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Questionnaire
The judge and inert administration. Administrative discretionary power

Introduction

The seminar will address the issue of inert administration and the role and competence of the courts in this regard. The inaction or silence of the authorities and its consequences affect the rights of individuals no less significantly than the administrative actions or administrative acts of the authorities. While institutional silence is mainly related to the managerial aspects of public administration, it also interacts and correlates with legal aspects, such as principles of legal certainty, good administration and the prohibition of arbitrariness. The aim of the questionnaire and the seminar is therefore to summarise and analyse the regulation and practice of the Member States in order to determine whether the rights of individuals in the context of administrative silence converge and are comparable in the different legal systems.

As the administrative silence is mainly related to the failure of authorities to act or to reply within the prescribed procedural time limits, the questions in the first section of the questionnaire will provide insights into the regulation and application of procedural time limits in the Member States. The following sections of the questionnaire contain questions that are directly related to the current national regulations of the administrative silence. The regulations are generally classified into a negative model (silence as deemed refusal of a claim) and a positive model (a claim not refused in due time is deemed granted). Most legal systems usually provide for both models and various specific combinations. However, the understanding and regulation of these models, as well as the various exceptions and specific rules, differs among legal systems. The questionnaire also seeks to identify national experiences in implementing Article 13(4) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, intended as a mechanism of simplifying and speeding the administrative activity. And finally, as one of the most important aspects, the questionnaire will clarify the role and competence of the courts in the process of appeal against fictitious acts resulting from administrative silence, also identifying the legal remedies. The questionnaire is intended to identify mentioned aspects for further workshop discussions.

The seminar is also intended to discuss issues of administrative discretionary power. The most ambiguous aspects of this matter relate to the identification of the discretionary power in each specific case, as well as to the competence of the court and limits of judicial review of use of discretionary power by the authority. The practice and approach of the Member States on this issue vary. Some legal systems between discretion in a narrow sense and margin of

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

Administrative time limits

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

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

    Please specify your answer briefly, if necessary

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

    It follows from the Public Administration Act § 11a that cases shall be prepared and decided "without undue delay". Moreover, it follows that if it is expected that it will take a disproportionately long time before an application can be answered, the administrative agency that received the application shall as soon as possible provide a provisional reply. In the provisional reply the reason why the application cannot be dealt with earlier shall be explained, and it shall, as far as possible, be stated when a reply can be expected. In cases concerning individual decisions, a provisional reply shall be if an application cannot be answered within one month of its being received.

    In certain areas of law, special laws provide fixed time limits.

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

    Yes, the Norwegian legal system does recognise, at least to some extent, the concept of "reasonable time". As stated in our answer to question 2, The Public Administration Act provides that cases shall be prepared and decided "without undue delay". The concept of "without undue delay" partly overlaps with "reasonable time", but is likely to be

slightly stricter as it implies that the public administration should never take longer time than necessary to decide a case.

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

   While the time scope varies depending on the nature of the case and the administrative body deciding it, most administrative decisions are made within a few weeks.

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

   As the administrative time limits in many areas are not set out in terms of a specific number of days or weeks, but rather as "without undue delay", the question of extending time limits does not arise in most cases. For the areas where more specific time limits are provided by law, such as spatial development and freedom of information, it is generally not possible to extend the time limits.

   The time limits for authorisation procedures that are set out pursuant to Directive 2006/123/EC article 13, cf. The Services Act § 11, can, however, be extended. Any extension of these time limits will have to be justified by the complexity of the issue. The extension has to be limited, and the decision to extend the time limit also has to be reasoned and given within the original time limit.

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

   As stated in our answer to question 5, the question of extending time limits does not generally arise in most areas of law. Thus, the question of complaints about the decision to extend the time limits also generally does not arise.

   For the authorisation procedures that are set out pursuant to Directive 2006/123/EC article 13, cf. The Services Act § 11, where the question of extending time limits may arise, the applicant does not have the right to complain about the decision to extend the time limit.

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 generally prohibit an authority to make decisions that are unfavourable to the potential addressee after the time limits. Where the positive model applies, however, the claim is deemed to be granted as the time limit expires. In these cases, the authority is generally prohibited from making a decision that is unfavourable to the potential addressee after the expiry of the time limit.

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 administrative time limits is not a common issue in Norway. In the few cases where a decision is not made "without undue delay" or within more specific time limits, it is generally because of lack of resources (e.g. lack of staff) within the authority.

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

    In certain areas, such as spatial planning, failing to comply with the time limits could entail that the relevant authority would have to reimburse, either partly or in full, fees that the applicant has paid in order to have the authority decide the application.

    Provided that the non-compliance with the time limits is deemed to be negligent and has led to damages on the hand on the applicant, the applicant could seek compensation from the authorities.

    Depending on the circumstances, staff members could possibly face disciplinary circumstances and administrative liability, but more so based on the reasons for failing to comply with the time limits – and not based on the failure itself. If members of staff are deemed to have grossly breached their official duty when exercising public authority, it follows from The Penal Code § 171 and § 172 that criminal liability in the form of a fine or imprisonment, can be applied.

Administrative silence

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

   No, the Norwegian legislation does not define "administrative silence" as a general legal concept.

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

   Yes, the Norwegian legal system provides for the negative model of administrative silence in certain areas of the law. In these areas, failing to comply with the fixed time limits shall be recognised as a refusal of the claim.

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 Norwegian legal system provides for the positive model of administrative silence in certain areas of the law. In these areas, failing to comply with the fixed time limits shall be recognised as an approval of the claim.

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

   While neither model is particularly typical or common, both models are applied in different areas of law, and approximately at the same rate.

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)?

In the areas of law where the negative model applies, the claim is, without any extra actions being required, automatically considered to be rejected when the fixed time limit has expired.

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.

   The process for appealing against a "fictitious refusal" resulting from administrative silence in areas where the negative model is applied, is similar to the general appeals process, see as an example, The Freedom of Information Act § 32.

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

   The "fictitious refusal" resulting from administrative silence in areas where the negative model applies can be appealed in court. The court would then examine the lawfulness and validity of the decision. In most cases, however, a lower authority's "fictitious refusal" can and will be appealed against to a higher authority within the public administration sector. In these cases, the courts would instead examine the lawfulness and validity of the higher authority's decision, and not that of the "fictitious refusal" stemming from the lower authority's failure to comply with the fixed time limits.

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

   Generally the courts competence is limited to ruling on the validity of the decision. As a consequence, the courts judgments in these matters will only rule that the decision – be it a regular one or a "fictitious refusal" constituted by the relevant rules on the negative mode – is invalid. It would then be for the relevant public body to examine or re-examine the matter, taking into account the ruling and findings of the courts. The courts would, at least generally, not set a specific time limit, but as always, the decision would have to be made "without undue delay" and in accordance with any other fixed time limits that might apply. See also our answers to question 6 and 7.

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?

As the issue of authorities failing to comply properly with court orders is not common in Norway, the legal remedies against said failure have not been thoroughly explored in practice.

It has, however, been argued that should the authority's failure become flagrant enough, the courts could set specific time limits for when the decision must be made, and in extreme instances, possibly even decide on the matter itself.

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

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

The positive model

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

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

   Please specify your answer briefly

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

There are no general prohibitions or restrictions on the application of the positive model in the Norwegian legal system, but the positive model is only applied where the it follows from the relevant special laws that failure to comply with fixed time limits is to be considered an approval of the claim.

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

In cases where the positive model applies, the claim is deemed to have been granted immediately after the expiry of the relevant 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 person would not have to get any kind of confirmation or proof that the claim has been granted, as it follows directly from the relevant laws that this is the case.

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

   There are no specific legal remedies offered to third parties affected by the "fictitious decision" of granting a claim, but as is also the case for regular decisions, third parties that are affected by the decision and that are deemed to have a legal interest in appealing, may appeal the decision to a higher authority.

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?

   There are no specific procedures for annulling a "fictitious decision" of granting a claim. It does, however, follow from The Public Administration Act § 35 that administrative decisions may in some cases be reversed without an appeal. These rules also apply to "fictitious decisions" of granting a claim.

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?

   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 has been implemented through § 11 (2) of The Services Act. The act itself – and in turn § 11 (2) – applies to all services that fall under the EEA Agreement part III chapter 3, apart from the services that are listed in The Services Act § 3, cf. Article 2 (2) of the Directive. For certain services covered by The Services Act, different arrangements have been put in place (i.e. it has been decided that failing to provide a response within the set time period does not entail that the authorisation is deemed to have been granted, cf. Article 13(4) second sentence).

   To the best of our knowledge, there have not been any particular difficulties related to the implementation of Article 13(4) of the Directive.

Other legal remedies

1. What legal remedies exist in your legal system in situations of administrative silence where the law does not regulate the administrative silence neither in accordance with the positive, nor the negative model?

As previously mentioned, situations of administrative silence where the law does not regulate the administrative silence neither in accordance with the positive, nor the negative model, are generally not a common or major issue in Norway.

Should these situations occur, the most prominent legal remedy would be a complaint to the national Ombudsman ("Sivilombudet"). Sivilombudet would then have the competence to examine to case at hand, and to issue a reasoned decision. In such a decision, Sivilombudet could, amongst others things, examine whether and find that the relevant public authority has not acted in accordance with the relevant time limits. Should Sivilombudet reach such a conclusion, Sivilombudet could also recommend that the case be re-examined by the relevant authority.

Furthermore, it has been argued that in certain cases of administrative silence, the silence could be construed as a refusal of the claim even in areas of law where the negative model does not directly apply. Should this be the case, it would give grounds for both an administrative appeal to a higher public authority and an appeal to the courts.

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?

Provided that the administrative silence constitutes negligence on the hand of the authority, it is possible to claim compensation for financial losses that have been caused as a result of the administrative silence 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?

To the best of our knowledge, there is no case-law where national regulation on administrative silence has been found unfounded or inapplicable in a particular case.

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.

There is no case-law from the courts 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. The aforementioned Ombudsman ("Sivilombudet") has, however, in a reasoned decision from May 2022 found that an authorisation procedure was not conducted in accordance

with The Services Act § 11, which as previously mentioned, is where Article 13(4) of the Directive is implemented.

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.

   The Supreme Court of Norway has not submitted any such questions to the EEA equivalent of the Court of Justice of the European Union, the EFTA Court.

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

   4.1. Construction, spatial development planning and environmental protection

   The positive model following from Article 13(4) of the Directive applies to the construction area in so far as the relevant service falls within the scope of The Services Act.

   For questions on spatial development planning, the positive model generally applies by virtue of special laws.

   For questions of environmental protection, a variation of the negative model applies in instances where the relevant authority does not order someone to clean up; this decision can be appealed against by others with legal interest in doing so.

   4.2. Social security

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

   4.3. Freedom of information

   For questions of freedom of information, the negative model applies. If the person who requested access has not received a reply within five working days, this shall be regarded as a refusal, which may be appealed against.

Administrative discretionary power

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

   Administrative discretionary power is generally defined as the public authorities' freedom of deciding, in certain cases, on the application of the law or on the contents of a decision in cases where the legal conditions for issuing a decision, are met (e.g. whether to issue a liquor license to a premise that meets the general criteria for

obtaining one). The administrative discretionary power also covers the authorities' decision to choose between different alternative legal consequences provided for in the legal provision.

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 Norwegian legal system does distinguish between discretion and margin of appreciation in the interpretation of undefined legal concepts.

   As stated in our answer to question 1, discretion relates to the contents of the decision – or the application of the law – in cases where the legal conditions are met.

   Margin of appreciation in the interpretation of undefined legal concepts, however, relates to the legal conditions or criteria themselves. More specifically, it relates to the assessment of whether the facts of the case at hand, are covered by the undefined legal concept. Generally, the authorities are not offered any margin of appreciation in the interpretation of undefined legal concepts. In certain cases, it could, nevertheless, follow from an interpretation of the relevant provisions that the authorities are offered some degree of appreciation with regard to the assessment of whether the facts of the case at hand, are covered by the undefined legal concept (e.g. whether a planned construction project will, in the view of the municipality, have "good visual qualities" when assessed in conjunction with its' natural surroundings and placement). In these cases, and as a result of the margin of appreciation offered, the courts could, depending on the circumstances, be less intensive in their judicial review. The court will nonetheless assess themselves whether the facts of the case at hand are covered by the relevant legal provisions, but they would offer some level of appreciation to the authority's assessment of the question. In more exceptional cases, the review could also be limited to the areas that are described in our answer to question 4 regarding judicial review of 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.

   Discretion:
   In short, assessing whether the authority has discretion in assessing a question, is largely a question of interpreting the relevant legal provisions and usually also its preparatory works. In some cases, the discretion may follow directly from the provision itself. For instance, it could follow from the provision that the relevant authority, provided that the relevant criteria are met, "may" decide on the application of the law or on the contents of the decision. In these cases, the relevant provision itself implies that there is a level of discretion offered to the authority (cf. judgment HR-2015-2252-A).

In other instances, the preparatory works could show that the legislator has intended for the authority to be offered discretion, even if terms like "may" have not been included in the provision itself.

Relevant criteria for assessing whether and to what extent the authorities are offered discretion in its assessment, could, for instance be that it is an assessment that requires particular expertise, that it presupposes broader assessments on a societal scale, that the relevant term is in itself vague or implies some level of discretion, and that there is limited guidance on the weight to be given to different relevant considerations. Legal certainty and rule of law considerations could on the other hand imply that the courts would have full competence in assessing certain questions or legal criteria.

Margin of appreciation in the interpretation of undefined legal concepts:
As previously mentioned, the authorities are not generally offered any margin of appreciation in the interpretation of undefined legal concepts. Where a margin has still been found to be offered, it is, much like the case for discretion, often due to the nature of the assessment at hand. For instance, if the undefined legal concept is vague or implies some level of discretion, and the courts find that the assessment is nonetheless to be considered as part of the process of establishing whether the facts of the case at hand are covered by the relevant provisions (i.e. not a question of whether to issue a decision or what the contents of said decisions should be), the courts could still take account of the authorities' assessment of the question. As a consequence, the judicial review could become somewhat less intensive. The same could also apply when assessment has a political character or requires some form of professional expertise.

For certain undefined legal concepts, such as "special circumstances" or "special grounds", it could follow from the nature of the assessment and the close connection to the discretion that the same legal provision provides, (e.g. that the provision also includes the "may" element described above) that assessing whether the facts of the case are covered by these undefined concepts, is in itself also covered by the authority's discretion (cf. judgments HR-2015-2252-A and HR-2007-326-A).

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, there are limits to the judicial review of the authorities' use of discretionary power in the Norwegian legal system. In cases of discretion, the review is generally limited to whether:
   1. *The authority, in exercising its' discretion, has taken unfair or illegal considerations into account,*
   2. *The discretion applied is sufficiently broad,*

3. *The exercise of the discretion entails unfair discrimination of the addressee, or*
4. *The decision, as a result of the exercise of the discretion, is wholly unreasonable.*

Should the courts find that any of these criteria are met, the decision would generally be considered invalid.

With regard to margin of appreciation, and provided that the relevant provisions lead to the conclusion that the judicial review should in some manner be less intensive because regard should be had to the authorities' assessments, the courts would still assess whether the facts of the case at hand are covered by the relevant legal provision, but they would offer some level of appreciation to the authority's assessment of the question. Should the courts, taking this margin into account, find that the facts of the case are not covered by the relevant legal provisions, the decision would generally be considered invalid.

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 will in some forms be affected by the fact that the exercise of discretionary power has resulted in a restriction of human rights, such as the human rights prescribed by the European Convention on Human Rights or by the Constitution. Should the decision entail such a restriction, the courts would have to assess whether that restriction is justifiable, i.e. whether it is prescribed by, pursues a legitimate aim, law and is proportionate. In assessing the proportionality of the restriction, the courts would generally conduct a full – and unlimited – assessment, in accordance with the methodical approach prescribed by the European Court of Human Rights (ECHR). As such, there are fewer restrictions on the judicial review if the exercise of discretionary power has resulted in a restriction on human rights. Furthermore, the intensity of the review of the proportionality of the restriction would in these instances generally be the same as in cases of no administrative discretion. Regardless of whether there is an element of administrative discretion or not, the courts will, should they find that said restriction on human rights is not proportionate, and thus not justified, order that the decision is invalid.