REPUBLIC OF LATVIA
SUPREME COURT
SENATE

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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

The Romanian Constitution (Article 51 para. 4) regulates the obligation of the public authorities to answer to petitions *"within the time limits and under the conditions established by law."*

The Romanian Constitution also provides in Art 52 para. 1 that: „Any person aggrieved in his/her legitimate rights or interests by a public authority, by means of an administrative act or by *the failure of a public authority to solve his/her application within the lawful time limit*, is entitled to the acknowledgement of his/her claimed right or legitimate interest, the annulment of the act and reparation for the damage."

The general framework for dealing with petitions is laid down in a legal act, namely Government Ordinance No 27/2002 on the regulation of the petitions handling activity.

The framework-law on administrative disputed claims (Law No 554/2004) also contains provisions on the time limit for resolving applications to public authorities.

Other administrative deadlines are set by special laws, namely in the field of taxation (Law no. 207/2015 on the Code of Tax Procedure), civil status activities (Law no. 119/1996 on civil status documents), information of public interest (Law no. 544/2001 on free access to information of public interest), those concerning the settlement of petitions addressed to Parliament (Decision of the Chamber of Deputies no. 8/1994 on the approval of the Regulation of the Chamber of Deputies, as amended and supplemented, and Senate Decision no. 16/1993 on the Regulation of the Senate, as amended and supplemented), etc.

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

The concept of "reasonable time" for administrative deadlines is not defined in Romanian law, but courts may determine on a case-by-case basis whether a claim has not been dealt with within a "reasonable time", by resorting to general principles.

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

The general deadline for the resolution of petitions is 30 days and is established by a normative act with legal force, Government Ordinance no. 27/2002 on the regulation of petition resolution activity.

According to Art. 8 para. (1) of the normative act in question, the authorities and public institutions to which a petition is referred are obliged to communicate the petitioner, within 30 days from the date of registration of the petition, the response, regardless of whether the solution is favourable or unfavourable.

The same time limit is also emerges from Article 2 para. 1, point h of the administrative disputed claims Law, according to which *"failure to settle a petition within the legal time limit - the failure to give an answer to the applicant within 30 days from the registration of the petition, unless the law provides another time limit;"*

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

Where the issues raised in the petition require further information and investigation, the head of the public authority or institution may extend the general 30-day time limit by up to 15 days, and in the field of energy and natural gas, by up to 30 days with prior notification to the petitioner.

In the case of administrative deadlines laid down by special laws, they may be extended only if there is an express provision to that effect.

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

Yes. The authority's decision to extend the deadline can be challenged under the general conditions for challenging administrative acts.

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

There are no express provisions prohibiting administrative authorities from issuing a response to a request after the time limit has expired.

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

   Most of the time, non-compliance with administrative time limits is caused by excessive workload or the passivity of officials.

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

    Yes

Administrative silence

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

   According to Law no. 554/2004 - Administrative Litigation Law [art. 2 para. 1 point h) and art. 2 para. 2], not replying to the applicant within 30 days of registration of the application (unless otherwise provided by law) is defined by the concept of "failure to settle a petition within the legal time limit" and is considered an assimilated (atypical) administrative act.

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

   As a general rule, according to the administrative disputed claims Law, administrative silence (failure to decide on an application within the legal time limit) is understood as a refusal to settle the claim (negative response).

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

   Yes, provided it is expressly provided for in the law. Government Emergency Ordinance No 27/2003 regulated the tacit approval procedure.

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

- The rule in the Romanian administrative law system is the negative model.

- In cases expressly provided for by law, the positive model applies. (see answer on question 3)

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)?

The person whose application or claim has not been dealt with within the legal deadline may apply to the competent courts to order the authority to issue a decision or, in cases expressly provided for by law, to apply directly to the court for a decision on the application.

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.
   No

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

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
   As a rule, the court may order the administrative authority to issue a decision within a certain time limit and may determine the application of certain penalties for each day of delay.

If the court has all the evidence necessary to verify that the conditions laid down by law for a favourable outcome of the plaintiff's application have been met, without further reassessment by the public authority, it may itself decide on the matter in dispute or oblige the public authority to issue an administrative decision with a certain content.

If the court does not set a time limit, the administrative authority must comply with the obligation within 30 days from the date the court decision becomes final.

In the case of actions for annulment of administrative tax acts or administrative acts for which a prior administrative appeal procedure is required, the court may order the administrative authority to settle the administrative appeal by a decision and set a deadline for it or, in cases expressly provided for by law, the court may itself decide on the petitioner's request.

For example, in the field of taxation, Law No 207/2015 on the Code of Tax Procedure provides that the court shall rule directly on the annulment of the tax administrative act, if the competent tax body dealing with administrative appeals does not resolve the administrative appeal within 6 months from the date of filing the appeal.

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?

If the authority does not willingly execute the judgment, it is enforced by compulsory execution, following a special procedure provided for by the Administrative Litigation Act.

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

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

   See answer to point 5

The positive model

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

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

Please specify your answer briefly

In 2003, the Government adopted Emergency Ordinance No 27/2003 on the tacit approval procedure, which aimed to remove administrative barriers in the business environment, to make public administration authorities responsible for respecting the deadlines

set by law for issuing permits, to boost economic development, to fight corruption and to promote the quality of public services by simplifying administrative procedures.

Subsequently, in 2009, the Government adopted Emergency Ordinance No 49/2009 on the freedom of establishment of service providers and the freedom to provide services in Romania, which transposed Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market and aimed to regulate a general framework for the freedom of establishment of service providers and the freedom to provide services in Romania.

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

Yes. The positive model is applied only in cases expressly provided for by law, i.e. in the case of authorisations issued by public institutions.

Applications for authorisation or renewal of authorisations issued in the field of nuclear activities, those concerning the regime of firearms, ammunition and explosives, the regime of drugs and precursors, as well as authorisations in the field of national security are exempted from the positive model.

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

The authorisation shall be deemed to have been granted or, where appropriate, renewed if the public administration authority does not respond to the applicant within the period prescribed by law for the issue or renewal of that authorisation.

If the law does not provide for a deadline for the decision on the application for a permit, the public administrative authorities are obliged to decide on the application for a permit within 30 days of its submission.

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?

Article 7 of the Government Emergency Ordinance no. 27/2003 states the following:

"(1) After the expiration of the period established by law for the issuance of the authorization and in the absence of a written communication from the public administration authority, the applicant may carry out the activity, provide the service or exercise the profession for which the authorization was requested.

(2) In order to obtain the official document permitting to carry out the activity, provide the service or exercise the profession, the applicant may apply to the authority concerned or directly to the court."

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

If, following the expiration of the period for tacit approval, the public authority has issued an official document, any person who justifies an interest and alleges a violation of a right can apply to the courts for the annulment of the decision.

If the plaintiff has addressed the court to obtain the official document, the court's judgment is final and cannot be appealed.

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 procedure allowing the annulment of a "fictitious decision" to admit an application is no different from the general procedure governed by the Administrative Litigation Act.

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

In Romania, Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market was transposed by Emergency Ordinance No 49/2009 on the freedom of establishment of service providers and the freedom to provide services in Romania.

The positive silence model laid down in Article 13(4) of Directive 2006/123/EC of the European Parliament is transposed by Article 12(4) of Directive 2006/123/EC. (3) of Emergency Ordinance No 49/2009 on the freedom of establishment of service providers and the freedom to provide services in Romania, according to which authorisation is deemed to have been granted if the competent authorities have not replied within 30 days, which may be extended by a maximum of 15 days.

However, a different regime may be established if justified by overriding reasons relating to the public interest, including a legitimate interest of a third party.

Emergency Ordinance No 49/2009 on the freedom of establishment of service providers and the freedom to provide services in Romania applies to the services market.

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?
   Not the case

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?
   Yes

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?
   Yes

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

No case law has been identified.

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.

There were no questions referred to the Court of Justice of the European Union by Romanian courts.

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

4.1. Construction, spatial development planning and environmental protection
This is not the case
4.2. Social security
This is not the case
4.3. Freedom of information
This is not the case

In all of the above cases, administrative silence is equivalent to failure to resolve a claim within the legal time limit, as regulated by Law 554/2004 - Administrative Litigation Law.

In the event of failure to settle a claim within the legal time limit, the person whose interest or right has been infringed may apply to the courts within 6 months of the expiry of the legal time limit for settling the claim.

Administrative discretionary power

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

In Romanian law, "excess of power" is defined as the exercise of the public authorities' right of discretion in violation of the limits of the competence laid down by law or in violation of citizens' rights and freedoms. Thus, a *definition of the power of discretion* is obtained through a per a contrario interpretation of excess of power and *represents the exercise of discretion by public authorities within the limits of the competence provided by law and with respect for the rights and freedoms of citizens.*

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 Romanian legal system does not distinguish between discretionary power and margin of appreciation, considering that discretionary power can and must be exercised within the margin of appreciation provided by law.

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 limits to the discretionary power of the authorities are set by the Constitution, legislation and principles of law. Exceeding the limits of discretionary power is an excess of power.

Public authorities are obliged to act only in good faith, to pursue the public interest in a reasonable manner, to follow fair procedures, to respect the requirements of non-discrimination and to follow the principle of proportionality.

As a rule, the administrative law rule is permissive in the sense that it expresses the discretionary power given to the public authority to act or not to act, the freedom of discretion in choosing the administrative solution that best suits the public interest. Discretionary power may not be used abusively, disproportionately, without justification of the choice made.

If, however, the legal provision imposes certain strict conditions on the administrative decision, it can be said that the authority has no discretion or the discretion is limited at zero. (See negative model, point 7).

For example, the Forestry Code states that wood harvesting is carried out after obtaining a harvesting permit and handing over the wood, in compliance with forestry rules and in accordance with the instructions on the time limits, methods and periods for collecting, removing and transporting timber, approved by order of the head of the central public authority responsible for forestry. In hilly and mountainous areas, priority is given to technologies based on ropeways.

Thus, the law confers on the head of the central public authority responsible for forestry the power to approve instructions on the time limits, methods and periods for the collection, removal and transport of timber, a power which necessarily involves a margin of discretion in identifying appropriate administrative solutions to ensure a reasonable balance between the public interest pursued by the issuing authority, the private rights and legitimate interests of the potential recipients of the administrative rules and the rights and legitimate interests of third parties who may be affected, in the context of the specific legal regime of the national forest fund and the objective of sustainable forest management. (High Court of Cassation and Justice, Administrative and Tax Litigation Chamber - Decision no. 4513/7 October 2019).

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. Judicial review of the use of discretionary power may not be carried out in the case of administrative acts of public authorities concerning their relations with Parliament, acts of command of a military nature, administrative acts for the amendment or abolition of which another judicial procedure is provided for by organic law.

Government ordinances and laws can only be subject to constitutionality review by the Constitutional Court.

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?

If the restriction of human rights is caused by a pattern of exercise of discretionary power, there is an "excess of power", subject to review by the court, which may order the administrative act to be annulled. If, however, there is no administrative discretion and the public authority is obliged to act in a certain way on the basis of an express provision contained in a Law or Government Ordinance, the administrative court can only refer the matter to the Constitutional Court with a plea of unconstitutionality of the law or ordinance.