the cabinet position lex silencio of 18 December

2007 (Parliamentary Papers II 2007–2008, 29 515, no. 224) and the motion Van Dijk et al., (Parliamentary Papers II, 31 579, no. 18). The government's position paper states that the government wants to promote timely decision-making on permit applications. The permit granted ex officio is one of the means by which this can be done.

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

Such a fictitious positive decision, for example an environmental permit for the construction of a structure or the felling of a tree, may be at the expense of the public interest, which requires careful consideration of whether the criteria for granting a permit have been met and that, if not, the license will be denied. In addition, the public interest sometimes requires that certain conditions be attached to a licence. A fictitious positive decision could therefore be at the expense of the interests of third parties who cannot know that a positive decision has been taken and who may miss objection or appeal periods as a result. Therefore, some mitigating provisions have been made.

For example, the competent administrative authority must, pursuant to art. 4:20c, para 1, GALA, publish the fictitious positive decision within two weeks after it has been legally issued.[6] Because this administrative body was already too late with regard to the granting of permits and is often a 'usual suspect' with regard to exceeding time limits, art. 4:20d GALA entitles the applicant to a penalty payment from two weeks after a notice of default. In this way, the third-party interested party is in principle informed in good time and can, if necessary, start legal proceedings.

Art. 4:20e GALA provides that if, pursuant to a statutory regulation or a policy rule, certain regulations are included as standard in an order, they also form part of the decision ex officio: for example, regarding the closing time for a terrace permit.

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

When section 4.1.3.3 GALA has been declared applicable, an order is granted ex officio if the administrative authority does not decide in time on an application. The applicable time limits are laid down in specific laws or follow from the GALA (see question 1). The legal consequences associated with a positive fictitious decision take effect three days after the decision period has expired without being used. This is a deviation of art. 3:40 GALA, which states that an order takes effect immediately after it has been notified. The administrative authority is obliged to notifty the fictitious order within two weeks after it has been granted, stating that the order has been granted ex officio. If the administrative authority fails to publish the order, the applicant may declare the administrative authority to be in default. If the administrative authority does not make the notification within two weeks, it will forfeit a penalty for each day that it is in

[6] Art. 4:20b, third paragraph, GALA provides that the decision given ex officio, in derogation from art. 3:40 GALA enters into force on the third day after the end of the decision period. This provision does not apply to the environmental permit, see art. 3.9 Wabo.

default. The penalty increases from € 20 on the first day to € 40 per day, with a maximum of € 1260.

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?

Yes. Art. 4:20c para 1 states that the administrative body has to notify the decision within two weeks after the decision has been taken ex officio.

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

An order granted ex officio is considered an order within the meaning of article 1:3 GALA. The legal protection system of the GALA therefore applies to orders granted ex officio in the same way as to 'real' orders. This means that an objection can be lodged against an order granted ex officio. There is no need to lodge an objection first (article 7:1, para 1, opening words and under f GALA).

If necessary, after following the objection procedure, an appeal can be lodged with the District Court, after which there is the possibility of appeal with the highest administrative court. Third-parties will sometimes become aware of the existence of the legally granted permit later, sometimes even after the appeal period has expired. Article 6:11 GALA can, however, offer solace in this case: a notice of objection or appeal submitted after the end of the time limit shall not be ruled inadmissible on this ground if it cannot reasonably be held that the applicant was in default.

In the appeal, the contested decision must be fully reconsidered. This reconsideration may result in an order initially granted ex officio being revoked or amended (Article 4.20f(1) GALA).

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 administrative authority may, pursuant to art. 4:20f GALA, impose conditions to the decision or can even withdraw the decision 'insofar as this is necessary to prevent serious damage to the public interest'. The administrative body can only do this within six weeks of the fictitious decision and, in doing so, must compensate for any damage. This could include damage that arises because article 4:20f GALA is applied at the moment that the person who has been granted the permit ex officio has already started the activities that are licensed with it. This procedure also serves the interests of third parties. Application of these 'corrective measures' is only allowed in exceptional cases.[7]

[7] Explanatory Memorandum Services Directive, p. 133-134. According to the legislator, a withdrawal of the fictitious order is not necessary in principle because the general interest of the order has already been taken into account when considering whether to apply the Lex Silencio Positivo.

What are ‘serious consequences for the public interest’? Parliamentary history has shown that this concept has 'an independent, national-law meaning', which is not equivalent to 'overriding reasons of public interest, including the legitimate interest of a third party' of Article 13(4) of the Services Directive. Due to the general character of the LSP in the GALA, 'a more generic concept of "public interest" that is in line with Dutch administrative law has been chosen’.[8] It is not clear what exactly is to be understood by this dynamic concept, which leads to uncertainty as to whether supplementation or withdrawal may apply in the specific case. If the administrative authority proceeds to amend or withdraw the fictitious decision, the applicant has two options: he can lodge an objection and appeal against the amendment or withdrawal decision and he can claim compensation under article 4:20f para 3 GALA.[9]

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?

This provision from the Services Directive is in line with the government's position of 18 December 2007 on the introduction of the general Lex Silencio Positivo (LSP) (Parliamentary Papers II 2007/08, 29 515, no. 224), as part of the government's plan on administrative burdens. If a specific licensing system is chosen for application of the LSP, Section 4.1.3.3 of the General Administrative Law Act will apply. This section, entitled «Positive fictitious decision in case of late decision», will be inserted into the General Administrative Law Act by means of the bill for a Services Act. The LSP applies if this is explicitly stipulated by law. In the bill for a Services Directive Amendment Act, the LSP is declared applicable to the licensing systems that fall within the scope of the Services Directive, unless compelling reasons of public interest, including the interests of third parties, stand in the way. This is a reversal of the system that normally applies in which, as explained, the LSP only applies when a special law says so. In order to determine to which licensing systems the LSP can apply, an investigation was carried out into which licensing systems are eligible as a result of the said government position of 18 December 2007. The parliament was informed about the results of this investigation by a letter from the cabinet dated 3 December 2008 (Parliamentary Papers II 29 515, no. 274). This study also includes the licensing systems that fall within the scope of the Services Directive. In the end, it turned out that, with regard to laws in a formal sense, only the licensing systems included in Articles II and VIII of this bill qualify for mandatory application of the LSP on the basis of the Services Directive.

Parliamentary papers and literature on the subject do not show difficulties with implementation.

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?

[8] Explanatory Memorandum Services Directive, Parliamentary Papers I 2008/09, 31 579, C, p. 17.
[9] Parliamentary Papers I 2008/09, 31 579, C, p. 23.

As mentioned, besides the fictitious decision the forfeit of a penalty is an important way to 'hurry up' the administrative authority. In this case, the administrative body will have to be given a notice of default. After receiving this notice and two weeks after the decision period has expired, the administrative authority will forfeit a penalty (4:17 GALA). This penalty applies to every day that the authority is in default, with a maximum of 42 days. For the first 14 days the penalty (or 'astreinte') will be € 23 a day, for the next 14 days € 35 a day and for the remaining days € 45 a day.

In the absence of an order after sending a notice of default, the applicant can also immediately appeal to the court. The judge then has the following possibilities:

a) In case the appeal is well-founded, he can determine the height of the penalty that the administrative body has to pay following the articles 4:17 – 4:20 GALA (see above 'Administrative Time Limits', question 9) (art. 8:55c para 1 GALA).
b) In case the appeal is well-founded and the administrative body has still not notified a decision, the judge might oblige the administrative body to give a notification within two weeks after the judge's decision has been sent to the administrative body (art. 8:55d para 1 GALA). The judge might also oblige the body to pay an additional judicial penalty payment (art. 8:55d para 2 GALA).

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?

Apart from the penalty mentioned in the previous answer, possible further damages might be granted on the basis of art. 8:88, para 1, under c GALA, which grants interested parties a right to seek compensation with the administrative courts for possible damages which are caused by untimely decision making. Here, the normal criteria for unlawful decision making apply (unlawfulness, causal link, relativity etc.).

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?

Here, the recent decision on the Temporary IND Suspension Penalties Act has to be mentioned. As stated, if an administrative body has still not taken a decision on an application during the appeal process, the administrative court might instruct the government to take a decision. He might also imposes a so-called *judicial penalty*. In addition to the judicial penalty, Dutch law also provides for an *administrative penalty*. The latter is a penalty that the government automatically owes if it does not take a decision within the statutory period. The Temporary Penalty Penalties Suspension Act excludes both judicial and administrative penalty payments in asylum cases, when the Immigration and Nationalisation Service does not take a decision on an asylum application in time.

The Administrative Jurisdiction Division judged that the Temporary Penalty Penalties Suspension Act is non-binding insofar as the possibility of imposing a judicial penalty in asylum cases is excluded. This is contrary to the principle of effective legal protection. It is important

for legal certainty and confidence in the government that the State Secretary decides on asylum applications in good time. For example, a foreign national who is granted asylum can start integrating as quickly as possible and a foreign national who is not granted asylum can return to his country of origin as soon as possible. Without a *judicial* penalty, a foreign national has no effective means of persuading the State Secretary to take a decision in time.

The Administrative Jurisdiction Division did however rule (ABRvS 6 July 2022, ECLI:NL:RVS:2022:3353) that abolishing the *administrative* penalty in asylum cases is not contrary to the European principle of effective legal protection. Unlike a judicial penalty, the government automatically owes an administrative penalty. This penalty is therefore not a means for a citizen to persuade the government to take a timely decision. The abolition of the administrative penalty is also not in conflict with the principle of equivalence, which requires that the same procedural rules apply to comparable proceedings. The Administrative Jurisdiction Division has ruled that the asylum procedure is not comparable to other Dutch procedures. A different regulation is therefore justified. The Administrative Jurisdiction Division therefore concludes that abolishing the administrative penalty in asylum cases is not contrary to the principle of effective legal protection or the principle of equivalence.

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 found one relevant case: District court of Rotterdam, 24 March 2022, ECLI:NL:RBROT:2022:2425. The case concerned the granting of a permit (ex officio) to exploit a restaurant. Art. 3 para 2 of the Liquor and Catering Law and the APV Schiedam 2013 (the general local regulation) however state that the regulation on positive decisions in the event of late decisions of section 4.1.3.3 of the General Administrative Law Act (Awb) does not apply.

The plaintiff argued that the aforementioned provisions from the DHW and the APV Schiedam 2013 were non-binding because these articles, whatever they may be, have not been reported to the European Commission. The District Court stated that this does not follow from the Services Directive. It quoted the explanation which was provided with the APV Schiedam 2013:

The introduction of LSP can pose a danger to public health, because persons who are not suitable for this may become responsible for the provision of alcohol and because alcohol may then be sold or served in establishments that do not meet the socio-hygienic requirements. The Licensing and Catering Act also gives the Municipal Executive the authority to subject managers of companies that require a license to a BIBOB test. The BIBOB test was introduced in the Liquor and Catering Act because the hospitality industry is exposed to a risk of entrepreneurs with criminal antecedents. The BIBOB test is intended to exclude them from this sector in order to prevent that the license will also be used for criminal activities, such as drug trafficking, illegal prostitution or other immoral behaviour. Administrative bodies must be given the opportunity to assess whether such criminal activities are being facilitated. If the municipality has insufficient time to check whether these are entrepreneurs who carry out criminal and illegal activities, there is a risk that undesirable catering entrepreneurs will get to work. This may concern drug

traffickers and loverboys, etc. This poses risks to public order and safety and to public health. As far as the BIBOB test is concerned, the overriding reason of public interest is both crime prevention and protection of public health. Because the local government determines in co-administration which license applications are assessed, it is not possible to regulate in the formal law which licenses are subject to an LSP and which licenses are not.

The District Court concluded that therefore is no question of an operating, liquor and catering law license granted ex officio.

3. Have you submitted a question to the Court of Justice of the European Union in order for it to make a preliminary ruling in a case concerning national regulation on administrative silence? Briefly describe the request and the substance of the judgment.

No.

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

4.1. Construction, spatial development planning and environmental protection

According to the Housing Act, for example, a (regular) building permit is granted ex officio if the mayor and aldermen do not decide on a building application within 12 weeks, unless the building plan is in conflict with the current zoning plan.

In the near future, a new environmental law will be applicable in the Netherlands: the Environment and Planning Act (*Omgevingswet*). In this law, all separate environmental laws will be merged into one. The Lex Silencio Positivo will no longer apply, whereas it currently does. Most permits granted under the construction of the Lex Silencio Positivo relate to a service. Many of these services consist of activities that place a burden on the environment and may also be in conflict with European law. Moreover, the abolition of the permit ex officio is more in line with the administrative authority's discretion. After all, the assessment of a permit requires customization in which various interests must be weighed up. There is insufficient space for this when a permit is granted ex officio.

4.2. Social security

The general rules from the GALA are applicable.

4.3. Freedom of information

Concerning this subject there is no specific administrative law.

Administrative discretionary power

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

In Dutch administrative law, a discretionary power is a power that grants an administrative body the freedom to a greater or lesser extent to take an order in concrete cases as it sees fit. This power is thus distinguished from bound powers and is also referred to as 'the concept of discretion'. When an administrative body has a 'discretionary' power (recognisable, for example,

by the use of words such as 'can', 'may', 'is authorized' and the like), there is room for policy: within the limits of the relevant power, the administrative body can choose whether, and if so, how it makes use of that power. A characteristic of policy space is that the board must always weigh up the interests in a specific case when interpreting it. Completely 'free' and completely 'bound' powers do not occur, but there are many degrees in between.

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*)?

The discretionary scope can be divided into assessment scope and policy scope:

- Assessment scope (*Beoordelingsruimte*):

There is scope for assessment if the wording of the law shows that the assessment (i.e. have the conditions for the use of a specific competence been met?) is primarily left to the administrative authority and, in principle, to the exclusion of others. If there is room for assessment, the court must test the assessment with restraint. This means that the assessment is only qualified as legally incorrect if the administrative authority was not reasonably able to arrive at its assessment. In some cases though, the judge does not offer a restrictive test but indeed applies a 'full test'.

- Policy scope (*Beleidsruimte*):

There is room for policy if the administrative body is free to make use of a discretionary power or not. An administrative body has policy scope if the legislator leaves it to that administrative body to determine for itself whether it will use a statutory power and how it will use that power. The administrative body may then choose not to use the power, even if the legal conditions for power have been met, and it can choose between different modalities of the exercise of power (restrictive conditions, grace periods, etc.). An administrative body does not always have room for policy. Decision-making can also be 'tied'. The outcome of the decision-making is then pre-determined, depending on whether the legal conditions have been met or not.

3. What are the characteristics, criteria or methods used in your legal system to determine whether an authority has discretionary power in a particular case? Provide the most typical examples of case law where the discretionary power has been recognised. If your legal system distinguishes between discretion and margin of appreciation, please describe both.

The judge might offer a less restrictive test when explanatory notes that accompany a law have not explicitly wanted the judge to be restrictive, for example when it comes to the interpretation of a legal standard. It might then substitute its opinion for that of the administrative authority.

Also, the nature of the discretionary power might be important. If specific knowledge is needed which does not necessarily lie within the scope of the judge (for example: knowledge of local circumstances) might lead the judge to be somewhat restrictive.

For an example of restrictive test, see ABRvS 7 April 2004, ECLI:NL:RVS:2004:AO7140: 'The court has rightly considered that the mayor is entitled to discretion in assessing the safety risks to be expected at a proposed event and in the resulting choice of the conditions to be attached to a permit'.

For a more 'strict' test if assessment scope see ABRvS 2 July 2002, ECLI:NL:RVS:2002:AE5780: 'Art. 37a paragraph 1 of the Media Act does offer the State Secretary a certain amount of discretion in the concrete interpretation of the terms "diversity" and "innovative contribution" included in this provision when deciding on an application for provisional recognition. However, this discretion is not of such a nature that, as the appellant argues (…) no concrete substantive assessment of the programs described in the policy plan of the appellant should take place in order to assess them for their contribution to diversity and innovation.'

Lastly, the wording of a legal provision is important. The words 'can' or 'may' point at a certain margin of appreciation. See, for example, Article 3.28, paragraph 1, Spatial Law (*Wet Ruimtelijke Ordening*)': "In the event of national interests, Our Minister (…) may establish an integration plan." It can be deduced from the word 'may' that, unlike in the case of a bound power, the minister may decide for himself whether to use his power.
Different decision margins can occur simultaneously in one and the same legal provision.

An illustration of this is offered by Art. 16 paragraph 1 sub c Aliens Act 2000: 'An application for a temporary residence permit as referred to in Article 14 CAN be rejected IF: the foreign national does not independently and permanently have sufficient means of subsistence (...)'. Here, the word 'can' points at the possibility to either reject the permit or not, on which the authority has discretion (beleidsruimte). The word 'if' however points at the question of the presence of the condition to exercise discretionary power (beoordelingsruimte). Here, a more strict test might be applied if the law does not state otherwise.

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 decision-making latitude that the legislator allocates to the administrative authority will affect the intensity of the court's review. The ratio lies in constitutional law (trias politica): the (administrative) judge is not allowed to "take the seat of the administrative body". The judge will:

- perform a thorough review of the legality of an order and interpretation of legal terms;
- perform a restrained assessment of the weighing of interests that led to the decision.

In the weighing of interests, the court examines whether the administrative authority has reasonably been able to make the decision come (arbitrary prohibition). See Supreme Court 25 February 1949, ECLI:NL:HR:1949:AG1963 (Doetinchemse Woonruimtevordering). This test

(known as *willekeurtoets*) has finally and definitely been abandoned in the recent decision *Harderwijk*, which will be discussed under 5.

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?

This will certainly make a difference in the case law of the highest administrative judges. We refer to the groundbreaking decision of the ABRvS of 2 February 2022 (*Harderwijk*). This decision was made by a so-called Grand Chamber consisting of five judges. In addition to the chairman and two state councillors of the Administrative Jurisdiction Division, the president of the Trade and Industry Appeals Tribunal (CBB) and a senior councillor of the Administrative High Court (CRvB) are part of the grand chamber.

In this decision, which concerned a house closing after the suspicion of drug related crimes, the Grand Chamber offered a new way of testing to the principle of proportionality, which is an important principle in cases where administrative authorities have discretionary power.

The Grand Chamber stipulated that the question of whether and, if so, how intensively the administrative court assesses the proportionality of a government decision depends on many factors. That test differs from case to case. When testing against the principle of proportionality, the administrative court will distinguish between the suitability, necessity and proportionality *strictu sensu* of the contested government decision.

Following the recommendations of the advocate generals Wattel and Widdershoven, the administrative court will, when testing against the principle of proportionality, distinguish between the suitability, necessity and balance of the government decision. If there is reason to do so, the administrative court assesses (1) whether the decision is suitable for achieving the objective, (2) whether it is a necessary measure or whether a less far-reaching measure would suffice and (3) whether the measure is in the specific case is balanced. This explicitly distances itself from the so-called 'arbitrary' criterion, which has been applied less often since 2015.

The question of whether and, if so, how intensively the administrative court assesses against the principle of proportionality depends on many factors and will differ from case to case. Contrary to what the Advocate General suggested, the variety in testing against the principle of proportionality cannot be reduced to three standard situations. It is more of a ‘sliding scale’ in which the administrative court can apply all variants between full and restrained. The intensity of that test is determined by the degree of policy space the government has to make a decision, but also by the purpose that the decision serves and what its weight is. It is also important whether and to what extent the interests of the citizens and businesses involved are affected. Here, the human rights play an important role, such as art. 8 ECHR (right to family life), which is often infringed upon in cases concerning housing closings. The more heavily these interests weigh, the more serious the adverse consequences of the decision or the decision violates human rights, the more intensive the assessment will be by the administrative court.

Applied to the concrete case about the housing closure in Harderwijk, the Administrative Jurisdiction Division is of the opinion that the administrative authority (mayor) paid too little attention to the interests of the tenant and his (partly minor) children when weighing up the interests. It does not appear from the decision that the mayor has taken into account whether the family can still return to the home after the housing closure if the housing corporation dissolves the lease and possibly places the family on a 'black list'. The mayor must still include the answer to that question in his new decision. In doing so, he must reassess whether the consequences for the family are not disproportionate to the purpose of the home closure. Because the house has not been closed so far, the mayor will also have to assess whether the need to close the house is still present.